

SS-8 Determination—Determination for Public Inspection

Occupation

05PCP Personal Service Providers

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes

I have read Notice 441 and am requesting:

- ☐ Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- ☐ Delay based on an on-going transaction
- ☐ 90 day delay

For IRS Use Only:**Facts of Case**

The worker submitted a request for a determination of worker status in regard to services performed for the firm from May 2017 to June 2017 as a licensed esthetician. The work done by the worker included IPL hair removal, laser tattoo removal, skin resurfacing, facials, eyelash/brow tinting, protocol creation, appointment scheduling, etc. The firm issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC. The worker believes she was an employee as the firm provided all of the equipment and tools. The firm set the scheduling hours, in addition to policies and procedures for work performed. The work was performed under the firm's supervision. Services were performed under a letter of intent.

The firm's response states it is a medical and aesthetic spa. The worker was engaged as an aesthetician. The work done by the worker included skin care consultations, facials/peels, and laser hair removal. She also assisted with the creation of aesthetics forms and consents, policies for facials/peels, and assisted the firm with posting ads on social media for marketing purposes. Services were performed under a signed and executed offer letter of employment outlining her job description. (A request was made to obtain a copy of the offer letter; however, the firm did not provide it for review.) The worker was an independent contractor as she set her hours, marketed her services, and it was discussed at length.

The firm stated it did not provide training or instruction to the worker as she is certified and licensed by the state. The worker set her hours, picked her clients, and chose her schedule and procedures. The worker was not supervised or controlled in the performance of services. The firm engaged the worker to market her services to fill her schedule. The worker did furnish a time record to the firm documenting the dates and hours worked. The worker was not expected to attend meetings. Services were performed at the firm's premises. The firm required the worker to personally perform services. The worker did not have helpers. The worker stated the firm provided training on its tattoo laser equipment, IPL hair removal equipment, and body sculpting equipment. The firm provided work assignments, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. The worker's daily routine consisted of scheduled hours for Monday, Wednesday, Friday, and Saturday. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided laser equipment, skincare products, and a room to perform services. The worker incurred the expense associated with travel, cell phone, certifications, license, and continuing education. The firm reimbursed the worker for a black scrub uniform. The firm paid the worker based on hours worked. A drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker could not incur a loss in the performance of services for the firm. The worker stated the firm provided all supplies, equipment, and materials. She did not lease equipment, space, or a facility. She did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid her an hourly rate of pay. The firm established the level of payment for the services provided.

Benefits were not provided. The firm stated it is unknown if the worker performed similar services for others or advertised to the general public. It is unknown if the worker had her own shop or office or an investment in a business related to the services performed. The work relationship could be terminated by either party without liability. Services were performed under the firm's business name. The firm did not represent the worker as an employee to its customers. The worker answered a bid for a service provider. The worker terminated the relationship. The worker stated she did not perform similar services for others.

The worker provided a copy of the firm's letter, dated 4/19/17, outlining its offer regarding employment. It states, in part, the relationship was "at will" and subject to the provisions of the firm's personnel policy manual. The worker would work three full days a week, in addition to one Saturday a month. As soon as the worker could fill her skin care schedule on Tuesdays and Thursday, it would be a full-time position. As with any professional position, the worker was expected to work as much as necessary to fulfill her responsibilities to the firm. Although the firm had specific practice policies and procedures, compliance regulations, and standard operating procedures, as a contracted position the worker would receive no additional benefits. The parties would meet on a bi-weekly basis during the worker's initial 90-days training to maintain open lines of communications and to brainstorm additional services that could be added to the firm's practice. The firm could terminate the worker for cause and without prior written notice.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's statement that the worker was an independent contractor pursuant to an agreement is without merit. For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided training during the initial 90-day period and required the worker to meet to discuss. The firm provided work assignments by virtue of the clients served and required the worker to perform in accordance with its policies and procedures. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. In this case, the worker did not invest capital or assume business risks. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the hourly rate of pay arrangement the worker could not realize a profit or incur a loss.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee, and not an independent contractor operating a trade or business.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.