

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP Personal Care Providers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 firm is a fitness studio offering personal training and group classes. The worker was engaged by the firm to perform massage therapy services. The firm reported the worker's remuneration on Forms 1099-MISC from 2016 and 2017.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. The worker scheduled appointments and hours based upon her availability, and the hours required to perform the specific tasks; no days or specific times were required. The worker handled all complaints and worked with clients towards resolution. At the end of the pay period, the worker was required to provide the firm with a list of massages performed; the firm paid the worker accordingly. The worker performed her services on the firm's premises, and at other locations as she permitted in her schedule. There were no meetings required or planned. If substitutes or helpers were needed, the worker hired and compensated them. The firm stated that she was not required to obtain the firm's approval.

The firm provided a washer and dryer, utilities, and the property. The worker provided all massage equipment and supplies necessary to complete her tasks. She did not lease space. The firm paid the worker on a commission basis. The firm did not cover the worker under workers' compensation. Customers paid the firm directly at prices established by the worker. Neither party indicated an investment by the worker in the firm or a related business. As the worker purchased her own equipment, she risked a loss of the items.

The worker obtained her position through www.indeed.com, a job seeker website. The firm did not make benefits available to the worker. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability. The worker performed similar services for others during the same time period. She was not required to obtain approval from the firm. There was no written agreement in place; the worker was able to work at-will. The worker advertised through social media using the firm's address. The firm's website shows massage therapy as part of its core services. The firm represented the worker as their "contract employee" for services needed. All services were performed under the firm's name. The firm terminated the contract.

Analysis

Section 3121(d)(2) of the Code provides that the term “employee” means any individual defined as an employee by using the usual common law rules. In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker’s activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm relied upon the worker’s prior training and experience to perform her services. Although the worker was responsible for resolving any problems or complaints that may have occurred, as the owner of the business, the firm must have been responsible for resolving any issues that were beyond the worker’s capacity to resolve. The worker scheduled her clients according to the services rendered and her availability. She generally performed her services on the firm’s premises. The firm required the worker to submit bi-monthly reports of services rendered. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was a right to direct and control the financial aspects of the worker’s activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital, lease a space, or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. The worker provided all massage equipment and supplies. 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. The firm paid the worker on a commission basis. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. Any bookings made by the worker benefited the firm’s business, and the firm incurred a loss for any lack of business. Although the firm allowed the worker to set the level of payment for her services, it financially controlled the worker via its receipt of monies from her clients and its remunerations to her. These facts show that the firm retained control over the financial aspects of the worker’s services.

Factors that illustrate how the parties perceived 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 were part of the service recipient’s regular business activities. In this case, the worker performed her services on a continuing basis. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The worker was not engaged in an independent enterprise, but rather the massage therapy services performed by the worker were a necessary and integral part of the firm’s mission of providing fitness and health services. Integration of the worker’s services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the business. The worker could have performed similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although the firm did not make benefits available to the worker, the firm terminated the work relationship without incurring liability or penalty. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. These facts show that the firm retained control over the work relationship and services of the worker.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm’s organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

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.