

**SS-8 Determination—Determination for Public Inspection**

Occupation

05PCP Cosmetologist

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**

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is a cosmetology salon providing hair cutting, hair coloring, and hair styling services as well as on-location hair styling and makeup services. The worker performed services for the firm from October 2016 to December 2017. The worker's services consisted of performing haircuts, hair color, hair styling and makeup services at the firm's salon location and at the firm's clients' locations. The firm states the worker was paid solely based on a commission and she supplied her own tools and equipment. The firm believes the worker was an independent contractor while performing services for them because she set her own hours, she marketed services to the general public, she maintained her own book of clients, she decided which services were best for each client and the best method to perform those services, and she decided how much to charge for services rendered.

The firm states that the agreement between themselves and the worker was for the worker to provide hair and makeup services for which she received a 50% commission as the entirety of her compensation, and the parties intended and agreed that the worker was an independent contractor and not an agent or an employee.

The firm states they provided no training or instructions to the worker. The firm states the worker scheduled most of her own salon appointments and she could check scheduled appointments via the computer system on their main computer or via an app on her personal cell phone. The worker also received a printout of appointments scheduled. The firm states the worker determined how she performed her services. The worker was required to personally perform her services and the firm states she performed her services at their location 40% of the time and at locations set by their clients 60% of the time. The worker's routine differed daily depending on the hours and clients the worker had set and scheduled. The firm states the worker was not required to contact them if any problems or complaints arose but she could have contacted the firm's owner or other workers from their business. The worker was responsible for any resolution to any problems or complaints. The worker was required to attend monthly meetings but there was no penalty set for not attending.

The firm provided the shampoo, styling aids, bobby pins, gloves, color, etc. and a work station to the worker in order to perform her services. The worker provided cutting tools, heat tools, brushes, combs, clips, capes, hair dryer, etc. The worker did not lease any equipment or space from the firm. The worker incurred expenses for the purchase of new tools, continuing education, and mileage to and from on-location appointments and the firm states they reimbursed the worker for mileage and some continuing education classes. The clients paid the firm for services rendered by the worker and the firm paid the worker on a commission basis. The firm states they set the base rate and the worker set her own pricing according to services performed. The worker could incur a loss due to loss or damage to equipment and tools, loss of personal clients, and loss of cosmetology license if sanitation laws are not met.

The worker did not perform similar services for others and the firm states the worker was solely in charge of her own advertising. The firm states they represented the worker to their clients as an independent contractor performing services for them. The engagement agreement between the firm and the worker included a covenant not to compete with the firm. Either party could terminate the work relationship at any time without either party incurring a liability. The worker terminated the work relationship.

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## Analysis

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Section 31.3401(c)-1(c) of the regulations states that generally professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others in an independent business or profession in which they offer their services to the public are not employees. However, if a firm has the right to direct and control a professional, he or she is an employee with respect to the services performed under these circumstances.

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.

As in this case and in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and her services should not be confused with the right to direct and control. The worker provided her services on behalf of and under the firm's business name rather than an entity of her own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and her services in order to protect their financial investment, their business reputation, and their relationship with their clients.

While the firm provided the worker with freedom of action as to when she performed her services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the client and whom did the client pay. In this case, that relationship was between the firm and their clients.

Factors that illustrate whether there is 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 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. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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.

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.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

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, co-adventurer, agent, or independent contractor must be disregarded. 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.

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.