

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 worker initiated the request for a determination of her work status as a licensed massage therapist in tax years 2016 to 2017. The firm's business is a massage studio.

The firm's response was signed by the member/manager. The firm's business is described as a holistic approach to the body. The worker provided services as a massage therapist.

The worker indicated she was given specific written and verbal training and instructions on how to perform massage as well as power points, texts and emails. The worker's job assignment was a set schedule that the firm's receptionist and the firm's owner booked the clients. The firm determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered on the firm's premises according to a set schedule with same days of week and times. The worker responded that she was required to perform the services personally; and, any additional personnel were hired and paid by the firm.

According to the firm, the worker was a licensed and trained massage therapist; but, the firm had the therapists follow the 'XXXX' massage method. The worker chose the days and hours they wished to work within the established shop hours and could alter their schedule with notification. The clients scheduled appointments with their therapists via the firm's receptionist. The worker determined the methods by which the worker's services were performed. The firm indicated that any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered 100% at the firm's location. The worker was required to perform the services personally.

The worker responded the firm provided everything. The worker furnished nothing; she did not lease equipment and did not incur expenses in the performance of the job other than for uniforms required, according to dress code and uniform policy. The worker was paid a set hourly commission of \$ZZZ/hour. The clients paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker indicated she was not at risk for a financial loss in this work relationship. The firm established level of payment for services provided or products sold.

The firm acknowledged the firm provided rooms, massage tables, massage oils, and equipment on site. The firm also handled the marketing and referral of clientele to the worker; the worker was free to take on additional clientele or not. The worker furnished clothing, license, continuing education, and liability insurance. The worker did not lease equipment, space or a facility. The firm paid the worker a flat rate per session. The clients paid the firm, with the tips typically paid to the worker. The worker was not covered under the firm's workers' compensation insurance policy. The firm indicated the worker was at risk for a financial loss in this work relationship as it pertained to her expenses, or if she did not have sufficient clientele. The firm stated the worker established level of payment for services provided or products sold based upon the established client rates.

The firm and worker concurred that there were no benefits such as paid holidays, health insurance, paid vacations, or sick pay available to the worker; although the worker indicated there were occasional bonuses given. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame; however, the firm noted that the worker was free to work for others. The firm responded that when a new client came in the worker was encouraged to convert the client to a monthly-paying member and a commission for doing this was offered to the worker.

Both parties provided a copy of the 'Independent Contractor Agreement', which provided, in part, the following: the firm hires the services of the worker to provide massage therapy to the firm's existing clients and as may be generated the firm's business operation; all service to be provided specifically in accordance with the firm's rules and operating procedures; the firm maintains the rules and operating procedures, which include but are not limited to. attire, booking and scheduling, office hour schedule, record keeping, the firm's techniques, and training; firm will pay based on 1-hour session, ½ session, and a commission based on converting clients to a firm membership; the worker can use only products sanctioned by the firm – no other products can be brought in; non-competition for a period of two years within a 50-mile radius of firm location.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship.

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.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. See Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises.

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.

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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

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.

We have considered the information provided by both parties to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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 owner of the business. 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.

CONCLUSION

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.