

SS-8 Determination—Determination for Public Inspection

Occupation

05PCP Personal Care 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 2016 to October 2017 as an aesthetician. The work done by the worker included performing facials, body treatments, eyebrow and eyelash tinting, and waxing services. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states its business provides skin care, waxing, massage, haircut and color services. The worker was engaged as an esthetician. The work done by the worker included evaluating the person's skin and determining the appropriate products to use for treatment to improve skin, removing unwanted hair, and selling products to improve skin. The worker was classified as an independent contractor as she was told during the interview that she would be an independent contractor and receive Form 1099-MISC. As the firm was not withholding taxes, it was the worker's responsibility to save money to pay taxes. Independent contractors determine the days and hours they will be available, and they are given appointments during those times. The worker was not required to be on-site or remain at the spa if she didn't have appointments scheduled. The worker performed services based on her educational training. Her schedule varied daily Tuesday through Saturday. The worker could perform similar services for others. Having independent contractors makes it easier to end an agreement if needed.

The firm stated that when asked, it provides specific training and/or instruction on equipment not familiar to workers and helps them improve techniques learned in school to provide better service. The worker received work assignments either verbally or by text message the day prior to scheduled appointments. The worker determined the service needed and the product to be used. The firm is contacted and resolves any unsatisfied client issues. The firm required the worker to document the products used to perform services, which were written on the back of the client's profile card. The worker's schedule varied based on scheduled appointments. Services were performed at the firm's premises. The firm recommended the worker attend a monthly meeting; however, there was no penalty if she was unable to attend. The firm required the worker to personally perform services. Hiring substitutes or helpers was not applicable. The worker stated the firm required her to attend a continuing education class on the skin care line that is retailed at the spa. Her schedule was blocked off, so she could attend the mandatory class. She did not have access to her scheduled appointments as they were scheduled by the firm. The firm determined the methods by which assignments were performed. She performed services on a regularly scheduled basis, i.e. Tuesday through Saturday. Her routine consisted of turning on the wax, preparing hot towels, preparing the room, and gathering supplies for the day. At the end-of-shift, she would take out the trash, put linens in the washing machine, and follow the firm's checklist to ensure the room was sanitized and met the firm's standard of cleanliness. The firm required her to attend mandatory staff meetings, typically scheduled when the spa was closed. She was also required to respond to the firm's text messages.

The firm stated it provided everything needed due to the size of equipment and number of products used. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense associated with her training and certification, license, and professional liability insurance policy. Customers paid the firm. The firm paid the worker commission; she was not allowed a drawing account for advances. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The firm consults with contractors and sets service and product costs. The worker stated the firm guaranteed her a minimum amount of weekly pay. The firm established the level of payment for services, products sold, and any special offer of services provided.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. There was no agreement prohibiting competition. The worker did not advertise and she was not responsible for soliciting new customers. The firm took appointments according to the worker's availability. The worker introduced herself to customers by her first name. Services were performed under the firm's business name. The worker terminated the relationship. The worker stated she did not perform similar services for others. The firm represented her as an employee to its customers. The work relationship ended when she quit.

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 a verbal 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. Furthermore,

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 specific training and instruction, required the worker to report on services performed and products used, and assumed responsibility for problem resolution. 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.

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. 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 commission 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.