

SS-8 Determination—Determination for Public Inspection

Occupation

05PCP Massage Therapy

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**

Information provided indicated the firm is a massage therapy business. The worker performed services as a massage therapist for the firm's three business locations for tax years 2014 through 2018. The firm reported the income on Form 1099-MISC, indicating they felt the worker was an independent contractor. The firm provided copies of the independent contract agreements. The worker was a licensed professional and was required to maintain her training and licensing through the State. The firm indicated work assignments were made upon client's request. SOAP notes are required by law, to be kept for each client. The firm indicated the worker is not required to be at the business location on any set days or times, unless contracted to provide a service to a client. Services are performed at the firm premises. The worker was not required to attend meetings. The firm stated the worker could obtain a subcontractor to cover for her if she could not provide the services. The firm indicated the company paid all subs. The firm indicated it provided the massage tables, sheets and lotion. The worker also provided lotion of her choice. The worker was paid on a commission basis. The client paid the firm. The firm did carry workmen's compensation insurance. The firm indicated the worker was required to carry their own liability insurance and deal with any claims for injury or loss. Either party could terminate the work relationship without incurring a penalty or liability. The firm indicated the worker did perform similar services for others. Their permission was not required to do so. There is a non-solicitation clause in the contract, that prohibits her from working on clients of the firm. she was represented as a contractor performing services under the firm's business name.

The worker indicated she performed services as a massage therapist/cosmetologist. She received facial training, microdermabrasion and other classes offered to new incoming staff. She was notified by text or phone or booking via a portal. If there was a complaint, the worker was required to write a letter of explanation. The firm would resolve the issue. She performed services at the firm's three business locations. Appointments were booked by the firm. The worker indicated she was never allowed to book her own appointments, nor had the freedom to rearrange her schedule. as needed without permission of the firm. Any time off was always met with resistance. The worker indicated there were mandatory biannual meetings. Termination was threatened if you did not attend. She was required to perform her services personally. Any replacements had to be approved by the firm. She agreed the firm paid all workers. The firm provided all equipment a supplies. The worker agreed she was paid on a commission basis and the customer paid the firm. The worker indicated she filed a workmen's compensation claim, and was subsequently terminated.

Analysis

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as “common law.” Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer’s right to direct and control the worker in the performance of his or her duties. 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.

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.

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.

Therefore, your 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 applied the above law to the information submitted. As is the case 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, you retained the right to change the worker’s methods and to direct the worker to the extent necessary to protect your financial investment.

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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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. All services were performed on firm premises as controlled by the firm. In order for a massage therapist to be an independent contractor, They would have rented the space from the firm, booked their own clients, charged what they wanted to those clients, and collected directly from those clients. At no time did this happen. There is no booth rental agreement. The firm would then have received just the monthly amount of rent..and never a split commission of what is earned. The firm determined the rates charged to the client. The firm controlled the scheduling of clients. the clients paid the firm directly for the services received.