

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 2018 to March 2019 as a massage therapist, which included various types of massage for the firm's guests. The firm issued the worker Form 1099-MISC for 2018 in connection with massage therapy services performed. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC. The firm also issued the worker Form W-2 for 2018 in connection with housekeeping services performed. The worker does not dispute receipt of Form W-2.

The firm's response states it is a resort offering lodging, dining, and wellness amenities. The worker was employed in its housekeeping department in 2017 and from May 2018 to March 2019, while also contracted as a massage therapist from May 2018 to March 2019. Massage treatments were performed for the firm's guests and local clients. The worker was classified as an independent contractor as she was free to 1) pursue her own clients and other business relationships; 2) provide her own supplies; 3) perform as little or as many massages during one of the two established time frames, per day. Services were performed under a signed contract designating her as an independent contractor.

The firm stated it provided the worker optional trainings for new massage offerings. The worker decided how many massages were performed per day. The client determined the methods by which the massage was performed. Therapists are contacted if there are problems or if complaints arise; they are expected to resolve issues. Intake forms were prepared in connection with services performed. The worker's routine was based on the time frame(s) she selected. Services were performed at the firm's premises. Meetings were not required. The worker was not responsible for personally performing services. She would coordinate with other therapists if coverage was needed. The worker stated the firm instructed her to inform the manager of schedule changes and breaks, work within established work shifts, and up-sell the firm's oil. The firm advertised and its employees scheduled all services. The firm's wellness manager or general manager were contacted and assumed responsibility for problem resolution. Reports included client pay slips. Her routine consisted of performing services as scheduled. Work hours varied from 16 to 20 hours per week. The firm required she personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided the room, table, sheets, and towels. As a convenience it also provided supplies. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense associated with any additional training required to maintain her license and the cost of oils supplied. Customers paid the firm. The firm paid the worker piece work; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. It is unknown if the worker incurred economic loss or financial risk. The firm established the level of payment for the services provided or the products sold. The worker stated the firm also provided equipment.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. The worker did not advertise. The firm represented the worker as a contractor to its customers. The work relationship ended when the worker quit. The worker stated the firm made the benefit of store and café discounts and the use of its hot tub available to her as long as she maintained a regular schedule. She did not perform similar services for others. The firm represented her as its licensed and insured massage therapist. The work relationship ended when the worker terminated the relationship due to the worker classification issue and potential risk based on the arrangement.

The signed agreement documents, in part, the worker would be paid a fixed rate based on the duration of the massage. The worker could also enjoy free spa access and a discount in the firm's general store and café. The worker was expected to keep her state license active and in good standing, in addition to maintaining her own liability insurance. Appointments would be scheduled with a 15-minute break between appointments. Longer breaks could be scheduled by the worker with the firm's wellness services coordinator. The worker would decide how many massages she wanted to give per day/shift, adhering to the firm's established schedule. The general job description included providing professional services tailored to guests needs and wants; maintaining communication, professionalism, and customer services with all guests and clients; keeping the massage cabin clean and neat; communicating availability to perform services and schedule changes to the firm's wellness services coordinator in a timely manner; arriving at least 15 minutes before scheduled appointments, dressing professionally, and prepping to greet guests. Failure to comply with the agreement terms could result in disciplinary actions and/or contract termination by the firm.

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 written 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.

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 massage therapy services performed by the worker were integral to the firm's business operation, i.e. wellness amenities. The firm provided training and work assignments by virtue of the clients served, required the worker to obtain intake information from the clients served, and expected the worker to adhere to its performance expectations or face disciplinary action or termination. 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. Based on the piece work 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.