

**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 initiated the request for a determination of her work status as a master stylist cosmetologist (all hair services and facial waxing) in tax year 2018, for which she received Form 1099-MISC. The worker stated she had a set schedule, had to remain at the shop even if she had no clients, and she had to request permission for time off. The firm's business is described as salon and barbershop.

The firm's response was signed by the owner. The firm's business is a barbershop providing hair care services via appointments and walk-in customers. The worker provided services as master stylist – cut, style, and color. She scheduled her own hours and told her existing clients she could perform services at the firm's location. The worker advertised on social media and used her business card to increase her client base and she set her own prices. The firm stated Form W-9 and a contract given to the worker at the beginning of the work relationship were not signed and returned to the firm.

The worker indicated she was responsible for maintaining her Continuing Education; and, stated she was told how to do men's haircuts and neck shaves. The job assignments were via a scheduling system on the firm's computer and written notes left on the desk as to the duties to be completed. 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 Monday, Thursday, Friday, and Saturday between 10 am and 7 pm; and, if she was first one to arrive, she opened the salon, checked the laundry, checked for messages, and serviced clients. There were all-staff meetings; but, penalties for non-attendance was never discussed. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded that no training and instructions were given to the worker since she was a licensed cosmetologist. The worker scheduled appointments with her clients, would take walk-in clients if she was not busy, and she would answer the phone and schedule new clients in her book. The worker determined the methods by which she performed her services. Any problems or complaints encountered by the worker were resolved by the worker; the firm never had to handle anything. The services were rendered 75% at the firm's premises and the remainder outside of the business for weddings and friends. The worker was required to perform the services personally; if, the worker wanted a helper she would have hired and paid the additional personnel.

The firm and worker acknowledged the firm provided a workstation, products used (each stylist paid for supplies they used), credit card/sales/scheduling software, as well as the keys to the shop. The worker furnished all required hair styling equipment, products, and supplies. The worker incurred expenses for depreciation of equipment, razor blades, shear sharpening, and hair products and supplies. The worker did not lease equipment, space, or a facility. The worker was paid a weekly commission on the services entered into the software, credit card tips, less the cost of hair products used/the back bar fees. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker indicated she was at risk for a financial loss due to loss or damage of her tools or if she was injured. The firm established the prices for the services and retail products; however, the worker was allowed to adjust some prices for services.

Both parties concur there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The firm indicated the worker was performing same or similar services for others during the same time frame; the worker disagreed. The worker posted to social media including her own specials, discounts and referral cards; she was responsible for doing her own advertising and marketing to get customers in her chair. The worker was represented as a master stylist, under the firm's business name.

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## Analysis

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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.

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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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.

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

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.

Please see [www.irs.gov](http://www.irs.gov) for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide