

**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 March 2018 to March 2019 as a barber. The services performed included haircuts, shaving, cleaning and running the cash register. The firm issued the worker Form 1099-MISC for 2018 and 2019. The worker filed Form SS-8 as he believes he was treated and compensated as an employee but received Form 1099-MISC.

The firm's response stated it is a barber shop business. It provides workstations for licensed barbers to operate their own independent businesses with their clients. The worker was engaged as a barber. Barbering services included, but was not limited to, haircuts, beard trims, straight-razor shaves, customer service, cleaning, and any other services agreed upon by the firm and worker. Barbers are customarily engaged in independent trade. Services were performed under an independent contractor and chair rental agreements.

The firm stated it offers classes, usually after hours, but attendance is never required. The firm does not provide barbers with any training. The firm does not control the manner or means by which services are performed. At times, the firm has a shop manager who runs the front desk, answers phones, and takes payments. Reports are not required. The written agreements state services performed on the company's premises were required to be conducted during the firm's normal business hours. During those business hours the worker's chair had to remain open for business based on a schedule determined between the parties. Any deviation from the open hours schedule had to be communicated and agreed upon by the parties. The worker had to use the workspace solely for the operation of barbering services, had to comply with all of the firm's applicable policies, and had to maintain the premises in a clean and neat condition at all times. The worker would devote sufficient resources to ensure services were performed in a timely and reliable manner. The worker was to personally provide services. The worker could not assign, delegate, or subcontract his obligations under the agreement without the firm's prior written consent. The firm did not hire assistants. The worker stated appointments were scheduled through the firm's website. The firm was contacted if problems or complaints arose. The firm assumed responsibility for problem resolution. His daily routine consisted of setting up, cleaning, working scheduled appointments, and then leaving for the day. Monthly shop meetings were required. Helpers were not allowed.

The written agreements state the firm provided access to its premises, a scheduling and revenue management system that the worker could use as a courtesy, the chair, workstation, towels, brooms, basic cleaning supplies, phone, marketing, payment receiving, and other miscellaneous barbershop equipment, tools or materials. The firm would also provide all relevant utilities and could provide janitorial and cleaning services to its premises. The worker provided and incurred the expense associated with his own combs, brushes, scissors, razors and clippers. The worker leased a station from the firm on a month-to-month basis. Clients paid the firm. The firm refunded to the worker a fixed percentage (commission) of the client amount it collected under the chair rental agreement. The firm paid the worker biweekly. The worker stated he did not lease equipment, space, or a facility. He did not incur expenses in the performance of services for the firm. The firm established the level of payment for the services provided.

The firm stated the work relationship could be terminated by either party without penalty. During the term of the agreement the firm did not allow the worker to engage in any business activity that would compete with the firm's business or work for other barbershops within a specific geographic location without the firm's prior written consent. The work relationship ended when the contract was terminated. The worker stated the benefit of bonuses were made available to him. He did not perform similar services for others or advertise. The firm represented him as a barber to its customers. Services were performed under the firm's business name.

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## 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.

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 work assignments by virtue of the customers served and required the worker to perform services during its open public hours, in accordance with its established policies. 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](http://www.irs.gov); Publication 4341.