

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP Personal Care Providers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 cosmetologist (hair, waxing, nails) and office work (charges, records, etc.) in tax years 2016 to 2020, for which she received Form 1099-MISC. The firm's business is described as cosmetology in retirement communities.

The firm's response, signed by the owner/president, described the firm's business as providing Salon Services (hair and nail) to Seniors at Senior Living Facilities. The worker provided services as a hair stylist; she would take care of all the hair needs for the residents/customers, cleaning and maintaining the salon, and notify/contact business (owner) in a timely manner when supplies were low.

The firm and worker acknowledged the firm provided on-the-job orientation at all locations as to how Seniors/Residents like their services performed as well as instructions on how to do things, how to charge work, getting product, computer POS, and scheduling. The job assignments were weekly scheduled appointments and tracking of the client's needs. The firm determined the methods by which the worker's services were performed; the firm approved the schedule and gave it to the worker for execution. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker provided the cash register report and charge sheet for billing purposes. The worker's services were rendered Monday through Wednesday, and Friday between 8am to 7pm, transporting equipment and supplies to each location in the retirement communities. The worker stated she was required to perform the services personally and that any additional personnel were hired and paid by the firm. The firm stated the worker was not required to perform the services personally; the firm's owner picked up the slack.

Both parties concur that the firm provided hair products (shampoos, colors, gels, perms), equipment (dryers, clippers, irons, cart), and was responsible for all advertising. The worker furnished her shears. The Senior Living facility provided a salon to the firm for a monthly rental or percentage. The worker did not lease equipment, space, or a facility. The firm paid the worker a percentage of the services rendered plus any gratuities from the Seniors/customers. The worker was not covered covered under the firm's workers' compensation insurance policy. The worker indicated she was at risk for a financial loss in this work relationship if she lost her license, or there was loss and damage of tools, loss of the ability to work, or a lawsuit of malpractice. The firm stated she was not at risk for a loss. The worker did not establish level of payment for services provided or products sold.

The firm and worker agree the worker was extended the benefit of a one-week's paid vacation in the amount of \$XXX. 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 was not allowed to acquire competitive work within 2-mile radius of the current location. The worker provided services under the firm's business name. The worker was not required to solicit prospective customers since the firm had an established client base. The worker terminated the work relationship.

The worker provided a copy of a contract with another worker's name. She explained that the firm presented her with the contract and there were verbal agreements that were to be changed for her contract. The worker stated she never received the amended contract. The firm provided a contract with the worker's name. The contract with the worker's name and a signature were similar, yet with handwritten changes. Excerpts: Job Description: Stylist: Take care of all the hair needs for the residents/customers; Cleaning and maintaining the Salon; Notify business contact in a timely manner when supplies are needed; Charge/bill residents/customers according to salon standard pricing chart; Remember to promote the business to family members and friends. Terms and Conditions: It will be the firm's Salon Services responsibility that all products and resources are provided for contractor to be able to adequately perform required job functions; Vacation: 1-week paid vacation each year at a value of \$XXX; Meetings with contractors will be held on as needed basis, either individually or by location; Contractor must follow all location rules; Contractor will be paid on a weekly; Contractor will be working under 1099 and earnings will not be taxed. Contractor will be responsible in filing their own taxes, as total earnings will be reported to internal revenue service; Contractor will not be allowed to acquire competitive work within 2-mile radius of current contracting location; When sick and/or needs excuse from work, contractor must call at least 2 hours prior to the start of shift. Doctor's note will be needed if the purpose of calling in is due to sickness, for it to qualify an excuse; Contractor cannot solicit in taking over business from firm's Salon Services. It is an on the spot terminable offense.

Analysis

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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work 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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

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.

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 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.