

**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 is seeking a determination of worker classification for services performed as a hair stylist for the firm from August 2015 until March 2020. The worker received a 1099-MISC from the firm for 2015 through 2019 and a 1099-NEC from the firm for 2020. The worker states that the firm misclassified them as an independent contractor because they were paid commission through payroll. The worker provided copies of text exchanges between the parties, a business card advertising the worker under the firm's name, and copies of checks issued to the worker. The firm states that it is a full-service beauty salon. The worker provided services for the firm as an independent contractor hair stylist/barber, performing services on the firm's clientele as well as walk-in customers. The firm classified the worker as an independent contractor because the firm did not instruct the worker when, how, and where to perform services, the worker supplied all equipment, the firm did not hire helpers for the worker, the worker was free to offer services to anyone, and the worker collected payment from customers. Only a verbal agreement existed between the parties.

The firm states that the worker was expected to have completed all formal training for their profession as licensed by the state. The worker's clientele would book appointments with the salon or with the worker based on the hours that the worker would be performing services at the salon. The worker determined the methods by which job assignments were performed. If the worker encountered any problems regarding the firm's premises, they were required to notify the firm for problem resolution. If the worker received complaints from clientele regarding provided services, the worker was expected to resolve those issues. The worker was required to provide the firm with a report showing any firm-purchased supplies used by the worker during their job duties. The firm would then use this report to charge the worker back for supplies used. The worker was also required to provide the firm with a report on services provided and total fees collected. The firm did not set the worker's daily routine. The worker performed all services at the firm's premises. There were no meetings required. The worker was required to personally perform services. The firm would be responsible for hiring any assistants needed and depending upon the type of assistant, whether it assisted the firm or the worker, either party would pay the assistant. The worker states that the firm owner assigned the worker to a station. The worker would receive job assignments through appointments booked through either the salon phone or the worker's cell phone. The worker determined the methods by which job assignments were performed. The worker would try to diffuse problematic situations but if they could not reach a resolution with a client, they would escalate the issue to the firm owner. The worker would write down client names, services rendered, and retail items sold to provide to the firm at the end of the day. The worker chose their own schedule. The worker performed all services at the firm's premises. The worker was required to attend once or twice-yearly meetings and to perform services personally. The firm owner had the final say on hiring any helpers. The firm paid the assistants, and the worker would tip them.

The firm states that they provided the premises and styling salon furniture, which set the basis for the hair stylist fee charged by the firm to the worker. The worker was required to provide all supplies, materials, and equipment necessary to provide services. The worker did not lease any space, facilities, or equipment. The worker did not incur any expenses while performing services for the firm. The firm did not reimburse the worker for any expenses. The worker was required to reimburse the firm for any supplies used out of their pay. The worker received on a daily basis the net amount of fees collected after the firm deducted a hair stylist fee. There was no guaranteed minimum, and the worker was not allowed access to a drawing account for advances. The worker would turn over fees collected from customers at the end of the day, and then receive a net pay from the firm. The firm did not carry worker's compensation insurance on the worker. The worker was at financial risk for loss due to damage, loss, or stolen equipment and supplies, as well as a loss of income. The firm and worker mutually decided on the payment for services. The worker states that the firm provided stations, a chair, towels, capes, shampoo, conditioner, color, foils, perm/rods, and wax. The worker provided combs, brushes, a mirror, styling products, a blow drier, and curling iron. The firm deducted chemicals and products used from the worker's weekly pay. If the worker needed specific products for their job duties, the firm would reimburse them if they purchased it. The worker was paid on a commission basis. Customers paid the worker. The worker turned all profits over to the firm. The firm owner suggested prices for services provided but the worker had flexibility. The firm owner set prices for retail products sold.

The firm states that they did not offer the worker any benefits. The relationship between the parties could be terminated by either party without liability or penalty. The worker did not perform similar services for other firms. There were no non-compete agreements between the parties. The worker was not a member of a union. The worker represented themselves as an independent contractor using the firm's premises. The worker's clientele would follow them to whatever establishment at which the worker performed services. The customer list was the property of the worker. The work relationship ended after a confrontation between the parties. The worker states that they did not perform similar services for other firms. The worker advertised on behalf of the firm on social media and with business cards. The firm represented the worker as a contractor providing services under the firm's name. The work relationship ended when the firm fired the worker for questioning their classification.

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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, a statement that a worker is an independent contractor pursuant to a written or verbal 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, required the worker to report on services performed, and assumed responsibility for problem resolution. 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.

Payment by the hour, day, 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. 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 commission 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 of a hair salon. 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.