Form **14430-A**
(July 2013)

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
Medical Practitioners/Scientists/Therapists	☒ 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 determination in connection with services performed for the firm from 2024-2025 as a licensed acupuncturist. Services performed included delivering acupuncture treatments as well as other modalities such as cupping and gua sha. The worker created treatment plans for patients and would see then through the entirely of their care. The worker filed Form SS-8 as they believe they were misclassified. The worker believes they were an employee as the worker was required to wear scrubs with the firm's logo on them. The firm supplies the necessary supplies needed to perform the services.

The firm's response stated its business provides acupuncture, massage therapy, fertility support, natural beaty, gua sha, and cupping. The worker was engaged as an acupuncturist. Services performed included acupuncture treatments and related traditional Chinese medicine services. The worker was classified as an independent contractor as the firm treated all acupuncturist as independent contractors. The worker controlled their own schedule and determined treatment and methods. There was a written agreement between the parties. The firm provided a copy of the independent contractor's agreement for review.

The firm stated there was no training or instructions provided. The firm did not provide work assignments, schedule work, set quotes, or time requirements. The worker determined their own methods of how assignments were performed. If problems or complaints arose, the worker was contacted as well as responsible for resolution. There were no reports or meetings required of the worker. Services were performed on both the firm's and firm's customer premises on an as-available basis. The firm required the worker to personally perform services. The worker could not hire substitutes or helpers. The worker stated there was no training or instructions provided by the firm. The worker learned how to perform acupuncture treatments in school. The firm provided work assignments as the firm's clients would book appointments through the firm's front desk or online via the firm's website. The worker determined the methods by which those assignments were performed. If problems or complaints arise, the firm would be contacted as well as responsible for resolution. The worker was required to complete patient charts. The firm required the worker to attend staff meetings.

The firm stated they provided the worker with treatment rooms, treatment tables, lines, and general supplies. The worker provided any special instruments they required. The worker did not lease space, equipment, or a facility. The worker incurred job-related expenses such as licensing, education, insurance, travel expenses, and specialty tools. The firm did not reimburse the worker for any job-related expenses. Clients paid the firm. The worker was paid a commission rate of pay. The worker could not request advance pay. The worker did take a financial risk and could suffer a financial loss performing services due to the job-related expenses incurred by the worker. Both parties mutually agreed to the rate of pay for the services provided. The firm set the rate for products sold. The firm did not carry workers' compensation insurance on the worker. The worker stated the firm provided all the necessary equipment, supplies, and materials that were needed to perform services. The worker did not incur any job-related expenses in the performance of the services for the firm. The worker did not take financial risk and could not suffer a financial loss performing services. The firm set the rate of pay for services provided and products sold.

The firm stated there were no benefits made available to the worker. Either party could end the work relationship without penalty. The worker performed similar services for others during the term of the work relationship. The worker advertised their services on social media. There were no agreements prohibiting competition. Services were performed under the worker's name. The worker ended the work relationship. The worker stated they did not perform similar services for others. Services were performed under the firm's business name.

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 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 clients served and ultimately 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. The need to direct and control a worker and their services should not be confused with the right to direct and control. The worker provided their services on behalf of and under the firm’s business name rather than an entity of their own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and their services in order to protect their financial investment, their business reputation, and their relationship with their clients.

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 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; Publication 4341.