

**SS-8 Determination—Determination for Public Inspection**

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| Occupation<br>06THE Therapists | Determination:<br><input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor  |
| UILC                           | Third Party Communication:<br><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**

Information provided indicated the firm is a massage therapy business. The worker performed services for the firm in 2017 as a massage therapist. The firm reported the income on Form 1099-MISC, stating the worker completed a W-9 and agreed to be an independent contractor. The firm stated all training had to be obtained by the worker. The worker could bring her own clientele, or the firm may request worker for a services. The firm stated the worker set her own schedule and only came in for their appointments. The worker had keys to the building and could come and go as needed. Services performed on firm premises, for appointments only. The firm indicates the worker was required to provide the services personally. If she needed a sub, firm approval was necessary. The worker would compensate that individual. The firm indicated they provided the sheets and oil, but the worker must pay to utilize. Three percent was taken from their pay, three percent for credit card payments also. The worker was paid by assignment only. The customer pays the firm. The firm indicated it determined the level of payment for the services provided or products sold. No benefits were given. Either party could terminate the work relationship without incurring a penalty or liability. There were no prohibitions, the worker may work freely for whomever they wanted. They use their own business cards. The firm indicated they are represented as independent workers, they deal with their own clientele. The firm indicated the worker quit.

The worker indicated she was an employee because she had to work a scheduled time and was not allowed to leave unless approved by the firm. She was required to wear a uniform with the firm's name on it and business cards had the firm's name, contact information and her name. The firm provided training how to do facials and body wraps. She would receive client information through an application called [REDACTED]. The worker had a varied work schedule, Monday twelve to seven, Wednesday two to seven, Thursday ten to four, Friday two to seven, and Saturday ten to six, often with no breaks. The firm of July in 2017 her work schedule changed to Monday, Thursday and Saturday ten to seven, until she quit. She agreed work was performed on the firm premises, outside events held one percent of the time. She was required to perform services personally. She had no authority to hire. The worker indicated the firm provided the oil, room, table, internet to check out clients, bathroom supplies, the first two monogram uniforms, sheets and cleaning supplies. She provided a bottle, holster, blankets, monogramed uniforms, business cards, scrubs, laundry soap, fabric softener, dryer sheets. She was paid on a commission basis. The clients paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. She was represented as an employee of the firm. The worker gave two weeks' notice before quitting.

**ANALYSIS**

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your statement that the worker was an independent contractor pursuant to an 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.

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## Analysis

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We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, 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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

## CONCLUSION

Based on the information provided and common law I find the worker have been an employee for federal employment tax purposes. The worker did not own or operate her own business. The business is not operating under a valid space rental, independent relationship. The firm determined the rates charged to the clients, their website gives the rates charged as well as membership discounts. The clients paid the firm, not the worker for the services performed. The worker was required to carry the firm's business cards and wear the firm's uniform. The worker was paid on a commission basis. Had the worker been an independent massage therapist, she would have paid a set monthly rental fee for the space (never a percentage of income earned). She would have booked her own clients, determined the rates charged (to be in competition with the firm) to her clients and collected directly from her clients.