

SS-8 Determination—Determination for Public Inspection

Occupation 06THE Licensed Massage Therapist	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 firm is operating a chiropractic business and engaged the worker a licensed message therapist to perform chiropractor's assistant services and massage therapist services on firm patients prior to adjustments being made. The patients also book massage therapist services for longer periods of time with the firm's massage therapist workers used by the chiropractor. The worker received the job through an application process. The firm provided training and instructions on performance of organ massages on his clients. The worker scheduled longer massage therapy appointments based on the worker's schedule. The firm and worker determined the methods used to perform the services. The firm indicated there was a verbal rental agreement based on a percentage of income brought in for the worker's services. The worker performed the services at the firm's premises. The worker was not required to perform the services personally. The firm and worker hired and paid substitutes or helpers if needed.

The firm provided the tables, linens and other items and the worker provided some personal items and a license per the firm. They disagreed on worker leasing equipment or space. The firm indicated the lease was based on % of income received in her business. The worker indicated no business expenses were incurred in a business except clothing and the firm did not know what expenses were incurred. The firm reimbursed the worker to hand soap purchased twice per the worker. The worker was paid on a piecework basis per firm and worker stated 55% of the hourly rate. No advances were allowed. The customers paid the firm and the worker. The worker was required to turn over a percentage of customer payments to the firm. They disagreed on if the firm carried workers' compensation insurance. They disagreed on who determined the level of payment for the services.

There were no written contracts or agreements. The firm paid the worker bonuses based on fulfillment of his businesses chiropractic schedules and through allowing increases in the workers number of message clients in her message services. The worker did perform services for others and was not required to obtain the firm's approval to do so. The firm provided business cards for advertising. The worker was represented as a contractor under the firm's business name. Both parties retained the right to terminate the working relationship at any time without incurring any liability.

Analysis

When a firm determines or retains the right to determine directly or through designation what, how, when, and where workers perform services an employer/employee relationship exists. For federal employment tax purposes, it is not necessary for firms to exert direct or continuous control nor that services be performed full-time on a fixed scheduled basis, it is sufficient that the firm retains the right to change the workers services, as they deem necessary for business purposes. This control may come from verbal instructions, training, meetings, reporting, as well as supervision. Also, the methods used by workers to perform services are not only controlled through verbal instructions but also by equipment, materials, and supplies provided. In this case, the firm not the worker had control over the methods and means used in the performance of the services. These facts evidence behavioral control by the firm over the services performed by the worker.

When a worker does not have a significant financial investment in a business requiring capital outlays and business risks an employer/employee relationship is evident. In this case, the worker had no significant financial investment in a business and did not incur any on-going significant business expenses. The firm had the business investment and control over profit and risk of loss with regard to the services the worker performed for the firm's business. There were no legal written binding rental agreements provided regarding the working relationship. The firm determined the level of payment for the products and services paid by the customer. The firm assigned the worker schedules to worker and allowed the worker to perform additional services per customer requests based on the worker's license and qualifications. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. These facts evidence financial control by the firm over the services performed by the worker.

There were no written contracts but a verbal working relationship was entered into. The worker advertised the firm's business and her services on firm provided business cards and firm's networking. The worker personally performed services for the firm's business at the firm's place of business for customers on a regular and continuous as needed and requested over several months. The worker did perform similar services for others and was not required to obtain the firm's prior approval to do so. Although this could be an important factor to consider in an independent contractor relationship, this factor alone would not make the worker to be an independent contractor. Many workers have more than one job at a time and may be an employee in one or all working relationships depending on the autonomy of each one. The worker advertised services on the provided firm's business cards and networking used by the firm's business.

Both parties retained the right to terminate the working relationship at any time without incurring any liability for termination. The right to discharge a worker at any time without incurring a liability for termination is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired without a liability so long as the independent contractor produces a result that meets the contract specifications. Likewise, if the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.