

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

Occupation

06THE Therapists

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 firm provides therapeutic massage services. The worker was engaged by the firm as a massage therapist. The firm did not withhold taxes from the worker's remuneration in 2016 through 2018.

The worker submitted the firm's staff handbook stating, among other things, that the firm prides itself on its personable and friendly staff members; it strives to promote a tranquil team-oriented environment and expects all staff members to contribute to this environment; the purpose of the handbook is to familiarize the worker-independent contractor-with the policies, rules, and other key aspects of the firm; compliance with the handbook is compulsory for all staff members; the firm reserves the right to interpret the handbook as it sees fit and to deviate from policy when it deems necessary; the firm will provide written notice of any changes to the handbook and the worker is responsible for understanding and complying with all up-to-date policies; paychecks are generally paid on Thursdays of every week; the worker is responsible for carrying professional liability insurance at all times at the minimum rate specified by the firm; proof of insurance coverage must be provided to the firm; it is the worker's responsibility to provide the firm with a current copy of her license and certificates of completion of any continuing education (CE) taken; the worker is responsible for maintaining her work area, and notifying the front office staff of any general area that needs cleaning or of any massage supplies that are running low; the worker is responsible for maintaining SOAP notes; the worker is required to attend once-a-month staff meetings; the worker may call in for a day off if feeling ill or for a personal emergency-if a call is made after 7:00 a.m., the worker must call her clients to reschedule; the worker will receive an annual pay increase and will receive an annual Christmas bonus; the firm will contribute up to \$300 (subject to change) towards CE per calendar year upon submission of a copy of the tuition fee receipt; the worker is encouraged to receive at least one massage per month and give one massage per month as a trade; the worker is required to give a two week notice upon resignation; and the firm will close/early close on the stated holidays and breaks.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. The worker received her assignments via the firm's on-line scheduling tool; she could also independently schedule other sessions with clients. The worker in consultation with her clients determined the methods by which she performed her services. The worker could contact the firm if there was a problem with the facility or on-line scheduling, or if unable to resolve a client problem/complaint herself. The worker determined her own availability; she was free to leave if no sessions were scheduled. The worker performed her services at the firm's location but could also perform massages in her home or for other similar businesses. If the worker was unavailable, a client could agree or decline to see another therapist; therapists may trade sessions with other therapists with client approval. The worker was required to perform her services personally.

The firm provided a private room, massage table, sheets, towels, and basic oils and lotions. The worker provided other oils, lotions, tools, rocks, extra sheets, pillow, decor, music speakers, and music selections. The worker did not lease space. She was responsible for her own licensure, continuing education, and insurance. There were no reimbursements, but the firm was responsible for the cost of the physical space, utilities, credit card processing fees, etc. The firm paid the worker at an hourly rate. Gratuities were offered by clients. The firm did not cover the worker under workers' compensation. Customers paid the firm directly at prices established by the firm. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm did not make benefits available to the worker. It did not prohibit the worker from providing similar services for others during the same time period. The worker advertised her services via social media. The firm represented the worker as a licensed massage therapist (LMBT) as indicated by her license number on the firm's on-line scheduling tool. Both parties reserved the right to terminate the work relationship, and in fact, the firm terminated the work relationship.

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## Analysis

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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. 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. The worker was considered part of the team-oriented environment and shared responsibility for the condition of the firm's general area and supplies. While the firm relied upon the worker's prior training and experience, it required her to follow its staff handbook and attend monthly meetings. Requiring the worker to attend meetings indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. The firm was ultimately responsible for resolving any problems or complaints that may have occurred. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for the firm on her behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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 lease space, 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The worker provided oils, lotions, tools, rocks, extra sheets, pillow, decor, music speakers, and music selections. She was responsible for her own licensure, continuing education, and insurance. 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. The firm paid the worker at an hourly rate with the possibility of a pay raise. Payment by the hour generally points to an employer-employee relationship. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker worked on a continuing basis. 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. The worker was not engaged in an independent enterprise, but rather the therapeutic massage services performed by the worker were a necessary and integral part of the firm's business. 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. The firm did not prohibit the worker from performing similar services for others; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. The firm terminated the work relationship without incurring liability or penalty. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. These facts show that the firm retained control over the work relationship and services of the worker.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

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.