

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 is in the business of providing chiropractic, physical and massage therapy. The worker was engaged as a massage therapist. The worker received a Form 1099-MISC for his services in 2015, 2016, 2017, and 2018,. The firm provided a blank agreement for a therapy assistant.

According to the worker, the firm provided instructions on what specific areas to work on each of their clients as well as how long and how much pressure to use. The firm indicated that the worker did not receive any training/instructions as he was retained based on his skills and experience. However, the firm indicated that it advised the worker of special circumstances and needs of its patients. The worker received his work assignments from the firm who determined the methods by which the assignments were performed and would be contacted if any issues or problems arose. However, the firm noted that he was offered patients that came to the firm's facility for chiropractic services. Occasionally, the worker provided an oral report on a client; firm noted no written reports. The worker had a fixed hourly schedule during specific weekdays at the firm's office. There were no meetings. The firm noted that he chose his own work schedule and that the firm scheduled patients for him on the days he designated that he would be in. The firm's patients were treated by the worker at the firm's premises. The worker was required to provide the services personally; the firm disagreed. The firm noted that either party could hire substitutes and the firm would pay those who serviced its patients.

The worker noted that the firm provided the massage rooms, tables, linens, supplies, music and speakers; the firm mentioned only the table. The worker supplied any other products he chose to use and provided his own liability insurance. Both parties agreed that the worker was paid by the hour; the worker had no other economic risk. The customer paid the firm. The worker noted that the firm established the level of payment for services; the firm indicated that the rate was agreed upon.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did perform similar services for others during the same period of time. The relationship ended when the worker quit.

Analysis

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. The relationship of the worker and the business must be examined. 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 should be considered. 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.

Section 31.3401(c)-1(c) of the regulations states that generally professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others in an independent business or profession in which they offer their services to the public are not employees. However, if a firm has the right to direct and control a professional, he or she is an employee with respect to the services performed under these circumstances. 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 the absence of direct control, it cannot be doubted that many professionals are employees.

Factors that illustrate whether there is a right to control how a worker performs 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 firm obtained the clientele and engaged the worker to provide the massage therapy services as needed for its operations. The worker was skilled and experienced in his line of work. Although he did not require extensive instructions, the firm informed/advised him of their patients' special circumstances and needs regarding massage therapy. He worked part-time, and when he was available. The firm was informed of his schedule and then scheduled patients for him based on his work schedule. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The worker's services for the firm were all performed at the firm's location, also a factor that suggests the firm's ability to retain control over the worker.

While the worker's services were for a limited number of hours, those services were continuous. 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.

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. The worker had no investment. It was the firm that had the investment in the office, equipment, and materials. The worker received an hourly rate of pay and had no other economic risk other than the loss of that compensation. Payment by the hour, 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.

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. There were no benefits and there was no written applicable agreement. When working for the firm, the worker was not engaged in a separate business venture. 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 fact that the worker occasionally serviced his own customers at the firm is acknowledged; however, the worker did not pay for that privilege nor shared those monies. Also the worker may have performed similar services for others, understandable as the worker only worked for the firm for limited hours. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.