

# SS-8 Determination—Determination for Public Inspection

Occupation 06THE 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 worker submitted a request for a determination of worker status in regard to services performed for the firm from January 2018 to May 2018. The services performed by the worker included massage therapy, in addition to daily cleaning and receptionist duties, i.e. answering the phones, scheduling appointments, marketing on social media, accepting client payment for the firm, cleaning the spa, and folding laundry. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states it is a facial spa business which provides aesthetic services for the face and body. For the period in question, massage therapy was offered to its clients when a massage therapist was available. Massage therapy was not a regular service offered and is no longer offered. The worker was engaged as a massage therapist and she performed services on an as-needed, as-available basis. Services were performed under a written agreement. The worker was classified as an independent contractor as she made her own schedule, changed and canceled appointments and work time at her own will, and chose who she provided services to. The worker carried her own insurance.

The firm stated it did not provide specific training or instruction to the worker. The worker received work assignments via automated text messages from its booking system, based on available times chosen by the worker. The worker determined the methods by which assignments were performed. The firm was contacted and assumed responsibility for problem or complaint resolution. Reports and meetings were not required. The worker had no set routine or schedule. She arrived at work about 15 minutes before the appointment, performed the scheduled services, and left when done. Services were performed at the firm's premises. The firm required the worker to personally perform services. Hiring and paying substitutes or helpers was not applicable. The worker stated the firm provided her specific training and instruction related to use of its computer and phone system to schedule appointments and how to wash/fold laundry and clean the spa. The firm determined the methods by which assignments were performed. Services performed were reported in the firm's computer software system. Her routine consisted of 10 am to 3 pm, six days per week. The firm required she attend meetings related to its promotions. She was not paid to attend meetings.

The firm stated it allowed the worker to use its tables and linens already used for facial services. The worker provided and incurred the expense associated with massage creams, aromas, and tools. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker a lump sum per service performed and client tips. The worker was not allowed a drawing account for advances. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to expiration of massage creams and broken tools. The firm set the client price and the worker received an agreed lump sum per service regardless to what the firm collected. The worker stated the firm provided all, i.e. spa location, rooms, massage tables, oils, creams, sheets, washer and dryer, and utilities. Her sole unreimbursed expense was travel to/from the firm's premises. The firm paid her commission. It did not guarantee her a specific minimum amount of pay. She did not incur economic loss or financial risk.

The firm stated benefits were not provided to the worker. The worker performed similar services for others; the firm's approval was required for her to do so. The worker advertised with business cards and via social media for her massage business. There was no agreement prohibiting competition between the parties. The firm represented the worker as a contractor to its customers. The work relationship ended when the worker was involved in an auto accident and she never contacted the firm to return. The worker stated the work relationship could not be terminated without liability or penalty due to the non-compete agreement. She did not perform similar services for others during the period in question and did not advertise. The firm represented her as a massage therapist to its clients. Services were performed under the firm's business name. The work relationship ended when she quit.

The firm stated the signed contract has a couple of mistakes. As the non-compete clause was of little importance to the firm it was eliminated. The worker was originally going to be charged a 5% fee for use of the firm's treatment table, linens, and creams. As the worker didn't care for the firm's creams, that part of the contract was also eliminated. Changes were verbally made and remained throughout the course of the work relationship. The written agreement states, in part, it could be terminated at any time by mutual agreement of the parties. The services to be performed were not documented. Services were to be performed for the firm's clients. The worker would only be reimbursed for pre-approved expenses and she would furnish vouchers to the firm. The worker was to maintain general liability insurance and would name the firm on her policy. Fixed rates of pay were set for various services provided. The worker could not solicit the firm's clients. Doing so would result in immediate contract termination. Only the firm's products would be promoted to the firm's clients. The worker was expected to be available during the firm's scheduled hours. She could block out time with permission from the firm's manager or owner. A 14-day written notice was required for blocked out time. Excessive absence co

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## 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 written 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 and expected the worker to be available during its scheduled hours. The firm provided work assignments by virtue of its clients, collected payment for services performed, and 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.

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 fixed per service 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. 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](http://www.irs.gov); Publication 4341.