

SS-8 Determination—Determination for Public Inspection

Occupation

06THE Massage Therapist

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 worker initiated the request for a determination of her work status as a massage therapist in tax year 2018, for which she received Form 1099-MISC. She provided massage therapist services as booked by the firm, as well as receptionist duties. The firm's business is described as a massage therapy business.

The firm's response was signed by the owner. The firm's business is massage therapy and the worker provided services as a licensed massage therapist.

The worker indicated there were instructions as to supplies, what discounts to apply, how to perform services that were implemented by the firm. The job assignments were booked by the owner and the worker was notified via text, email, or an appointment app. The firm determined the methods by which the worker's services were performed; and, any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered on the firm's premises with a first appointment at 9am and the last appointment at 2pm. The worker was required to perform the services personally.

According to the firm, there were no specific training and/or instructions given to the worker. The job assignments were online bookings per the worker's control and availability. The worker determined the methods by which she performed massage therapy services. Any problems or complaints encountered by the worker were resolved jointly. The worker's services were rendered on a part-time basis on the firm's premises. The worker was required to perform the services personally.

The firm and worker acknowledged the firm provided oils, lotions, massage tables, and linens; however, the firm noted that the worker had the option of providing the equipment and supplies. The worker did not lease equipment, space, or a facility and did not incur expenses. The firm paid the worker a commission; the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker stated she was not at risk for a financial loss in this work relationship. The firm indicated the worker and firm established the level of payment for services provided or products sold; the worker disagreed stating the firm's owner set the level of payment.

Both parties concurred there were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The worker stated she was represented as an employee on the firm's website and services were rendered under firm's name. The worker had no responsibility to solicit new customers; she was to only rebook the client.

The firm and worker provided a copy of the Independent Contractor Agreement which provided the following: this was a 6-month agreement; the worker had control of the means, manner and method by which the services were performed; the worker could have furnished supplies and materials, however, the firm provided massage tables, bolster, hot towel cabinet, clean linens, oil, and music; the worker had the right to perform services for others, but the worker could not advertise or offer to see clients of the firm outside of the business; the firm would provide a safe clean environment within the massage facility, orientation of the facility, client documentation forms, and time sheets; compensation of 60% of the service cost before discount will be given; if there was a no call/no show/last minute cancellation the firm will compensate the worker \$25 (unless firm collected the full amount due); and, the worker was to submit a time sheet to the business after each weekly work period, and the firm to pay on a weekly basis.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

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.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises.

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. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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.

The firm's 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.

We have considered the information provided by both parties to this work relationship. 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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. 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.

CONCLUSION

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.