

SS-8 Determination—Determination for Public Inspection

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| Occupation 06THE Therapists | 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 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. The firm refers the patient, schedules the appointment, and bills/collects for the services. The firm's business is described as chiropractic services.

The firm's response was signed by the owner. A mutual acquaintance introduced the worker who was looking to relocate, to the firm who was looking for a new massage therapist. The firm's business is a chiropractic clinic; and, the worker provided services as a licensed massage therapist.

The worker was given an initial training on the flow of the office. The job assignments were scheduled by the front desk/office manager and printed off each morning. The worker determined the methods by which the worker's services were performed with suggestions from the chiropractor. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker was required to complete forms as to the muscles that were focused on during treatment for the insurance billing. She stated her hours of work and breaks were scheduled to align with the firm's; services were rendered on the firm's premises. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded the worker was responsible for her accreditation. The job assignments were patients of the clinic or the worker's clientele. The worker used her judgment and determined the methods by which she performed the services. Any problems or complaints encountered by the worker were directed to the firm's office manager for resolution. The worker's services were rendered three days a week on the firm's premises for 1/2 to 1 hour appointment. The worker was required to perform the services personally; any additional personnel hired and paid by the firm.

The worker stated the firm provided the massage room, table, linens/sheets, oils/creams/lotions, and hot and cold packs. The worker furnished additional/optional room furnishings such as plants and candles. She did not lease equipment, space, or a facility and did not incur expenses. The worker was paid piecemeal. The clients paid the firm. The worker indicated she was not at risk for a financial loss in this work relationship and that she did not establish level of payment for services provided.

The firm acknowledged providing the facility, sheets, laundry, lotions, and scrubs; and the worker furnished the table and ancillary equipment. The firm indicated the space was provided and compensation was adjusted downward. The worker was paid piecemeal. The firm's clients paid the firm and the firm handled the billing and collection under the firm's name and license. The worker was not covered under the firm's workers' compensation insurance policy. The worker carried medical malpractice insurance. The firm determined the fee for clinic clients. The worker determined the fee for her personal clientele.

Both parties concur there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker was performing same or similar services for others during the same time frame and the firm's approval was required. The worker treated private clients on days/hours when the firm's owner was not in the office. The worker was required to report any scheduled patients to the firm. The firm billed for her services under the firm name and license. The firm and worker provided a copy of the Independent Contractor Agreement which contained the following: • Contractor also acknowledges that Contractor will always abide, until the very last day of working with this Company, by all the Company policies and guidelines delineated hereinafter. • Company will be responsible for furnishing the massage equipment (table/chair), oils/creams, 3 pairs of scrub tops and 3 pairs of new sheets every 12 months, in which all the above remain the property of the Company after the last day of working. The Contractor will not pay a space rent for the massage facilities. The Contractor is responsible for he/she transportation, performance, behavior, attitude, appearance and Integrity. The Contractor is also responsible for washing/drying sheets, cleaning massage space, vacuuming and taking trash out. • Uniforms: Contractor will always be in scrubs provided by the Company, while on company time or on a company job. • General Liability: Contractor accepts all liability for the use of any company equipment if it is damaged, stolen or destroyed in any way. • Compensation: The following shall constitute a schedule of the fees charged by Contractor and Company: a.) The company will pay \$35.00 an hour (4 units) for massage performed by the Contractor. b.) Contractor will not be paid for no-shows or missed appointments. • Advertising and Marketing done by the firm. • Business Services: The Company will provide Contractor with the following services: a.) The Company will conduct record keeping, filing, record updating, and scheduling on behalf of the Contractor; and b.) The Company will conduct billing and bookkeeping, maintain accounts payable and accounts receivable, and provide Contractor with 1099 tax forms.

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.

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 on 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.