

**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 worker submitted a request for a determination of worker status in regard to services performed for the firm in 2017, 2018, and 2019 as a licensed massage therapist. The firm issued the worker Form 1099-MISC for 2019; a related business entity issued her Form 1099-MISC for 2017 and 2018. The worker filed Form SS-8 as she believes she received Form 1099-MISC in error.

The firm's response states it is a day spa business offering soaking pool, sauna, and massage therapy services. Retail products and a small cafe are also on site. The business reorganized on January 1, 2019. The worker was engaged as an independent massage therapist that provided several of the services offered at the spa during the firm's normal business hours. The worker was classified as an independent contractor as she provided the firm with her available hours, she provided the same services at other locations, and she provided her own insurance. The worker performed services based on her own style and expertise based on her license and as dictated by her schedule.

The firm stated it was the worker's choice to take continuing education courses to further skills which could be offered anywhere. The worker provided the time she was available for client appointments. The firm follows a template so therapists have a break between appointments. The worker determined the methods by which assignments were performed. The firm and worker shared responsibility for problem or complaint resolution. The worker's schedule varied based on booked appointments. The worker's routine consisted of coming in to prepare for clients and performing services which typically ran for 60 - 90 minutes. Services were performed at the firm's premises. There were no mandatory meetings. The firm required the worker to personally perform services. The firm contacted and paid qualified workers if substitutes or helpers were needed. The worker stated the firm charged her to learn its spa treatments. The firm provided a monthly schedule of assigned appointments. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. All meetings were mandatory and unpaid.

The firm stated it provided the room, table, linens, and various specialized equipment, i.e. towel heater. The worker was free to use her own oils, lotions, and equipment. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense associated with the items she provided, insurance, and licensure. Customers paid the firm. The firm paid the worker piece work; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to possible lack of bookings for the period of her availability. The firm determined the level of payment for the services provided and the products sold. The worker stated she provided a holster and work attire. The firm paid her commission.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. It is unknown if the worker advertised. The firm represented the worker as a contract service provider to its customers. Services were performed under the firm's business name. The work relationship ended when the worker chose to remove herself from the schedule. The worker stated she did not perform similar services for others or advertise. The work relationship ended when she resigned.

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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, a statement that a worker is an independent contractor pursuant to a written or verbal 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. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the clients served, collected payment for services performed, and ultimately 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 piece work or commission 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. 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.