

SS-8 Determination—Determination for Public Inspection

Occupation 06THE.17 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 firm is a holistic detoxification spa in the business of detoxing and revitalizing. The worker provided her services to the firm in 2011 through 2014 as a massage therapist with services which included specific massages and treatments for the firms' customers and received the Forms 1099-MISC for these services.

The worker stated that the firm provided her with specific training and protocols for each treatment to do all the tasks the job provided. The firm contends that there was no training or instruction. The worker received her assignments daily from the firm with a list of clients, times and treatments, and the firm's spa manager determined the methods by which the assignments were performed. The firm stated that the worker received her assignments by request and she determined the methods by which the assignments were performed. If problems or complaints arose the worker was required to contact the firm's spa manager who was responsible for problem resolution. The firm required the worker to submit a tech sheet initialed by the firms' clients' at the end of the day. The worker maintains that she had a set schedule working 12:00PM to 8:00 PM daily. The firm expressed that the worker gave her available hours to the firm's manager, the firm's clients' requested the worker, and the firm's guest services scheduled the firm's clients' treatments. She provided her services personally on the firms' premises 100% of the time. The worker reported that the firm held product launch meetings, customer services meetings, and massage training which the worker attended. If additional help was required, the worker explained that the firm hired and compensated the helpers.

The firm provided all the necessary supplies and equipment the worker needed to provide her services such as; the table, linens, oils, iPods, treatment supplies and toiletries. The worker stated that she did not lease any equipment nor were any business expenses incurred in the performance of her services. The firm contends that the worker had a monthly 3% room rental, and a 2% equipment and supply fee. She received a commission for her services. The firm's customers paid the firm for the services the worker provided. The worker did not assume any financial risk in the relationship. The worker reported that the firm established the level of payment for the services the worker provided. The firm maintains that the worker established the level of payment for the services she provided.

The worker did not perform similar services to others during the same time period. The firm indicated that the worker did provide similar services to others during the same time period. The worker provided her services under the firm's business name. Both parties retained the right to terminate the relationship without incurring liability. In fact, the firm stated that the relationship ended when the firm did not schedule the worker.

Analysis

The application of the three categories of common law evidence to the available facts of the relationship indicates that the firm retained the right to direct and control the worker in the performance of her services. Accordingly, the worker was an employee of the firm for purposes of Federal employment taxes.

Worker status is not something to be selected by either the firm or the worker. Worker status is determined by the examination of the actual working relationship as applied to Internal Revenue Service code.

The firm submitted a Form W-9, but the fact remains that the Form W-9 is simply used as an information document to verify a Taxpayer Identification Number, or a valid Social Security number and has no bearing on the SS-8 determination process. The Form W-9 is also used to indicate that the worker is not subject to "Backup Withholding" Backup Withholding is a specific type of withholding and should not be confused with Federal Income Tax withholding.

There was a written contract describing the terms and conditions of the relationship. However, for Federal tax purposes it is the actual working relationship that is controlling and not the terms and conditions of a contract be it written or verbal between the parties. See also Section 31.3121(d)-1(a)(3) of the Employment Tax Regulation.

Hence, to clarify the Federal Government's position on worker status, we will be determining this case based on their common law practices in which the actual relationship between the parties is the controlling factor.

The firm trained the worker regarding the performance of her services. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. The firm retained the right, if necessary to protect their business interest, to determine or change the methods used by the worker to perform her assignments. The facts show that the worker was subject to certain restraints and conditions that were indicative of the firm's control over the worker. 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. 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. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. The worker had a continuous relationship with the firm as opposed to a single transaction. The worker rendered her services personally. The worker's services were under the firm's supervision.

The firm provided the worker with the necessary equipment and materials. 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. Her pay was based on a commission. The worker could not have incurred a loss in the performance of her services for the firm, and did not have any financial investment in a business related to the services performed.

The worker worked under the firm's name, and her work was integral to the firm's business operation. The above facts do not reflect a business presence for the worker, but rather, strongly reflect the firm's business. 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. Either the firm or the worker could terminate the agreement.

Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.