

SS-8 Determination—Determination for Public Inspection

Occupation

06THE.18 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 firm is a day spa/salon business. The worker was engaged to perform services as licensed massage therapist. The parties entered into an independent contractor agreement, and the firm treated the worker status as independent contractor. As a result, the firm issued to the worker a Form 1099-MISC at year-end to report the monies received for his services as non-employee compensation.

The firm determined the specific services to be performed at its location, for its clients. The worker received specific training from the firm. Sessions were scheduled for the worker based on his availability and willingness to perform the treatments. The firm and worker both determined the work methods by which to perform the services. Problems or complaints that the worker could not resolve were reported to the firm for resolution. The worker's services were performed personally, at the firm's premises. The firm required the worker to provide invoices for payment purposes.

The firm provided the facilities needed to perform the services. The firm and worker both provided the equipment and supplies. The worker did not lease or rent space at the firm's location. The firm established the prices for all services performed. All monies generated from the worker's services except tips, were remitted to the firm, and the firm paid the worker on a commission basis for his services. There was no information provided in this case to support that the worker incurred economic loss or financial risk related to the services he performed for the firm.

The firm did not carry workers' compensation insurance on the worker. Employment benefits were not made available to the worker. There was no information provided in this case to support that the worker performed similar service for others while engaged by the firm, or that he advertised his services during this work relationship. The work relationship was continuous, and could have been terminated by either party at any time without incurring liabilities.

Analysis

The 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.

The facts provided for this case do not evidence the worker's behavioral control of the work relationship. The worker followed the firm's schedule, and routine in the performance of his services. The worker's services were performed personally, at the firm's location. The worker used the firm's facilities, equipment, and supplies, and he represented the firm's business operations in the performance of his services. As a result, the firm retained the right to direct and control the worker to the extent necessary to protect its investment, and the reputation of its business operations.

The facts provided for this case do not evidence the worker's financial control of the work relationship. The worker's remuneration was established by the firm. The worker had no opportunity for profit or loss as a result of the services performed for the firm. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The worker did not have a significant investment in the facilities, equipment, tools, or supplies used to perform his services for the firm. 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.

The worker performed services as requested by the firm, for an indefinite period of time, and both parties retained the right to terminate the work relationship at any time without incurring liabilities. The facts provided for this case evidence that the worker was engaged to perform services that were a necessary and integral part of the firm's business operations. 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.

Based on common law principles, the worker shall be found to be an employee for Federal employment tax purposes. For correction assistance, you may refer to Publication 4341, which can be obtained at www.irs.gov