

SS-8 Determination—Determination for Public Inspection

Occupation 06THE.27 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 operating a day spa and massage service business. The firm engaged the worker through a posting on Craig's List to perform therapeutic massages. The firm provided no training or instructions due to the worker's license qualifications and experience received through education. The firm offered jobs through appointments and allowed the worker to bring in personal clients. The firm and the worker determined the methods used to perform the services. The worker contacted the firm regarding resolution of any problems or complaints the worker was not able to resolve. The worker performed the services on a flexible variable schedule basis during the firm's hours of operation. The worker performed the services at the firm's place of business. The firm required the worker to perform the services personally.

The firm provided the business, equipment, materials, and supplies. The worker provided personal items if the worker wanted too. The worker did not lease space or equipment. The worker could incur business expenses if the worker chose to provide personal items. The worker indicated no expenses were incurred. The firm paid the worker a set amount per massage and the customers paid the firm and the worker. The worker turned over the agreed amount the firm determined needed to be paid for the services by the customer. The firm did not carry workers' compensation insurance. The firm determined the level of payment for the services and products. The worker could not suffer any economic loss and had no financial risk other than damage to equipment per the firm.

There were no written contracts. The firm stated the worker did perform similar services for others and was not required to obtain the firm's prior approval to do so. The worker advertised her credentials on social media. The firm referred to the worker by name as a licensed massage therapist to the customers. Both parties retained the right to terminate the working relationship at any time without incurring any liability.

Analysis

When a firm determines or retains the right to determine directly or through designation what, how, when, and where workers perform services an employer/employee relationship exists. For federal employment tax purposes, it is not necessary for firms to exert direct or continuous control nor that services be performed full-time on a fixed scheduled basis, it is sufficient that the firm retains the right to change the workers services, as they deem necessary for business purposes. In this case the worker was engaged through a resume posted on social media to perform services for the firm's business operation on a flexible schedule basis during the firm's business hours of operation at the firm's place of business. The firm took appointments and allowed the worker to choose jobs as well as to bring in clients to the firm's place of business who requested the worker to perform the services personally. The firm and the worker determined the methods used to perform the services. The methods used by workers to perform services are not only controlled through verbal instructions but also by equipment, materials, and supplies provided. The firm required the worker to perform the services personally. These facts evidence behavioral control by the firm over the services performed by the worker.

The firm provided the place of business, equipment, materials, and supplies needed to perform the services. The worker provided a license and could provide personal items. The worker did not lease space or equipment. The worker did not incur any on-going significant business expenses. The firm paid the worker a set amount per massage and the customers paid the firm or the worker. If the customers paid the worker the worker turned over the amount the firm agreed to charge for the services and products. The firm determined the level of payment for the products and services. The firm indicated the worker's economic loss and financial risks were related to damages to equipment. No legal documentation was provided to support this would be a responsibility of the worker. The worker indicated not having any control over profit and loss with regard to performance of services. The risk of damages to equipment would not be considered having control over profits and losses in the operation of a business. These facts evidence financial control by the firm over the services performed by the worker.

There were no contracts between the firm and the worker. The firm indicated the worker did perform similar services for others and was not required to obtain the firm's prior approval to do so. Although this could be an important factor to consider in an independent contractor relationship, this factor alone would not make the worker to be an independent contractor. Many workers have more than one job at a time and may be an employee in one or all working relationships depending on the autonomy of each one. The worker advertised her credentials on social media but did not advertise as being actively engaged in a business. The worker personally performed services for the firm's business as a licensed massage therapist under the firm's business name on a regular and continuous flexible scheduled basis over several years.

Both the firm and the worker retained the right to terminate the working relationship at any time without incurring any liability. The right to discharge a worker at any time without incurring a liability for termination is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired without a liability so long as the independent contractor produces a result that meets the contract specifications. Likewise, if the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.