

SS-8 Determination—Determination for Public Inspection

Occupation

06THE.16 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 worker requested a determination of employment status for services performed for the firm in 2013-2015. The firm responded to our request as follows:

The firm is chiropractic and health club licensed facility providing massage and chiropractic services. The worker provided massage therapy services. The firm feels the worker was an independent contractor as she had her own business license and insurance. She determined her own schedule and could accept or refuse appointments. She quoted prices and directly collected payment from the clients. She paid rent and fees to the firm for use of the facility and support. No training was provided. The worker frequently scheduled her own appointments and she also paid a desk fee for the front desk to schedule appointments while she was busy or away. The worker handled her own problems. No reports were required. A weekly rent/invoice was required from the worker. The worker provided the firm with her days of availability. She came and went without control from the firm. No meetings were required. The worker was required to find a replacement if she was not available for a scheduled time. The worker was charge a fee for use of the general equipment. The worker provided her own oil and lotion. The worker paid \$600 a week in rent and an average of \$30 a week in fees. The firm stated that the worker paid her rent and fees to the spa and the spa did not pay the worker other than reimbursements, she keeps the rest of the fees.

The rental agreement stated that the worker would be an independent contractor. The worker was expected to work independently except the firm retained the right to specify the standards and results to be achieved. The firm will provide the worker with a non-exclusive use of a designated area. The worker was required to turn in assigned schedule of their available shifts 2 months in advance. The shifts are not guaranteed and the worker was required to honor the schedule or find a replacement within the staff. The worker was required to give the firm 60%. Rent sheets and paperwork were due every Sunday. If not turned in the worker would not get paid for that time. If turned in late there was a charge. The worker was to be paid every other Friday. If the worker changed the prices the firm, front desk, and client were required to be notified prior to service. If the client was dissatisfied with the worker, the worker would take that liability, if for another reason the firm would be responsible. The worker was responsible for collecting payment. If a credit card the worker could use the firm's card machine and be charges 1% or have her own. The worker chose the firm's machine. The firm charged the worker for linen usage and wax products if needed. All major equipment was provided. The worker was required to supply her own oil and lotion. The worker was required to have business cards and the design and content had to be approved by the firm before printing. The worker was required to follow the uniform policy, subject to the firm's inspection, and suspension of work. The worker was required to provide her own licensing and insurance. The worker was responsible for her own taxes and did not receive any benefit. The firm gathered feedbacks from clients on the worker and used these feedbacks to judge her performance for renewal of the contract. There was a confidentiality clause in the contract.

Analysis

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below. Therefore, a 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your business. 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. The contract show control over the worker in scheduling, documentation and payment requirements. Also the worker submitted her contractor information form that further detailed the requirements from the firm and the control the firm had 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.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, 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. 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. The firm had to approve the worker's business cards. She was required to submit her paperwork weekly the way the firm required. Although the firm stated the worker rented, this was not a valid rental situation. The worker was required to work or provide a replacement, (another therapist at the firm), she was required to submit information on the daily services performed and charges. The firm controlled what she was to wear, and the space provided for her to work was also used by others.

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 worker had no investment in the firm's business, received commission set and controlled by the firm, and could not suffer a loss.

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.

Firm: For further information please go to www.irs.gov Publication 4341