Form **14430-A**
(July 2013)

Department of the Treasury - Internal Revenue Service

# SS-8 Determination—Determination for Public Inspection

| Occupation | Determination: |
|---|---|
| 06THE Massage Therapist | [X] Employee [ ] Contractor |
| UILC | Third Party Communication: [X] 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 is seeking a determination of worker classification for services performed as a massage therapist for the firm from June 2018 until November 2019. The worker received a 1099-MISC from the firm for 2019 and no pay documentation for 2018. The worker feels that they were misclassified as an independent contractor by the firm because they worked for the firm full-time, the firm made the rules of service, the worker used their facilities and equipment, and the firm was responsible for hiring and terminating workers. The worker states that there was a written agreement between the parties.

The firm states that it provides massage therapy services. The worker was requested to provide massage therapy services. The worker was classified as an independent contractor by the firm because the worker was a licensed 1099 contractor. The firm provided a copy of the written agreement between the parties and copies of checks paid to the worker.

The firm states that there was a code of conduct for workers posted in the firm's break area. The worker was also trained in the cleaning procedures for their work area. The firm did not give the worker any assignments. The worker would receive customers on a rotating basis if other workers were present. The firm states that the firm owner was responsible for problem resolution for problems the worker would encounter on the job. There were no reports required of the worker. The firm states that the business had posted hours, but the worker was free to determine their own schedule. The worker performed all services at the firm's premises. There were no meetings required of the worker. The worker states that the firm instructed the worker on opening and closing procedures. The worker would receive customers through customer reservations or walk-ins. The customer and the firm determined how services were performed. If the worker encountered any problems or complaints, they were required to contact the firm's owner for problem resolution. The worker was required to report to the firm how many guests they performed services for daily and what income they provided. The worker performed services from 9am until 10pm every day. The worker performed services at any one of the three shops the firm owned. The worker was required to perform services personally. Helpers and substitutes were hired and paid by the firm.

The firm states that it provided the space and the equipment. The worker did not provide anything. There is no mention of the worker leasing anything in the agreement the firm refers to and attached. The worker incurred expenses related to their license, insurance, and continuing education. The worker was not allowed access to a drawing account for advances. Customers paid the worker and would turn in the firm's percentage at the end of the business day. The firm carried worker's compensation insurance on the worker. The worker's only financial risk is that they were paid a percentage of customer payments and not a salary. The firm provided a fixed rate for services in the lobby of the firm's premises. The worker states that the firm provided everything, and the worker provided nothing and did not lease anything. The worker was required to pay the firm rent to live in the firm's premises on a monthly basis. The worker was paid on a commission basis. Customers paid the firm. The worker had no exposure to financial risk or economic loss.

The firm states that they did not offer the worker any job benefits. The relationship between the parties could be terminated by either party without liability or penalty. The firm did not require the worker to seek approval from the firm before providing similar services to other firms. There was a non-compete clause in the written agreement between the parties for a period of six months upon termination. The worker was not a member of a union. The worker was represented as a licensed massage therapist performing services under the firm's name. The worker determined their hours and schedule and therefore the work relationship ended when the worker stopped providing services at their discretion. The worker states that there were no benefits offered. The worker did not offer similar services for other firms. The worker was only allowed to work for the firm and no other firms. The worker did not advertise their services to the public. The worker was represented by the firm as an employee providing services under the firm's name. The worker was responsible for introducing customers with the firm's services and fees.

## 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 customers served, required the worker to report on services performed, and 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.

Payment by the hour, day, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. 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 percentage 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; Publication 4341.