

# SS-8 Determination—Determination for Public Inspection

Occupation Medical Practitioners/Scientists/Therapists	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 worker initiated the request for a determination of his work status as an Aesthetician/office staff/front desk/doctor's assistant/nightly cleaning person in tax years 2019 to 2021, for which he received Form 1099-MISC for 2019 and 2020. The firm's business is described as a medical spa offering skin care services/treatments, facials, cool sculpting, micro-needling, and skin care products.

The firm's response, signed by the owner, describes the business as skin care services. The worker provided esthetician services. There were no written agreements between the parties regarding the work relationship, commission compensation, or any rental arrangement.

The worker stated that he was given training and instructions from the firm on all facets of services that could be performed under his license such as hydra facials, laser, Cool-sculpting, and micro-needling treatments. The job assignments were a result of clients that booked their appointment with firm and the doctor directed the worker as to the service the worker was to perform. The firm determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered Monday through Friday from 9am to 5pm, but, indicated he consistently worked more than 40 hours per week and he was never paid more than the salary of \$XXX/week. However, if he took sick/vacation time his pay was reduced. The worker was required to perform the services personally.

According to the firm, the worker was given training and instructions on the firm's equipment to ensure proper use and safety. There were no job assignments; the worker had 100% responsibility to solicit new patients, although the firm would provide him with leads to prospective customers. The processes by which the worker conducted his esthetician services was based on his personal education and experience. The worker attended esthetician school and is a licensed esthetician. His responsibilities fell within the limitations of his license. The worker also received additional trainings and certifications on specialized equipment beyond his preliminary education which fell within the scope of his job and was self-insured to conduct such services. The worker was required to self-manage his practice. He often referred to various professionals in the esthetician community for advice to avoid or handle a complex situation which came up in his practice of aesthetic services and equipment issues were directed to representatives or vendors. The worker's services were rendered on the firm's premises 100%, with the worker in control of his own schedule. He chose to establish a set schedule of Monday through Friday from 9:00am to 5:00pm. He often modified this schedule to accommodate his client's schedules and his personal time off and responsibilities. The worker had full access to the facility. He was able to provide services outside of his established hours and on weekends, if he so desired, without notification to the firm. The worker serviced his client list personally and without assistants.

The worker responded that the firm provided all equipment and supplies and that the worker furnished nothing and did not incur expenses. The worker did not lease equipment, space, or a facility. The firm paid the worker a salary of \$XXX/week; the customers paid the firm. The worker indicated he was covered under the firm's workers' compensation insurance policy. The worker stated he was not at risk for a financial loss in this work relationship other than the loss of his weekly salary. The firm established the level of payment for the services provided and products sold.

The firm acknowledged that it provided basic skin care solutions and the worker was able to rent the shop's equipment which included an IPL machine, micro needling machine and Coolsculpting machine. The worker furnished his own computer, treatment table, sheets, cleaning supplies, skin care tools, stool, wall art, aromatherapy equipment, massage oils and solutions, as well as the music system and decorations. The worker incurred the expenses based on the rental of the advanced equipment including the price of consumable (one time use) attachments. The worker did not lease equipment, space, or a facility. The worker was paid a commission; the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The firm indicated the worker was subject to economic losses based on the utilization of his personal equipment and products based on his fixed costs and the expiration of unused consumable products purchased to perform his services. The firm stated the worker established the level of payment for services provided and products sold.

Both parties acknowledge there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services to others during this same time frame. All advertising, marketing, and social media was paid for and done by the firm, promoting the firm's business. The worker ended the work relationship.

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## Analysis

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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.

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.

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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

Payment by the hour, 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.

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.

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.

### CONCLUSION

We have considered the information provided by both parties to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. The worker, based on the submitted documentation, was paid a salary and not a commission. There was no written agreement that defined the work relationship and the 'rental' of equipment or space. 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. 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. 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.

Please see [www.irs.gov](http://www.irs.gov) for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide.