

**SS-8 Determination—Determination for Public Inspection**

Occupation

02OFF Office Workers

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 submitted a request for a determination of worker status in regard to services performed for the firm from January 2016 to December 2016 as a front desk receptionist. The services performed by the worker included greeting patients, helping them get ready for the treatment, scheduling patient appointments, answering the phones, etc. The firm issued the worker Form 1099-MISC for 2016. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states it is an acupuncture clinic. The worker was engaged under an acupuncture apprenticeship certification program with the firm. The services performed included patient communication, conditions recording, and treatment assistance. The worker did not have a job title. Major work included learning acupuncture, including condition diagnosis and treating techniques, in accordance with the program. Although paid a monthly stipend, the worker was not an employee. There was no written agreement between the parties.

The firm stated it provided the worker specific training, instruction, and work assignments as required by the apprenticeship program. The apprentice instructor determined the methods by which assignments were performed. The worker did not handle problems or complaints. Reports and meetings were not required. The worker set her own work hours during the firm's business hours. Services were performed at the firm's premises. The firm required the worker to personally perform services. The worker stated the firm provided her basic training as a receptionist, i.e. how to schedule appointments; how to check on patient insurance and accept payment. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. She performed services during the firm's regularly scheduled business hours.

The firm stated it provided the acupuncture clinic setting and related supplies. The worker provided textbooks, reference books, and related learning materials. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid the worker a stipend; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker incurring economic loss or financial risk was not applicable. The firm established the level of payment for the services provided. The worker stated the firm provided an office computer and office supply. The firm paid her salary.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The firm represented the worker as an apprentice to its customers. The worker did not independently perform services. The work relationship ended when the worker quit. The worker stated the firm represented her as its receptionist. Services were performed under the firm's business name. The work relationship ended when the firm informed her that she had been replaced.

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## 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.

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. In this case, the firm provided the worker specific training and instruction. It ultimately determined the methods by which assignments were 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, 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the monthly stipend or salary 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](http://www.irs.gov); Publication 4341.