

**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 2018 to December 2018. The services performed included handling multiple administrative tasks involving nurse scheduling, in addition to clerical and medical record keeping. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC. The firm has issued her Form W-2 in the past.

The firm's response states its business is to support people with development disabilities, along with their families. This includes administrative support to ensure it is compliant with all rules and regulations. The worker was engaged as a clinical clerk. The services performed included administrative support to ensure compliance with rules and regulations. The worker was classified as an independent contractor as the firm did not train the worker and the worker set her own hours. The worker was verbally contracted because of her specialized skill.

The firm stated it did not provide the worker specific training or instruction. Work assignments were based on the worker's knowledge; therefore, the firm did not provide assignments to the worker. The worker determined the methods by which assignments were performed. If problems or complaints arose, the worker contacted the registered nurse. The worker was responsible for resolving issues. Reports and meetings were not applicable. The worker's routine consisted of half-days, 2 or 3 days per week. Services were performed at the firm's office. The firm required the worker to personally perform services. Hiring substitutes or helpers was not applicable. The worker stated the firm trained her in all aspects of the position. Work assignments depended on what tasks needed to be accomplished on a daily basis. The clinical coordinator and nurse staff determined the methods by which assignments were performed. The clinical coordinator was contacted and assumed responsibility for problem resolution. Reports included monthly funding sheets and nurse schedules. Her hours were flexible. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated the worker did not lease equipment, space, or a facility. The worker incurring expenses in the performance of services for the firm was not applicable. Customers paid the firm. The firm paid the worker as invoiced; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker established the level of payment for the services provided. The worker stated the firm provided a desk, laptop, and office supplies. The firm paid her an hourly rate of pay. She did not incur economic loss or financial risk. She did not establish the level of payment for the services provided.

The firm stated benefits were not provided. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others. It is unknown if the worker advertised. There was no agreement prohibiting competition between the parties. The firm did not represent the worker to its customers. The worker stated she did not advertise. There was no agreement prohibiting competition between the parties. Services were performed under the firm's business name. The work relationship has not ended. The firm now pays her as an employee.

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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.

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 administrative support services performed by the worker were integral to the firm's business operation. 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.

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. 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 expenses in connection with services performed. Based on the invoiced or hourly 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.