

SS-8 Determination—Determination for Public Inspection

Occupation

04MAN Pharmacy Manager

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 February 2018 to April 2019 as a pharmacy manager. The services performed included filling prescriptions, counseling patients, checking in drugs, filing invoices, processing third-party claims, stocking drugs, answering phones, delivering medicines, etc. The firm issued the worker Form 1099-MISC for 2018 and 2019. The worker filed Form SS-8 as she believes she received Form 1099-MISC in error.

The firm's response states it was an attempt to open a pharmacy. The worker was hired through a third-party as a licensed pharmacist to advise on steps that would be needed to open and start a pharmacy. The worker was classified as an independent contractor as she was hired through a third-party and made aware on multiple occasions of her 1099 status. The firm had no control over her work hours, how, when, and where she worked, and what she did. The worker also earned money through other sources during the period in question, including payments from a personal account with no taxes withheld. There was no written agreement between the parties.

The firm stated it did not provide the worker specific training. The third-party which hired her did provide training. The worker created her own work assignments and determined the methods by which assignments were performed. The worker was responsible for resolving problems or complaints which arose. She provided status updates to the firm as she saw fit. There were no required reports. The worker communicated with the firm verbally, by text message, and email. The worker set her own work schedule and was not required to report hours to the firm. The worker could work from whatever location she chose. She did sometimes have to be physically present at the pharmacy to meet people, stock items, or distribute medications. There were no mandatory meetings and no penalty if the worker was unable to attend a meeting. The firm did not require the worker to personally perform services. Hiring and paying substitutes or helpers was not applicable. The worker stated the firm provided her specific instruction related to what time to work and when to open and close the pharmacy. Doctors' prescriptions provided work assignments. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. The worker performed services at the firm's premises on a regularly scheduled basis, i.e. Monday through Friday, 9 am to 5 pm. The firm required she attend a weekly staff meeting. The firm required she personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided the physical location, medicines, telephone, and printer. The worker provided her license, knowledge of opening a pharmacy, laptop, and shelving. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker a fixed weekly rate of pay regardless of the work she performed. A drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. Insurance companies determined the level of payment for the products sold. The worker stated the firm provided all supplies, equipment, and materials. She incurred the unreimbursed expense associated with renewal of her pharmacy license to practice and continuing education. The firm paid her an hourly rate of pay.

The firm stated benefits were not made available to the worker; however, its additional documentation evidences it paid the worker for the cost of her health insurance from November 2018 to April 2019. The work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. The worker created and ordered business cards for distribution. She had sole control over content and design. The firm represented the worker as a licensed pharmacist to its customers. The work relationship ended when the worker quit. The worker stated she did not perform similar services for others as the state requires a pharmacy manager to only manage one pharmacy under their pharmacy license. The firm represented her as an employee to its customers. Services were performed under the firm's business name. The work relationship ended when she resigned.

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, the firm's statement that the worker was an independent contractor pursuant to a 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.

Section 31.3401(c)-1(c) of the regulations states that generally professionals in an independent business or profession in which they offer their services to the public are not employees. However, if a firm has the right to direct and control a professional, he or she is an employee with respect to the services performed under these circumstances.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

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 pharmacy management services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the clients served and it ultimately 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 fixed weekly 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; Publication 4341.