

SS-8 Determination—Determination for Public Inspection

Occupation 05ITE.74 Instructor/Teacher	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

Facts of Case

The worker submitted a request for a determination of worker status in regard to services performed for the firm from April 2013 to December 2015 as a weight loss educator. The work done by the worker included seeing patients, drawing blood, giving injections, coaching patients, rooming patients, and making appointments. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she was compensated as an independent contractor but treated as an employee. The worker believes she was an employee as she performed services only at the firm's medical office 40 hours (or more) per week and she attended staff meetings. The firm trained and instructed the worker on how to chart, bill patients, and document services.

The firm's response stated it is a family practice medical office. The worker performed services as a weight loss consultant. She used the firm's office to see her patients and sell meal replacement products. The worker saw her patients for weight loss consultation services on her own schedule, which was set by the worker. The worker did her own marketing, ordered the weight loss products she sold, and provided weight loss advice without any control, direction, training, or interference from the firm.

The firm stated it did not provide specific training or instruction to the worker. In 2013, the firm was considering providing certain meal replacement products for weight loss. The worker learned from a representative of the meal replacement vendor that the firm was considering selling the products. The worker contacted the firm to offer her consulting services and selling the meal replacement products. The worker stated she was providing weight loss consulting services as an independent contractor for another clinic and she wanted to offer her services, at the firm's office, to the firm's patients and her own patients. The worker saw and scheduled her own patients, in addition to offering her services to the firm's existing patients. It was expected the worker would appear for scheduled patients. The worker determined the methods by which assignments were performed. The worker was ultimately responsible for resolving problems or complaints which arose. The worker was required to report (invoice) the number of products sold and the number of patients seen. As the worker had her own key to the firm's place of business, she set her own schedule and frequently saw her patients during hours when the firm was not open, i.e. early mornings and Saturdays. The worker was not required to attend meetings. The firm did not require the worker to personally perform services. The worker never hired substitutes. In October 2015, after investigating observations made by the firm's new office manager, the firm requested the worker to 1) begin providing additional information to document all patient encounters and sales; 2) stop providing its products free of charge; 3) appear for all scheduled patients or contact the firm to cancel the appointment. The worker stated the firm provided her specific training and instruction related to patient scheduling, how to document patient services, where to see patients, and what to charge patients. Copies of various e-mails were provided for our review which document the worker being provided instruction by the firm. Patient appointments provided work assignments and determined the methods by which assignments were performed. The firm's doctor or office manager were contacted and assumed responsibility for problem resolution. The worker's routine varied based on patient scheduling. The work done by the worker primarily included initial consultations consisting of weighing in patients, drawing blood, EKG, counseling, documentation, and fees. The worker also filled-in to provide general nursing services of greeting patients, escorting them to private exam rooms, administering injections ordered by the doctor, etc., in addition to administrative duties associated with ordering product and writing marketing materials. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided a computer at its office. The worker provided a computer for use outside of the firm's office. 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 primarily paid the worker commission based on sales and patient visits. In October 2014, a small hourly rate of pay was added for the worker's time spent in ordering product, writing marketing materials, etc. On average the worker was paid from five to ten hours every two weeks. A drawing account for advances was not allowed. The firm did not carry worker's compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker established the level of payment for patient visits. The vendor, not the firm, established prices for weight loss products. The worker stated the firm also provided a scale, medications, EKG, and office supplies. The worker did not provide patients, supplies, equipment, or materials. The firm determined the level of payment for the services provided and the products sold.

The firm stated benefits were not provided to the worker. The work relationship could be terminated by either party without incurring liability or pen

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.

Section 31.3401(c)-1(c) of the regulations states that generally professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others 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 services performed by the worker were integral to the firm's medical business operation. The firm provided work assignments by virtue of the patients served and required the worker to report on services performed and products sold. 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 economic loss or financial risk. Based on the commission and 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.