

SS-8 Determination—Determination for Public Inspection

Occupation 06AAS Aides/Assistants	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 submitted a request for a determination of worker status in regard to services performed for the firm from May 2013 to August 2017 as a patient care administrator (PCA). The work done by the worker included answering patient calls to schedule appointments, calling in refill requests, processing prior authorizations, and miscellaneous clerical duties which could be performed from home where services were performed. The firm issued the worker Form 1099-MISC for the years in question. Forms 1099-MISC for 2013 - 2015 were reported under the owner's Social Security number. Forms 1099-MISC for 2015 - 2017 were issued under the firm's tax identification number. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC. The worker believes she was an employee as she was trained by the firm and she did not have control over the details of how the services were to be performed, i.e. hours, pay, clients, time off, and telephone provider. The firm asked the worker to sign non-compete and non-disclosure agreements two years after she had started to perform services.

The firm's response stated its business is to provide virtual office administration and consulting services. The firm underwent a name change and changed from a sole proprietorship business to an LLC in July 2015; however, the business services offered did not change and the services performed by the worker did not change. Work can include checking phone messages and emails, answering phone calls, scheduling appointments, and other tasks as requested by the client. Titles include virtual assistant to non-medical clients and patient care coordinator (PCA) to medical clients. The worker was classified as an independent contractor as she performed all jobs in the location of her choice. Work hours were set by the client and not by the firm. The worker had investment in all equipment such as a computer, phone, fax line/machine, and needed supplies. Expenses were not reimbursed. The worker was not supervised. The worker could have other workers, in the firm's pool of workers, cover in her absence and she could assist others in providing job coverage. The worker was paid a flat fee per client job. Instructions and/or requests came directly from the client and not from the firm. Benefits were not available. Services were performed under signed non-compete and non-disclosure agreements. A verbal agreement was made as to fees paid for each client/job.

The firm stated it met with the worker several times during the hiring process to go over contract information, pay, and introduction to clients. The worker was given information about the firm and potential clients. The worker had prior knowledge and training of the administrative industry. The firm made introduction between the worker and the client in a 3-way phone call. The client gave job parameters to the worker. The worker and the client determined the methods by which assignments were performed. The worker would address problems with the client directly to resolve any differences. If resolution couldn't be reached, the firm was contacted. If the client was a doctor, a daily report would be provided for client/patient records. For a non-medical client, there were no reports required. The worker's routine was based on client needs, which varied. Services were normally performed in the worker's home. Meetings were not required. The worker would exchange help on jobs from other workers in exchange for providing help to others when needed. The worker stated the firm trained her to answer phones, input data, prepare a daily log, set up and use a multi-line phone system, etc. The firm provided work assignments, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. The worker was required to prepare a daily activity log for each doctor. The worker's daily routine consisted of 9 am to 5 pm, Monday through Friday. Services were performed from the worker's home. The firm required the worker to personally perform services. The firm was responsible for scheduling (and paying) substitutes as the worker could not assign her work to others. When providing coverage for others, the worker received the same amount of pay so that when she requested time off, she would be paid, i.e. paid vacation.

A copy of the firm's client contract template documents, in part, the firm offering the services of a PCA and the client's request for services offered by the firm. The firm will collect, via automatic monthly draft, from the client's bank account for services performed. The firm can assess the client a fee if the client's bank does not honor the auto draft. The firm agrees to use its best efforts to maintain a high professional standard in the execution of its services; it will keep copies of correspondence and records for seven years. The firm guarantees that all patient information will be kept private. The client agrees not to disclose, discuss, or negotiate the fee for service with its assigned PCA/contractor. The client agrees not to engage or offer to engage/solicit PCA to perform or take on independent work or additional responsibilities not covered in the agreement without the knowledge AND prior approval of the firm. The client agrees not to offer the assigned PCA independent employment. The client acknowledges its assigned PCA can have a qualified replacement PCA to cover in a limited capacity, if needed, at no additional cost to the client.

The firm stated it did not provide supplies, equipment, or materials. The worker provided and incurred the unreimbursed expenses associated with a phone, phone lines, Internet, fax, computer, supplies, office, and office furniture. The firm notifies medical clients of an app which is HIPPA compliant. If a client is interested in the app, the firm sets it as part of its consultation with the client. The worker has no part of it. The medical client can use this app to contact others in their practice or the PCA providing services. It is unknown if the worker leased equipment, space, or a faci

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 services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the clients served, required the worker to report on daily medical transactions to satisfy its client requirement, and 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 most individuals own a phone and computer for their personal needs, they are not considered a significant investment in an independent business. Based on the flat fee 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. 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.