

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 firm is operating a dental office and the worker was engaged to perform part-time dental hygienist services under a verbal agreement. The firm indicated that the worker requested to not have taxes withheld so Forms 1099-MISC were issued for the payments made in years prior to 2016. The worker then requested that taxes be withheld in 2016 and so the firm issued W-2's in 2016 & 2017 for the payments made at that point in time. The services remained the same.

The firm allowed the worker to perform services during hours the worker was available. The firm did not provide the worker with training as the worker was licensed and performed the same services full time for another dental office. The worker provided the firm with hours available to work for the firm. The firm provided the patients and schedules according to the worker's availability. The firm and worker determined the methods used to perform the services. The firm was required to be contacted to resolve problems or complaints for resolution. The worker was required to perform the services personally at the firm's place of business. The firm hired and paid substitutes or helpers if needed.

The firm provided all the equipment, materials, and supplies needed by the worker to perform the services. The worker did not lease equipment or space. The worker did not incur any business expenses other than her license. The firm paid the worker an hourly wage and the customers paid the firm. The firm determined the level of payment for services and products. The firm carried workers' compensation insurance. The worker could not suffer any economic loss and had no financial risk but was responsible to damage to equipment due to negligence per the firm.

There was a verbal working relationship agreement between the firm and worker per the firm. The firm provided no benefits. The worker did perform similar services full time for another dentist and was not required to obtain the firm's approval to do so. The worker did no advertising to the public as being engaged in a business. The worker personally performed services under the firm's business name. Both parties retained the right to terminate the working relationship at any time without incurring any liability.

Analysis

When a firm determines or retains the right to determine directly or through designation what, how, when, and where workers perform services an employer/employee relationship exists. For federal employment tax purposes, it is not necessary for firms to exert direct or continuous control nor that services be performed full-time on a fixed scheduled basis, it is sufficient that the firm retains the right to change the workers services, as they deem necessary for business purposes. This control may come from verbal instructions, training, meetings, reporting, as well as supervision. Also, the methods used by workers to perform services are not only controlled through verbal instructions but also by equipment, materials, and supplies provided. In this case, the firm not the worker had control over the methods and means used in the performance of the services. These facts evidence behavioral control by the firm over the services performed by the worker.

When a worker does not have a significant financial investment in a business requiring capital outlays with business risk an employer/employee relationship is evident. In this case, the worker had no financial investment in a business and did not incur any significant on-going business expenses. The firm had the business investment and control over profit and risk of loss with regard to the services the worker performed for the firm's business. The firm paid the worker an hourly wage and the customers paid the firm. The firm determined the level of payment for services and products. The risk of damage to equipment would not be considered control over profit and loss in the operation of a business and there was no legal documentation to support this as a risk the worker legally had with regard to performance of services for the firm's business operation. These facts evidence financial control by the firm over the services performed by the worker.

There were no legal binding written contracts between the firm and worker. The firm indicated there was a verbal working relationship agreement. It is noted that whether there is an employment relationship is a question of fact based on the autonomy of the work relationship and is not subject to negotiation between the parties. The worker personally performed services for the firm's business under the firm's business name at the firm's place of business on a regular and continuous part-time flexible schedule over several years. The worker did perform similar services for another business and was not required to obtain the firm's approval to do so. Although this could be an important factor to consider in an independent contractor relationship, this factor alone would not make the worker to be an independent contractor. Many workers have more than one job at a time and may be an employee in one or all working relationships depending on the autonomy of each one.

Both parties retained the right to terminate the working relationship at any time without incurring any liability. The right to discharge a worker at any time without incurring a liability for termination is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired without a liability so long as the independent contractor produces a result that meets the contract specifications. Likewise, if the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.

We are aware that the worker was reclassified to employee status in 2016 for the same services and appreciate the firm coming into compliance with federal employment tax laws. Based on the autonomy of the working relationship we have determined the worker to be an employee under common law for all years the services were performed.