

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

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is a dental office and the worker was engaged from October 2017 to January 2018 as a fill-in dental hygienist. The worker's tasks included cleaning patients' teeth and taking x-rays if needed by the patient while the firm's employee dental hygienist was out for a short time period. The firm believes the worker was an independent contractor (IC) while performing services for them because they asked her to fill in on days when their hygienist was out, they told the worker that they would pay her as an independent contractor, and she would need to save some of her earnings to pay for her taxes later.

The firm states their other dental hygienist in their office showed the worker where the instruments were and how to sterilize them; the firm states that no other instructions were given to the worker. The firm's receptionist would contact the worker and ask if she was available to fill-in for their hygienist. The firm states they determined how the worker completed her assignments. The worker was required to personally perform her services at the firm's premises. If any problems or complaints arose, the worker would either tell the firm's receptionist or the dentist. The firm states they were ultimately responsible for the resolution to any problems or complaints. The worker made notes in the patients' chart of what services she performed and any future work diagnosed by the dentist. The firm's office hours are 7 a.m. to 4 p.m. and the firm states the worker saw between eight (8) to ten (10) patients a day with a 30 minute lunch break. The worker was not required to attend meetings.

The firm provided all instruments and supplies necessary to the worker in order to perform her services. The firm states that while they provide scrubs to their employees, the worker provided her own scrubs. The firm states the worker did not incur expenses, clients paid them for services rendered by the worker, and the worker did not have an opportunity to incur a loss as a result of her services. The firm paid the worker a flat rate per day but paid her per hour when she only worked two and one-half hours one day while their full-time hygienist went to the doctor. The worker did not establish the level of payment for the services provided. The firm reported the worker's 2017 earnings on a Form 1099-MISC.

The worker was not eligible for employee benefits. The worker performed similar services for others but she did not advertise her services. The firm states the worker performed her services under their business name. Either party could terminate the work relationship at any time without either party incurring a liability. The relationship ended when their employee hygienist came back and the worker got a full-time job at another dental office.

Analysis

As in this case and in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and her services should not be confused with the right to direct and control. The worker provided her services on behalf of and under the firm's business name rather than an entity of her own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and her services in order to protect their financial investment, their business reputation, and their relationship with their clients.

The firm's statement that the worker performed services on an as-needed basis and therefore, an independent contractor is without merit as both employees (seasonal) and independent contractors can perform services when the needs of a business warrants.

A continuing relationship was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The existence of a continuing relationship indicates an employer/employee relationship was established.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided.

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. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

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, co-adventurer, agent, or independent contractor must be disregarded.

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

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.