

**SS-8 Determination—Determination for Public Inspection**

Occupation

06AAS Aides/Assistants

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 firm is a dental practice treating children only. The firm engaged the worker as an Associate Orthodontist to provide services approximately three days per month. The firm reported the worker's remuneration on Forms 1099-MISC for 2016 and 2017.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. The worker had the sole discretion and legal responsibility to determine which cases to accept, which ones to refer out, what type of treatment plan to design for each patient, how to perform the treatment, and for how long to carry out the treatment. She was required to sign off for each treatment with each patient on every visit. Referrals were made using the worker's name and title, and the firm's address and telephone number. The worker was accountable to the patients and regulators. If the worker's work was substandard, patients could complain to the dental board and as the treating provider, it was the worker's responsibility to respond and defend her actions. The firm scheduled patients on the days the worker was in the office. If she was not present for any reason, it was the firm's responsibility to reschedule the patients. The worker generally followed a routine daily schedule within the firm's business hours and performed her services on the firm's premises.

The firm provided the property and staff, equipment, supplies, and materials. It was responsible for compliance with the dental board and OSHA regulations. The firm ordered supplies from specific vendors as requested by the worker. The worker utilized her personal instruments. She did not lease space. The worker was financially responsible for maintaining her dental license which needed to be renewed every two years and required 50 hours of continuing education (CE) credits, and her professional liability insurance. The worker had the freedom to choose which insurances to work with. In the oral agreement between the parties, the firm agreed to pay the worker the specified daily rate, plus an amount for each orthodontic treatment sold, payable on the day services were rendered. The firm compensated the worker for any extra time she provided services. Customers paid the firm directly according to the worker's treatment plans and the firm's prices for the services. All payment plans were made between the firm and its patients. The worker's income could have increased with more referrals and the corresponding additional daily work.

The firm did not make general benefits available to the worker. The worker provided similar services for other practices during the same time period. She solicited business by distributing her business cards with the firm's practice. The worker's membership in various organizations provided her with avenues to promote her services to other dental practices and patients. The firm terminated the work relationship and immediately brought in another certified orthodontist to comply with the Dental Board's prohibition of the abandoning of patients.

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**Analysis**

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Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience to perform her services, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and ensure its patients' satisfaction with the work. It was the firm's responsibility for any scheduling and rescheduling of its patients. The worker performed her services during the firm's hours of operations. She performed her services on the firm's premises. Due to the nature of the profession, the services were rendered personally. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. The firm paid the worker at a daily rate, payable on the day services were rendered. Payment by the day generally points to an employer-employee relationship. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed her services on a continuing basis. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The worker was not engaged in an independent enterprise, but rather the orthodontic services performed by the worker were a necessary and integral part of the firm's dental practice. 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. Any solicitation for business by the worker benefited the firm as well as the worker. Although the firm did not make benefits available to the worker, the firm terminated the work relationship and was responsible for ensuring its compliance with the dental board. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. These facts show that the firm retained control over the work relationship and services of the worker.

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.

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.