

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 April 2015 to March 2016 as a full-time associate veterinarian. The work done by the worker included seeing scheduled appointments and medically treating pets, i.e. dentals, simple limited surgeries, vaccinations, etc. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states it is a 501(c)(3) non-profit low-cost spay/neuter clinic and small animal wellness clinic. The worker was engaged to perform veterinarian services, to include but not limited to a complete check-up on the general health of the clients' pets, vaccinations, tests, blood work, diagnosis and treatment of ailments, issues involving dental problems, small tumor removals, skin conditions, allergies, etc. The worker was classified as an independent contractor as all veterinarians performing services for the firm are independent contractors. Services were performed under an independent contractor agreement.

The firm stated it did not provide specific training or instruction to the worker. Work assignments were scheduled or walked-in during the worker's established workweek schedule, in addition to the worker being on-call during the firm's off hours. The worker determined the methods by which assignments were performed and assumed responsibility for problem resolution. The worker kept client records and made entries into log books. Services were performed at the firm's premises. Meetings were not required. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers. The worker stated the firm's director provided specific instruction related to her work schedule and manner in which services were to be performed. The firm's front desk receptionist scheduled appointments based on her work schedule. The firm's director determined the methods by which assignments were performed and assumed responsibility for problem resolution. The firm required her to attend informal clinic meetings as scheduled.

The firm stated it provided all materials and equipment needed to provide services. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense associated with continuing education, licenses, and phone (for being on call). Customers paid the firm. The firm paid the worker a fixed rate of pay per day worked. A drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The firm established the level of payment for the services provided. The worker stated she did not incur expenses in the performance of services for the firm. The firm paid her salary.

The firm stated the benefit of additional days compensation was provided to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The firm represented the worker as its veterinarian in charge to its customers. The work relationship ended when the worker quit under breach of contract. The worker stated the firm represented her as an employee to its customers. Due to a variety of reasons, she ceased performing services for the firm, i.e. short-pay, clinic (medical) decisions made by non-licensed individuals, worker's concern over loss of license, etc.

Both parties agreed the worker was not responsible for soliciting new customers.

The independent contractor agreement states, in part, the contract ran for a one-year term, renewable by review and consent of the firm's president and board of directors. The workweek schedule was Monday, Thursday, Friday, and every other Saturday, from 9 am until 2 pm. The worker agreed to be on-call for unexpected needs arising for any of the firm's clients during off hours. Compensation was based on a fixed daily rate of pay, not including personal days. As a bonus for being on-call, the worker would be compensated for additional days covering the firm's closed weekdays during the year. The firm would pay the worker on a weekly basis after completion of services. The worker was not entitled to participate in the firm's management decisions or administrative oversight in the normal operations of the non-profit corporation.

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.

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.

Therefore, the firm's statement that the worker was an independent contractor pursuant to a written 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 veterinary services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the clients served and maintained administrative oversight over normal business operations. 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, day, 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 acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the fixed daily 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.