

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

Occupation 06AAS Dental Hygienist	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. After the worker's initial filing of the Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, we requested information from the firm concerning this work relationship. The firm provided information in regard to this work relationship by completing Form SS-8.

From the information provided the firm is a general and family dental practice and the worker was engaged as a registered dental hygienist from January-February 2018 to June 2018. The worker's duties included performing dental cleanings for the firm's patients. The firm states there was no written agreement with the worker and after the worker did a few shifts for them, they asked the worker if she would be willing to work other days for them if they had the need. The firm states the worker told them she would be willing to work additional time. The firm states they told the worker if she was unable to work any of those days, they would find other temporary workers to help on those days. The firm reported the worker's earnings on a Form 1099-MISC.

The firm states there was no training needed to be given to the worker as she was a licensed dental hygienist and was licensed to perform work under her own knowledge/scope. Instructions given to the worker were to simply provide dental cleanings to the firm's patients. The firm states they provided the worker with patients to clean on dates that they needed the help which was based on their ability to schedule patients willing to come in for cleanings. The firm states the worker determined how she performed her services. The worker was required to notify the firm if any problems or complaints arose and the firm states they were responsible for the resolution of any problems or complaints. The worker was only required to make treatment notes in the patients charts for services she rendered which was required by the state dental board and that this was done under the worker's own license. The worker was required to personally perform her services at the firm's premises. The firm states the worker was never required to work a certain number of hours in a day or week. Most, but not all, of the days the firm states they had a need for the worker's services were on Mondays. The firm states they hold staff meetings bimonthly and hygienist meetings quarterly but the worker was not required to attend any of these meetings. The firm hired other temporary hygienists when the worker was unable to help. The firm states the worker was not able to hire substitutes as she had no authority to do so. The firm was responsible for paying these substitutes or helpers.

The firm provided the instruments, sterilization equipment and dental supplies to the worker in order to perform her services. The worker provided her own uniform and her own magnifying glasses if she wished. The firm states they asked the worker that she wear black scrubs but she was not required to do so. The worker did not incur expenses, the clients paid the firm 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 states that the dental insurance contracts established the level of payment to them which they then paid the worker at an hourly rate.

The worker was not eligible for employee benefits. The firm states the worker performed similar services for others and she was completely free to work anywhere else at any time. The firm believes that the worker also offered her hygiene services to other dentists through a temp agency. The firm states they specifically told their patients that the worker was helping out on the days she worked in the office so that they knew she was not part of their staff. Either party could terminate the work relationship at any time without incurring a liability.

The firm states they never at any time asked the worker to be an employee or interviewed her to be an employee or offered her a job in their office as an employee. The worker practiced using her own registered dental hygienist (RDH) license and she practiced according to her own training from her previous education and experience. The firm states the worker's services were checked clinically by one of the dentists in their practice to verify it met the standards set by the State Dental Board. The firm states the worker was not treated the same as their employee dental hygienists as she was not required to complete one of their new hire employee packets, sign an office policy indicating the firm would be her primary place of work, did not receive any benefits, was not given a key to their office door or an employee badge, she did not receive training, she was not required to read, agree to and sign their conduct and policies manual, or perform other functions and duties of the firm's office.

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## Analysis

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As is the case 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.

The methods by which professional men and women work are prescribed by the techniques and standards of their professions. No layman should dictate to a lawyer how to try a case or to a doctor how to diagnose a disease. Therefore, the control of a firm over the manner in which professional workers shall conduct the duties of their positions must necessarily be more tenuous and general than the control over nonprofessional workers. Yet, despite this absence of direct control over the manner in which professional men and women shall conduct their professional activities, 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 firm argues that the worker was only helping out, the worker performed services for the firm's business and the firm paid that worker for the services she rendered. Therefore, a work relationship was established. It was a continuous work relationship even though the worker performed services on an as needed basis. A continuing relationship can and does exist even though work is performed in frequently recurring although irregular intervals.

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 firm did not require the worker to perform and act like their other employee workers; however, this does not mean the worker was not the firm's employee. The worker was unable to carry on her own independent dental hygienist business separate and distinct from the firm's business or from any dental office. The worker performed her services on behalf of and under the firm's business name for the firm's patients. While the firm afforded the worker with more freedom than their employee hygienists, we believe the firm still retained the right to direct and control the worker and her services to protect their business reputation, their business name, their financial investment, but most of all the protection and care of their patients.

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. The worker did not incur any expenses other than the normal expenses associated with being a dental hygienist indicating there was no significant investment on the part of the worker. 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. If the worker did not have a significant investment, she is paid at an hourly rate, and she took no responsibility in the collection of payment for services therefore indicating she has no opportunity to incur a loss as someone in business can.

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 worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, it is possible for a person to work for a number of people or firms concurrently due to financial need and the supporting of oneself and be an employee of one or all of whom engages her.

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.