

SS-8 Determination—Determination for Public Inspection

Occupation

06AAS Dental Hygienist

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 worker initiated the request for a determination of her work status as a dental hygienist in tax years 2018 to 2019, for which she received Form 1099-MISC. The firm's business is described as a dental practice. The worker noted that she had been issued Form W-2 to report her 2017 earnings.

The firm's response was signed by the president of the firm. The firm's business is a dental practice and the worker provided services as a dental hygienist.

Both parties provided a copy of the Independent Contractor Agreement initiated by the firm as of January 2018. The worker is to provide services as a Registered Dental Hygienist, for \$XX/hour, and is responsible for federal and state income taxes and general excise taxes.

The worker stated she was to provide the treatment diagnosed by the dentist. The worker is provided a list of scheduled patients; all patients are first examined by the dentist before the RDH works on the them. Standard care is determined by the ADA and the State Dental Board. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered at the dental office. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded the worker was given training and instructions for office procedures; no formal training was given since the worker is licensed. The worker is provided a list of scheduled patients. The firm indicated the hygienist determined the methods by which the services were performed; any problems or complaints encountered by the worker were directed to the firm's office manager for resolution. The services were rendered at the firm's location during office hours. The worker was not required to perform the services personally.

Both parties acknowledge the firm provided all equipment, instruments, dental chair, computer, eye protections and other personal protection equipment, and cleaning supplies and the worker furnished her own loupes. The worker did not lease equipment, space, or a facility. The worker was paid an hourly wage; the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship. The worker did not establish level of payment for services provided.

The firm and worker concur that there no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker was performing same or similar services for others during the same time frame. The work relationship was considered temporary.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control.

Payment by the hour, 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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

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.

State Statute §447-3 Employment of and practice by dental hygienists.

(c) A licensed dental hygienist may operate in the office of any licensed dentist, or legally incorporated eleemosynary dental dispensary or infirmary, private school, welfare center, hospital, nursing home, adult day care center or assisted living facility, mental institution, nonprofit health clinic, or in any building owned or occupied by the State or any county, but only under the aforesaid employment and under the direct or general supervision of a licensed dentist as provided in section 447-1(f). No dental hygienist may establish or operate any separate care facility which exclusively renders dental hygiene services.

We have considered the information provided by both parties to this work relationship. In this case, 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 business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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. 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.

CONCLUSION

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.