

**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 initiated the request for a determination of her work status as a lab assistant who was trained on the job to register patient specimen, cut up patient tissue for processing, using the processing machines, and stain tissue for diagnostic reasons in tax years 2017 and 2018, for which she received Form 1099-MISC. Additionally, she answered the phone, answered company emails, and sent out packages. The firm's business is described as a private histology lab that processes patient biopsies for pathology examinations.

The firm's response was signed by the controller. The firm's business is a pathology lab. The worker performed 'Grossing' – she looked at and described specimens and input information into [REDACTED] software. The worker performed services based on her schedule and availability; she had no set hours.

The firm also indicated a re-organization took place; pathology activity from another was transferred to a new entity (the firm) as of 2/2018, and taking place at the same location.

The worker stated she was given specific training and instructions from day one and was continually trained to learn new skills. Her job assignments were determined by an immediate supervisor. The firm determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker indicated her services were rendered on the firm's premise and that her work schedule revolved around when the clinic was open, Monday through Friday and sometimes Saturday. Any additional personnel were hired and paid by the firm.

The firm responded that no formal training was provided, however she was given high level instructions to complete the tasks. The director was off-site, so the manager gave the worker general instruction for work that needed to be accomplished. The firm indicated it was the worker who determined the methods by which she performed her services. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered on the firm's premises; upon arrival she checked in with the manager and then completed the tasks independently. The worker was required to perform the services personally.

The firm and worker acknowledged the firm provided the pathology lab with all necessary equipment, supplies, computers, software, and safety equipment. The worker furnished nothing, she did not incur expenses, and she did not lease equipment, space, or a facility. The firm paid the worker an hourly wage; the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. Both parties concur the worker was not at risk for a financial loss in this work relationship; however, the worker noted there were serious safety risks such as spilling chemical on skin, clothes, and in eyes, or breathing in chemicals that are carcinogenic. The worker did not establish level of payment for services provided.

There were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm responded that the worker was performing same or similar services for others during the same time frame; the worker disagreed. The worker terminated the work relationship.

---

## 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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship.

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.

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.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

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 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.

We have considered the information provided by both parties 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.