

**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 August 2018 to January 2019 as a registered dental hygienist. The work performed by the worker included providing oral hygiene care to the firm's patients. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC. As a registered dental hygienist, by state law she cannot legally be an independent contractor for services performed.

The firm's response states it is a general dental practice. The worker was engaged as a registered dental hygienist to clean teeth. The firm believes the worker was an independent contractor due to the independence with which she performed services, the fact that she performed the same services for other dental practices, and the fact that she was paid commission. The worker worked very infrequently due to her other jobs. There was no agreement of employment between the parties.

The firm stated it provided no training or instruction related to the worker's performance of professional services. Work assignments were based on the worker's availability and scheduled patient appointments. The worker performed services according to her training. The dentist on duty would inspect the worker's work and then look to find out if the patient needed other services. The worker was required to report to the firm, for billing purposes, services rendered. Patient dental chart records were also maintained as required by professional standards. The worker informed the firm of her availability to perform services. She did not have a set routine or schedule as priority was given to her full-time employer. Services were performed at the firm's premises. The worker was required to attend an assignment meeting scheduled on the days she worked, which were 24-days or less per year. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes if the worker was unable to perform services. If unable to find a replacement, the firm could cancel the job. The worker stated she is licensed by the state board of dentistry. The firm scheduled patients, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. When working, her daily routine consisted of arriving at the firm's office by 7:30 am and leaving by 5 – 5:30 pm, when all scheduled patients had been seen and notes in the patients' charts were completed, including a one-hour lunch break.

The firm stated it provided the dental chair and standard dental equipment. The worker provided and incurred the unreimbursed expense associated with lighting, magnification, uniform, and any special equipment, in addition to transportation. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker commission; the firm did not allow a drawing account for advances. The worker's economic loss or financial risk related to malpractice liability and loss or damage to items provided to perform services. 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. She did not incur economic loss or financial risk.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. The worker did not advertise. The firm represented the worker as a professional, licensed dental hygienist to its customers. The work relationship ended when the worker informed the firm she was no longer available to perform services due to increased work days with her employer.

The firm also considered Revenue Ruling 87-41, The Twenty Factors. In addition to facts documented above, the firm also considered the following: As a temporary engagement, the firm agreed to provide a location for the worker to work and the convenience of billing the patients for the work she performed. It is unknown if the worker had a significant investment in the location where she performed services. It is doubtful as she only worked a total of nine (9) days. The worker had no liability for business expenses.

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## 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.

Therefore, a statement that a worker is an independent contractor pursuant to a written or verbal 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.

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.

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 services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served and inspected the services performed by the worker. 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.

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. 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. Based on the commission 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](http://www.irs.gov); Publication 4341.