

SS-8 Determination—Determination for Public Inspection

Occupation

06AAS Aides/Assistants

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, a licensed dental hygienist, submitted Form SS-8 requesting a determination of worker status related to dental hygienist services she provided to the Firm, a dental practice, between January 1, 2017 and July 28, 2018. The Worker submitted forms 1099-MISC issued by the Firm for 2017 and 2018. The parties agree that there was no written agreement between the Worker and the Firm, and that the Worker did not work for the Firm in any capacity before providing the services relevant to this determination request.

The parties agree that the Firm provided the Worker with no specific training or instruction. The Firm specified that it gave the Worker her job assignments as the Firm's patients entered its dental practice; the Worker generally concurred that her assignments were received from the Firm by request. The Firm required the Worker to perform services personally, in the Firm's facility. The Firm states that it permitted the Worker to determine the methods by which her job assignments were performed; according to the Worker, the "owner of the dental office" [Firm's dentist] determined the methods by which the Worker performed her job assignments. Research, discussed in the Analysis below, indicates the latter is likely. The Worker described her daily routine with the Firm as arriving at the Firm's facility and performing the services the Firm dictated in the Worker's scope of practice; not inconsistent with the Worker's description, the Firm more broadly describes the Worker's daily routine as being based on the Firm's need. The Firm states that it required the Worker to contact the Firm's office manager if problems or complaints arose, and that Firm's office manager was responsible for the resolution of such problems; the Worker understood that the Firm required her to contact either its office manager or owner in such situations, and that the Firm's office manager or owner was responsible for the resolution of such problems. Here, too, research discussed in the Analysis below indicates the latter is likely. The parties agree the Firm did not require the Worker to make reports or attend meetings. The Worker's understanding was that the Firm was responsible for hiring and paying substitutes or helpers if the Firm needed them; in contrast, the Firm stated that the question of hiring and paying substitutes or helpers was not applicable to the Firm. It is not uncommon for dental practices to hire substitute dental hygienists when the need arises; research has revealed that there are staffing agencies exclusively dedicated to meeting the temporary staffing needs of dentists and dental practices.

The Firm states that it provided the Worker with the Firm's facility, its dental chair, and some of its instruments, while the Worker supplied her uniform and medical instruments. The Worker maintains the Firm provided her with all necessary instruments, equipment, and PPE. It is not uncommon for workers to supply their own uniforms and tools or instruments. The parties agree the Worker did not lease equipment, space, or a facility. The Firm contends that, in working for the Firm, the Worker incurred expenses for uniform laundering, travel, equipment, and maintenance; the Worker states she incurred no expenses in working for the Firm. Research indicates it is common for workers to launder their own uniforms and incur regular expenses getting to and from their jobs. The Firm states that it paid the Worker daily, on a lump sum basis, while the Worker maintains the Firm paid her an hourly wage. A daily, lump sum wage per day of work is not necessarily inconsistent with an hourly wage – both are based upon a worker's measurable units of time on the job. The parties agree that a drawing account for advances was not allowed, and that the Firm did not carry worker's compensation insurance on the Worker. The Firm viewed the Worker as "liable" in terms of economic loss or financial risk that the Worker might incur in working for the Firm, beyond the normal loss of wages; the Worker viewed herself as having no exposure to economic loss or financial risk in her work for the Firm. The parties agree that the Firm's patients served by the Worker paid the Firm for the Worker's services, and that the Firm established the level of payment for those services.

The parties agree that the Worker did not belong to a union, that the Firm made no benefits available to the Worker, and that the relationship between the Firm and Worker could be terminated by either party without liability or penalty. The parties also agree that the Worker was not required to get the Firm's approval to perform similar services for others. The Worker did perform similar services for others during the relevant time periods. The parties agree that there was no agreement prohibiting competition between the Firm and the Worker while the Worker was performing services for the Firm or during any later period. The Worker did no advertising. The Firm represented the Worker to patients as "Contractor" or, as the Worker states, would tell patients that the Worker was "filling in" or "not here everyday [sic]." The parties agree that the Worker had no responsibilities in soliciting new customers for the Firm. While the Firm states that it did not know who provided the Worker with leads to prospective customers, the Worker maintains she received leads from the Firm, which "provided all the patients." The parties agree the Worker did not pay for the privilege of serving Firm's customers, and that the Firm's relationship with the Worker ended when the Firm no longer needed the Worker's services.

Analysis

The common law rules for determining employment status are described in Treas. Reg. 31.3121(d)-1(c). Under common law, a worker is an employee when the person for whom the services are performed has the right to control and direct the individual who performs the services. This control reaches not only the result to be accomplished, but also the details and means by which that result is to be accomplished. Note that the right to control must be present but need not actually be exercised. Also, note that courts have held that the degree of supervision necessary to demonstrate control is only "such supervision as the nature of the work requires." *McGuire v. United States*, 349 F. 2d 644, 646 (1965 9th Cir.).

The Worker performed personal services as a licensed dental hygienist for the Firm and its patients; the nature of the Firm's and the Worker's relationship contemplated that the Worker would personally perform those services. Statutory provisions in the taxpayers' State restricted dental hygienists like the Worker to only practicing under the general or direct supervision of a dentist. The relevant statute defines general supervision as meaning "...the dentist is available for consultation, whether or not the dentist is in the dentist's office, over procedures that the dentist has authorized and for which the dentist remains responsible." Direct supervision is defined as meaning "... the dentist is present in the office while the dental hygienist is treating a patient and is available for consultation regarding procedures that the dentist authorizes and for which the dentist is responsible." [Taxpayers' State] Revised Statutes Title 32, Chapter 11, Article I, §32-1281(D),(E),(H),(I)(2-3).

Neither party submits that the Worker falls into any category of exception to their State's unequivocal requirement that Firm's dentist supervise the Worker upon hiring her to perform dental hygienist procedures on its patients. Taking the Firm's representation at face value, its dentist's arguably hands-off approach to supervising the Worker does not carry sufficient weight to reflect a business presence for the Worker - nor does it relieve the Firm of its ultimate, statutorily mandated control over and responsibility for the Worker's services to the Firm and its patients. Based on the Worker's education, licensure, 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.

When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, such as dental hygienist services at dental practices, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. The dental hygienist services provided to the Firm by the Worker were a necessary and integral component of the Firm's dental practice. The Worker performed her assigned duties at the Firm's place of business, for the Firm's patients, under a schedule set by the Firm. To facilitate this, the Firm provided its dental office, dental chair, and certain dental instruments and materials necessary for the Worker to do her job, and paid her wages on a predictable schedule based on her work schedule - which the Firm set by virtue of its patient's needs. The procedures the Worker performed on the Firm's patients were necessarily authorized by and under the supervision of the Firm's dentist - who was, under State law, responsible for the outcome of those procedures. This integration of the Worker's services into the Firm's business operations supports a finding that the Worker was subject to the Firm's direction and control.

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. Generally, independent contractors advertise their services and incur expenses for doing so. In this case, the Worker did not advertise her services and was restricted by State law to only providing her services under the general or direct supervision of a dentist. The Worker did not assume business risks, nor did she make any significant investment in capital. The term "significant investment" does not include tools, instruments, and clothing commonly provided by workers in their trade, nor does it include education or training. With the daily lump sum or hourly rate of pay arrangement, the Worker could not realize a profit or incur a loss.

The facts presented do not reflect a business presence for the Worker; instead, they evidence the Firm retained the right to direct and control the Worker to the extent necessary to ensure the Worker's satisfactory job performance in a manner acceptable to the Firm. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest that the similar services the Worker performed for others during the relevant time period were provided by the Worker as an independent contractor. Nor is there evidence to suggest the Worker advertised dental hygienist business services to the general public during the term of her work relationship with the Firm.

Based on the above facts and analysis, this determination concludes 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 of the Firm during the relevant time period, and not an independent contractor operating a trade or business. Accordingly, the Worker is classified as an employee of the Firm for employment tax purposes.

The Firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.