

**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 initiated the request for a determination of her work status as a Registered Dental Hygienist in tax year 2018, for which she received Form 1099-MISC. The firm's business is described as a dental practice.

The firm's response was signed by the dentist, a member of the [REDACTED]. The firm is a dental practice and the worker provided services as a temporary dental hygienist to cover a maternity leave. The worker was told she was not an employee and that taxes would not be withheld.

The worker stated there was no specific training and instructions given. The job assignments came from the dentist/firm; and it was the firm that 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 performed the services from 8 am to 5 pm at the firm's locations. The worker was not required to perform the services personally; any additional or substitute personnel were hired and paid by the firm.

According to the firm, the worker was licensed so she was not extensively instructed on how to perform dental hygiene tasks and she needed no training; except for, instructions as to routines and procedures specific to the firm's office. The job assignments were as a result of patients making appointments. The worker determined the methods by which she performed the services, although supervised by the dentist. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker was required to complete the record of treatment. The worker's services were rendered at the firm's place of business between 8 am and 5 pm. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm and worker acknowledge the firm provided all equipment, supplies, instruments, and handpieces; the worker furnished nothing. She did not lease equipment, space, or a facility. The firm paid the worker an hourly wage; the patients 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 firm established the level of payment for services provided and/or products sold.

Both parties concur there were no benefits extended to the worker and that 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 worker was represented as 'temporary' while covering for another person on maternity leave, working under the name of the dental practice. The worker terminated the work arrangement.

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## 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.

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.

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.

Under the State's guidelines for Dental hygienists, in all instances, a dentist assumes responsibility for determining, on the basis of diagnosis, the specific treatment patients will receive and which aspects of treatment may be delegated to qualified personnel. A dentist may only delegate to a dental hygienist those services that are within their authorized scope of practice. Definition of "Direct supervision" means that the dentist is present in the treatment facility, but it is not required that the dentist be physically present in the treatment room. Direct supervision is required for a dental hygienist administering local anesthesia or nitrous oxide inhalation analgesia, or for a hygienist providing services to a new patient, except under public health supervision. The dentist must conduct an examination during an initial visit by a new patient. "General supervision of a dental hygienist" means that a dentist has examined the patient and has prescribed authorized services to be provided by a dental hygienist. The dentist need not be present in the facility while these services are being provided. If a dentist will not be present, certain requirements must be met.

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, and State guidelines are being adhered to. 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

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.

Please see [www.irs.gov](http://www.irs.gov) for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide.