

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 June 2017 to November 2017 as a dental hygienist. The firm issued the worker Form 1099-MISC for 2017. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error as the firm provided all supplies, materials and equipment for their job duties. There was no written agreement between the parties.

The firm's response states it is a dental office. The work provided by the worker was as a dental hygienist. The worker was requested to perform general dentistry duties. The firm states that they classified the worker as an independent contractor for an unknown reason.

The firm did not specify any instruction or training that was given to the worker for their job responsibilities, or how their job assignments were given or how the methods to perform the job duties were determined. The firm states that the worker was required to perform all services personally. The firm states that helpers or substitutes were not applicable to the work relationship. The worker states that the firm provided training on the dental equipment used for the job responsibilities as well as the software used by the firm. The worker states that the firm provided the job assignments through patients of record, and that the firm's dentist determined the methods by which job assignments were performed. If problems or complaints arose during job duties, the worker was required to get in touch with the firm's dental office manager. Ultimate problem resolution was the responsibility of the firm's dentist and owner. The worker was responsible for documenting in the firm's computer system clinical charting and notes. The worker would perform services for the firm 2 to 3 times weekly, from 8a.m. until 4:30p.m. The worker was required to perform all services at the firm's premises and to attend dental sales representative lunch-n-learns. There were no penalties for not attending these meetings. The worker was required to perform all services personally. If helpers or substitutes were required, the dental firm was responsible for hiring and paying them.

The firm states that they provided uniforms, computer, chair, and dental instruments for the worker's job duties. The worker did not have to provide any supplies or materials. The worker did not have to lease space, facilities, or equipment. There were no expenses incurred by the worker during their job duties. The worker received a percentage of their production as pay and did not have access to a drawing account for advances. The customers would pay the firm for all services rendered. The firm carried worker's compensation insurance on the worker. The firm states that the worker set the level of payment for services rendered. The worker states that the firm provided everything or the job duties except for the uniform and their phone for contact purposes. The worker received commission payments from the firm. The customer would pay the firm for all services rendered and the firm set the level of payment for all services rendered based upon insurance rates. The worker states that they did not have any exposure to economic loss or financial risk.

The firm states that they did not offer any benefits to the worker. The work relationship could be terminated by either party without incurring loss or liability. The firm states that the worker performed similar services for other firms at the time they worked for the firm. There were no agreements in place prohibiting competition between the parties. The worker was not a member of a union and the worker did not advertise their services to the public. The worker was represented by the dental firm as an employee of the firm. The work relationship ended when the worker quit. The worker states that they were offered no benefits by the firm and they did perform similar services for other firms at the time they worked for the firm. The worker was not a member of a union and did not advertise their services to the public. The worker states that they were represented as an employee of the firm. The worker states that the work relationship ended when they quit working for the firm.

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.

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. By law, dental hygienists can only perform services under the direction and control of a dentist, which indicates the level of control the firm had over the worker. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed through reports and clinical notes, and assumed responsibility for problem resolution. 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.

Payment by the hour, day, 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. 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. 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; Publication 4341.