

**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 submitted a request for a determination of worker status in regard to services performed for the firm from March 2019 to August 2019 as a receptionist. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error because they received instruction from the firm and were given a work schedule by the firm. There was no written agreement between the parties.

The firm's response states it is a chiropractic office. The work provided by the worker was as an assistant. The worker was requested to welcome and schedule patients and sometimes perform therapeutic modalities. The firm believes that the worker was an independent contractor because the worker performed services on a flexible schedule.

The firm states that the worker previously performed services at a similar firm and knew how to do everything. The worker received job assignments from the firm's doctor when the patient came into the office. The firm's doctor, who is also the firm owner, determined the methods by which job assignments were performed and assumed responsibility for problem resolution for any on the job problems or complaints arising during job duties. The worker was not required to provide the firm with any reports. The worker would come into the office, look at the schedule, and prepare everything for patient appointments. The worker would have a lunch break then come back for afternoon clinic. The worker's workday would end around 6pm depending upon the last scheduled patient. All work was performed at the firm's premises. The worker did not have to attend any meetings, but the firm states that the worker was required to perform all services personally. If helpers or substitutes were needed, the firm owner would hire and pay the additional help. The worker received instruction from the firm on every day tasks associated with their position as a receptionist. The firm owner would verbally give the worker assignments and determine the methods by which they were performed. The worker was required to contact the firm owner if they encountered any problems or complaints while working. The worker did not have to provide the firm with any reports, and the worker performed services on Mondays and Wednesdays from 9am until at least 3pm. The worker provided copies of their schedule as well as time sheets. The worker states that all job duties were performed at the firm's premises and there were no meetings required. The worker states that the firm owner hired and paid all helpers or substitutes required.

The firm states that they provided all materials and equipment needed for the worker's job, and the worker did not have to provide anything for their job duties. The worker did not lease any space, equipment or facilities. There were no expenses incurred by the worker in the performance of their job. The firm states that they issued the worker a 1099-MISC based upon the hours that they worked, thus showing that the worker was paid an hourly wage with no access to a drawing account for advances. Patients of the firm paid the firm for all services rendered. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk while performing services for the firm. The firm's owner set the level of payment for all services rendered. The worker states that the firm provided all supplies and equipment needed for the job. The worker states that there were no expenses incurred during the work relationship. The worker was paid an hourly wage. The worker states that the firm's owner handled everything financial regarding patients and services rendered. The worker states that they did not own anything in the office, therefore they faced no economic loss or financial risk during their job duties.

The firm states that the work relationship could be terminated by either party without liability or penalty. The firm states that the worker performed similar services for other firms during the work relationship and that they were required to seek approval from the firm before doing so. There were no non-compete agreements in place between the parties. The worker was not a member of a union. The firm represented the worker as an assistant to their patients. The work relationship ended when the worker quit without providing the firm with any notice. The worker states that the firm did not provide the worker with any job benefits. The worker states that they did not provide similar services for other firms during the course of the work relationship, but that they would have needed approval from the firm to do so. The worker states that they did not advertise their services to the public. The worker states that the firm represented the worker as an employee of the firm. The work relationship ended when the worker quit.

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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.

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 as a chiropractic office. The firm provided work assignments by virtue of the patients scheduled 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 worker had no expenses associated with the job, and the firm provided everything necessary for the job duties. 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 hourly 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.