

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 February 2019 to October 2019 as a dental hygienist. The firm issued the worker Form 1099-MISC and Form W-2 for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. There was no written agreement between the parties. The worker believes that they were a W-2 employee because the firm had the right to control how all services were performed by the worker.

The firm's response states it is a multi-specialty dental office. The work provided by the worker was as a dental hygienist. The worker was requested to perform dental assessments on the oral health of the firm's patients, working on an as-needed basis. The firm provided a statement of checks issued to the worker as added documentation. The firm believes the worker was an independent contractor because the work was performed on a highly variable work schedule.

The firm states that they provided the worker with a schedule for duties, an agreed upon rate of pay, and an overview of dental office flow and schedule. The worker would receive job assignments when the firm's scheduler would reach out to the worker as dental office needs would arise. The firm states that the worker determined the methods by which job assignments were performed. If the worker encountered any problems or complaints during their job duties, they were required to contact the firm's office manager or dentist, depending upon the issue. The worker was not required to provide the firm with any reports, only a communication of tasks completed and hours worked. The worker would arrive at the firm's premises to set up and acquaint themselves with their work area, software and schedule, complete their tasks, and then leave for the day. The worker performed 100% of all services at the firm's premises. There were no meetings required by the worker and all services were required to be performed personally. If helpers or substitutes were required, the firm's office scheduler would hire and the firm would pay the additional help. The worker states that the firm trained the worker on standard operating procedures. The worker was given a schedule of patients and treatments needed. The firm determined the methods by which job assignments were performed and also assumed responsibility for problem resolution. The worker performed services within the dental office's business hours at the firm's premises. The worker states that meetings were not a requirement and they were required to perform services personally. The firm hired and paid all workers directly, including any additional help needed.

The firm states that they furnished the worker with dental hygiene instruments and supplies, PPE, and the work area. The worker supplied magnifying eye-wear, a uniform, and any additional PPE desired. The worker did not have to lease space, facilities, or equipment. The worker incurred no expenses and was paid an hourly wage by the firm with no access to a drawing account for advances. Customers of the firm paid the firm directly. The worker was covered by worker's compensation insurance. The worker had no exposure to economic loss or financial risk. The firm states that the worker set the hourly rate of pay that they wished to receive for services rendered. The worker states that the firm provided all supplies and equipment needed for the job. The worker did not have to provide anything additional for their job duties. The worker incurred no expenses. The worker was paid an hourly wage by the firm. Customers of the firm paid the firm and the firm carried worker's compensation insurance on the worker. The worker had no economic loss exposure. The worker states that the firm set the level of payment for services rendered.

The firm states that the worker was not eligible for benefits. The relationship between the parties could be terminated by either party without liability or penalty. The firm states that the worker provided similar services to other firms during their work relationship and was free to do so without seeking approval from the firm beforehand. The worker was not a member of a union. The worker provided professional information on a website for all prospective employers to view. The worker was not represented by the firm as either temporary or permanent to their clients. The firm states that all jobs that were offered to the worker were never guaranteed to be permanent and were offered on an as-needed basis. There were no written or verbal agreements between the parties. The worker was not responsible for soliciting business on behalf of the firm. The worker states that there were no benefits offered by the firm and the work relationship could be terminated by either party without liability or penalty. The worker states that they did perform dental services for other firms without approval from the firm needed. There were no non-compete agreements in place between the parties. The worker was not a member of a union and the worker states that they did not advertise their services to the public. The worker states that they were represented as a dental hygienist for the dental firm. The temporary work was completed, thus ending the work relationship between the parties.

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. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed, 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. By law, dental hygienists can not perform their duties unless they are supervised by a dentist.

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 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; Publication 4341.