

## SS-8 Determination—Determination for Public Inspection

Occupation

06AAS.3 Aide/Assistant

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

### Facts of Case

The firm is in business as a nurse registry. The worker was engaged by the firm as a home health aide to provide services for the firm's clients. The firm reported the worker's remuneration on Forms 1099-MISC for 2009 through 2012.

Information from the parties supports that a nurse registry is an agency that offers health-care-related contracts for registered nurses, licensed practical nurses, certified nursing assistants, home health aides, companions, or homemakers who are paid by fees as independent contractors. By state statute, a nurse registry cannot have any employees except for the administrator and office staff. All individuals who enter the home of the patient to provide direct care must be independent contractors.

The parties submitted the "Conditions of Employment" agreement stating the worker is engaged as an independent contractor; she will conduct herself professionally and dress professionally; she is responsible for the payment of her own taxes and is not eligible for benefits; the worker will pay the firm a 15% commission of her gross income; upon termination the worker will not procure, or visit, any clients of the firm; any requests for changes to the worker's schedule must be approved by the firm; and timesheets must be faxed to the firm weekly.

The worker submitted the "Rules and Regulations" stating general conduct responsibilities: she must maintain client documentation; submit timesheets by midday on Tuesdays; if there are any issues regarding a client or "employee", the worker should contact the firm; the worker must maintain an up-to-date license and other requirements by the [REDACTED] Health Department; the rules will be monitored by the compliance officer; and "employee" performance will be evaluated at the discretion of the firm.

The firm provided the worker with an orientation package and instructions. The firm provided the worker with her work assignments. She performed her services according to her prior training and experience, and the firm's expectations. If problems or complaints occurred, the worker contacted the firm for resolution. The firm scheduled the worker's hours according to the clients' needs and her availability. The worker performed her services on the firm's clients' premises. The worker was required to perform her services personally. If additional personnel were needed, the firm was responsible for hiring and compensating them.

The firm provided the paperwork, nurse notes, and time sheets. Clients provided supplies, if needed. The worker did not lease space or equipment, or incur expenses in the performance of her services. Clients paid the firm directly at prices established by the firm. The firm paid the worker at an hourly rate. It did not cover her under workers' compensation. Neither party indicated an investment by the worker in the firm or a related business.

The firm did not make benefits available to the worker. The worker did not advertise her services. The firm did not prohibit the worker from providing similar services for others during the same time period. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability, and in fact, the worker terminated the work relationship.

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## Analysis

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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, 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.

There are significant similarities between this case and Revenue Ruling 54-616, 1954-2 C.B. 346. In the ruled case, the facts are similar as it applies to expressed or implied consent. Accordingly, the firm's expressed or implied consent enabled its clients to direct and control the worker's services as was necessary to protect their needs and expectations.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm ensured that the worker was qualified to perform her services. It monitored her performance, showing 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 ensure its clients satisfaction. If the worker had been engaged directly by the clients, she would have been deemed to be the clients' employee for Federal tax purposes; however, when the firm engaged, qualified, and placed the worker to perform services under the direction and control of the firm's clients, it was done with the firm's expressed or implied consent. The firm required the worker to perform her services on the firm's clients' premises. Control over the place of work is indicated when the firm has the right to compel the worker to work at a specific place as required. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for the firm on her behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the clients exercised an element of financial control by furnishing the premises, materials, equipment, and supplies. But more importantly, the firm financially controlled the worker by its receipts of monies from the clients for the worker's services and its remuneration to her at an hourly rate set by the firm. The worker did not incur work related expenses and was not engaged in an independent enterprise requiring capital outlays or the assumption of business risks. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed her services under the firm's name, enabling the firm to fulfill its contract with its clients. The worker was not engaged in an independent enterprise, but rather the home health services performed by the worker were a necessary and integral part of the firm's nurse registry business. 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. The worker could have performed similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although the firm did not make benefits available to the worker, the worker terminated the work relationship without incurring a liability. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

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 for Federal purposes, and not an independent contractor operating a trade or business.