

SS-8 Determination—Determination for Public Inspection

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| Occupation 06MPX Medical Practitioners | 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 initiated the request for a determination of his work status as an optometrist in tax years 2015 through 2017. The firm's business is described as placing optometrists in their clinic locations.

The firm's response was signed by the director of human resources. The firm's business is explained as providing optometric services. The worker, an optometrist, performed optometric services including comprehensive eye exams for contact lenses and glasses and overall eye health.

The firm and worker acknowledged that there was no specific training and instructions given by the firm. The worker was to see patients as scheduled. The worker 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's services were rendered 9:30 am to 6:30 pm, Monday through Friday at the firm's location. The parties to this case concurred the worker was required to perform the services personally; and, any additional personnel were hired and paid by the firm.

The firm provided computer, exam lane, consumables, slit lamp, and phoropter; the worker furnished nothing. The worker did not lease equipment, space, or a facility. The worker indicated he did incur expenses for conferences, travel to conferences, and liability insurance for this job. The firm paid the worker a daily rate plus bonuses. The customers paid the firm for the services they received. The firm and worker concurred that the worker was not at risk for a financial loss in this work relationship; and, that the firm established level of payment for services provided or products sold.

The benefits extended to the worker were paid vacations, insurance benefits, and bonuses. Either party could terminate the work relationship without incurring a liability or penalty as long as the worker provided a 3-month notice. The worker was not performing same or similar services for others during the same time frame; there was a non-compete clause in contract.

Both parties a copy of the "Professional Services Agreement" which covered the following:

The worker was to devote minimum of 5 days coverage each week Monday through Friday with Saturday; provide services to every patient that visited the location; keep and maintain medical records, reports, claims and correspondence; business expenses to be reimbursed and all expenses must be approved by an officer of the company; 3 weeks for time off and attendance at continuing education seminars, as approved by company; worker to obtain medial liability insurance; company furnishes office space, equipment, administrative assistance; compensation of \$XX per each full work day and \$YY for Saturday; from 9:30-6:30 with 1-hour lunch; 15 days of paid time off annually; reimbursement monthly up to \$ZZ for medical/dental premiums and worker was permitted to participate in any group health insurance offered to employees of the company; all fees compensation, monies, and other things of value as a result of the professional services rendered by optometrist shall be paid to and delivered to company; company has authority to set the fees and to bill and receive payments; and, a 90-day notice of termination required.

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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control.

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.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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 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.

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. 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

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.