

SS-8 Determination—Determination for Public Inspection

Occupation 06MPX Pharmacist	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 a pharmacist in tax years 2017 to 2018, for which he received Forms W-2 (2017) and 1099-MISC (2018). There were no changes in the work/duties performed as a licensed pharmacist. He performed all duties of a pharmacist, managed pharmacy employees, checked and verified accuracy of prescriptions and counseled patients. The firm's business is described as an independent retail pharmacy.

The firm's response was signed by the Vice President. The firm's business is a community pharmacy and the worker provided services as a pharmacist under the state Board of Pharmacy.

The firm provided a copy of the Mutual Confidentiality Nondisclosure/Noncircumvention Agreement initiated by the firm with the worker's corporation. The firm stated the intent was to ensure that although the worker was free to work at another pharmacy, he was prohibited from discussing their business relationship. The firm stated the contract was initiated because of the concern of disclosure. The parties acknowledge that there is no written agreement that defined any change to the work relationship or the method of payment. The firm alleges the firm engaged the worker through the worker's corporation. The worker alleges the firm advised him to set up a corporation as a means of being able to deduct business-related expenses; although he assumed he was still an employee of the firm and continued to perform the same duties. There was no business transacted through the corporation which has since been dissolved.

The firm filed the forms with the state's Board of Pharmacy, designating the worker as the 'prescription department manager'. In this role, he was responsible for ensuring the pharmacy permittee's (the firm's) compliance with all statutes and rules governing the practice of the profession of pharmacy, including maintenance of all drug records and ensuring the security of the prescription department.

The worker was hired as an employee from December 3, 2017 to January 6, 2018 and was issued Form W-2 to reflect his earnings. From January 7, 2018 to September 15, 2018 the earnings were reported on Form 1099-MISC under the worker's name and Social Security Number.

The firm and worker agree that the worker was trained on how to use the computer software. The worker was to open the pharmacy at 9am Monday through Thursday/Friday, verifying and dispensing prescriptions and overseeing the technicians, and closing the pharmacy at 7pm. The worker stated the firm determined the methods by which the worker's services were performed and any problems or complaints encountered by the worker were directed to the firm for resolution. The firm responded that it was the pharmacist on duty that determined the methods by which the worker's services were performed; and, any problems or complaints encountered by the worker were directed to the worker's corporation for resolution. The services were rendered at the firm's place of business. The worker was required to perform the services personally.

Both parties acknowledge the firm provided the pharmacy location, medications, computers, technicians, cashiers, stationery, and all necessary materials. The worker did not lease equipment, space, or a facility. The firm paid the worker an hourly wage; the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The firm responded that the worker was at risk for a financial loss in this work relationship if there was legal action threatening the pharmacist directly for incorrect dispensing or consultation on a prescription, and therefore the hiring company (the worker's corporation) would defend or respond. The worker stated his risk was the lack of health insurance and/or workers' compensation insurance. The worker stated he did not establish level of payment for services provided or products sold. The firm response was that the firm controlled pricing of products; however, the worker's corporation controlled the cost for providing the pharmacist.

The firm indicated no benefits were extended to the worker; the worker disagreed, stating he was paid for Christmas day, New Year's day, and the 4th of July when the pharmacy was closed. If the worker was sick, he was not paid and the firm's owner would fill in for the day. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame.

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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work 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.

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 opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

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. The worker was not operating a separate and distinct business to provide pharmacists or pharmacy personnel to pharmacies. 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 of the firm, and not an independent contractor operating a trade or business.