

**SS-8 Determination—Determination for Public Inspection**Occupation  
06NUR NursesDetermination:  
☒ 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 January 2017 to August 2017 as a nurse practitioner. The work done by the worker included the overall care of new and existing weight loss and hormone therapy patients. The firm issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states its business is medical weight loss, testosterone therapy, and Botox and anti-aging treatments. The worker was engaged on a part-time basis as a medical provider. The worker was responsible for patient assessments and writing prescriptions. The worker was classified as an independent contractor as she had a permanent job with a university and she wanted a part-time job where she could utilize her skill sets and education. Her position was clinical director for the office when she was there. Her position was self-directed as she was responsible for oversight of the medical practices.

The firm stated the worker attended a hormone therapy conference was is transferable for her profession. The worker was self-directed and gave direction to the clinic on how to streamline, operate, and maintain compliance. The worker determined medical procedures and prescriptions for clients. The worker handled most patient concerns (99%) but if necessary, she would contact the medical director for direction. Reports and meetings were not required. The worker's daily routine consisted of Monday through Wednesday, 9 am to 2 pm. She prescribed medication for patients. Services were performed at the firm's premises. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers. The worker stated the firm provided specific training and instruction on its electronic medical records, clinic computer systems, clinic protocols, and hands-on training from other providers and the medical director. Marketing was completed and paid for by the firm. Patients called in to schedule appointments. The worker had a set schedule. Clinic protocols and the medical director determined the methods by which assignments were performed. The clinic manager/owner assumed responsibility for problem resolution. The worker was required to complete patient electronic medical records. The worker was occasionally asked to attend non-mandatory meetings. There was no penalty if she was unable to attend.

The firm stated it provided the medications and medical supplies. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expenses associated with her licensing fees and continuing education. Customers paid the firm. The worker was not allowed a drawing account for advances. The firm did carry workers compensation insurance on the worker. The worker did not incur economic loss or financial risk. The firm established the level of payment for the services provided. The worker stated the firm also provided office locations, all materials, computers and software, equipment, personnel, including medical assistants, and phones. The worker did not incur expenses in the performance of services for the firm. The firm paid her an hourly rate of pay.

The firm stated benefits were not provided. The work relationship could be terminated without liability or penalty. The worker did perform similar services for others; the firm's approval was not required for her to do so. The offer letter contained a provision related to non-compete. The worker did not advertise. The firm represented the worker as a nurse practitioner to its customers. Services were performed under the firm's business name. The work relationship ended when the worker gave a two-week notice. The worker stated the firm provided the benefit of paid vacation time and malpractice insurance. She did not perform similar services for others. The firm's business cards also represented her as a clinical director.

The offer letter, dated 11/11/16, stated, in part, as the clinic director, the worker would oversee the firm's clinic operations during her time in office. Duties included, but were not limited to, overall patient care for new and existing patients, management of medical assistants, overseeing the dispensing of prescribed medication, ordering/monitoring medical supplies, and general clinic operations/management. The firm also expected the worker to play an integral role in the expansion of practices, services, and procedures offered by the firm. The worker would report to a firm official during the performance of duties. Either party could terminate the relationship at any time; however, the firm requested at least 60-days advance notice. Part-time services would be performed at two locations, which could change due to patient needs and demands. The worker would be paid an hourly rate of pay. The firm would provide malpractice insurance and cover the worker under its workers' compensation coverage. The firm offered PTO (paid time off) which accrued based on hours worked.

Both parties agreed the worker was not responsible for soliciting new customers. The firm brought new patients into the office.

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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. The firm provided work assignments by virtue of the patients served and ultimately 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, 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the hourly rate of pay arrangement she 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.