

SS-8 Determination—Determination for Public Inspection

Occupation 06NUR Nurses	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 firm is an adult day health care facility. The worker is engaged by the firm as a nurse to cover vacations, sick time, and emergency absences taken by its regular nurses as mandated by the licensing Department of Aging and the Department of Health Services. The firm has not withheld taxes from the worker's remuneration from 2011 through 2018.

The agreement between the parties states, among other things, that all documentation produced the worker under the contract is the property of the firm; the worker agrees that she is not an employee of the firm and is not entitled to any employee benefits; the worker is responsible for the reporting and payment of all appropriate taxes, as well as any insurance that the worker may require; the contract may be terminated at any time by either party with 30-days' written notice; the contract may be terminated by the firm upon notice to the worker for any of the stated reasons; and the worker will not receive insurance through the firm, but she must maintain adequate insurance appropriate to the services she delivers to the firm.

Information from the parties supports that the firm relies upon the worker's prior training and experience to perform her services. The firm provides the worker with her work assignments. If problems or complaints occur, the worker contacts the firm and suggests resolutions. The worker submits reports required by the Department of Aging; she has the discretion to add reports as she determines appropriate. The worker follows the schedule set by the firm and performs her services on the firm's premises. The worker is invited to attend department meetings/in-services; there is no penalty for not attending. The worker is required to perform her services personally.

The firm provides the facility, lab supplies, and approval forms. The worker provides her own uniform, computer, writing utensils, and other supplies as needed. The firm pays the worker at an hourly rate. Customers pay the firm directly at prices established by the firm. Neither party indicated an investment by the worker in the firm or a related business. Other than the risk of losing or breaking her computer and other supplies, the worker does not risk incurring a financial loss beyond the normal loss of compensation.

The firm stated that the worker provides similar services for others. There is no evidence presented showing the worker advertises her services or maintains a business listing.

Analysis

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, co-adventurer, agent, or independent contractor must be disregarded. Therefore, the firm's statement that the worker is 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. The firm's statement that the worker performs services on an as-needed basis and is therefore, an independent contractor, is without merit as both employees and independent contractors can perform services when the needs of a business warrants.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm relies upon the worker's prior training and experience to perform her services. 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. The firm is ultimately responsible for resolving any problems or complaints that may occur, showing the firm retains the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker performs her services as scheduled by the firm. She performs her services on the firm's premises. The worker is required to perform her services personally. 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 retains behavioral control over the services of the worker.

Factors that illustrate whether there is 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 worker did not invest capital or assume business risks, and therefore, does not have the opportunity to realize a profit or incur a loss as a result of the services provided. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. 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 firm stated that the worker provides her own uniform, computer, etc. 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. The firm pays the worker at an hourly rate. Payment by the hour generally points to an employer-employee relationship. These facts show that the firm retains control over the financial aspects of the worker's services.

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 performs her services on a continuing basis. 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 worker is not engaged in an independent enterprise, but rather the services performed by the worker as a nurse are a necessary and integral part of the of the firm's adult day health care 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 firm does not prohibit the worker from performing similar services for others; 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. These facts show that the firm retains control over the work relationship and services of the worker.

Based on the above analysis, we conclude that the firm has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee, and not an independent contractor operating a trade or business.