

**SS-8 Determination—Determination for Public Inspection**

Occupation

06NUR Nurse Consultant

Determination:

☒ 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 firm is in the business of offering consulting services to seniors and families to educate as well as to provide resources on aging in place or moving. The worker was engaged as a nurse consultant to discuss options with the firm's potential clients. She received a Form 1099-MISC for her services in 2017 and 2018. There was a written agreement.

The firm gave the worker instructions on what to do once in a client's home such as the care to provide and the contract to obtain. The firm indicated that it provided the worker with its philosophy and scope of referrals. The firm obtained the customer, then would call/text/email the customer's information to the worker as well as what the firm wanted done. The worker's work assignments were word-of-mouth referrals. The firm remained involved and billed the customer for the services provided (such as giving meds, taking blood pressure, etc.) The worker would also give/attend community seminars and networking on the firm's behalf. All contracts/orders were subject to and approved by the firm. The firm directed where and where not to market its services. Each party indicated that the other determined the methods by which the assignments were performed; but both noted that the firm would be contacted and both parties would resolve any issues or problems arose. The worker submitted nursing notes with time charges, and emails detailing ongoing services along with any problems; the firm noted that she submitted invoices. The worker scheduled workload according to the firm's direction as to needed frequency or emergency. The firm only asked that she notify the firm when on vacation in case a client called. Both agreed that all services were at customers' locations (homes or assisted living facilities). There were meetings which she attended at the firm's request for client summaries and progress. The worker was required to provide the services personally with only firm hiring and paying any substitute workers; the firm disagreed (though the agreement indicated that any assistants or subs could not provide the consultation to the client).

The firm provided the marketing materials, contracts and intellectual property. The worker provided nursing equipment such as a stethoscope, BP cuff, and gloves. The worker incurred local travel expenses (car & phone). She was paid a commission on packages sold as well as an hourly rate for the services she provided. The hourly rate was evidenced by an invoice, and covered in the agreement regarding the worker's compensation. The package pay percentage was higher if the worker brought the client in. There was a set monthly draw schedule which the worker declined. The customer paid the firm. Each party indicated that the other established the level of payment for services.

Both the firm and the worker agreed that there were no benefits other than a 'bonus' (higher package commission) mentioned by worker. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others; the firm disagreed. There was a noncompete agreement. The relationship has ended.

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## Analysis

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In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

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 retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker was a registered nurse engaged by the firm to provide the consultation services that it offered to potential clients. If a firm has the right to direct and control a professional, he or she is an employee with respect to the services performed under these circumstances. Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite the absence of direct control, it cannot be doubted that many professionals are employees. The firm obtained the clients. Then the worker was contacted to see if she accepted the task. Once accepting, she was responsible for scheduling the meeting as well as adhering to the firm's philosophy and scope of referrals per previous firm instructions/training. She reported to the firm, another indication of control. While the work schedule may have varied, 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. The worker provided her services to the firm for a brief period of time but on a continuous basis. Her services were not a one-time occurrence. 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.

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, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. The worker received a commission on the firm's contracted care packages. "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. In addition, the worker also received an hourly rate of pay when providing nursing-related services. 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.

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. There was a written agreement. However, the firm's belief 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. The worker was engaged to provide the consultation services that the firm offered to its clients. When providing those services, the worker was not engaged in a separate business venture. The fact that she was a registered nurse did not make her self-employed based on the circumstances of providing the very services that the firm's business promoted. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.