

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

It is our usual practice in cases of this type to solicit information from both parties involved. After the worker's initial filing of the Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, we requested information from the firm concerning this work relationship. The firm provided information in regard to this work relationship by completing Form SS-8.

From the information provided the firm is a nursing agency providing nurses to patients for special infusion therapies and the worker was engaged from August 2018 to October 2018 as a registered nurse. The firm believes the worker was an independent contractor (IC) while performing services for them as the worker only worked when she accepted a patient and she was paid on a per visit basis per the nursing contractor agreement. The firm states the worker saw patients through them for approximately six weeks for a total of 12 patient visits and for a total of 45 hours. The firm reported the worker's earnings on Forms 1099-MISC.

The firm states there were supervisory visits made with the worker and the nursing manager to check the worker off on specific therapies. Available assignments and patients were offered to the worker via the telephone, email, and text and the worker determined whether she wanted to accept the assignment or not. The worker only performed services for the firm when patients were assigned and accepted. The worker was required to follow industry best practice guidelines/protocols while performing services for the firm. Depending on the nature of a problem or complaint, the worker was required to notify the pharmacist, doctor, or the firm's nursing manager. The nursing manager would follow up on any issue that arose. The worker was required to submit patient assessment and infusion monitoring forms to the firm along with a visit log. The worker was required to personally perform her services and her services were performed ninety percent (90%) of the time in the patients' homes, five percent (5%) of the time delivering specimens, and five percent (5%) of the time completing paperwork. The worker was not required to attend meetings.

The firm states they provided the forms such as paper assessments, infusion monitoring, etc. and the worker provided all nursing tools such as blood pressure monitor, stethoscope, etc. The firm states the patients' pharmacy provided all other medical supplies required such as dressings, blood tubes, gloves, etc. The clients paid the firm for services rendered by the worker and the firm compensated the worker on a piece work basis. The firm states they determined the level of payment for the services provided. The worker was required to have medical malpractice insurance and the firm believes the worker could incur a loss as a result of her services because of this.

The worker was not eligible for employee benefits. The worker did not perform similar services for others and the worker did not advertise her services. The firm states the worker performed her services under their business name. Either party could terminate the work relationship at any time without incurring a liability. The worker terminated the work relationship.

A nursing independent contractor agreement was signed between the firm and worker indicating the worker would be treated as an independent contractor for tax purposes.

Analysis

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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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 this absence of direct control, it cannot be doubted that many professionals are employees. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and her services should not be confused with the right to direct and control. Even when a company allows a worker considerable latitude in performing their services, the retention of the right to give instructions or directions, without exercising that right, is enough to make the worker an employee. In many instances, this retention is indicated by the requirement that the worker provide the firm with frequent reports and a list of responsibilities the worker was required to follow. The worker's position was performed on behalf of and under the firm's business name. The firm alone had the right to determine how the worker ultimately performed her services in order to protect their financial investment, their business reputation, and the satisfaction and health of their clients.

A continuing relationship was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The existence of a continuing relationship indicates an employer/employee relationship was established.

While the worker could accept or deny any assignment given to her, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the client and whom did the client pay. In this case, that relationship was between the firm and their clients.

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.

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.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

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 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.

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.