

**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 November 2017 to October 2018 as a cancer support helpline registered nurse. The firm issued the worker Form 1099-MISC for 2017 and 2018. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. The worker believes they were an employee because they were given shift work performing job duties according to guidelines determined by the firm.

The firm's response states it is a cancer support hot-line. The work provided by the worker was as a registered nurse providing call support. The worker was requested to answer calls placed to the firm's hot-line that provided cancer support. The firm states that the worker was an independent contractor because they worked from home, set their own hours, and provided their own computer and liability insurance. The firm provided a job description, contractor agreement, example schedules, and various email transcripts for our consideration.

The firm states the worker was given training on the call routing system that the firm had in place and their referral database. The firm states that the worker would receive periodical professional supervision by a licensed mental health professional. The firm states that the worker received job assignments based upon their availability and the worker determined the methods by which job assignments should be performed based upon guidelines provided by the firm. The firm states that if the worker encountered problems or complaints during their job responsibilities, they were required to contact the firm's helpline director who would be responsible for their resolution. The firm states that the worker was required to document their calls in the firm's call management system and provide reports to the firm after their shift. The firm provided an example copy of typical shifts experienced by workers in the same class and an email exchange detailing the call requirements of the worker during their schedule as well as the reporting the firm required after their shift. The firm states that all of the job responsibilities were performed in the worker's home. The worker was not required to attend any meetings. The worker was required to perform all services personally. Helpers or substitutes were not applicable to the work relationship. The worker states that they were given specific training on the scripting involved with their job duties, which was revised at monthly required meetings. The worker states that they received work assignments daily and reports were required at the end of their shifts. The worker states that the firm determined the methods by which job assignments were performed. If issues or problems arose during job duties, the worker was required to contact the supervisor. The worker states that they were required to document medical information in charts and encrypted emails between the worker and the firm's nurses and doctors. The worker's schedule consisted of shifts that began at 9a.m. until 9p.m. Monday through Friday and from 9a.m. until 7p.m. on the weekends. The worker provided services from their home with their computer and mobile phone and states that monthly meetings were a requirement. The worker states that they would receive phone calls or emails if they did not attend the meetings, and they were required to perform all services personally. The worker states that the firm was responsible for hiring any helpers or substitutes if required.

The firm states that they provided no supplies or materials for the job, and the worker provided their computer and phone for the job duties. The firm states that they are not aware if the worker had to lease space, facilities or equipment nor do they know about the expenses incurred by the worker. The worker was paid an hourly wage with no access to a drawing account for advances. There were no payments from customers because services were offered free of charge to callers. The firm did not carry worker's compensation insurance on the worker. The firm states there was no exposure to economic loss or financial risk by the worker during job responsibilities. The firm states that they offered the worker an hourly rate which the worker accepted. The worker states that the firm provided all training, scripts, support staff, office software, and charting software, and the worker only have to provide their phone and computer. The phone expenses were reimbursed by the firm, and the worker did not have to lease space, facilities or equipment. The worker was paid an hourly wage and the firm set the pay scale for services rendered.

The firm states that they did not offer the worker any benefits. The work relationship could be terminated by either party without incurring loss or liability. The firm was unaware of any other firms that the worker may have performed similar services for, and there were no agreements prohibiting competition between the firm and worker. The worker was not a member of a union and did not advertise their services to the public. The worker was represented by the firm as a representative of the firm, answering calls on behalf of the firm. The work relationship ended when the worker was terminated for demanding higher pay. The worker states that they did not perform similar services for any other firm at the time they worked for the firm. The worker states that they were represented as the firm's call line help nurse. The worker states that they were fired out of retaliation for something that occurred while on the job.

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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 customers served, required the worker to report on services performed, and 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, day, 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. Based on the hourly rate of pay arrangement the worker 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.