

SS-8 Determination—Determination for Public Inspection

Occupation

05PCP.48 Personal Care Worker

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

The worker submitted a request for a determination of worker status in regard to services performed for the firm in 2014 and 2015 as an acupuncturist. Patient services, provided to walk-in car accident victims under no-fault insurance, were performed as directed by the firm. The firm issued the worker Form 1099-MISC for 2014. A tax reporting document was not received for 2015. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response stated its business is acupuncture, chiropractic, and massage therapy. The worker performed acupuncture services. Reference was made to five factors relevant to determining control within a work relationship: (1) a worker works at his/her own convenience; (2) is free to engage in other employment; (3) receives fringe benefits; (4) is on the employer's payroll; and (5) is on a fixed schedule. The facts of this case establish the worker as an independent contractor as she 1) set her own work hours and she did not have a fixed start or end time; 2) took time off without prior permission obtained from the firm; 3) negotiated and set the rate of pay; 4) received payment not subject to any employee withholdings; 5) advertised herself online as a licensed acupuncturist in private practice and not an employee of the firm; 6) was not subject to performance reviews and she worked without supervision or inspection; 7) was free to work for others and her own private business; 8) maintained her own license and insurance; 9) was not provided fringe benefits or business cards. In summary, the worker was in business for herself.

The worker stated the firm instructed her to perform acupuncture services for walk-in patients. The firm determined the methods by which assignments were performed. The worker determined the specific acupuncture points. The firm was contacted and responsible for problem resolution. The firm required the worker to complete confidential patient records and report the hours worked. The worker's routine consisted of Monday, Wednesday, Thursday, and Friday from 10 am – 7 pm. Services were performed at an office location sub-leased by the firm. While meetings were not regularly scheduled, the firm and worker had informal discussions when chart notes were picked up. Both parties agreed the firm required the worker to personally perform services.

The firm stated it reimbursed the worker for supplies purchased. Customers paid the firm. The firm paid the worker an hourly rate of pay. The firm did not carry workers' compensation insurance on the worker. The worker stated the firm provided all forms, supplies, equipment, and materials; therefore, she did not incur expenses in performing services for the firm. A drawing account for advances was not allowed. The worker did not incur economic loss or financial risk. The firm set the price for what was billed to insurance companies and also the cash rate paid by cash patients.

The work relationship could be terminated by either party without incurring liability or penalty. The firm stated the worker performed similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. The worker advertises online. The worker ended the work relationship. The worker stated she was provided the benefit of personal days. She did not perform similar services for others or advertise. The firm represented her as an employee to its customers. Services were performed under the firm's business name. The firm ended the work relationship due to lack of work.

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, the firm's statement that the worker was an independent contractor pursuant to a 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.

Section 31.3401(c)-1(c) of the regulations states that generally professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others in an independent business or profession in which they offer their services to the public are not employees. However, 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 this absence of direct control, it cannot be doubted that many professionals are employees.

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, required the worker to report on services performed and hours worked, and collected payment for services performed. 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. 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. 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; Publication 4341.