

SS-8 Determination—Determination for Public Inspection

Occupation

06AAS Dietician

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 worker submitted a request for a determination of worker status in regard to services performed for the firm from February 2018 to December 2019 as a registered and licensed dietician having the title of independent consultant. The services performed included completing nutritional assessments, providing interventions, monitoring patients nutritional status, reporting patient statuses to the department via meetings or weekly and monthly reports, and conducting audits. The firm issued the worker Form 1099-MISC for 2018 and 2019. The worker filed Form SS-8 as she believes she received Form 1099-MISC in error.

The firm's response states it is a consulting company providing clinical charting and consulting in healthcare. It works with nursing homes. 60% of registered dieticians hired have other private contracts with clients. The worker was engaged as a clinical dietician to provide charting in contract long-term facilities. The worker was classified as an independent contractor as she was contracted based on her expertise in charting and understanding clinical nutrition, which is industry standard. Dieticians make their own work hour schedules, as needed, and typically do not go over the time allowed on part-time basis contracts with clients. They can work for others, as long as they do not under-mind the firm's existing contracts with clients. The client may orient workers on its software for electronic charting. An independent contractor agreement was provided for our review; however, as it was not signed by the firm or the worker, it is not considered relevant.

The firm stated it did not provide the worker specific training or instruction. Work assignments were based on healthcare requirements and dependent on the building census. Federal guidelines determined the methods by which assignments were performed. If complaints or concerns arose, the worker or the firm could be contacted for resolution. All reports are typically government forms or customized by a worker. The worker was required to report the number of hours worked. The routine depended on the census and acuity of residents on a given day. Typically, work was done onsite; however, charting could be done remotely. The firm required the worker to attend meetings to update clients on the nutrition status or residents at risk. The firm required the worker to personally perform services as she was on-record as the licensed person and registered dietician. The worker stated the firm provided her specific orientation and forms to use. The clinical manager sent emails telling her what to do. The firm provided work assignments, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. The firm required she prepare various weekly and monthly reports. Template copies were provided for our review. She had set days, which were sometimes flexible, and a set number of hours per facility where she attended meetings, completed tasks, communicated with other departments, and sent reports. The firm required her to attend various meetings as scheduled.

The firm stated the worker may have used her computer to access online charting. The client provided an onsite computer for the worker's use. The worker did not lease equipment, space, or a facility. The worker incurred the expense associated with her cell phone, Internet access, and insurance. She could negotiate the cost in her rate compensation. Customers paid the firm. The firm paid the worker an hourly rate of pay, which could be billed back to the client. The firm did not allow the worker a drawing account for advances. The firm did not carry workers' compensation insurance on the worker. The worker incurring economic loss or financial risk was not applicable. The worker established the level of payment for the services provided. The worker stated the firm established the level of payment for the services provided.

The firm stated benefits were not applicable. The work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others or advertised. Clients contracted with the firm; therefore, services were performed under the firm's business name. The work relationship ended when the worker notified the firm that she was taking a new job. The worker stated she did not perform similar services for others or advertise. The firm represented her as an employee to its customers.

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 clients served, required the worker to report on services performed and attend meetings, and ultimately 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, 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. 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; Publication 4341.