

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

Occupation 05PCP Personal Care Providers	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**

The worker submitted a request for a determination of worker status in regard to services performed for the firm from May 2017 to August 2017 as a dental hygienist. The work done by the worker included helping the dentist perform patient services, including charting, cleaning teeth, cleaning office spaces, writing up patient notes, making appointment, and taking x-rays. The firm issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC as in the state where she performed services she cannot work without the supervision of a dentist.

The firm's response states it is a dental office business. The worker was engaged as an independently licensed dental hygienist. The worker was classified as an independent contractor as she 1) advertised her services to dental practices and set her own fees; 2) was responsible for all services performed; 3) was utilized as a temporary contractor based on her availability; 4) was employed for another business entity; 5) was not subject to training, supervision, or pre-determined/established times to be in office; 6) was not subject to an exclusive relationship and likely provided similar services to others; 7) did not receive benefits such as vacation or sick leave. There was no written agreement between the firm and worker. The worker advertised via an on-line forum for dental hygienists to provide temporary services in dental practices, not permanent employment positions.

The firm stated it did not provide specific training or instruction to the worker. The worker notified the firm of her availability and would provide services to patients based on the daily schedule. The worker determined the methods by which assignments were performed. The state board of dentistry was contacted if problems or complaints arose. The worker was required to provide clinical reports. When available, the worker provided patient services by appointment. She was not required to be present during regular office hours. Services were performed at the firm's premises. Meetings were not required. The firm required the worker to personally perform services. Hiring and paying substitutes or helpers was not applicable. The worker stated the firm provided her specific instruction related to patient services to be performed. The firm's daily schedule, on its computer system, provided work assignments. The firm's owner (dentist) determined the methods by which assignments were performed and assumed responsibility for problem resolution. The worker's daily routine consisted of 8:30 am to 5:30 pm on Wednesday and Friday; one-hour lunch break provided. If working less than a full-day, her pay was docked. If working more than a full-day, she did not receive additional compensation.

The firm stated it provided the dental office. The worker provided and incurred the unreimbursed expense associated with uniforms, dental loupes, travel, advertising, training, continuing education, license fees, etc. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker a fixed daily rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. It is unknown if the worker incurred economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated the firm provided instruments, gloves, masks, sterilization equipment, cleaning supplies, pens, paper, and malpractice insurance. She provided scrubs. She did not incur expenses in the performance of services for the firm and she did not incur economic loss or financial risk. She did not establish the level of payment for the services provided.

Benefits were not made available to the worker. The work relationship could be terminated by either party without 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 advertised her services to dental practices. The firm represented the worker as a contractor to its customers. Services were performed under the worker's name (as assisting at the firm's office). The work relationship ended when the temporary work was completed. The worker stated she did not advertise. The firm represented her as an employee to its customers. The worker quit due to the firm not withholding taxes from her earnings.

State rules and regulations state, in part, a dentist may delegate to a licensed and registered dental hygienist specific procedures to be performed only on a patient of record and only under the supervision of a dentist. The level of supervision, whether direct, indirect or general, shall be at the discretion of the supervisory dentist. A dental hygienist shall not own or operate an independent practice of dental hygiene.

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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 and by state rules and regulations was required to supervise the worker. 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 daily 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 on-line at [www.irs.gov](http://www.irs.gov); Publication 4341.