

SS-8 Determination—Determination for Public Inspection

Occupation 06AAS.54 Aide/Assistant	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

Facts of Case

The worker initiated the request for a determination of her work status as a Certified Medical Assistant in tax years 2014 through 2016. The firm's business is described as a private medical practice specializing in cosmetic surgery and other aesthetic services. The worker was issued Form W-2 in 2014; however, Form 1099-MISC was issued in tax years 2015 and 2016.

The firm's response was signed by the Medical Director. The firm's business is described as aesthetics and wellness. The worker was hired to perform services as a laser practitioner and also to assist with daily office procedures and patient care.

According to the firm, the worker was trained directly by the laser manufacturing rep and she also attended additional classes; it was noted that she scheduled laser patients on her own. The worker determined the methods to use the perform the assignments using the training protocol from the laser rep. The worker would contact the medical director if unable to resolve any and all disputes. The services were rendered on the firm's premises. The worker was not required to attend, participate, acknowledge or approve of any meetings with the firm. The firm responded that the worker was required to perform the services personally.

The worker responded that she was given specific training and instructions from the firm/medical director and she was sent to a training session for laser safety at the firm's expense. The job assignments were assigned by the firm verbally and via email. The firm determined the methods by which the worker's services were performed and handled any problems or complaints encountered by the worker. The services were rendered at the firm's location from 9 am to 7 pm; she stated that her pay could be docked for a late arrival. She indicated that attendance at staff meetings was required. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm acknowledged that the laser device and an iPad were provided to the worker; and, the worker furnished nothing, she did not lease equipment, space, or a facility, and she did not incur expenses in the performance of her services. The firm indicated the worker was paid piecework. The customer paid a third party and the third party established the level of payment for the services rendered. Calls to the firm to identify the third-party were not returned.

The worker stated the firm provided all medical equipment, supplies, and medications. She indicated that she furnished nothing, did not lease equipment, and did not incur expenses in the performance of the job. She was paid an hourly wage and the customers paid the firm. The worker stated she could be held responsible for damaged/lost equipment and in addition would be required to reimburse the firm for any payment for service not accepted in full (this was in the company's payment policy). The firm established the level of payment for services provided or products sold.

Both parties agreed that there were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The worker stated a confidentiality agreement was required. The worker responded that she worked under the direct supervision of the medical director.

The firm's medical director stated the Form W-2 was issued because the worker was a medical assistant; when she received her laser practitioner certificate she was paid as an Independent Contractor. He acknowledged that she could only perform her services under the supervision of a licensed practitioner, which in this case was him. He stated that less than 10% of her time in 2015 and 2016 was as a Medical Assistant for which she as paid an hourly wage; she was paid an hourly wage for laser practitioner services and paid once a month.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

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.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

Your 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.

We have considered the information provided by both parties regarding this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. 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.

CONCLUSION

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.