

SS-8 Determination—Determination for Public Inspection

Occupation

04FSC.10 Overseer

UILC

Determination:

☒ Employee

☐ Contractor

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 from March 2013 to June 2013 as director of nursing. 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.

The firm's response stated it is a home healthcare agency. The worker was engaged as director of nursing. The worker was an independent contractor as she made her own schedule.

The firm stated it provided the worker in-service and cell training pertaining to the agency. The worker's schedule was determined per patient load. The worker determined the methods by which assignments were performed. The worker and firm administrator were responsible for problem resolution. The firm required the worker to prepare electronic patient files. The worker set her own schedule and was required to be available by phone from 9 am – 5 pm. Services were performed at the firm's premises and patient homes. The firm was responsible for hiring and paying substitutes or helpers. The worker stated she reported directly to the firm's administrator who determined the methods by which assignments were performed and assumed responsibility for problem resolution. The worker was required to provide progress reports regarding clinical daily operations and patient schedule. The worker's routine was 8:30 am – 5 pm. Duties included direct patient care in the field, 75% of the worker's time, and administrative duties related to the development of clinical and quality assurance programs, training new skilled care nurses, and evaluating skilled nurses' performance 25% of her time. She was 100% of the time on-call to address clinical issues. The worker was required to attend various meetings.

The firm provided an in-facility computer and phone. The worker did not incur expenses in performing services for the firm. The firm reimbursed the worker mileage if over 50 miles per day. Customers paid the firm. The firm paid the worker salary for a specific number of patients and piece work. A drawing account for advances was not allowed. The firm did carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated she did not lease equipment, space, or a facility. She did not establish the level of payment for the services provided.

The firm stated the benefit of bonuses was made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did perform similar services for others; the firm's approval was required for her to do so. There was a non-compete agreement between the parties. The worker was not a member of a union and did not advertise. The firm represented the worker as a representative to its customers. The worker was fired due to a conflict of interest. The worker stated she received the benefits of paid vacations, sick pay, paid holidays, and personal days. She did not perform similar services for others. She was engaged full-time and obligated to perform services for the firm. The firm represented her as its director of nurses to its customers. Services were performed under the firm's business name. Both parties agreed the worker was not responsible for soliciting new 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.

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 services performed by the worker were integral to the firm's business operation. The firm provided training and work assignments, ultimately assumed responsibility for problem resolution, and collected customer 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.

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. Based on the salary and piece work rate of pay arrangements and as acknowledged by the firm, the worker did not incur economic loss or financial risk.

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.