

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN Managers/Supervisors	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 January 2017 to May 2019 as an office manager. The firm issued the worker Form 1099-MISC for 2017, 2018, and 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error because the firm determined the worker's hours, pay, and provided training.

The firm's response states it provides mental health services. The work provided by the worker was as an office manager and counseling intern. The worker was requested to perform office duties as well as assistance with counseling services. An independent contractor contract was provided for our review.

The firm states that they provided supervision to the worker as the worker was an intern, and they also provided the worker with training to be a counselor and case manager. The worker scheduled their own job assignments and the firm determined the methods by which job assignments were performed. If the worker encountered problems during their job duties, they were required to contact the firm and jointly work on problem resolution. The worker was required to provide a weekly pay sheet and the firm provided an example. The worker usually worked Monday through Saturday for the firm and worked hours around other jobs. The worker would schedule group counseling sessions which they facilitated and did office work. The worker provided services for the firm both at the firm's premises but sometimes scanned documents at home. The worker did not have to attend any meetings, and there were no penalties. The worker had to perform all services personally. If helpers or substitutes were required, the firm and the worker had to jointly decide who to hire and the firm would pay for the assistants. The worker states that the firm provided training on software and systems provided by the firm. The firm also chose the provider for the counseling training for the worker and paid for their certification. The worker was given a weekly schedule by the firm, and all client appointments were set by the firm. The firm determined the methods by which job assignments were performed and assumed responsibility for problem resolution. The worker had to submit timecards to the firm in addition to reports on clients and their service plans. The worker was responsible for checking in patients, taking payments, answering client questions, and case management for all clients as well as accounting and other office duties. The worker states that all job responsibilities took place at the firm's premises. The worker states that they were required to attend 2 yearly meetings and perform all services personally. If helpers or substitutes were needed, the firm would hire and pay for them.

The firm states that they provided the office supplies for the worker's job and the worker provided the laptop. The worker did not have to lease space, facilities, or equipment. The worker incurred gas expenses and kept track of her expenses. The worker was paid an hourly wage and had access to advances. The customers would pay the firm for all services rendered. The firm did not carry worker's compensation insurance on the worker. The worker did not have any exposure to economic loss or financial risk, and the level of payment for services rendered was outlined in the contract between the worker and the firm. The worker states that the firm provided everything needed for their job duties including the location, advertising, training, supplies and software. The worker states that all business expenses were paid by the firm. The worker states that they were paid an hourly wage with no access to a drawing account for advances. The worker states that the firm paid for the liability insurance and the worker had no financial investment in the firm. The worker states that the firm set the level of payment for all services rendered.

The firm states that they did not provide the worker with any benefits. The worker relationship could be terminated at any time without incurring loss or liability. The firm states that the worker performed similar services for other firms while working for the firm and did not need the firm's approval. The worker was not a member of a union. The worker was advertised on business cards as an intern of the firm, and that was the representation of the worker by the firm to their customers. The work relationship ended when the worker decided that the job was complete and was no longer needed. The worker states that the firm provided professional liability insurance as a benefit. The worker states that they did not perform similar services for any other firm while working for the firm. The worker states that there were no written agreements prohibiting competition between the worker and the firm, but it was agreed upon that working for multiple firms could result in termination. The firm represented the worker as staff on their website, and the worker attached examples of this to demonstrate how they were represented to clients. The work relationship ended when the worker gave 2 weeks of notice and left the firm.

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 of clinical mental health services. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed through the firm's software, and 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, 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 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 worker was represented to clients under the firm's name on business cards and also on the firm's website. 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.