

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

Occupation 05COU Counselors	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 firm is in the business of operating an adoption agency. The worker was engaged as an adoption specialist who worked with the birth mothers. She had received a 2017 Form 1099-MISC for her services; she also received a 2016 Form 1099-MISC as well. There was a written agreement.

According to the worker, the firm provided an employee manual. The worker also shadowed the firm director, i.e. her supervisor, as well. The firm noted only that there was an initial four hour orientation. The worker's assignments were referrals from the firm as well as her actively recruiting new clients through marketing. The firm indicated that it sent out group texts to the contractors. Usually, the first one responding got the client though some assignments were given to specific workers based on expertise or the location. Each party indicated that the other determined the methods by which the assignments were performed but both agreed that the firm would be contacted if any issues or problems arose. Both parties agreed that the worker submitted weekly contact reports and updates. Her hours varied but she typically worked daily. The firm confirmed that the worker set her own hours and schedule which averaged about eighteen hours a week. The worker noted that she worked from the firm's office, her home, hotel rooms, hospitals, doctors' offices but mostly out in the field with the birth mother client. The firm noted that worker worked wherever the client preferred whether at their homes, other community locations or at hospitals. There were monthly staff meetings during which time the firm provided some of the state-required training; however, the firm added that attendance was not mandatory. Both parties agreed that the worker was to personally provide the services though the firm also indicated that the worker could hire and pay any substitutes.

The firm provided the worker with an employee badge, business cards, apartment start-up kits, loaner car seats, food boxes, etc. The firm mentioned that it only provided legal paperwork. The worker supplied a vehicle and notary stamp. The firm added that the worker also supplied a phone, computer, printer and other office supplies. According to the worker, the firm reimbursed for mileage, hotel costs associated with work, printing, faxing expenses and out-of pocket related expenses. The firm disagreed. Both parties agreed that the worker received an hourly rate of pay. The firm indicated that she assumed all professional liability and economic loss. Both agreed that the customer paid the firm. The firm disagreed that they established the level of payment for services but instead indicated that they set the standard rate which could be negotiated.

Both firm and the worker agreed that there were no benefits other than bonuses. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others; the firm did not know. The worker was to respond to intake calls and provide counseling; she handed out cards, networked with hospital personnel and encouraged the birth mother to refer others. She received leads from the agency website, community marketing materials and work of mouth. She would email or text updates to the firm as to status of cases. The relationship has ended.

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## Analysis

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In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. The firm provided a manual, orientation, shadowing and detailed processes for the worker to adhere to. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. It is acknowledged that the worker scheduled her own work time, however, she was required to meet the needs of the firm's birth mother client. In addition, the firm provided information that indicated the worker was to be available at all times to the birth mother, adoptive parents and to the firm's supervisor indicating that the worker's activities were subject to supervision. The worker was required to submit specific reports to the firm such as weekly updates on the status of cases, intake narratives, birth narratives, and attorney summaries. She also was required to submit time sheets, accounting for her activities and hours worked. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. This was understandable as the firm's success was dependent on the worker's activities and therefore the firm needed to monitor case progress. The worker provided her services on a part-time basis but her services were continuous in nature. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, 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. In fact, information provided by the firm indicated that the worker would get paid whether or not the adoption was successfully completed. The worker received an hourly rate of pay and had no other economic risk other than the loss of her compensation. 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. In addition, the worker was reimbursed for expenses incurred on the firm's behalf such as needed hotel stays and out-of-pocket expenses. This was supported by information provided on pay stubs, as well as in the agreement that the firm paid for approved expenses. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

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. There were no benefits other than bonuses and there was a written agreement. The firm's belief 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. The worker was an adoption specialist engaged by the firm's adoption agency. She had filled out an application and met the firm's qualifications. When working for the firm, the worker was not engaged in a separate business venture. While the firm reiterated a few times that the birth mother was the worker's client, information provided by the firm indicated that the worker was to provide services for the birth mother, a client of the firm. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.