

SS-8 Determination—Determination for Public Inspection

Occupation 05COU.3 Counselor	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

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the payer concerning this work relationship. The payer responded to our request for completion of Form SS-8.

From the information provided the payer is a social service non-profit organization providing services to individuals with developmental disabilities. The worker was engaged under a written agreement to provide evaluations and speech therapy services to the payer's clients under an [REDACTED] grant with specified duties such as conducting parent workshops, conducting extra therapy sessions, and creating student materials. The payer did not provide any training or instructions to the worker in regard to her services. The worker received her assignments from the payer's speech department supervisor. The payer states the worker determined how she performed her services. The worker was required to personally perform her services at the payer's premises. The worker was required to notify the payer's program director via the speech supervisor if any problems or complaints arose for their resolution. The worker was required to submit monthly progress notes and individual education plans to the payer for children receiving therapy. The worker's routine was to perform services three (3) days a week. The worker was required to attend monthly department meetings.

The payer provided the work space/room, a color printer, a computer, special education software programs, and laminator to the worker in order to perform her services. The worker incurred no expenses, she was paid at an hourly rate, and she did not have an opportunity to incur a loss as a result of her services. The payer reported the worker's earnings on Forms 1099-MISC.

The worker was not eligible for employee benefits. The worker did not perform similar services for others. The worker did not advertise her services and she performed her services under the payer's name. Either party could terminate the work relationship at any time without either party incurring a liability.

The written agreement between the firm and the worker indicates the worker would be treated as an independent contractor for tax purposes.

Analysis

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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Section 31.3401(c)-1(c) of the regulations states that generally professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others in an independent business or profession in which they offer their services to the public are not employees. However, if a payer has the right to direct and control a professional, he or she is an employee with respect to the services performed under these circumstances.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the payer to directly supervise the services so the control over the worker by the payer is more general. Factors such as integration into the payers organization, the nature of the relationship and the method of pay, and the authority of the payer to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the payer. The need to direct and control a worker and her services should not be confused with the right to direct and control. The worker provided her services on behalf of and under the payer's organization's name rather than an entity of her own. The payer was responsible for the quality of the work performed by the worker and for the satisfaction of their clients and compliance with specifications of the grant. This gave the payer the right to direct and control the worker and her services in order to protect their financial investment, their organization's reputation, and their organization's mission.

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.

The worker did not have an investment in a business related to services performed and she did not have an opportunity to incur a loss as a result of her services. "Profit or loss" implies the use of capital by a person in an independent business of her own. The risk that a worker will not receive payment for 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. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, the payer's 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.

Based on the above analysis, we conclude that the payer 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.