

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

Occupation 05COU.9 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**

The firm offers a wide variety of interventions and supports for children, youth, and families, including behavioral health services, residential services, education, early childhood education, family support services, in-home prevention services, and substance abuse prevention and intervention. The worker was engaged by the firm to provide therapeutic services in the assigned school setting. The firm reported the worker's remuneration on Forms 1099-MISC for school years 2011 through 2014.

The agreement between the parties stated, among other things, that the firm retains the worker as an independent contractor to perform services as a SAP Consultant/Therapist at \$20 per hour, and accordingly, the worker has no authority to act for or on behalf of the firm without the firm's express consent; the worker agrees she is not an employee of the firm and that she is not entitled to workers' compensation; the worker is responsible for her own federal, state, and other taxes arising out of her performance of services; the worker is available to perform consulting services for other entities, and warrants and represents that there is no conflict of interest between her services for the firm and any other entities; the firm neither has nor exercises control or direction over the methods by which the worker performs her services, but the worker agrees that she will perform her services in strict accordance with currently approved methods and practices in her field; the worker will report on the performance of her services to the Department Director and/or supervisor during regularly scheduled performance review meetings; the worker will submit monthly invoices to the firm detailing each and every service performed and time allocated to each and every service; the worker is responsible for all costs, liabilities, and expenses, including travel and business expenses incurred in the performance of her services; both parties may terminate the agreement immediately for any reason; the firm may terminate the agreement immediately for misconduct or breach of the agreement; the worker will promptly communicate and disclose to the firm all materials, records, and documents produced or developed by the worker or coming into her possession during the term of the agreement, they will be the sole property of the firm, and upon the termination of the agreement the worker will deliver same to the firm; all work product produced by the worker will be owned by the firm, and the worker assigns all proprietary rights to the firm; the worker will not assign or transfer any rights or obligations under the agreement with the firm's prior written consent.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. The department director made assignments according to available funding; the worker was free to refuse assignments based on her availability. Generally, the worker was expected to problem-solve; to the extent there were problems with assignments or billing, the worker contacted the program director. The worker maintained client notes and other reports in accordance with [REDACTED] guidelines. She made her own schedule which could vary from day to day or week to week. When meeting with students or parents, the worker generally worked in the school setting; she was free to perform her work, including paperwork, at any location she chose. The worker was required to perform her services personally.

The firm provided the software the worker was required to utilize. The worker provided her own computer, writing instruments, paper, and all supplies necessary to do her work. The school provided the work space. The firm was paid directly for the services provided. The firm did not cover the worker under workers' compensation. It did not make benefits available to the worker. Neither party indicated an investment by the worker in a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation. There is no evidence that the worker advertised her services or maintained a business listing.

---

## Analysis

---

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, the firm'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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience to perform her services, the agreement stated that she participated in regularly scheduled performance review meetings, showing 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 worker was required to generally perform her therapeutic services on the school's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to work at specific places as required. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for the firm on her behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The worker furnished her personal computer, and supplies and materials used in the course of performing her services. 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. According to the agreement between the parties, the firm paid the worker at an hourly rate. Payment by the hour generally points to an employer-employee relationship. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker followed a part-time schedule on a continuing basis. A continuing work relationship, even on a part-time basis, indicates an employer-employee relationship. She performed her services under the firm's name, allowing the firm to fulfill its obligation to the school. 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 mission of providing support services for children, youth, and families. 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 business. The firm did not prohibit the worker from performing similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although the firm did not provide benefits to the worker, both parties retained the right to terminate the work relationship without incurring a liability, a factor indicating an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm 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.

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.