

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

Occupation

Personal Service Providers

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ 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 is seeking a determination of worker classification for services performed as a personal care assistant for the firm from January 2020 until June 2020. The worker received a 1099-NEC from the firm for 2020. The worker feels that they were misclassified by the firm as an independent contractor because the firm set their hours, scheduled the worker, held staff meetings, and dictated how the worker performed their job. There were no written independent contractor agreements between the parties.

The firm states that it is a personal care home. The worker was requested to be a caregiver. The firm classified the worker as an independent contractor because that was the initial agreement upon hiring the worker to perform services. The firm provided the worker's application for employment as well as a daily task schedule.

The firm states that it provided the worker with verbal and written job assignments. The firm owner determined the methods by which job assignments were performed. If the worker encountered any problems or complaints while working, they were required to contact the firm owner for problem resolution. The worker would provide the firm with a daily checklist for each patient. The worker performed services mainly in the afternoon for the firm from 2pm until 9pm, Monday through Thursday, for approximately 3 to 4 days a week. All job duties were performed at the firm's personal care home premises. The worker was required to attend twice monthly meetings with the firm pertaining to job performance. The firm required the worker to personally perform services. Helpers and substitutes were not applicable. The worker states that the firm provided the worker with training videos and in-service training assignments that were continuously provided. The firm's owner assigned the worker shifts sheets for each work shift. The owner of the firm determined how jobs were performed and assumed responsibility for problem resolution. The worker performed services from 2pm until 8pm, taking care of residents, giving medication and food, and providing patients with baths. All services were performed at the firm's premises. The worker attended monthly staff meetings which were mandatory and unpaid. The worker was required to perform services personally. All helpers and substitutes were hired and paid by the firm's owner. The worker never hired or paid anyone.

The firm states that it provided everything for the worker's job duties. The worker did not lease any space, facilities, or equipment. The worker's only expense was transportation to work. The firm paid the worker an hourly wage. The worker did not have access to a drawing account for advances. Customers paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk. The firm established the level of payment for services provided. The worker states that the firm provided gloves, personal protective equipment, and all supplies needed for the worker's job duties. The worker provided nothing and did not lease anything. The worker had no expenses and was paid hourly by the firm. Customers paid the firm for services provided. The worker had no exposure to economic loss or financial risk. The firm's owner established the level of payment for services provided.

The firm states that there were no benefits offered to the worker. The relationship between the parties could be terminated by either party without liability or penalty. The worker did not perform similar services for other firms. The worker was free to provide similar services to other firms as no non-compete agreements existed between the parties. The worker was not a member of a union and did not advertise their services to the public. The worker was represented by the firm as a representative of the firm on the firm's business card. The worker was fired for violating HIPAA laws. The worker states that there were no benefits offered. The worker did not provide similar services to other firms. The worker was not a member of a union and did not advertise services to the public. The worker was represented by the firm as an employee. The work relationship ended when the worker was terminated by the firm.

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## 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, co-adventurer, 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 providing personal care to patients. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed for each patient, 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 firm provided all supplies, materials, and equipment needed for the worker's job duties. 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 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](http://www.irs.gov); Publication 4341.