

SS-8 Determination—Determination for Public Inspection

Occupation 05CSI.46 Companion Sitter	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

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 firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is a home health agency and the worker was engaged to provide care giving services as a certified caregiver. The firm received inquiries from potential clients wanting caregiver services at times the clients specified. The firm states the worker was called to see if she wanted the work. The firm told the worker the schedule the customer wanted and the customer's diagnosis and needs. The firm states this was totally the worker's decision if she wanted to take the job and she could accept or reject any job at any time. The firm states the worker determined how she performed her services and the worker resolved most problems if and when they occurred. The firm states they would assist the worker in these cases on an as needed basis because of their duty to their clients. The worker was required to personally perform her services at the clients' homes. The worker submitted notes of the work she performed. The firm states the worker did not have a daily routine and her routine depended upon what she agreed to do for the client. The worker was not required to attend meetings.

The firm believes the worker was an independent contractor because she went to school and completed a lengthy amount of training including clinical training to become registered as a certified caregiver under their state law. The worker had to pass tests at her school which showed she knew intellectually what to do and how to operate on her own making all the decisions necessary to be a competent provider. The worker also had to demonstrate her competency in the classroom and on patients.

The firm states the worker provided all equipment, supplies and materials in order to perform her services. The firm states the worker also incurred expenses for personal supplies, car insurance, license requirements/continuing education, CPR and First Aid certification, fuel for her vehicle, and registration. The clients paid the firm and the firm paid the worker at an hourly rate. The firm carried workers' compensation on the worker due to their state's requirements. The firm believes the worker could incur a loss due to liability to the person she cared for and for losses to her car.

The firm states the worker performed similar services for others and she was not required to seek their approval in order to do so. Either party could terminate the work relationship at any time without either party incurring a liability.

Analysis

As in this case and 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.

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 firm. 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 firm's business name rather than an entity of her own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and her services in order to protect their financial investment, their business reputation, and their relationship with their clients.

While the firm provided the worker with freedom of action as to when she performed her services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the client and whom did the client pay. In this case, that relationship was between the firm and their clients.

Subcontractors are truly independent of a firm and a firm's business. Some of the characteristics of subcontractors are that they will not consider a firm as their boss, they will have a contract for each job, they will carry their own insurance, they will pay their own helpers and labor costs, they will not have to personally perform their services but have the ability to have anyone they engage perform services since that person would be representing the subcontractors business, and they would have their own business bank account and credit lines. Subcontractors will file tax returns and conduct themselves as real businesses. Subcontractors will dictate what services their business offers and how they process and perform those services, what software it would use, and how much it would charge for those services. We did not find that the worker had this freedom or autonomy. There was no evidence presented and through our thorough research from various sources available to us, found no evidence that the worker operated a business, advertised her services to the public, had obtained a business license or had a business registration in the state which she performed services.

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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or 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. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

While the worker was required to be experienced and have all the necessary training and formal instruction and continuing education credits, this is not considered a significant investment. 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.

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. A continuing relationship between the worker and the firm was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. A continuing relationship indicates that an employer-employee relationship exists. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.