

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

Occupation

05PCP Personal Care 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 firm is a hospital providing massage therapy services through its Hospice program. The worker was engaged by the firm as a licensed massage therapist. The firm reported the worker's remuneration on Forms 1099-MISC through 2016.

The agreement between the parties states, among other things, that the worker will provide such massage therapy services as prescribed by those persons for whom Hospice has assumed responsibility; services are to be performed within the scope and limitations set forth in the Hospice plan of care, and may not be altered in type, scope, or duration by the worker; Hospice RNs are on call 24 hours a day and are available to consult with the worker regarding patients and the prescribed plan of care; following the initial and subsequent therapy visits, the worker will complete Clinical Visit Notes and submit them to Hospice within one week of each visit; the worker will schedule visits in coordination with other disciplines, participate in discussions for the purpose of planning and evaluating patient care, participate in interdisciplinary team care planning as requested, attend in-service programs when appropriate, and provide instruction to the patient/family in appropriate follow-up; the Hospice Manager shall supervise the worker and perform the annual evaluation to be subsequently placed in her personnel file; the worker shall meet the same requirements for supervision, orientation, physical examination, and in-service training as other Hospice personnel, and she will adhere to other applicable Hospice policies; the worker will be responsible for carrying her own malpractice liability insurance and shall indemnify, hold harmless, and defend the hospital for any actions, etc., in connection with the performance of her services performed under this agreement; a pre-affiliation physical within the last six months will be required that is substantially the same as that conducted for the hospital's employees; an initial and annual PPD test for tuberculosis and a criminal background check and drug testing are required; the worker understands she is not covered by workers' compensation and at all times she is acting as an independent contractor and not as an employee; the worker shall bill Hospice noting the patient's name, date of visit, type of service rendered, and fee per visit; Hospice shall pay the worker \$50 per visit as determined by mutual negotiations; and only Hospice may bill the patient or health insurance program. In 2013, the contract changed to state that the Volunteer Coordinator will perform the annual evaluation in a written format to be read, signed, and reviewed by the Hospice Manager and placed in the personnel file.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. The firm provided the worker with her work assignments. It did not control the worker's hours or schedule; it did not require her to devote a certain number of hours to providing services. The worker set her daily routine, schedule, and hours in coordination with other team members. If problems or complaints occurred, the worker contacted the hospital's Volunteer Coordinator or Hospice Manager. The worker performed her services at the patients' residences. She was required to perform her services personally.

The worker provided lotion, hand sanitizer, and gloves. She incurred travel and insurance expenses. The firm did not prohibit the worker from providing similar services for others during the same time period. There is no evidence presented showing the worker advertised her services or maintained a business listing. The firm did not make benefits available to the worker. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the firm terminated the work relationship.

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## 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, it was responsible for resolving any problems or complaints that may have occurred. The worker coordinated her services with the Hospice team and she was required to follow the firm's policies, 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 and ensure its patients' satisfaction with the services. The worker was required to submit reports stating specific criteria. 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. 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. 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. The firm financially controlled the worker by its receipts of monies from the patients, or their insurance companies, for the worker's services and its remuneration to her at the set rate agreed upon by the parties. 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 performed her services on a continuing basis. She wore the firm's badge identifying her as an associate. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a massage therapist were a necessary and integral part of the firm's mission of providing hospice services. 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 worker could have performed 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, it terminated the work relationship without incurring a liability. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. 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.