

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 personal assistance provider agency. The worker was engaged by the firm to provide personal assistance services to the firm's clients. The firm did not withhold taxes from the worker's remuneration in 2016 through 2018.

The firm submitted the agreement between the parties, dated November 21, 2016, stating, among other things, that the worker will perform the services for the firm as an independent contractor; services will be rendered at the specific project identified in the plan of care; the agreement constitutes a contract for personal services and cannot be delegated by the worker to another individual; to the extent necessary, the firm shall work with the worker to coordinate devices to ensure continuity of care for the firm's clients; the agreement shall continue for one year and is renewed annually; the agreement is terminated by either party at any time, with or without cause, effective upon 10 days' written notice; as required by state law, the worker shall remain in compliance with personal and agency policies; the firm shall pay the worker at an hourly rate on a bi-monthly basis; the worker shall be solely responsible for payment of her own expenses, tools, and materials related to each project; the worker represents that she is fully competent, trained, and able to execute each project independently; the worker shall be solely liable for reporting and paying any taxes, contributions, or other assessments; the worker will not participate in any fringe benefit programs or be covered by any workers' compensation policy maintained by the firm; the firm shall not have the right to control or direct the details, manner, or means by which the worker accomplishes the results of the service logs, progress notes, and time sheets in which services are provided; such documentation shall be turned in at the firm's home office every Monday by 12:00 noon via mail, fax, or delivery; documentation not turned in may result in the firm's inability to compensate the worker for her services; if the worker's vehicle is used in the performance of her services, she shall maintain automobile insurance coverage in accordance with state law and provide the firm with proof of coverage; all records, notes, etc., developed during the course of the worker's services for the firm are the property of the firm.

The firm also submitted a letter welcoming workers contracting with the firm and stating that it recently had to retool its entire business structure and delivery protocol in order to continue to operate in the economic climate by letting go of its employee-based business model and hiring independent contractors, meaning workers will not be entitled to fringe benefits including health benefits; while workers will receive more gross monies, they are responsible for paying their own taxes; the manner in which services are to be performed will be determined by the workers subject only to verified training and qualifications required by the state; the firm will conduct compliance audits; and workers will come prepared, trained, and with their own tools to do the job.

Information from the parties supports that if problems or complaints occurred, the worker contacted the firm for resolution. The worker's scheduled hours were dependent on the clients' care plan, and changed and varied every day. The worker performed her services on the firm's clients' premises.

Payments for services were made directly to the firm. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The worker obtained her job through an application process. There is no evidence submitted showing the worker advertised her services or maintained a business listing. The worker terminated the work relationship.

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.

There are similarities between this case and Revenue Ruling 54-616, 1954-2 C.B. 346. In the ruled case, the facts are similar as it applies to expressed or implied consent. Accordingly, the firm's expressed or implied consent enabled its clients to direct and control the worker's services as was necessary to protect its business needs, reputation, and financial investment.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. When the firm engaged, qualified, and placed the worker to perform services under the direction and control of the firm's clients, it was done with the firm's expressed or implied consent. Although the worker exercised independent judgment of her duties according to her training, the firm conducted compliance audits and was responsible for resolving any problems or complaints that may have occurred, 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 submit service logs, progress notes, and time sheets on a weekly basis. 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's schedule was dependent upon the firm's clients. She performed her service on the clients' 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 travel a designated route, to canvass a territory within a certain time, or 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 clients exercised an element of financial control by furnishing the premises in which the worker performed her services. More importantly, the firm financially controlled her via its receipts of monies for services she performed and its remuneration to her at an hourly rate set by the firm. Although the worker furnished supplies and materials, 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. 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 was not engaged in an independent enterprise, but rather the services performed by the worker were performed under the firm's name, enabling the firm to fulfill its contracts with its clients. The worker's services were a necessary and integral part of the firm's business of providing personal assistance 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 owner of the business. These facts show that the firm retained control over the work relationship and services of the worker.

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 of the firm, and not an independent contractor operating a trade or business.