

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

Occupation

05PRW Public Relations Workers

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 human service organization rendering day support habilitation to individuals who are mentally and/or developmentally challenged. The worker was engaged by the firm as a paraprofessional/activities director. The firm did not withhold taxes from the worker's remuneration in 2016 through 2018.

The agreement between the parties states, among other things, the description of services to be provided by the worker to include interacting with the individual/provider/significant others in regard to services; locating and coordinating sources of help; attending IEP meetings and school transition meetings; communicating information to supervisors, case managers, and/or parents; completing all documentation related to treatment plans; implementing goals and recommendations; and making decisions based on training and policies when unsupervised. It further states that the worker is expected to perform her services in a timely and professional manner, and to provide applicable service documentation meeting the service definition, and is Medicaid-billable as required; the firm will pay the worker at an hourly rate, payable monthly, and issue the worker Form 1099-MISC within the guidelines of the law; the parties understand that the worker is an independent contractor and not an employee of the firm; the worker is required to maintain paraprofessional status, including training requirements, and provide the firm with her certifications, education credentials, and resume and/or vita to create a personnel record for the worker and abide by HIPAA and confidentiality rules, regulations, and laws; and the agreement may be terminated at the discretion of either party, or if the worker fails to meet established standard, or the firm's funds are no longer available. The worker submitted a job description to include creating monthly activities calendars, developing age and skill appropriate group activities, securing supplies and resources, leading the execution of the activities, and being an alternate driver for group outings

Information provided by the parties supports that specific instruction on how to work with an individual is given through the individual's individualized habilitation treatment plan that was developed by the individual and his/her treatment team. The firm assigned the worker an individual to work with via the agency's contractual relationship referral process. The worker was matched to the individual via skill/preference/etc. If problems or complaints occurred, the worker contacted the firm's qualified professional, the individual's legal guardian, and/or the individual's case manager for resolution. The worker was required to maintain grid sheets and submit time sheets. The worker's schedule and hours were determined by the treatment plan. She performed services in the community and at the firm's licensed facility. The worker attended meetings. She was required to perform her services personally. If additional personnel were needed, the firm was responsible for hiring and compensating them.

The firm stated that it provided the individualized treatment plans and other documentation. The worker utilized her own car for transportation purposes. As the activities coordinator, the firm reimbursed the worker for supplies upon the worker's submission of receipts. The firm did not cover the worker under workers' compensation. 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 firm did not make general benefits available to the worker. The worker stated she did not provide similar services for others during the same time period. There is no evidence submitted showing the worker advertised her services or maintained a business listing. 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, the firm assigned particular individuals to the worker. She performed her services according to the individual's habilitation plan. The firm ensured the worker was qualified and trained to perform the services. 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 performed her services on the firm's premises and in activities in the community. 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 utilized her personal car for transporting individuals; however, there is no evidence to suggest the worker's car was purchased exclusively for business purposes. Presumably this item was also used by the worker for her personal needs, and therefore, it is not considered a significant business investment. 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 performed her services on a continuing basis. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. The worker performed her services under the firm's name. She was not engaged in an independent enterprise, but rather the services performed by the worker as a paraprofessional and activities director were a necessary and integral part of the firm's mission of providing habilitation 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 firm terminated the work relationship without incurring liability or penalty. 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.

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.