

SS-8 Determination—Determination for Public Inspection

Occupation 06AAS Aides/Assistants	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

The worker initiated the request for a determination of her work status as a physical therapy assistant in tax years 2018 and 2019, for which she received Form 1099-MISC. In this position she follows the plan established by the physical therapist, such as exercises, gait, balance training, functional mobility, and providing home exercises. The worker, under the law, is not able to establish her own practice, as she has to be supervised by a physical therapist and all her documentation must be signed by the physical therapist before submission for payment to the insurance company or Medicare. The worker is not paid by the patient. The firm's business is described as a home health agency providing nursing, physical therapy, and occupational therapy in the patients' homes.

The firm's response was signed by Human Resource. The firm's business was not described. The firm responded the worker provided physical therapy services at the patient's home.

The worker stated after the Register Physical Therapist performs an evaluation, they notify the firm to have the firm add the patient to the worker's case load. The plan of care is established by the physical therapist. Any problems or complaints encountered by the worker were directed to the firm and physical therapist and sometimes she confers with the RN assigned to the case, for resolution. The worker's services are rendered 60% of the time in the patient's home, 20% is drive time, and 20% documenting cases from her home. The worker is required to perform the services personally.

According to the firm the worker receives her job assignments via calls, emails, texts. It is the firm's director of therapy that determines the methods by which the worker's services are performed. Any problems or complaints encountered by the worker are directed to the firm's director of therapy for resolution. The worker is required to provide written visit notes. The services are rendered based on the patient's and worker's schedules.

The worker stated the firm provided patient referrals; and, that she furnished a car, BP cuff, oximeter, thermometer, and iPad. The Registered Physical Therapist or the doctor performs the patient evaluation. The worker did not lease equipment, space, or a facility. Both parties responded that the firm paid the worker piecemeal. The firm was paid by insurance companies and Medicare. The worker was not covered under the firm's workers' compensation insurance policy. The worker was at risk for a financial loss in this work relationship if she were to be involved in a car accident. The worker did not establish level of payment for services provided.

There were no benefits extended to the worker other than for mileage for travel greater than 20 miles for meetings and patient visits. Either party could terminate the work relationship without incurring a liability or penalty. Both parties concur the worker was performing same or similar services for others during the same time frame; but, that the worker was not required to obtain the firm's approval.

The worker provided a copy of the Offer Letter & Employment Agreement, dated 3/2/2018, which provides the following:

- Worker offered position as a 1099 Employee in the capacity of a Physical Therapist Assistant
- Compensation rates: rate per visit; office/in-service/meetings rate; missed visits; mileage rates; areas of coverage
- The employment agreement was contingent upon successful completion of the background check and verification of degrees and certifications
- Responsibilities are outlined in job description (not attached)
- The worker was required to submit documentation within 48 hours per company policy as well as Medicare guidelines

The worker also provided a copy of the firm's Health and Hospice Time Sheet with dates, medical record numbers, client signatures, and total # of visits, each week.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

Payment by the hour, 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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "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.

We have considered the information provided by both parties to this work relationship. In this case, 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 business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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. 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.

CONCLUSION

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.