

SS-8 Determination—Determination for Public Inspection

| | |
|---|---|
| Occupation Medical Practitioners/Scientists/Therapists | 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 "contract clinician" in tax year 2019, for which she received Form 1099-MISC. The firm's business is described as counseling business that hires independently licensed counselors to provide counseling services to clients the firm refers to the worker.

The firm's response, signed by the Director, describes the firm's business as counseling service. The worker provided services as a counselor; treatment planning and delivery of mental health counseling.

The worker stated she was given instructions/orientation by the firm's owner on office policies and how to document services and was provided with an office manual. The worker's job assignments were conveyed via an email from the office coordinator assigning her a client to call and schedule for an Intake Assessment. The worker determined the methods by which she performed the services. Any problems or complaints encountered by the worker were directed to the firm for resolution, and depending on the situation, the firm or the worker would handle the matter. The worker documented notes for the sessions, which were submitted and recorded in firm's Electronic Health Record. The worker's services were rendered Friday afternoons from 1:30pm to 5:30pm and Saturday from 10am to 4pm on the firm's premises using the firm's owner's office. The worker was required to perform the services personally.

According to the firm, HIPPA training, which counselors must have every 2 years, was available if needed and orientation to Therapy Notes, a practice management software. The clients were assigned through referrals from the firm's website or the worker's own advertising. The worker/clinician determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm's director for resolution. The services were rendered according to the worker's schedule on the firm's premises or via telehealth, as determined by worker. The worker was required to perform the services personally.

The firm and worker acknowledged the firm provided office space, furniture, therapy supplies, paper, printer/fax, pens, clipboards, email, electronic health records/practice management software, and business cards. The worker furnished a computer and cell phone. The worker did not lease equipment, space, or a facility. The firm paid the worker an hourly rate per session. The clients paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker stated she was not at risk for a financial loss in this work relationship. The firm noted her risk for possible loss or damage of equipment and the potential legal liability if there was an issue. The firm established the level of payment for services provided.

Both parties concur there were no benefits extended to the worker. Either party could terminate the work relationship; however, the worker noted that if she left before 2 years was completed, the worker would have to pay the firm a designated amount. The worker was not performing same or similar services for others during the same time frame; but, if she did, she would have to obtain the firm's permission. The worker stated the contract did not specifically prohibit competition, however, the firm's owner terminated the work relationship after the worker informed the owner of her intention to open her own business while maintaining the agreement with the firm. The worker indicated the firm provided the worker with business cards with the firm's logo and the worker's profile on the firm's website. The worker's services were rendered under the firm's business name. The worker was expected to maintain a 'Psychology Today' profile, to attend marketing events for the firm, and to provide business cards with firm's logo and information.

Both parties provided a copy of the contract. Excerpts provided the following: The Contracted Clinician will provide clinical counseling for clients assigned to him/her by 'the firm' as well as those that reach out to him/her through other means; compensation was \$XX.00 for insurance and private pay clients. The 'firm' shall provide the Contracted Clinician adequate space to perform the duties expected of an LPC working with a client. All records related to the clients treated by the Contracted Clinician shall belong to and remain the property of 'the firm'. Other Compensation: Half of all no-show client fees (\$ZZ.00); Half of all court related costs as defined in the 'firm's Fee Sheet; All mileage costs related to court subpoenas; 100% of all income from leading a workshop minus a \$45.00 set up fee for registration/payment if posted on the firm's website.

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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work 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.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere.

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.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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.

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.

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

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.

Please see www.irs.gov for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide.

Please go to www.irs.gov/notice for Notice 1155, Disaster Relief is Available from the IRS