

# SS-8 Determination—Determination for Public Inspection

Occupation 06THE 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 firm is in the business of providing behavior consulting offering Applied Behavior Analysis (ABA) services. The worker was a behavior technician who implemented treatment plan objectives, developed strategies to identify deficits and address core skill deficits of clients. She received a Form 1099-MISC for her services in 2015, 2016, and 2017. There was a written, signed agreement.

According to the worker, the firm provided mandatory training including forty hours of ABA training and book work; the firm indicated that the training was optional. The firm gave the worker her work assignments, i.e. clients based on her availability. The worker noted that the firm's scheduler sent out the schedule weekly. The BCBA (Board Certified Behavior Analyst) gave instructions. The firm's clinical consultant provided the objectives but the worker selected the method; the clinical consultant would be contacted if any issues or problems arose. The worker submitted time sheets and client notes. The worker had set scheduled hours either at the child's home or at the firm's clinic. The firm indicated that the worker set her own hours and availability and selected the appropriate location to work. There were meetings but the firm indicated that attendance was not mandatory. The worker noted that she was obligated to watch a training video if she didn't attend the meeting. The firm noted that the worker was required to provide the services personally with only the firm hiring and paying any substitutes.

The firm provided the ipad, computers, craft and reinforcement materials and the workspace. According to the firm, the worker supplied materials, edibles, iphone, and vehicle. The worker noted that she was reimbursed for mileage and any materials purchased for activities if approved by the firm. The worker was paid an hourly rate and had no other economic risk though the firm mentioned possible damage or loss to her cell phone and tablet. The customer paid the firm. The worker did not establish the level of payment for services.

Both the firm and worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. The worker noted that she was listed as a member of the firm's staff on its website. The firm noted that she was a behavior tech consultant. Both agreed that the worker quit.

The written contract was for a Behavior Consultant-Behavior Technician. The worker was to provide technical assistance for behavior analysis services for the firm's clients. Her primary role was program implementation, data collection and other services as approved by the firm. She was to work the necessary hours to fulfill the purpose of the contract as well as to adhere to the firm's policies, rules and regulations. The firm maintained professional liability insurance.

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## Analysis

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In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. There was disagreement between the parties whether or not there was mandatory training. However, when the worker was not working with her assigned clients, there were additional duties which were scheduled for her as outlined in the 'floater' information provided. This included a checklist of activities. The worker did not create the plan of care for the firm's clients, but was engaged to implement the firm's plan. She was instructed to adhere to the firm's policies, rules, and regulation. While it is acknowledged that the worker provided the hours that she was available to work, it was the firm that scheduled her work. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The worker worked at the firm's premises as well as off-site. 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. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's 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.

In addition, the worker provided her services on a continuous basis throughout the time period involved. 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.

Factors that illustrate whether there is 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. It was the firm that had the investment in the facility. The worker received an hourly rate of pay and had no other economic risk. The worker's personal phone and tablet would not be considered a significant investment on which to incur a business loss. 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.

Factors that illustrate how the parties perceive 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 are part of the service recipient's regular business activities. There were no benefits and there was a written agreement. The firm's belief 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. The worker was engaged as a behavior consultant/technician who implemented the firm's objectives regarding their clients. When doing so, the worker was not engaged in an separate business venture. Her services instead were essential to the firm's continuing operations. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.