

**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 an organization that provides individual, family and group counseling. The worker was engaged as a therapist/counselor. She obtained the job by initially working for the firm as an intern. She received a Form 1099-MISC for her services in 2016 and 2017. There was a written agreement but it was not signed.

Both the firm and the worker agreed that the worker had previously been trained during an internship with the firm. The firm assigned clients to the worker for counseling services; the firm indicated that it provided referrals. Each party noted that the other determined the methods by which the assignments were performed. The worker noted that the firm would be contacted if any issues or problems arose; however, the firm noted that it depended on the situation. The worker submitted a billing form and written documentation (clinical notes) weekly for every client encounter. The worker's work routine varied as her schedule was determined by her caseload and clients' schedule as well as by the number of clients. The firm agreed that the worker scheduled her own hours. The worker provided her services at the firm's office, clients' homes, and other community-based locations as needed. There were required meetings. Both parties agreed that the worker was to provide the services personally; only the firm hired and paid any substitutes according to the worker.

Both the firm and the worker agreed that the firm provided the fax, computer, phone, billing services, office supplies and office space. The worker supplied transportation for which she was reimbursed. The worker was paid a percentage of insurance billings; she had risk of vehicle damage, loss of license or malpractice. However, the firm noted that she was paid per client. The clients paid the firm. The firm carried workers' compensation insurance on the worker. The firm noted that the level of payment for services was negotiated.

Both the firm and the 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 was told that the clients belonged to the firm. She requested additional cases when her case workload became too low. The firm provided all leads; the worker would need to report back to the firm if the client would be receiving services. The relationship ended when the worker's position was eliminated.

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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 and mission. The firm trained the worker when she was initially engaged as an intern. So when the worker was engaged by the firm after the internship, she was already familiar with the firm's operations, policies and procedures. The firm gave her work assignments by referring clients to her for counseling. The worker was given considerable latitude in managing her work schedule based on her caseload, the clients' schedule and the number clients assigned. The worker submitted notes and documentation for her sessions with the firm's clients. These remained the property of the firm as the worker was providing her services on behalf of the firm. She worked at the firm's location, their clients' homes or at other community-based locations. 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 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.

Throughout the time period involved, the worker provided the services personally and on a continuous 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. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. In addition, 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. In this case, the firm trained her as an intern and knew the methods she would use to accomplish the expected results.

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. Profit or loss" implies the use of capital by a person in an independent business of his or her own. It was the firm that had the investment in the facilities and equipment. They also provided the billing services and reimbursed the worker for mileage. The worker received a per client fee if they signed up for services, as well as a percentage of amounts billed for her counseling services. The worker had no business risk on which to incur a profit or loss as the opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

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 but unsigned agreement. The firm's belief that the worker would be 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 counselor to provide her services for the firm's operation of providing those services to its clients. When doing so, the worker was not engaged in a separate business venture, nor could she be as the state required that she work in an agency or institution under direct supervision. Only by possessing a specific license would the worker be able to engage in an independent practice. 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 for the entire work relationship 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.