

SS-8 Determination—Determination for Public Inspection

Occupation

06THE Therapists

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 worker initiated the request for a determination of her work status as a psychotherapist in tax years 2017 and 2018, for which she received Form 1099-MISC. The firm's business is described as mental health services and parent education.

The firm's response was signed by the business owner. The firm's business is outpatient counseling and the worker provided services as a clinical therapist.

The worker stated she was given specific training and instructions during the monthly in-service. The work assignments were given by the firm; and, it was the firm that determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker provided her services 25-32 hours per week at the firm's locations. The worker was not required to perform the services personally; any additional personnel were hired by the firm.

According to the firm, specific training and instructions as to changes/updates regarding insurance companies and other payers were given to the worker. The job assignments were clients of the worker and firm. The worker determined the methods by which the worker's services were performed; any problems or complaints encountered by the worker were directed to the mandatory reporting agencies, the firm's clinical supervisor, and the executive director, with the worker responsible for the resolution. The worker's schedule varied; but, the services were performed at the firm's locations. The worker was required to perform the services personally.

The worker indicated the firm provided the office, utilities and Internet, front desk staff, all supplies, copier, furniture, and coffee/tea. Although the worker furnished a computer and some furniture, she did not lease equipment, space, or a facility. The worker's compensation was paid a percentage of the insurance that was billed; the clients/insurance companies paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship. The worker did not establish level of payment for services provided.

The firm responded that the worker was provided with registration packets and forms for compliance. The worker furnished a computer, printer, office furnishings, and supplies. The worker was paid a percentage of what was collected on the worker's behalf was charged to the worker for space used to provide the services. The firm paid the worker a percentage of what was collected on worker's behalf, according to the contract. The customers paid the firm. The firm responded that the worker was at risk for a financial loss in this work relationship due to loss or damage of equipment; and, that the level of payment for services provided was established by insurance companies and payers.

Both parties acknowledged that there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The firm indicated the worker was performing same or similar services for others during the same time frame; the worker disagreed. The firm and worker provided a copy of the Independent Contractor's agreement which addressed the following: counseling and social services to be rendered for at least 15 billable hours per week; worker was to maintain appropriate records relating to all professional services, maintain license and liability insurance; abide by all policies and procedures of the firm; and, the worker was prohibited from soliciting the firm's clients and other staff members for a period of one year within a 50-mile radius.

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.

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

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.