

SS-8 Determination—Determination for Public Inspection

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| Occupation 06THE Registered Behavior Technician | 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 submitted a request for a determination of worker status in regard to services performed for the firm from February 2017 to March 2018 as a registered behavior technician. The work done by the worker included implementing behavior therapy plans, provided by the firm's board-certified behavior analyst (BCBA), on children who have autism. Each plan was uniquely written by the BCBA to suit the needs and deficits of the client served. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states its business provides in-home care to families who have children with autism. Approved and paid for by insurance companies, the usual length of service is 4 - 6 months. Services may be increased if progress is evident. The worker was engaged as a registered behavior technician. Workers typically work for more than one agency. The worker was classified as an independent contractor as she may have worked for other agencies, direct supervision was not supplied, the length of service may have been 4 - 6 months, the worker could quit without notice, future work was neither implied or guaranteed, and the firm provided no materials. The work lasts for as long as the insurance company approves.

The firm stated the worker was required to take a training course at her own expense. A behavior analyst, assigned to the case, notified the worker of an opening (assignment) and if she had interest in working. The insurance company approved appropriate goals to be mastered. The behavior analyst was contacted and assumed responsibility for problem resolution. The insurance company required daily progress reports. The schedule and hours were determined by the worker and child's parent. Work hours ranged from 12 - 25 hours per week. Services were performed at customer locations. Meetings were not required. The firm required the worker to personally perform services. The insurance company/parent ultimately hired substitutes or helpers. The worker stated the firm paid for her 40-hour registered behavior technician training and crisis intervention training and certification. There was also ongoing training provided by the BCBA who supervised her. The firm's BCBA provided work assignments, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. Her schedule was flexible and changed often depending on the need of the client and their family. She generally worked 30 - 35 hours per week. Client locations included home, school, or day care. The firm was responsible for hiring and paying substitute or helpers.

The firm stated it did not provide supplies, equipment, or materials. The worker provided toys. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. Insurance companies paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker did not establish the level of payment for the services provided. It was based on an insurance percentage. The worker stated the firm provided the therapy plan to be implemented, data collection sheets, and picture cards.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker did perform similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. The worker advertised at her own discretion. The firm represented the worker as a contractor to its customers. Services were performed under the firm's business name. The work relationship can end for a variety of reasons, i.e. quit, fired, job completed, contract ended, etc. The worker stated benefits were not provided. She did not perform similar services for others or advertise. The firm represented her as an employee to its customers. The work relationship ended when she resigned.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or verbal 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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 required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the clients served, required the worker to report on daily transactions, and ultimately assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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. In this case, the worker did not invest capital or assume business risks. 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the hourly rate of pay arrangement the worker could not realize a profit or incur a 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. 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.