

SS-8 Determination—Determination for Public InspectionOccupation
06THE TherapistsDetermination:
☒ 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 counselor in tax year 2017, for which she received Form 1099-MISC. The firm's business is described as an agency that provides drug and alcohol treatment through individual and group therapy and case management for drug and alcohol program clients.

The firm's response was signed by the firm's director. The firm is a non-profit, health education and social services organization; and, the worker provided services as a substance abuse counselor.

The worker indicated she was required to attend trainings, seminars, and orientation. The supervisors assigned the clients and assignments and she reported directly to her supervisor. The firm 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 was required to provide monthly progress reports for the federal probation board, timesheets, daily progress and report notes, charts, assessments and a treatment plan for clients at least every 60 days. The scheduled appointments were rendered at the firm's premises. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

According to the firm, the worker was responsible for her own training and was given minimal instructions on agency policy; but, no instructions were given to the worker on how to do the actual work she was assigned. The job assignments were based on factors such as the counselor's availability, willingness to work with a client, and the counselor's demonstrated competency or suitability to counsel a client. The firm determined the methods by which the worker's services were performed. The worker was required to direct any problems to the firm for resolution. The worker was required to complete clinical forms related to treatment of the client and for the purpose of accountability. The worker was assigned cases based on hours and days that counselor was willing to work. The services were rendered on the firm's premises as services were not allowed at outside locations. The worker was required to perform the services personally; no helpers or substitutes are used.

The worker responded that the firm provided a computer, printer, forms, charts, office space, and stationery supplies. The worker furnished her appointment book. She did not lease equipment, space, or a facility. The firm paid the worker an hourly wage; the customers paid the firm. The worker stated she was not covered under the firm's workers' compensation insurance policy. The worker replied she was not at risk for a financial loss in this work relationship and that she did not establish the level of payment for services provided.

The firm acknowledged that the firm provided office space, clinical forms, and computers unless worker elected to use their own laptop. The firm indicated the worker furnished her own reference manuals and educational materials. The worker did not lease equipment, space, or a facility; she was responsible for her requisite training as required by state law, including travel and any related per diem expenses. The firm paid the worker an hourly wage with the customers paying the firm. The worker was covered under the firm's workers' compensation insurance policy. The firm responded that the worker was at risk for a financial loss in this work relationship for damage or loss of any of her reference manuals or educational materials. The firm stated the worker established the level of payment for services provided.

Both parties concur there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The firm terminated the contract.

The firm and worker provided a copy of the Contractor Agreement which indicated the worker was to provide services that would include but not exceed drug and alcohol evaluation and counseling, in individual, group, and family sessions with compensation of \$XX/hour.

The worker provided a copy of the job description: counselor responsible for counseling and case management for drug and alcohol program clients with responsibilities that included individual drug and alcohol counseling, group counseling and group facilitation and coordination of services and case management; accurately record and document on a daily basis all contacts with clients and others on the client's behalf. As well as, copy of treatment protocols, the firm's personnel policies (employment status, benefits, reasons for dismissal), a copy of the worker's probationary evaluations for her first 90 days, and memos to all counselors regarding training requirements policies pertaining to invoicing, clinical documentation, and monthly progress reports.

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.

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.

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.

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.