

**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 an outpatient therapist in tax years 2017 to 2019. She was responsible for providing the most clinical and therapeutic services to children, adolescents, and adults with mental health or substance abuse issues. The firm's business is described as a private practice outpatient therapy.

The firm's response was not entirely legible. Several attempts to contact the firm went unanswered. The firm's business is to provide outpatient therapy services and the worker provided services as an outpatient therapist.

The worker indicated specific training and instructions on case note documentation, medical records training, case staffing meetings, and mandatory staff meetings were provided. The firm required the worker to get credentialed with the firm's insurance provider. The job assignments were determined by the firm's owners when the clients called into the office. The firm determined the methods by which the worker's services were performed; and, any problems or complaints encountered by the worker were directed to the firm for resolution. The reports required from the worker included clinical assessments, treatment plans, client session notes, coordination notes, and discharge notes. The worker's services were rendered Monday through Friday at the firm's business location. The worker was required to attend staff meetings, case staffing, documentation training, and outreach programs and non-attendance impacted her performance evaluation. The worker was required to perform the services personally; and, any additional personnel were hired and paid by the firm.

The firm response indicated there was no specific training and instructions on how to provide therapy services. The job assignments were based on the provider's availability and scope of practice. The worker determined the methods by which the worker's services were performed. The worker was assigned an individual supervisor, with any problems or complaints encountered by the worker being directed to the firm for resolution. The worker was responsible for providing a time sheet for billable services. The worker's services were rendered at the firm's office and based on the worker's availability. The firm held monthly staff meetings and it is unclear as to whether the worker was required to attend. The worker was required to perform the services personally; and, any additional personnel were hired and paid by the firm.

The worker stated the firm provided office space and office furnishings as well as utilities, Internet, printer, printing supplies, intervention supplies, and business cards. The worker furnished a laptop computer, locking file cabinet, desk chair, intervention supplies, lamp, and decorations and, she was required to obtain worker's liability insurance. The worker did not lease equipment, space, or a facility. The firm paid the worker 50% of the payment amount per session; the clients paid the firm. The worker was unable to pursue other opportunities due to a non-compete clause in the agreement. The firm determined a 50/50 split between the firm and the worker for the clients' payment amount per session.

The firm's response indicated the firm provided office space; and, the worker furnished furniture and a laptop computer. The worker did lease equipment, space, or a facility. The worker was paid 50% of the services billed. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker was at risk for a financial loss in this work relationship for loss or damage to her personal computer and materials. The worker did not establish level of payment for services provided.

Both parties acknowledge there were no benefits extended to the worker. The firm indicated that either party could terminate the work relationship without incurring a liability or penalty. The worker responded that only the firm could terminate the work relationship. The worker was not performing same or similar services for others during the same time frame due to the non-compete clause in the contract whereby she could not provide services within a ten-mile radius. The worker stated the firm represented her as an associate/employee with the worker's services rendered under the firm's name. The worker was assigned by the clinical supervisor/firm owner to engage in community outreach and the worker was evaluated on marketing, networking, and outreach in her annual evaluation. The firm assigned and provided the clients.

Both parties provided a copy of the position description for the outpatient therapist position which provides in part the the following: the worker was under the direction and supervision of the Clinical Supervisor; the duties and responsibilities of the position to deliver services based on the client's issues and provide therapeutic interventions; the requirements of the position such as availability and flexibility and thorough knowledge of psychological theories and principals; and the necessary educational qualifications and licensing as well as good communication skills.

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## Analysis

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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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work 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.

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

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 [www.irs.gov](http://www.irs.gov) for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide.