

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 worker submitted a request for a determination of worker status in regard to services performed for the firm from April 2018 to currently as a licensed professional therapist. The firm issued the worker Form 1099-MISC for 2018 and 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. The worker provided copies of email exchanges mentioning required meetings, annual reviews, agendas, and payroll transactions that reflected the manner in which the worker was paid by the firm. The worker believes they were misclassified because they were required to attend meetings and the firm would withhold pay from the worker if work and reports were not provided within a specific time frame.

The firm's response states it is a medical facility providing psychotherapeutic treatment to the general public. The work provided by the worker was that of a contracted therapist. The worker was requested to provide treatment services to the firm's clients. The firm did not provide supervision or direction. A contracting agreement was provided for our review. The firm believes that the worker was an independent contractor because the work provided by the worker was historically classified as an independent contractor by the firm, the worker faces loss if payment for their services is uncollectable, the worker pays various expenses related to their licensing and liability insurance, and there were no restrictions on where the services could be provided by the worker.

The firm states that the worker received general onboarding training on the firm's systems. The firm states that the worker received job assignments when the firm would make names available from which the worker would choose in order to provide services. The firm states that the worker would exercise professional discretion in determining how best to perform work assignments. If problems arose during job duties, the worker was required to contact the firm's clinical director or director of human resources. The firm required the worker to provide medical reports as required by insurance, federal and state law. The firm states that the worker would set their own appointments with patients and make their own hours at their discretion. The worker provided services at the firm's premises. The worker was required to attend onboarding training and education when they first started working for the firm. There were also mandatory meetings on a monthly and quarterly basis. The penalty for not attending these meetings was suspension or termination. The worker was required to provide services personally. As the worker was a licensed professional, helpers and substitutes are not applicable to the work relationship. The worker states that there were yearly required unpaid trainings. The worker states that the firm's site assigned tasks to the worker, and the firm's clinical supervisor determined the methods by which job assignments were performed. The worker states that they were required to provide case notes and treatment plans to the firm. The worker performed services during the firm's business hours where a receptionist would check in clients for the worker. The worker also performed services after hours and would sometimes be responsible for locking up and closing the office. The worker states that they were required to attend monthly meetings and they provided email evidence of these meeting reminders. The worker also provided meeting agendas as supporting documentation of these required meetings.

The firm states that they provided the worker with an office location and administrative expenses, whereas the worker was responsible for gas expenses for travel to work, their own personal laptop, and their own personal licensing fees and liability insurance costs. The worker did not have to lease space, facilities, or equipment. The worker would receive a percentage of revenues collected by the firm after the worker provides services and did not have access to a drawing account for advances. The customer would pay the firm and the firm would set the level of payment for all services rendered. The firm did not carry worker's compensation insurance on the worker. The worker states that they were provided an office and a key to the office, fax, telephone, and office utilities. The worker incurred the expense of a laptop and associated laptop repairs. The financial risk that the worker would be exposed to would be clients not showing up for their appointments and therefore the worker would lose pay because services were not rendered.

The firm states that they did not offer the worker any benefits. If the work relationship was to end, both parties would do their best to try to collect any outstanding balances for services rendered. The firm states that the worker was allowed to perform similar services for other firms without requiring approval from the firm and offered a copy of their contract agreement to demonstrate this. The firm states that the worker was allowed to advertise services to the public at their own discretion. The worker states that they represented the worker to clients as an outpatient contractual therapist. The worker states that if the work relationship was to end, they would still be responsible for completing case notes on services rendered or they would risk not being paid by the firm. The worker was not a member of a union. The worker states that the firm was responsible for advertising services. The worker states that they were represented as a therapist under the firm name. The worker still works at the firm's location and the work relationship has not ended. The worker states that the firm provided the worker with clients and the worker did not prospect clients on their own. The worker was subject to annual reviews and also received emails from the firm stating when they would be assigned clients by the firm.

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 customers served, required the worker to report on services performed, and assumed responsibility for problem resolution. The firm also required the worker to attend meetings and trainings. 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, day, 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. Based on the pay arrangement of a percentage split with the firm of revenues collected, 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. 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.