

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 submitted a request for a determination of worker status in regard to services performed for the firm from February 2018 to September 2018 as a therapist. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error because the firm exercised control over the worker's job duties, set the work hour window for the worker, and the clients were the property of the firm. The worker provided a copy of their contract between the firm and the worker as well as a determination issued previously regarding their employment status.

The firm's response states it is a mental health clinic. The work provided by the worker was therapy services. The worker was requested to provide therapy services for the adult and children clients of the firm. The firm did not provide supervision or direction. The firm believed the worker is an independent contractor because they signed an independent contractor agreement with the firm, set their own hours, was not offered benefits, and was responsible for their own licensing expenses.

The firm states that the worker received no training or instruction and that they set their own schedule, made their own appointments, and canceled their own appointments. The firm states that the worker had outside referrals from a previous employer and also accepted referrals from the firm's clinic. The firm states that the worker determined the methods by which job assignments were performed and assumed responsibility for problem resolution. The worker would complete diagnostic assessments and write therapy notes after each client visit. The firm states that the worker had a part time schedule working on their own schedule. The firm states that the worker performed all services personally at the firm's clinic. The worker was not required to attend any meetings. The firm states that helpers or substitutes were not applicable to this work situation. The worker states that the firm made phone calls and scheduled patients on behalf of the worker and that the worker did not have the ability to bill under their own name or answer phone calls. The worker states that they received hand-written notes for the day of the job assignments. The worker states that the firm's office manager determined the methods by which job assignments were performed as well as address all problem resolution. The worker was required to turn in diagnostic assessment reports to the firm. The worker states that their schedule varied but averaged about 25 hours weekly, and that they were told by the firm to be available between 9a.m. and 5p.m. The worker states that they were required to perform all services at the firm's premises and that no meetings were required. The worker was required to use the firm's "black book" and nothing digital. The worker states that they were required to perform all services personally and could not hire additional help.

The firm states that they provided the worker with the office space, furniture, a landline telephone, paper and a computer. The worker was responsible for providing books and computer supplies. The worker did not have to lease space, facilities, or equipment. The worker was responsible for the expenses of liability and malpractice insurance as well as their licensing fees. The worker received a commission based upon what they brought into the firm and did not have access to a drawing account for advances. The customer would pay the firm for all services rendered. The firm did not carry worker's compensation insurance on the worker, and the worker did not have any exposure to economic loss or financial risk. The firm states that contracts between the firm and insurance companies set the level of payment for services rendered. The worker states that the firm provided all necessary materials, supplies, and equipment for the job duties and the worker did not have to provide anything. The worker states that they received a percentage of the fees they brought in and did not have any exposure to economic loss or financial risk during their job duties.

The firm states that the worker did not have any benefits offered to them as they set their own schedule. The relationship between the parties could be terminated at any time without loss or liability. The firm states that the worker did not perform similar services for any other firm at the time they worked for the firm. There were no agreements prohibiting competition between the firm and the worker. The worker did not advertise their services to the public. The firm states that they represented the worker as a therapist to their clients. The work relationship was terminated when the worker was fired due to misconduct. The worker states that there were no benefits offered to them. The worker states that the firm would have to provide the percentage of fees due to the worker upon termination of employment. The worker was not a member of a union. The worker did not perform similar services for any other firm during the work relationship. The worker states that the firm did their own advertising, and that they were represented under the firm's name on business cards. The worker states that all work done became the property of the firm. The worker states that they were terminated without notice prior to the work contract ending. The worker provided a copy of the contract that was signed by both the firm and the worker regarding this notice as well as job duties and other guidelines for the worker.

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 through diagnostic assessments, and 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, 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 firm provided office space and equipment as well as landline communication and took payments directly from customers. 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 percentage 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.