

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 his work status as a Physical Therapy Assistant in tax year 2019, for which he received Form 1099-MISC. The firm's business is described as physical and occupational therapies in an outpatient setting.

The firm's response, signed by the president, indicates the firm's business is outpatient physical and occupational therapy. The worker provided services as a physical therapist and patient care. As a physical therapist assistant, he would execute the treatment plan under the supervision of the clinic therapist/supervisor.

The worker indicated the firm provided specific training and instructions in aquatic therapy techniques. A supervisor evaluates the patients and sends the patient to the worker for treatment under supervision; the supervisor who must sign off on the work and billing completed. 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's services were performed for the firm in the firm's location for set hours (7:30 am to 7 pm) on pre-determined days. 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 given training and instructions as to Physician-specific protocols and software/documentation. The job assignments were decided by the clinic supervisor. The worker determined the methods by which the worker's services were performed. He directed any problems or complaints to the firm; but, resolution was the responsibility of the worker. The worker's services were rendered at the firm's business location. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm and worker acknowledged the firm provided the location, pool, all equipment, and computer; and, the worker furnished nothing. The worker did not lease equipment, space, or a facility. There was a verbal agreement that he would be paid an hourly rate every two weeks. The provided copies of 'invoices' from the worker which appear to be the dates (generally 6 days), hours worked (average 11 hours per day), and calculated at the hourly rate. The firm stated the worker's payment was not dependent upon the firm billing the insurance companies. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship. The firm stated the worker established the level of payment for services provided or products sold; the worker disagreed.

The worker indicated the benefits extended to him were vacation, paid sick days, and paid holidays. Both parties concur that either party could terminate the work relationship without incurring a liability or penalty and the worker was performing same or similar services for others during the same time frame. They agree the worker quit.

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.

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.

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.

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

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 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.