

**SS-8 Determination—Determination for Public Inspection**

Occupation

06THE Physical Therapist

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 is seeking a determination of worker classification for services performed as a physical therapist for the firm from April 2019 until December 2019. The worker received a 1099-MISC for 2019. The worker provided a copy of their 8919 and feels they were misclassified as an independent contractor.

The firm states that it provides rehab services and in-home physical therapy. The worker was requested to provide physical therapy to clients on a contract basis. The firm believes that the worker was an independent contractor because the worker was able to use their own tools, choose what jobs to take, and could work outside of the contract. The firm attached a written agreement between the parties.

The firm states that they did not provide the worker with any training or instruction on their job duties. The firm states that the worker determined the methods by which jobs were performed. However, this is contradictory to the agreement between the parties that specifically states that "contractor agrees that all are patients admitted to the agency and the agency will direct, supervise, evaluate, and coordinate care for those patients". The worker was required to contact the firm for problem resolution if they experienced any on the job problems. The worker was required to provide the firm with an invoice for services performed, and the firm provided an example. The worker performed services at customer locations. There were no meetings required of the worker. The worker was required by the firm to personally perform services. Helpers and substitutes were not applicable to the job situation. The worker states that the firm trained the worker on standard precautions, HIPAA privacy rules, and how to use the documentation site. The worker received job assignments through text messages and a patient documentation website the firm used. The contract between the parties states that the worker was required to perform evaluations within 48 hours of receiving assigned patients from the firm's physician orders. The worker states that the firm's supervisor assumed responsibility for problem resolution. The worker was required to provide the firm with reports on missed visits, patient discharges, and patient requests. The worker would contact the patient and schedule a visit for physical therapy. The worker's hours were determined by the physical therapist. Per the agreement the firm attached, the worker was required to notify and coordinate the patient schedule with the firm. The worker performed services at each customer's home for 30 minutes to one hour at a time. There were no meetings required of the worker, and the worker was required to personally perform services. The firm was responsible for hiring and paying helpers needed. The worker was required to seek the firm's approval before hiring any helpers, and the firm would reimburse the worker for any helpers needed.

The firm states that they did not provide anything for the worker's job duties. The worker did not lease any space, facilities, or equipment. The worker did not incur any expenses during the job duties. The worker was paid on a piecework basis with no access to a drawing account for advances. Customers paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The firm states that the worker did not establish the level of payment for services provided. The worker states that the firm provided nothing for the worker's job. The worker provided gloves, a medical kit for checking vitals, therapy bands, and physical therapy balls. The worker's expenses were related to car and transportation, personal protective equipment, and therapy kits. The worker was paid on a piecework basis per therapy visit. The contract between the parties states that the worker was paid bi-monthly dependent upon all paperwork being received by the firm. The worker did not have any exposure to economic loss or financial risk during their job duties. The worker did not set the level of payment for services provided by the worker.

The firm states that there were no benefits offered to the worker. The relationship between the parties could be terminated by either party without liability or penalty. The worker did perform services for other firms during the work relationship. The firm states that there were no non-compete agreements in place between the parties. However, evidence in the contract between the parties shows that such an agreement was in place. The worker was not a member of a union. The firm does not state how the worker was represented by the firm or the status of the work relationship. The worker states that they did not perform similar services for other firms during the work relationship. The worker states that they were not a member of a union and did not advertise their services to the public. The worker states that they were represented by the firm as a contractor performing services under the firm's name.

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## 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, co-adventurer, 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 of providing physical therapy services to the firm's clients. 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. 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 piecework pay arrangement and non-compete clause evident in the contract between the parties, 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](http://www.irs.gov); Publication 4341.