

SS-8 Determination—Determination for Public Inspection

Occupation Medical Practitioners/Scientists/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 is seeking a determination of worker classification for services performed as an assessor/therapist for the firm from February 2020 until December 2020. The worker received a 1099-NEC from the firm for 2020. The worker states that they were misclassified as an independent contractor by the firm because the firm had extensive control over the worker's hours, assignments, schedules, and methods. The firm required the worker to wear a name badge with the firm's name, the worker's job duties were integral to the firm's business, and the worker was represented on the firm's website as a member of staff. The worker was also required to tell clients that they were employed by the firm, the firm provided all supplies needed, and the worker was required to personally perform services. The firm also provided the worker with liability insurance. The worker provided an employee self-assessment, a picture of their employee badge, and a scope of services overview.

The firm states that it contracts with DFCS to provide transportation to children, visitation supervision, and paraprofessional services. The worker was requested to provide paraprofessional, therapist, and assessor services to the firm's clients. The firm classified the worker as an independent contractor because the position was advertised as such, the worker could accept or decline assignments, the worker was required to provide certain supplies and equipment, and the firm did not withhold taxes or provide the worker with any benefits. The firm provided a copy of an unsigned contract between the parties.

The firm states that DFCS required the worker to complete 6 online courses. The firm provided orientation and expectations to the worker. The firm would receive job assignments from DFCS and would then post assignments in a group text. The worker could accept or decline the assignment. DFCS determined the methods by which job assignments were performed. If the worker encountered any problems or complaints while working, they were required to contact either the DFCS case manager or the firm's supervisor for problem resolution. The worker was required to provide the firm with notes on what they did with each child's case and their mileage log. There were no set hours or routine. The worker could accept or decline jobs and would follow the requests of the DFCS case assignment. Most work performed by the worker was performed in the community or at the firm's office for supervision of visitation. There were no meetings required. The worker was required to perform services personally. Helpers and substitutes were not applicable. The worker states that they were required to perform services as instructed and could face a reprimand if they deviated from the instructions given by the firm. Cases were sent out by the firm owner to staff and distributed on a first come, first serve basis. The firm determined the methods by which job duties were performed. The firm's CEO assumed responsibility for problem resolution. Each case was documented on a system, and the worker was required to update the cases for which they performed services. The worker would typically transport foster kids to have visits with their biological parents, or they would provide behavioral aid services by monitoring children until placements were found. The worker performed services sometimes at the firm's office, at the DFCS office, or at hotels. The worker was required to attend training and instructional meetings and to provide services personally. The firm was responsible for hiring and paying all helpers needed.

The firm states that they did not provide anything, and the worker provided a computer, phone, car, auto insurance, paper, and pens. The worker did not lease anything. There were no job-related expenses incurred by the worker. However, if the worker bought the client food or other items, DFCS would reimburse the worker with a receipt. DFCS also paid for mileage for the worker. The worker was paid by the services provided and the length of time they took. The worker did not have access to a drawing account for advances. The firm did not carry worker's compensation insurance on the worker. The worker experienced no economic loss or financial risk exposure. The DFCS had a set rate that was paid to the firm, and the firm and the worker had a negotiated rate for services performed. The worker states that the firm provided a computer, software, office supplies, and office space. The worker provided and leased nothing. The worker's expenses included gas, a laptop for documentation, and food and clothes for clients. The firm reimbursed the worker for food, clothes, or toiletries purchased for kids in need. The worker was paid an hourly wage and mileage. DFCS paid the firm for services provided by the worker. The firm received pay from the state, and the worker received a portion of this pay from the firm.

The firm states that the relationship between the parties could be terminated by either party without liability or penalty. The worker performed similar services for other firms and did not need approval from the firm. There were no non-compete agreements in place between the parties. The worker was not a member of a union and did not advertise their services to the public. The worker was represented by the firm as a contractor/assessor/therapist/paraprofessional of the firm. The worker was no longer assigned any further assignments by the firm, so the work relationship ended as a result. The worker states that the firm provided liability insurance for the worker. The worker did not provide similar services for other firms. The worker advertised on behalf of the firm on business cards. The worker was represented by the firm as an employee and team member performing services under the firm's name. The firm stopped paying and giving work to the employee.

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. 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 hourly rate of 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 worker was represented by the firm on their website as a member of staff and required the worker to perform services while wearing a name badge identifying them as an employee of the firm. 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.