

SS-8 Determination—Determination for Public Inspection

Occupation 06THE.19 THERAPIST	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 October 2012 to August 2015 as a habilitative interventionist. The work done by the worker included providing behavioral intervention supports for families of children with developmental disabilities. The worker was a full-time employee with the firm and he was asked/expected to take on additional work as a habilitative interventionist on a contract basis. The worker remained employed full-time while completing the contract work. The firm issued the worker Form W-2 and Form 1099-MISC for the years in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response stated its business is to provide therapy for children that are developmentally disabled. This occurs in the home, community, and/or school. The worker was originally employed by the firm in 2010. From July to September 2012, the worker contracted out of his home to write developmental assessments. The template for these assessments is based on state law governing the firm's programs. The assessments were written on the worker's own time and at his own expense. The firm reimbursed him per assessment. The worker continued to be employed by the firm and ultimately obtained the title of vocational director. In April 2013, the worker contracted as a habilitative interventionist. The program was new with the state and the worker desired to work after his regular hours were completed. The worker was interviewed by a parent and chosen to work with the child. The worker arranged his schedule with the parent, provided his own supplies, and was responsible for his certifications, trainings, etc. The firm provided the worker template forms for billing and evaluations which were based on state law. Services were performed under a signed agreement.

The firm stated it provided forms and templates as required by state law. The worker was responsible for following state law. Parents contact the firm and the firm sets up interviews with its available workers. Parents choose the worker. State law determines the methods by which assignments are performed. If problems or complaints arise, the worker tries to work it out with the family or client first. If unsuccessful, the firm is contacted for resolution. Reports were required by state law; meetings were not required. The worker's routine was based on what he arranged with each client and what the state had authorized for each client. Services were performed in the client's home and community. The firm required the worker to personally perform services. The worker was responsible for hiring substitutes or helpers. The firm paid substitutes or helpers based on billable hours. The worker stated the firm provided weekly trainings and required the worker to attend meetings as scheduled. All work assignments were given through the firm, via the clinical supervisor. The firm determined the methods by which assignments were performed. Problems were to be referred to the clinical supervisor or director, who would resolve the issue unless the worker could resolve it. Reports included daily documentation of services, time cards, weekly meetings, and bi-annual data reviews. The worker's routine consisted of reporting to the client's home and providing services as prescribed by the firm. The worker would collect data while services were delivered and turn the data into the firm each week, along with a time card. Nearly all services were provided at the client's home. The firm was responsible for hiring and paying substitutes or helpers as the worker could not hire.

The firm stated it did not provide supplies, equipment, or materials. The worker provided his car, computer, office equipment, office supplies, etc. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense of driving, training, certification, etc. The firm was paid for services performed. The firm paid the worker a billable unit; a drawing account for advances was not allowed. The firm carried workers' compensation insurance on the worker. If the worker lost his clients, he lost his investment in equipment, supplies, car, etc. The worker would also lose his investment in ongoing training and certifications. The worker stated the firm paid him an hourly rate of pay. The worker did not incur economic loss or financial risk. The firm established the level of payment for the services provided.

The firm stated benefits were not made available to the worker. The work relationship could not be terminated by either party without incurring liability or penalty as a 30-day notice was required. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. Copies of completed reports were retained in the firm's client files; originals were turned into the state for approval. The firm represented the worker as a contract worker to its customers. The worker stated services were performed on behalf of the firm. The worker terminated the arrangement by choice when he changed careers.

The written agreement states, in part, the firm was responsible for providing general administrative direction to the worker in providing services; orienting the worker in the firm's policies and procedures pursuant to record keeping, reports to complete, and policies impacting the provision of care; informing the worker of any changes in the rules and regulations relating to the care of clients; providing workers' compensation insurance; providing professional liability insurance; obtaining 12-hours of documented training yearly. The firm would pay the worker an hourly rate of pay. The worker would operate in compliance with the professional code of ethics and the code of ethics outlined by the firm, and in compliance with mandatory reporting laws as specified by state code. The worker agreed to adhere to all of the firm's standards, policies, and procedures.

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, the firm's statement that the worker was an independent contractor pursuant to a written 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.

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. In this case, the firm required the worker to adhere to its standards, policies, and procedures. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the clients served, required the worker to report on daily transactions, and ultimately 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, 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. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised independent 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.