

SS-8 Determination—Determination for Public Inspection

Occupation 06THE.20 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**

Information provided indicated the firm provides on line occupational therapists to their clients. The worker had been retained as an Occupational Therapist. The worker performed services for the firm for tax years 2013 through 2015. The firm reports the income on Form 1099-MISC. The workers are licensed therapists, therefore training, or instruction on how to perform their services, is not required. The firm gives assignments to the workers according to the schedule they submit. Services are to be performed personally. The firm provides access to the online portal to deliver services. The worker provides her own computer and internet access. The worker is paid by the hour, plus bonuses. The client's pay the firm. The worker would have to submit SOAP (Subjective/objective/Assessment/Plan) notes following each therapy session, per client. She was not required to attend PL hosted meetings/conference calls. She may have been asked to attend a student-client's Individualized Education Program (IEP) meeting, which is convened and run by the school. Attendance at IEP meetings is also an OP professional standard of conduct, not a unique PL requirement. The worker was required to submit an invoice for her time.

The firm provided the one page independent contract agreement. They also provided the independent contract packet, given to workers. It states the worker would be given a firm e-mail address. The worker was to register to utilize the firm's Litmos, SPEDinsigt, OPS and Yammer systems. The packet provided an onboarding checklist of the documents required by the firm. It states they are independent contractors, they must read through the packet on the firm's administrative policies regarding absences, time off and invoicing requirements. The worker would report to a clinical lead if she had any questions. They asked that they get started on cross-licensing with other states, in order to meet assignment needs. Please start that process ASAP.

The policies stated taking time off when school is in session is strongly discouraged. Requests needed to be in 30 days in advance. They were to contact the Clinical Consultant in case of emergencies.

It states "As a PresenceLearning Clinician you are an independent contractor, their payment system is such as if you ran a private practice, they were one of their clients." They must submit an invoice which would be paid in thirty days. Most clinicians prefer direct deposit. Once they have been granted access to the platform, they will also have access to the invoicing tab referred in the update given.

The worker provided a copy of the entire 6 page contract agreement. It stated if the firm or the school cancels a session at least 24 hours, it will be considered canceled with advance notice, and payment for the session will not be paid, until it is made up. If less than 24 hour notice, the worker will be paid for the session. If the contractor cancelled, they have 30 days to make it up. The worker is to submit in writing for authorization for any business expenses to be reimbursed by the firm.

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The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities

Analysis

Therefore, your 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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The worker indicated as her role of lead clinician she was required to work 30 hours per week and be available 5 days per week. Therapy schedules were determined with the firm's client schools schedules.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. 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.

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, 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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

CONCLUSION

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 for services performed as an occupational therapist and lead clinician, and not an independent contractor operating a trade or business. The worker had been retained by the firm and represented as a Presence Learning Clinician, under the firm's business name. The worker was required to follow the firm's rules and regulations, utilizing the software programs given by the firm. The firm obtained the various clients, and determined the work assignments. The worker was paid by the hour, with bonuses, and was required to submit an invoice via the firm's software programs. The contract held a non-compete clause. The firm had indicated the worker owned her own company Global Therapy Consultants. According to Ohio Secretary of State and the website information this company was not established until 2016, after the work relationship had ended. The 1099-MISC documents were issued to the worker, not to a business or business entity. As the technology age advances, more and more services are able to be performed/provided virtually or can telework at home. This does not mean the worker is not an employee of the firm who advertises, charges and collects for those services.