

SS-8 Determination—Determination for Public Inspection

Occupation 06THE.23 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 indicates the firm deals in sports medicine and therapy. The firm stated she is an assistant physical therapist. they also stated she started as a secretary for the firm. Documentation shows she was issued Form s 1099-MISC and Form W-2 for wages received. The firm stated she was an employee, because all deductions were made to her. The firm provided a copy of the work agreement, which stated her schedule was to be Monday through Friday form 8 – 5. She was given paid holidays, sick pay, personal days and bonuses. The firm stated they offered instruction verbally and in writing on how to treat patients in their therapy. (the firm provided a list of the responsibilities of the position). The worker was required to provide daily notes per patient, a sample was also provided. The firm indicated in her first year she performed services as a secretary, then she ascended to Assistant Physical Therapist, assisting two patients per hour. All services were performed on the firm premises. She was required to perform her services personally. The firm hired and paid all workers. The firm indicated they provided all equipment and supplies. The worker was paid on salary, then the last ten months she was paid as a contractor. The firm indicated the customer paid the firm. The firm indicated she received unemployment. The firm indicated she did perform similar services for others, but provided no evidence to support this. The firm indicated they presented her as a PTA and work was performed under the firm’s business name. The firm stated the worker abandoned her position, she was then terminated. A copy of the termination letter was provided.

The worker has performed services as a physical Therapist assistant since 2012. The worker has received both W-2 and 1099 pay documents throughout her work relationship. The worker indicated instructions were given by the owner /administrator Mrs. Morales. She was required to complete patient medical forms for every treatment given. She agreed her schedule was eight am to five pm. Services were performed on the firm premises, utilizing the firm’s equipment and supplies. The worker indicated she provided her own uniform. She was paid by the hour. The patient’s paid the firm. The worker indicated she was represented as an employee of the firm. She stated she was fired.

Analysis

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, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

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.

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. The firm stated she was provided with instructions and training. 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. 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. The worker was required to complete patient assessment reports.

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. The firm has indicated they provided all equipment, materials and supplies. The worker was paid either a salary or by the hour, which indicates no opportunity for profit or loss. The clients paid the firm for the services received.

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, and not an independent contractor operating a trade or business. Whether the services were as a secretary for the firm, or in her position as a message therapist. All services were performed under the direction and control via instructions and training of the firm. She had a set schedule, paid vacations, sick pay, paid holidays and bonuses. They had an employment contract, not an independent contract agreement. (even if it had been an IC agreement, the firm maintained direction and control and would have been invalid.) Furthermore the worker had to complete a three month probationary period, another indication of an employer/employee work relationship.