

SS-8 Determination—Determination for Public Inspection

Occupation

06THE.24 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 firm is in the business of providing home-based applied behavior analysis therapy for children. The worker was a behavioral therapist/technician who provided services to the firm's clients in their homes, school, church, or in the communities. She received a Form 1099-MISC for her services in 2013 and 2014. There was a written agreement.

The worker noted that she received hands-on training with the clients. The firm confirmed that the treating provider, a Board Certified Behavior Analyst, would meet with the worker to provide details of the client's treatment plan and the best practices to implement the therapy. The scheduling of work assignments/clients would be prepared monthly by the firm and would be determined by the availability of clients and worker. The firm noted that the worker could accept or decline the work. Both parties indicated that there were ABA (applied behavior analysis) standards to adhere to. The worker noted that she would contact her supervisor if any issues or problems arose; the firm agreed that contact would be with the treating provider or the firm. Both also agreed that daily session notes were submitted by the worker; the firm noted that the worker also submitted a bi-monthly invoice for services. The worker's work routine varied dependent on the client and their availability for treatment sessions as well as the acceptance of the worker to provide the services. All of the treatments were performed at the client's location. There were monthly meetings to attend. Both also agreed that the worker was to provide the services personally; the firm would hire and pay any substitute staff members.

Both the firm and the worker agreed that the firm provided nothing. The worker provided transportation and possibly some supplies. The clients provided the therapy materials. Both parties agreed that the worker was paid an hourly rate and had no other economic risk. The customer paid the firm. The worker did not establish the level of payment for services.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. The relationship ended when the worker quit and moved away.

Analysis

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. The relationship of the worker and the business must be examined. 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 should be considered. 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm obtained the clientele and provided the worker with specific instructions for each client as well as policy guidance from its Client Handbook. 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. This is true even if the training was only given once at the beginning of the work relationship. The worker performed her services according to the firm's scheduling of the her work assignments based on her acceptance, her availability as well as the availability of the clients. So even if the worker did not have set scheduled workdays and hours, which would be factors 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 firm provided the worker's work assignment and told her what was needed, how to accomplish the task via a treatment plan, where to go and when to provide those services. 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.

The worker personally provided her services on a continuous basis throughout the time period involved, indicating that the firm cared not only about the result but the methods used. In addition, 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.

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 worker simply received an hourly rate of pay and had no other economic risk. 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.

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. There were no benefits and there was a written agreement. However, the firm's belief 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. The worker provided behavioral therapy services for the firm's business which included the provision of applied behavior therapy services. When working for the firm, the worker was not engaged in an independent enterprise. Her services instead were essential and integral to the firm's business operations. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.