Form **14430-A**
(July 2013)

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
06THE Therapists	[X] Employee [ ] Contractor
UILC	Third Party Communication: [X] 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 worker submitted a request for a determination of worker status in regard to services performed for the firm from November 2018 to December 2019 as a licensed [redacted] t providing [redacted] services. The firm issued the worker Form 1099-MISC for 2018, 2019, and 2020. The worker filed Form SS-8 as he believes he received Form 1099-MISC in error.

The firm's response states it is a professional counseling business. The services performed by the worker included the counseling of children and adolescents. The worker was classified as an independent contractor as he did his own client scheduling. Services were performed under a signed independent contracted counselor employment contract. The worker signed Form W-9, Request for Taxpayer Identification Number and Certification, which documented his Social Security Number.

The firm stated it did not provide the worker specific training or instruction. The worker received work assignments through his own scheduling, which determined his schedule. The worker determined the methods by which assignments were performed and he assumed responsibility for his clients. Insurance companies determined the reports required. Services were performed at the firm's premises. The worker was not required to attend meetings. The firm required the worker to personally perform services. The worker stated the firm required he maintain licensure, malpractice insurance, and credential with insurance companies. Work assignments were provided by referral and scheduled/re-scheduled by the firm. The firm determined the methods by which assignments were performed, prohibited him from performing best practice evaluations, and set his work schedule. He was required to use the firm's software to generate therapy notes. He performed services on a regularly scheduled basis. The firm recommended he attend its supervision meetings to discuss general business protocol, policies, and updates. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided the therapy notes computer program. The worker provided his personal computer. Customers paid the firm. The written agreement documents the firm would retain a fixed dollar amount per client or group receiving services. The remaining private client or insurance company payment would be paid to the worker. The fixed dollar amount retained by the firm would go towards general business expenses, including but not limited to rent, utilities, and office supplies. The arrangement would be reviewed on an annual basis and could be increased or decreased, as needed, to uphold the firm's business costs. The worker would be paid every two-weeks on Friday, at 26 pays per year. A drawing account for advances was not allowed. Expenses incurred by the worker were not reimbursed by the firm. The firm did not carry workers' compensation insurance on the worker. The worker was required to carry his own malpractice insurance. The worker could negotiate with insurance companies the level of payment received as related to services performed. The worker stated the firm provided an office with office related furniture and supplies, play therapy materials, an email, and business cards, He did not lease equipment, space, or a facility. Other than expenses associated with the profession as related to license, continuing education, and insurance, he did not incur other expenses. The firm established the level of payment for the services provided.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others; the firm's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. The worker chose how to advertise. The firm represented the worker as a contractor to its customers. The work relationship ended when the firm asked the worker to leave. The worker stated there was no end-term to the written agreement and it did not document if the work relationship could be terminated without liability or penalty. The firm prohibited the worker from performing the same or similar services in the professional park complex. He did not advertise. The firm terminated him against his will.

The written agreement states, in part, the worker agreed to perform all duties required of the position, complying with the firm's written and oral policies, procedures, rules, and regulations. The firm retained the right to change the worker's assignment, duties, responsibilities, and reporting arrangements in its sole discretion without causing termination of the agreement. The worker was required to sign acknowledging and agreeing to abide with the firm's policies and procedures as outlined in its manual, including firm-updates relayed in writing during the term of engagement. The worker was required to maintain an active license, including completion of all continuing education requirements, and work within the scope of his license and all legal and ethical requirements of federal and state governments. If the worker elected to market his services through a specific website, emails would be received by the firm's office manager, who would handle all initial client referrals. The worker agreed to perform any other duties as assigned. The worker was required to give the firm a three-month notice for contract termination. The firm could terminate the agreement at any time, without notice or payment in lieu of notice, for sufficient cause.

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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

Section 31.3401(c)-1(c) of the regulations states that generally professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others in an independent business or profession in which they offer their services to the public are not employees. However, if a firm has the right to direct and control a professional, he or she is an employee with respect to the services performed under these circumstances.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm’s organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

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 and required the worker to abide by its policies and procedures. 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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. “Profit or loss” implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm’s customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. 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 per customer or group 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 independently performed similar services or advertised 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.