

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.142 Manager	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

Facts of Case

The worker initiated the request for a determination of her work status as a manager in an adult foster care home in tax years 2014 through 2016. The firm's business is described as an adult foster care home for the elderly. The worker was issued a letter on September 26, 2017 with a finding of 'employee'. The firm's Form SS-8 response had not been received.

The firm's response was signed by the firm's owner. The firm is an Adult Foster (care) Home () for seniors. The are inspected by and licensed by the State prior to the receiving individuals for care; and, then annually to maintain the provider's/firm's license. In this case, the firm operates more than one ; therefore, it is required that a resident manager be hired to oversee the home(s). As an provider, the firm provides meals, transportation to appointments and other activities, medication management, assistance with activities of daily living, personal care, mobility, and household activities. The worker was a primary caregiver and resident manager for five seniors in her care and to manage the other caregivers beneath her. She was responsible for planning, purchasing, preparing, and serving meals, and ensuring the personal care of the five seniors.

According to the firm, the worker was only given assistance when she asked for it. The training for a provider/resident manager was required by and given by the State. The worker's daily assignments/tasks were determined by the worker per State rules/guidelines and were adjusted per the individual resident's needs. The worker determined the methods by which the tasks were performed. The worker was required to contact the firm's owner with any problems or complaints that required resolution. The State requires narratives, medical records, meals, and incident reports. The services were rendered on the firm's premises. The worker was required to perform the services personally; additional personnel could be hired with the State's (background checks) and the firm's approval.

The firm provided the home for the senior residents and some furniture; some of the residents had their own furniture. The worker prepared and served meals based on the funds allocated by the firm. The firm reimbursed the worker upon remittance of the receipts. The worker and firm negotiated the worker's compensation based on the number of days and the number of hours per day she would be available. Consideration was given to the need for additional personnel. The firm acknowledged that the other caregivers were paid by the firm and also issued Form 1099-MISC. The firm is paid through the Medicaid system or a self-pay arrangement with the resident. The worker was not covered under the firm's workers' compensation insurance. The worker was not at risk for a financial loss in this work arrangement.

There were no benefits extended to the worker. The worker could incur a liability if a violation occurred in the firm's ; the State records would reflect the infraction under the firm's license. The firm could terminate the worker as a result of the violation. The worker was a resident manager under the firm's name.

The worker concurred that she was required to have training for care in the . Her job assignments were via phone, fax, or in person from the firm's owner/provider. She noted the firm changed her schedule so that she could train other resident managers and caregivers. The firm determined the methods by which the worker's services were performed. The worker stated that she directed any problems or complaints to the firm for resolution. The services were rendered at the firm's adult foster homes. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The worker agreed the firm provided everything; the worker stated she furnished nothing and did not incur expenses in the performance of the job. The worker was paid a salary; the firm was paid for the resident's care. The worker was not covered under the firm's workers' compensation insurance policy. The worker was at risk for a financial loss in this work relationship having sustained an injury on the job. The firm established the level of payment for services provided. The worker was required to submit time sheets for hours/shifts covered for herself and the other caregivers.

The worker acknowledged there were no benefits made available to her. The services were rendered at the firm location and under the firm's name. The work relationship ended when she sustained an injury.

Analysis

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.

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.

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.

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.

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.

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. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm.

We have considered the information provided by both parties to this work relationship. 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met, and that State rules/requirements were adhered to. The worker was not operating a separate and distinct business; she 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. 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. 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.

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.