

SS-8 Determination—Determination for Public Inspection

Occupation 05CSI.38 Companion Sitter	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

The agency is in the business of providing home health care workers to its clients. The worker was engaged by the agency as a Direct Services Worker (DSW) to provide personal care services to the its clients in their homes according to an Individualized Service Plan (ISP). The agency did not withhold taxes from the worker's remuneration for 2014, 2015, and 2016. The agreement between the parties states that the worker will be an independent contractor and not an employee of the agency. Information submitted by the agency shows that the worker only provided services for one client of the agency, his mother. The Department of Health and Hospitals Rules, Louisiana Register Vol. 38, No. 1 January 20, 2012, submitted by the agency, is also considered.

The agreement between the parties also states, among other things, that only the agency accepts patients for care. The agency has the ultimate responsibility for the administration and supervision of the worker. The worker will provide services to clients in accordance with ISPs established by the agency. The agency will provide all relevant records to its clients and appropriate agency reporting forms. The agency will maintain records of all visits by its personnel. It will provide a schedule of all daily visits and initial evaluations by the nurse/administrator. The agency will provide placement of contract staff and contingency staff. It will ensure overall quality of care by the worker and that the worker has met all regulatory training and competency requirements.

The worker was required to participate in performance improvement activities, as applicable: meetings, trainings, and in-services. The worker's services included personal care, household services, record keeping, accompanying clients according to their ISP, knowing the whereabouts and physical condition of the clients at all times, informing the agency of any changes, maintaining a written record of any accidents or sudden events and notifying the agency of such, and other services as agreed by the worker and the agency. The agency provided the worker to its client on a contract basis and paid the worker for the specific number of actual visits at an hourly rate. The agency paid the worker upon receipt of correct timesheets and progress notes; payment was issued on a biweekly basis. The worker was required to meet all personnel requirements: licensure, health assessment, good physical health, reliable transportation, orientation, competency evaluation, and First Aid certification. He was required to maintain automobile insurance, personal injury insurance, and property damage insurance. The worker was entitled to coverage under the agency's workers' compensation insurance; it was his responsibility to notify the agency within one hour of an incident. The worker was not responsible for the failure to render the agreed service if such failure was due to illness, vacation, or absence while attending trainings or meetings, provided that adequate notice was provided to the agency.

The worker understood that the agency would not withhold any taxes; the agreement stated that if the Internal Revenue Service (IRS) should question or challenge the independent contractor status of the worker, both parties shall have the right to participate in any discussion or negotiation with the IRS. The worker was not to directly or indirectly engage the agency's clients while engaged with the agency, for the purpose of having them follow him to another agency. The worker was evaluated and supervised by the agency's administrator. It reviewed the worker's qualifications and performance sixty (60) days after initial "employment" and annually thereafter, in written form and on an informal basis during the contract term. The agreement was to continue and be binding upon both parties unless terminated as herein provided for one (1) year, at which time it was reviewed. It could have be terminated at any time by either party upon thirty (30) days advance written notice to the other party. In fact, the agency stated that the work relationship terminated when the worker failed to communicate with the agency within a thirty (30) day time frame.

Analysis

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 agency's 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.

There are significant similarities between this case and Revenue Ruling 54-616, 1954-2 C.B. 346. In the ruled case, the facts are similar as it applies to expressed or implied consent. Accordingly, the agency's expressed or implied consent enabled its clients to direct and control the worker's services as was necessary to protect their needs and expectations.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the agency ensured that the worker was qualified to perform his services. It was responsible for the administration and supervision of the worker. It is only reasonable to assume that the agency retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. If the worker had been engaged directly by the client, he would have been deemed to be the client's employee for Federal tax purposes; however, when the agency engaged, qualified, and placed the worker to perform services under the direction and control of the agency's client, it was done with the agency's expressed or implied consent. The worker submitted daily progress notes, daily sign in/out sheets, and time sheets. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. These facts show that the agency retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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 client exercised an element of financial control by furnishing the premises, materials, equipment, and supplies. But more importantly, the agency financially controlled the worker by its receipts of monies for the worker's services and its remuneration to him at an hourly rate set by the agency. The worker did not incur work related expenses and was not engaged in an independent enterprise requiring capital outlays or the assumption of business risks. These facts show that the agency retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed his services under the agency's name, enabling the agency to fulfill its contract with its client. The worker was not engaged in an independent enterprise, but rather the care giving services performed by the worker were a necessary and integral part of the agency's home health care business. 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. The client had the right to reject the worker, but only the agency had the right to discharge him, and accordingly the agency is held to be the employer. These facts show that the agency retained control over the work relationship and services of the worker.

Based on the above analysis, we conclude that the agency 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 of the agency, and not an independent contractor operating a trade or business.