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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
05COU Counselors	[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

It is our usual practice in cases of this type to solicit information from both parties involved. After the worker's initial filing of the Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, we requested information from the firm concerning this work relationship. The firm provided information in regard to this work relationship by completing Form SS-8.

From the information provided the firm provides intensive outpatient services for substance abuse patients. The firm states the worker was working for a company they purchased in 2014 which provided the same treatment services. The firm states the worker worked as a 1099 independent contractor for that company. When the firm purchased this business in February 2014, they engaged with the worker for her counseling services. The firm believes the worker was an independent contractor while performing services for them because she was in charge of her schedule, she made appointments for clients, and she was in charge of her professional license and how she did her job. The firm states that the worker was not required to be at their premises for any fixed hours, she scheduled her own appointments and times, she was not required to use a company mandated counseling protocol or addiction treatment method, and she was the expert and had complete autonomy over methodologies she chose to utilize. The firm reported the worker's earnings on Forms 1099-MISC.

The firm provided no training or instructions to the worker. The firm states the worker was an expert and had complete autonomy over methodologies she chose to utilize. The worker signed up the clients for appointments or clients were referred to her by the courts, probation, or other local agencies. The firm states independent contractors are paid 50% of client fees and their company keeps 50% of client fees. They state independent contractors incur no overhead costs nor do they buy or lease any equipment or supplies. The firm states independent contractors are not required to attend any meetings away from their premises. The firm states the worker scheduled her own appointments and she determined how to complete her services 100% of the time. The firm states the worker was responsible for resolving all problems directly and they did not require the worker to submit reports to them. The firm states the worker did not have a set schedule and if the worker had a client intake, individual counseling or group counseling, then she scheduled these at whatever time she wanted. The worker was required to personally perform her services at the firm's premises. The firm states the worker was not required to attend meetings. The firm states they did not have any responsibility in hiring and paying substitutes or helpers.

The firm provided 100% of the supplies, equipment, materials and property to the worker in order for the worker to perform her services. The worker incurred expenses for professional liability insurance, CPE, and licenses. The clients paid the firm for services rendered by the worker and the firm paid the worker a percentage of the client fees received. The firm states the worker did not establish the level of payment for the services provided.

The worker was not eligible for employee benefits. The worker did not perform similar services for others or advertise her services to the public as being in business of providing addiction counseling services. Either party could terminate the work relationship at any time without incurring a liability. The firm terminated the work relationship with the worker.

Analysis

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.

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.

The methods by which professional men and women work are prescribed by the techniques and standards of their professions. No layman should dictate to a lawyer how to try a case or to a doctor how to diagnose a disease. Therefore, the control of a firm over the manner in which professional workers shall conduct the duties of their positions must necessarily be more tenuous and general than the control over nonprofessional workers. Yet, despite this absence of direct control over the manner in which professional men and women shall conduct their professional activities, it cannot be doubted that many professionals are employees. To give an example outside of the medical profession, there are many eminent lawyers who are full-time employees of corporations and who carry on their professional work with a minimum of direct supervision or control over their methods on the part of their employer. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. Although the worker was afforded with freedom of action while performing her services, some of this was because of the worker's experience and some was due to the nature of the services performed. However, the need to direct and control a worker and her services should not be confused with the right to direct and control. The worker provided her services on behalf of the payer rather than an entity of her own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the payer the right to direct and control the worker and her services in order to protect their financial investment, their business reputation, and their relationship with their clients.

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. While the worker incurred some expenses such as for licensure, insurance, etc., this is not considered a significant investment. 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. The worker did not have a business presence operating her own business.

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. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

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, co-adventurer, agent, or independent contractor must be disregarded. Therefore, the firm'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.

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.