

SS-8 Determination—Determination for Public Inspection

Occupation 05CCP. Personal Service Providers	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 worker initiated the request for a determination of her work status as a daycare worker in tax years 2015 through 2017. The firm's business is described as childcare.

The firm's response was signed by a firm member. The firm's business is described as a daycare. The worker performed services as a childcare provider. An employee has regular assigned room/kids and an Independent Contractor is on-call to take shifts.

According to the firm, the worker was given training in accordance with local, state, and federal childcare laws. The work assignments were based on the designation of on-call service and regular scheduled shifts. The firm determined the methods the worker was to use to perform her job. In the event of a problem or complaint the worker was required to contact the member/firm for resolution. The reports required of the worker consisted of daily logs and injury reports. The services were rendered at the firm's location. The worker was required to perform the services personally.

The worker indicated she was given specific training and instructions for first aid and CPR. She was given a written schedule which was printed once a month and personally handed to her. The worker agreed the firm determined the methods by which the worker's services were performed and that any problems or complaints encountered by the worker were directed to the firm. The worker responded that the services were rendered 7 am to 3:15/4:15 pm Monday through Friday. The worker was required to perform the services personally, with any additional personnel being hired and paid by the firm.

The firm and worker agreed the firm provided all supplies, materials, and property; the worker added that the firm provided the curriculum (teaching the alphabet, colors, numbers and some sign language, preparing food and toilet training 1-2 year old children). The firm stated the worker incurred the expense for background checks and licensing. Both parties concurred the firm paid the worker an hourly wage and the customers paid the firm. They also agreed the worker was not at risk for a financial loss in this work relationship and that the firm established the level of payment for services provided.

There were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm indicated the worker was performing same or similar services for others during the same time frame; the worker disagreed, stating she was prohibited from providing services to others.

The firm submitted a copy of the Employee/Provider Contract (worker acknowledged reading the firm's handbook and the firm's policies) as well as copies of forms for a background check. In a letter of explanation, the firm indicated the worker was hired as an independent contractor to work available shifts and then became an employee and then left the firm only to return as an IC, and then was rehired as an employee. There was no evidence to indicate Form W-2 was issued to the worker during this work arrangement.

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.

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.

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.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor 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.

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.

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.

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.

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. The worker was not operating a separate and distinct business; 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. 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.