

SS-8 Determination—Determination for Public Inspection

Occupation 05CCP Child Care 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 firm is a home daycare business. As the owner of the firm, you engaged the worker to provide childcare services. You reported the worker's remuneration on Forms 1099-MISC for 2015, 2016, and 2017. You stated that you informed the worker she would be hired as an independent contractor, bringing to your business her knowledge and activities to perform with the children. You explained to the worker that she would need to file her own taxes, which she agreed to and stated she understood.

Information from the parties supports that you instructed the worker to supervise a small group of children while you operated the daycare. You provided the worker with her work assignments. The worker determined the methods by which she performed her services. If problems or complaints occurred, the worker contacted you for resolution. The worker followed the schedule that you set. She performed her services on your premises. She was required to perform her services personally.

You provided the facility. The worker furnished arts and crafts, if interested, and her talents, i.e.: music, dance, etc. You paid the worker at an hourly rate. You did not cover her under workers' compensation. Customers paid your firm directly at prices that you established. Neither party indicated an investment by the worker in your firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

You did not make benefits available to the worker. The worker did not advertise her services or provide similar services for others during the same time period. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the worker terminated the work relationship.

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, your 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. If a firm has to make a worker “understand” or even if a worker “agreed to” being an independent contractor (as in a verbal or written agreement), this factor does not determine the worker’s status as 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, you retained the right to change the worker’s methods and to direct the worker to the extent necessary to protect your financial investment. The worker followed the schedule that you set and performed her services on your premises. 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. The worker was required to perform her services personally, meaning that she could not engage and pay others to perform services for your firm on her behalf. 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. These facts show that you 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 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. “Profit or loss” implies the use of capital by a person in an independent business of his or her own. 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 worker could have provided arts and crafts items; however, 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. You paid the worker at an hourly rate. Payment by the hour generally points to an employer-employee relationship. These facts show that you 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 her services on a continuing basis. She was not engaged in an independent enterprise, but rather the childcare services performed by the worker were a necessary and integral part of your daycare 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. Although you did not make benefits available to the worker, the worker terminated the work relationship without incurring penalty or liability. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. These facts show that you retained control over the work relationship and services of the worker.

Based on the above analysis, we conclude that you 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.