

**SS-8 Determination—Determination for Public Inspection**

Occupation 05CCP Child Care Giver	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 submitted a request for a determination of worker status in regard to services performed for the payer from July 2017 to February 2018 as a child caregiver. The payer issued the worker Form 1099-MISC for 2017. A copy of the 2018 tax reporting document was not provided for our review. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The payer's response states it is a childcare business. The worker was engaged as a caregiver of children. The worker was classified as an independent contractor as the payer previously performed the same services for others and she was also classified as an independent contractor. If the worker was misclassified, it was not the payer's intent to do so.

The payer stated training was provided by an outside source. The worker was responsible for attending. The payer (or other caregivers) provided work assignments. Others determined the methods by which assignments were performed. The payer was contacted and assumed responsibility for problem resolution. Reports and meetings were not required. The worker reported to work at times she stated she could work. Services were performed at the daycare center. The payer required the worker to personally perform services. The payer was responsible for hiring and paying substitutes or helpers. The worker stated the payer required her to attend training at the library. The payer determined the methods by which assignments were performed. The worker's daily routine consisted of Monday through Friday, 8 – 5:30, unless told otherwise.

The payer stated the worker provided a background check. The worker did not lease equipment, space, or a facility. The worker did not incur expenses. Customers paid the payer. The payer paid the worker an hourly rate of pay. The payer did not carry workers' compensation insurance on the worker. The worker did not establish the level of payment for the services provided. The worker stated the payer provided all supplies, equipment, and materials. A drawing account for advances was not allowed. The payer established the level of payment for the services provided.

The payer stated the benefit of personal days was made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others. Services were performed under the payer's business name. The work relationship ended when the worker quit.

Both parties agreed the worker was not responsible for soliciting new customers.

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## Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

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, a statement that a worker is an independent contractor pursuant to a written or verbal 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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. In this case, the payer required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the payer's business operation. The payer required the worker to attend training, provided work assignments, and assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retained the right to do so if needed.

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 payer 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 payer 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. In this case, the worker did not invest capital or assume business risks. 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. Based on the hourly rate of pay arrangement the worker could not realize a profit or incur a loss.

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 payer's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

Based on the above analysis, we conclude that the payer 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.

The payer can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.