

SS-8 Determination—Determination for Public Inspection

Occupation

05CCP Child Care Providers

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ 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 is an in-home child care business and the worker was engaged from January 2018 to January 2019 by the firm. The firm states the worker performed services as an assistant for the preparation of food and household cleaning. The worker states she also cared for the children at the firm's daycare. The firm believes the worker was an independent contractor while performing services for them because she set her own hours and she was informed that she would be receiving a Form 1099 at the end of the year.

The firm did not provide any training or instructions to the worker and the firm states they did not provide the worker with work assignments. The firm states the worker was required to notify them if any problems or complaints arose for their resolution as it is their business. The firm states the worker set her own hours of work in order to be able to perform those services when her children were in school. The worker personally performed her services at the firm's location.

The firm provided all supplies, equipment, materials, and property to the worker in order to perform her services. The worker incurred expenses for CPR instruction and a live scan and the firm states they reimbursed the worker for one-half of those expenses. The clients paid the firm for services rendered by the worker and the firm paid the worker at an hourly rate. The firm states there was a mutual agreement regarding how much the worker wanted to charge them for her services.

The worker was not eligible for employee benefits. It is unknown to the firm if the worker performed similar services for others. The worker did not advertise her services to the public as someone in business does. The firm states they represented the worker as an independent contractor to their clients. Either party could terminate the work relationship at any time without incurring a liability. The worker terminated the work relationship.

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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker did not require any training or 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. The need to direct and control a worker and her services should not be confused with the right to direct and control. The worker performed her services on behalf of and under the firm's business rather than an entity of her own. The clients paid the firm for services rendered by the worker. The firm was ultimately responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to change the worker's methods and to direct the worker to the extent necessary 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.

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. There was no evidence presented or found in this investigation that the worker operated as a sole proprietor or as a business entity. 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.