

# 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 worker initiated the request for a determination of her work status as a nanny in tax years 2018 to 2019. She was caring for two children, walking the dogs, doing some house cleaning and laundry, and some car detailing, in the home and occasionally traveling with the parent.

The firm's response was signed by the president (and parent). The firm's business is an oil and gas service provider. The worker provided care to the corporation's employees children on an as-needed basis.

The worker stated the job assignments came directly from the parent/mother; and it was the parent(s) that determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the parent(s) for resolution. The worker's services were rendered in the parent's home. The worker was required to perform the services personally; any substitute or helper were hired and paid by the parent(s).

The parent/firm response was that the worker was engaged based on her skills and experience. The job assignments were sporadic – no set schedule. The parent and/or worker determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were handled by the worker. The worker's services were rendered in the firm's home office premises. The worker was required to perform the services personally.

The worker stated the parent(s) provided everything including airfare to [REDACTED] and [REDACTED]; the worker furnished her own lunch. The worker did not lease equipment, space, or a facility. The worker was paid an hourly wage; but, when traveling was paid a day rate. The worker was not covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship unless she was injured and the taxes not being withheld. The worker did not establish level of payment for services provided.

The firm did not respond to what the parent(s) or the worker furnished. The worker did not lease equipment, space, or a facility. The worker was paid an hourly wage and lump sum. The worker was not covered under the firm's workers' compensation insurance policy. The firm indicated the worker was not at risk for a financial loss in this work relationship; but, that she did establish level of payment for the services provided.

Both parties acknowledge there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The worker quit after asking for W-2 and told she would only be given Form 1099-MISC and a family issue.

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## Analysis

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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.

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 parent/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.

In general, domestic services include services of a household nature in or about a private home performed by cooks, waiters, butlers, housekeepers, maids, valets, babysitters/nannys, janitors, laundresses, caretakers, handymen, gardeners, grooms, chauffeurs of family-use vehicles, and companions for convalescents, the elderly, or the disabled. A private home is a fixed place of abode of an individual or family.

Nurses' aides and other unlicensed individuals normally perform services that are expected of maids and servants. Such services include bathing the individual, combing his/her hair, reading to the individual, arranging bedding and clothing, and preparing meals. These services are also considered domestic services.

## CONCLUSION

We have considered the information provided by both parties to this work relationship. In this case, the parent retained the right to change the worker's methods and to direct the worker to the extent necessary to protect the children under the worker's care. 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. In this case, we conclude that the parent had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a household/domestic employee, and not an independent contractor operating a trade or business. Because the worker's services constitute domestic services, the employer is responsible for withholding the employee's share of the FICA tax if the worker was paid up to a specific income threshold amount in each particular year. The wage threshold for withholding FICA tax in a specific year may be found in that year's Publication 926, Household Employer's Tax Guide.