

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

Occupation

05CCP Personal 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**

The worker submitted a request for a determination of worker status in regard to services performed for the firm from September 2018 to January 2019 as a nanny. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. The worker believes they were an employee of the firm because they worked in the firm's home, their schedule and pay were determined by the firm, and all supplies for job responsibilities were provided by the firm. A contractor agreement was provided for our review, outlining the job duties and responsibilities of the worker, the benefits and pay offered, and scheduling guidelines.

The firm's response states it is a household. The work provided by the worker was that of a nanny. The worker was requested to provide childcare and complete household chores. The firm states that they gave the worker general guidelines but did not direct or control how the job duties were performed. The firm provided a contract agreement, text communication between the worker and the firm, and additional information supporting the reason why they classified the worker as an independent contractor.

The firm states that they gave the worker key household rules but that the worker represented themselves as fully trained. The firm states that they instructed the worker to do certain tasks regarding childcare and household care but that the worker determined the methods by which these job assignments were performed. The agreement that was provided by the firm outlined the general duties of the worker. Job assignments were assigned by verbal or text communication from the firm to the worker. The firm provided a text message exchange between the worker and the firm demonstrating how the worker and firm determined the schedule for the day based upon availability. If problems or complaint would arise during the worker's job duties, the worker was required to contact the firm (household) for problem resolution. The worker was required to record day events in a journal for the firm to review if they had any concerns about activities or the well-being of the children in the worker's care. The firm's provided agreement demonstrates that the worker was to write down each activity done during the day as well as locations visited and food and beverages consumed by the children. The worker performed 75% of their work duties within the household of the firm and 25% of the work duties were performed outside of the home at recreational or learning areas. The firm states that the worker was required to perform all services personally and no meetings were required of the worker. The worker states that they were instructed by the firm on daily tasks such as household chores and the needs of the children within their care. The tasks were assigned by verbal communication, and the worker states that the firm was responsible for determining the methods by which all job assignments were performed and for problem resolution. The worker states that no reports were required but that there were monthly progress meetings required for them to attend. The worker's schedule consisted of childcare, transportation of the children to school, feeding and playing with the children, and household chores. The worker was required to perform all services personally. If helpers or substitutes were required, the firm was required to hire and pay the assistants.

The firm states that they provided all of the supplies, materials, and equipment for the worker to complete their tasks, including children's clothing, toys, and food. The firm reimbursed the worker for any work-related expenses such as entertainment, meals, or travel expenses. The worker did not have to lease space, equipment, or facilities. The firm set up an allowance for the worker due to car-related issues in addition to the reimbursement of expenses. The firm states that the worker was paid an hourly wage and did not have access to a drawing account for advances. Attached documentation demonstrates how pay was direct deposited on a weekly basis. The firm did not carry worker's compensation insurance on the worker. The firm states that they carried home and property insurance for anything occurring on the property but that the worker was responsible for carrying their own liability insurance. The firm states that the worker set the level of payment for all services rendered. The worker states that the firm supplied all supplies, materials and equipment for the job duties and that the worker did not have any expenses. The worker states that they did not have any exposure to economic loss or financial risk in the performance of their job duties. The worker states that the firm set the level of payment for all services rendered by the worker.

The firm states that they offered the worker paid vacations, sick pay, paid holidays, personal days, and occasional cash gratuities as benefits. The relationship between the two parties could be terminated at any point without incurring liability or loss. The worker did not perform similar services for any other firm at the time they worked for the firm. There was no agreement in place prohibiting competition between the firm and the worker. The worker was not a member of a union. The firm states that the worker promoted themselves on care.com as a nanny and advertised their services on that website. The firm states that they did not represent the worker to any clients, and that the worker terminated the work relationship at the second 60-day assessment mark without notice. The firm provided a copy of their evaluation of the worker detailing specific instructions to the worker on performance improvement, and the worker quit 8 days after they were given the evaluation. The worker states that they were offered sick pay, paid holidays, and personal days by the firm as benefits. The worker states that they did not advertise their services to the public.

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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 firm required the worker to personally perform services. The firm required the worker to report on all services performed, and assumed responsibility for problem resolution. The contract and guidelines outlined therein provided demonstrates the authority of the firm over the worker in all aspects of the job responsibilities. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

Payment by the hour, day, 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. 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. The firm also reimbursed the worker for any job-related expenses. 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. The firm provided extensive benefits to the worker in the form of cash bonuses and paid days off. 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 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.

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