

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**

The Worker submitted Form SS-8 related to babysitter / nanny services she provided in 2018 to the Payer and Payer's spouse (referred to collectively here as "Payer") for the care of their child in the Payer's private household. The Worker attached a copy of the TY2018 Form 1099-MISC issued to her by the Payer. The Worker believes she was the Payer's employee and should have been issued a Form W-2. The Payer submitted a responsive Form SS-8 and a copy of the TY2018 Form 1099-MISC it issued to the Worker. The Payer believes the Worker was an independent contractor.

The parties agree the Worker didn't provide services for the Payer in any capacity before the work at issue here, and that they had no written agreement about the Worker's services.

According to the Payer, the training and instruction they gave the Worker, their toddler's nanny, consisted of providing her with a nap and meal schedule but that "otherwise she had complete freedom to provide care." The Worker maintains the Payer trained her on their child's routine, what to feed him, what kind of diapers to use, and how to manage specific situations such as tantrums and bad behavior. The Payer states they gave the Worker her assignments verbally; the Worker agrees, adding that the Payer sometimes conveyed assignments via text message. Regarding who determined the method by which the Worker performed her assignments, the Payer states "[Worker] has flexibility for field trips and other activities." The Worker maintains the Payer -- the toddler's parents -- determined the method by which she performed her assignments, explaining that she followed directions on how to deal with tantrums and bad behavior according to the Payer's instructions, and was to follow and implement the Payer's parenting style.

The parties agree the Worker was required to contact the Payer if problems or complaints arose and that the Payer was responsible for the resolution of any such issues. The parties agree no reports were required from the Worker, with the Worker explaining that at the end of each workday she verbally communicated with the Payer on "what was done through the day, behavior, etc." The Payer describes the Worker's daily routine as working "7:45-5:45, 3 days per week," and Worker's specific duties as "make/feed child breakfast, read/play, make/feed lunch, naptime, read/play time, make/feed dinner." According to the Payer, the Worker "did not perform household tasks such as laundry or cleaning."

The Worker describes her workday as beginning at 7:45 a.m., when she arrived at the Payer's house and the Payer told her what time the child woke up and whether he had breakfast yet, whether he needed a diaper change, and what the Worker should feed the child for lunch, dinner, and snacks. The Worker states she also performed light housekeeping tasks such as cleaning the child's play areas, preparing his meals, and washing dishes.

The parties agree the Worker was required to provide services personally and that the Payer provided all supplies, equipment, materials, and property necessary for the Worker to do her job. The parties also agree the Worker didn't lease equipment, space, or a facility and that the Worker incurred no expenses in her performance of services for the Payer. The parties agree the Worker was paid an hourly wage, that the Worker didn't establish the level of payment for the services she provided, and that the Payer didn't carry worker's compensation insurance on the Worker.

The parties generally agree their working relationship could be terminated by either party without incurring liability or penalty and that the Worker performed similar services for others during the time period she provided services to the Payer. The parties also agree the Worker wasn't a union member. Neither party contends there was any agreement between them prohibiting competition during or after the Worker performed services for the Payer. The parties agree the Worker didn't advertise. The Worker no longer provides services to the Payer.

Analysis

Because this case involves a worker who performed nanny or babysitting services for a private household in 2018, a good starting point for this analysis is IRS Publication 926 Household Employer's Tax Guide for 2018 -- the version in effect when the Worker provided services to the Payer's household.*

According to IRS Publication 926, you have a household employee if you hired someone to do household work and that worker is your employee. Household work is work done in or around your home; babysitters and nannies who work in or around your home are doing household work. When determining worker classification for federal employment tax purposes, workers doing household work for you are considered household employees -- as opposed to independent contractors -- if you, the payer, have the right to control both (1) what work is done and (2) how it is done. And if your nanny or babysitter is your household employee, it doesn't matter whether the work is full time or part time or that you hired the worker through an agency or from a list provided by an agency or association. It also doesn't matter whether you pay the worker on an hourly, daily, or weekly basis, or by the job.

The Worker here fits the above criteria. She was paid to serve as a babysitter / nanny to the Payer's child for 3 ten-hour shifts a week in the Payer's home. She followed the Payer's specific instructions on caring for their child and performing related light housework such as cleaning play areas and meal preparation. The Payer provided the household equipment, food, diapers, and any other supplies the Worker needed to do her work. These facts strongly indicate the Worker was the Payer's household employee and not an independent contractor.

The fact that the Payer gave the Worker flexibility to take their toddler to the library, park, and other places doesn't make the Worker an independent contractor. Nor does the fact that the Worker was free to work with, and did work with, other families and had the economic flexibility to pursue other employment opportunities. The vital element boils down to this: the Payer, parents of the child, had the right to control and direct what the Worker did with their minor child and how she did it. It doesn't matter that the Payer may have had a more laid back approach and didn't actively direct and control the Worker during her shifts, what matters is they had the right to do so. It's indisputable that the Payer had the absolute right to direct and control what the Worker did with their child. This points to the Worker being a household employee and not an independent contractor.

As discussed at the top of Page 1, above, common law factors are considered when examining worker classification issues. Based on the evidence and facts presented and researched, this analysis concludes the Payer had the right to direct and control the Worker to the degree necessary to establish the Worker was a common law household employee of the Payer during the relevant time period, and not an independent contractor operating a trade or business. Accordingly, the Worker is classified as an employee of the Payer for employment tax purposes.

The Payer can find additional information related to worker classification at www.irs.gov; Publication 4341.

*Current and prior year versions of IRS Publication 926 Household Employer's Tax Guide are available at www.irs.gov.