

**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 a request for a determination of worker status in regard to services performed for the payer from January 2019 to August 2019 as a daycare worker. The services performed included supervising and feeding children and infants. The payer issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as she believes she received Form 1099-MISC in error.

The payer's response states it is a licensed, in-home daycare business. The worker assisted with supervising children in a group setting. The worker was classified as an independent contractor as her services were used on an as-needed basis and she could perform similar services for others. The payer did not provide instruction or training. The worker performed services as she saw fit. A written agreement was not applicable.

The payer stated it did not provide the worker specific training or instruction. The payer asked the worker to work, as-needed. The worker determined the methods by which assignments were performed. If problems or complaints arose, the payer was contacted and assumed responsibility for problem resolution. Reports and meetings were not required. Services were performed at the payer's home, as-needed. The payer required the worker to personally perform services. Substitutes or helpers were not applicable. The worker stated the payer provided her specific instruction related to when to feed the children and the nap schedule. The payer determined the methods by which assignments were performed. She performed services on a regularly scheduled basis; Monday through Thursday, 9 am to 4 pm. The payer was responsible for hiring and paying substitutes or helpers.

The payer stated the worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense associated with travel to and from the work location. Customers paid the payer. The payer paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The payer established the level of payment for the services provided. The worker stated the payer provided all required equipment and food. She did not incur expenses.

The payer stated benefits were not applicable. The work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others. There was no agreement prohibiting competition between the parties. The worker advertising was not applicable. The payer represented the worker as an assistant caregiver to its customers. Services were performed under the payer's business name. The work relationship ended when the payer asked the worker to leave and not return due to poor performance. The worker stated the benefit of paid vacation time and holidays was made available to her. She did not perform similar services for others.

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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 childcare services performed by the worker were integral to the payer's business operation. The payer provided work assignments by virtue of the customers served and ultimately 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. As acknowledged by the payer, the worker did not incur economic loss or financial risk. 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.