

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 firm from April 2019 to December 2019 as a nanny. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error because the firm exercised control and direction over the services provided by the worker.

The firm's response states it is a household. The work provided by the worker was babysitting the firm's child. The worker was requested to perform nanny services four days a week initially, then one day a week, planning out and carrying out activities with the child. The firm did not provide supervision or direction. The firm states that the worker requested to be classified as an independent contractor and performed similar nanny services for other families during the course of the work relationship.

The firm states that they did not provide any training to the worker. The firm (household) provided the worker with their child's eating and napping schedule and the worker planned and decided the activities for the day. The firm states that the worker determined the methods by which tasks were performed. If the worker encountered any problems during their job duties, they would contact the firm and together a resolution would be found. The worker was not required to provide any reports to the firm. The worker performed services on a weekly basis, arriving in the morning to provide breakfast for the firm's child, carry out activities, make lunch, and then leave in the afternoon. If the worker needed flexibility with their arrival or departure times, the firm would make arrangements with the worker to accommodate their request. All services were provided at the firm's household. There were no meetings required of the worker. The firm required the worker to perform all services personally. The worker could not hire substitutes or helpers. The worker states that the firm provided them with a daily schedule and written instructions. The worker adhered to this schedule despite making more decisions independently as time went on in the work relationship. The firm would contact the worker if anything outside of the normal schedule or daily activities was required, and they also determined the methods by which tasks were performed even though the worker was given some flexibility. The worker provided the firm with informal daily updates and end-of-day summaries. The worker performed services at the firm household initially four days a week and then eventually just one day a week. The worker provided services 75% of the time at the firm's household and 25% of the time on field trips at various locations such as the library or park. The worker states that they were required to perform services personally.

The firm states that they provided the worker with paint, crayons, paper, and the child's food. The worker could provide supplies for any activities the worker planned to do with the child. The worker drove their own car to transport the child to various field trips. The worker did not lease space, facilities, or equipment. The worker incurred activity supply expenses and gas expenses for their car. The firm would reimburse the worker for any tickets for out-of-home activities. The worker was paid a daily wage by the firm and they did not have access to a drawing account for advances. There were no customers applicable to this job relationship. The firm did not carry worker's compensation insurance on the worker. The worker did not face any economic loss or financial risk in the performance of their job duties. The firm states that the worker set the level of payment for services rendered. The worker states that the firm provided art supplies and their residence for the childcare the worker provided. The worker would sometimes have the expense of art supplies and admittance fees to various locations they would bring the child for field trips. These particular costs were reimbursed by the firm. The worker was paid a daily wage and did not have access to a drawing account for advances. The worker states that the firm established this rate of pay for services rendered. The worker did not have any financial risk exposure while working for the firm.

The firm provided the worker with paid vacations and paid holidays as benefits. The relationship could be terminated by either party without liability or penalty. The firm states that the worker performed similar care-giving services for other families while working for the firm. The worker did not require permission from the firm to do so. The worker was not a member of a union. The firm is not aware of any advertising to the public done by the worker. The firm did not represent the worker to anyone. The work relationship ended when the worker quit. The worker states that they were given paid vacations and holidays by the firm. The worker states that they did not perform similar services for other families during the terms of the work relationship. There were no non-compete agreements between the parties. The worker states that they did not advertise their services to the public. The worker states that they quit performing childcare for the firm because they were pursuing a different career, thus ending the work relationship.

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 worker was unable to hire and pay substitutes. The firm required the worker to report on services performed through informal updates, and assumed responsibility for problem resolution. 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. Based on the daily 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 firm'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 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; Publication 4341.