

**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 May 2019 to July 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 dictated the worker's schedule and instructed the worker on what to do. There was no written agreement between the parties.

The firm's response states it is a salon. The work provided by the worker was as a nanny for the firm owner. The worker was requested to care for the firm owner's two children and take care of household chores. The firm feels that the worker was an independent contractor because the worker made their own hours and worked around their availability.

The firm states that they provided the worker with instructions on childcare and where things were located in the household in order for the worker to complete their job duties. The worker received job assignments through verbal instruction. The firm owner was responsible for problem resolution for any problems that the worker encountered during their work duties. The worker was not required to provide the firm with any reports. The worker's daily routine involved childcare and house cleaning. All job duties were performed at the firm owner's home. There were no meetings required of the worker. The firm required the worker to personally provide services. Helpers or substitutes would be hired by the firm owner. The worker states that the firm owner instructed the worker on errands and groceries needed, children's activities, and things to clean or chore around the house. The worker received assignments through text messages and notes. The worker attached examples of chore lists that the firm would leave for the worker. The firm owner determined the methods by which job assignments were performed. If the worker encountered any problems on the job, they were required to contact the firm owner. The worker's daily routine on the job was determined by the firm owner and when they needed childcare. The worker would perform services in the firm owner's home, at the children's school picking them up, and also at the store running errands. The worker would have to attend events for the children. The worker was required to personally perform services. The firm owner would hire and pay all help needed.

The firm states that the worker did not lease any space, facilities, or equipment. The worker's expenses related to childcare were reimbursed by the firm. The worker was paid an hourly wage by the firm with no access to a drawing account for advances. The firm did not carry worker's compensation insurance on the worker. There was no economic loss or financial risk faced by the worker. The worker states that the firm provided car seats, household supplies for cleaning, and the children and pets that needed care. The worker provided their car and did not lease any space, facilities, or equipment. The worker's expenses included gasoline and household shopping costs, which were reimbursed by the firm. The worker was paid an hourly wage and did not have access to a drawing account for advances. The firm owner set the hourly wage that the worker was paid, and the worker provided a copy of the text exchange between the parties to demonstrate this detail.

The firm states that they did not provide the worker with any benefits. The work relationship between the parties could be terminated by either party without liability or penalty. The worker was not a member of a union. The worker advertised their services on care.com. The worker was not in contact with the firm's customers since the worker provided services personally solely for the firm owner. The worker was let go for showing an attitude towards the firm owner's children. The worker states that the only benefit offered by the worker was a reimbursement for gas spent while on the job. The worker did not perform similar services for other firms during the work relationship. There were no non-compete agreements in place between the parties. The worker was not a member of a union and did not advertise their services to the public. The work relationship ended when the worker quit.

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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 provided work assignments directly 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. The firm provided all materials, supplies, and equipment needed for the worker to perform their job duties. Any job-related expenses realized by the worker were reimbursed by the firm. 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. 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.