

SS-8 Determination—Determination for Public Inspection

Occupation 05CCP Child Care Providers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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

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Facts of Case

The information provided by both parties indicated that the payer is an individual that engaged the worker as a Nanny. The worker was hired to perform services from 8/21/2019 until 11/15/2019. This was pursuant to a written agreement between the parties. According to the payer the worker had previously performed services for the firm from 8/14/2019 through 8/21/2019. The payer decided to use the worker more regularly at that time. The worker did not mention that the worker previously performed services for the payer. Both parties agreed the worker was found through an employment agency but paid directly by the payer.

The worker stated the payer provided materials on [REDACTED] education and one day of orientation with the previous nanny. The worker was also required to provide CPR/First Aid certificates and a valid driver's license. Both parties agreed that there were instructions from the payer but, the worker was free to create projects and chose activities. According to the worker, the payer provided text messages, verbal and written instructions as to the details and means by which the worker was to perform the services. The payer mentioned that the worker was free to do what the worker thought would be fun and engaging for the children. Periodically the worker would check in with the payer to ensure selected activities were permitted. Both parties agreed that the worker performed services 5 days a week, from 2:00pm until 6:30pm and according to the worker, periodically, the worker was forced to work beyond the normal scheduled hours. The payer's response was the worker performed services days, evenings and weekends. As per the payer, the worker performed services at the payer's location approximately 60%-70% of the time. Both parties stated that the worker would perform services at the payer's location, also, at the playground, stores & transporting the children from school. The payer was responsible for problem resolution. According to the payer, the worker was required to submit a weekly journal of the children's general state of being and performed services on and off the firm's premises. Although the worker signed the contract agreeing to the journal entries, according to the payer, the worker did not complete the journal. However, the worker mentioned that a daily verbal report was given to the payer and a text messages when needed. The worker mentioned that the worker did pass along communication from the children's school to the payer as well. The worker was not required to attend meetings. The relationship between the parties was continuous, as opposed to a one-time transaction. The nature of this relationship contemplated that the worker would perform the services personally. The worker stated that the payer hired and paid substitutes or helpers.

Both parties agreed that the worker was paid an hourly wage and was entitled to paid holidays, sick and personal days. The worker bought supplies to engage the children in fun, educational activities. The worker's personal vehicle was used to transport the children, also to perform tasks for the payer. The payer reimbursed the worker for the expenses for crafts and educational materials used specifically for the payer's children. Occasionally, the worker was reimbursed for gas used for the services performed for the payer. The payer determined the worker's rate of pay and benefits. The payer did not carry worker's compensation insurance on the worker. The worker did not have a substantial investment in the services performed did not assume the usual business risks of an independent enterprise.

Either party had the option to terminate the worker's services at any time without incurring a penalty or liability. The worker was not a member of a union. The contract between the two parties stated that the worker was not allowed to accept work, enter into a contract or an obligation inconsistent with contractor's obligations under that agreement. According to internal research, the worker had performed similar services for others and was treated as an employee for Federal Tax purposes. There was no indication or evidence of an independent enterprise. Both parties agreed that the worker was discovered through an employment agency. The payer mentioned that the employment agency took commission upon request for the workers services, however, the payer paid the worker directly for the services performed. The worker agreed an employment agency was used to find the job but made no mention of additional advertising used for the services performed.

Analysis

The worker performed personal services on a continuous basis. Work was performed mostly on the payer's premises, on a regular schedule set by the payer. The payer provided a workspace to the worker. Occasionally, the worker would buy educational learning materials, crafts and activities for the children to use. According to both the payer and worker, any educational material, crafts, activities and gas expenses were reimbursed. The worker could not incur a business risk or loss. The worker was paid an hourly wage, holiday, sick and personal days. The worker had performed similar services out to the general-public.

The worker followed a schedule but was free to be engaged in activities, crafts and educational learning materials with specific instructions but without oversight from the payer. Many individuals are hired due to their expertise or conscientious work habits and close supervision is often not necessary. Usually, independent contractors advertise their services and incur expenses for doing so. Both parties stated that the worker was discovered using an employment agency. The above facts do not reflect a business presence for the worker. Although the worker was found using an employment agency, the employee factors outweigh the independent contractor factors. Therefore, the worker will be deemed an employee. The three main categories of evidence that helped to determine the worker's employment status were applying law, regulations or a clearly applicable ruling.

A worker who is required to comply with another person's instructions about when, where, and how the work is performed is ordinarily an employee. This control factor is present if the person for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them.

If an employer-employee relationship exists, the designation or description of the parties as anything other than that of employer-employee is immaterial. Contractual designation of a worker as an independent contractor cannot outweigh evidence regarding the actual relationship between worker and taxpayer.

Both parties provided a copy of an independent contractor agreement. The payer was led to believe that this should be a clear indication that the worker agreed that the worker was an independent contractor. However, Federal guidelines stipulate that this agreement in of itself cannot be considered in the SS-8 determination process, as we are obligated to base our decisions on the actual relationship between the parties, which is the controlling factor, and not the terms of the contract either oral or written.