

SS-8 Determination—Determination for Public Inspection

Occupation Personal Service 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

For IRS Use Only:

Facts of Case

The worker is seeking a determination of worker classification for services performed as a nanny for the firm from January 2019 until May 2019. The worker received a 1099-MISC from the firm for 2019. The worker feels that they were misclassified as an independent contractor because the firm controlled the worker's job duties. The worker states that there was a written agreement between the parties.

The firm states that it is an individual who sought out the worker's babysitting services. The firm classified the worker as an independent contractor because the worker was on a trial period, with employment to be considered beyond 90 days. The firm paid the worker in cash and told the worker that the job was probationary for that time period.

The firm states that it provided no training the worker. The worker received job assignments verbally. If the worker encountered any problems or complaints during their job duties, they were required to contact the firm. The firm requested the worker's help Monday through Thursday, from 9am until 3pm. All job duties were performed at the firm's home. There were no meetings required of the worker. Helpers and substitutes were not applicable to the job situation. The worker states that the firm provided disciplinary and behavioral instruction, and instructions on activities and diet, and nap instructions. The worker received job assignments from the firm and the firm determined the methods by which they were to be performed. The firm assumed responsibility for problem resolution. The worker provided the firm with updates on the well-being of the firm's children through phone, text, or in-person. The worker generally worked Monday through Wednesday as well as Friday, from 9am until 3pm. The worker's schedule was subject to change based upon the needs of the firm. All services were conducted in the firm's private residence. The worker would periodically meet with the firm for feedback and updates. The worker was required to perform services personally. Helpers and substitutes were hired and paid by the firm.

The firm states that they provided all supplies, materials, and equipment needed for their job duties. The worker did not provide anything and did not lease anything for their job duties. The firm states that the worker did not incur any expenses during their job duties. The firm reimbursed any and all expenses that the worker might've incurred on the job. The firm paid the worker an hourly wage with no access to a drawing account for advances. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk during their job duties. The firm states that the worker established the level of payment for services provided. The worker states that the firm provided everything needed for their job duties. The worker states that the firm did not reimburse for any expenses incurred. The worker was paid hourly by the firm. There was no discussion about economic loss or financial risk concerning loss or damage to materials and supplies in the contract between the parties.

The firm states that they did not provide the worker with any benefits. The relationship between the parties could be terminated by either party without liability or penalty. The firm states that the worker did not provide similar services to other firms during the work relationship. There were no non-compete agreements between the parties. The worker was not a member of a union and did not advertise their services to the public. The firm did not have any representation of the worker as the worker provided services privately and there were no customers. The work relationship ended when the probationary period ended, and employment was not offered. The worker states that the firm represented the worker as a nanny. The worker states that the relationship ended when the firm no longer needed a nanny.

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, co-adventurer, 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. Furthermore, the services performed by the worker were subject to the firm's direction and control. The firm provided work assignments directly to the worker, required the worker to report on services performed, 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 everything needed for the worker's job duties. 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; Publication 4341.