Form **14430-A**
(July 2013)

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
05CCP.10 Childcare Provider	[X] Employee [ ] Contractor
UILC	Third Party Communication: [X] None [ ] Yes

Facts of Case

The worker initiated the request for a determination of her work status as an assistant in the attending and caring for kids in the daycare in tax year 2013. The worker provided a copy of the hand-written Form 1099-MISC for $7817.00. The firm's business is described as a group home daycare.

The firm's response was signed by [redacted]. The firm's business is described as a daycare. The worker performed services as a childcare worker.

According to the firm, the worker's training was from the state of [redacted]. The state determined the methods by which services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker was to come in when the state required two adults. The services were rendered at the firm's location. The firm responded that the worker did not have to render the services personally; the worker could hire and pay for any substitute/helper.

The firm provided the childcare supplies; the worker provided nothing. The worker did not lease equipment, space, or facilities and she did not incur expenses in the performance of her job. The firm responded the worker was paid piecework – depending on the number of children. The customer paid the firm for the services. The firm acknowledged the worker was not covered under the firm's workers' compensation coverage. Both parties acknowledge the worker was not at risk for a financial loss in this work relationship. The stated she did not provide anything or incur any expenses. She also indicated she was paid a salary.

The firm indicated the worker was not extended any benefits. Either party could terminate the work relationship without incurring a liability. The firm provided a copy of an 'Independent Contractor Contract' that provided the following: it is the intent of the firm that the worker be an independent contractor; [redacted] will give a 1099-MISC for services provided; the worker will pay her own income taxes; the worker will follow the state of [redacted] laws and regulations pertaining to the services of the daycare; it was the intent of the worker to be an IC. The firm also provided a copy of the Form 1099-MISC.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons 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. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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 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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. See Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694, 1956-2 C.B. 694.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. See Rev. Rul. 70-309, 1970-1 C.B. 199. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

Your statement that the worker was an independent contractor pursuant to an 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.

We have considered the information provided by both parties and have applied the above law to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction. The worker was not operating a separate and distinct business. The worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control, as in this case. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. 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.

CONCLUSION

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.