

**SS-8 Determination—Determination for Public Inspection**

Occupation 05CCP.50 Childcare Provider	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

**Facts of Case**

Information provided finds the worker performed two services for the firm, as an office manager for their company [REDACTED] and as a nanny in their home. The income earned for the office manager position was reported on Form W-2 with applicable taxes withheld. The income for the nanny position was reported on Form 1099-MISC. The firm stated they explained the two positions to the worker when hired, she stated she wanted to receive more money now, and would take care of her taxes later. This determination will cover the services performed as a nanny. The firm stated they paid the worker twelve dollars per hour for both positions. After a 60-90 day probationary period they raised her pay to fifteen dollars per hour to assist with the tax consequences she would have as a 1099 “employee.” She later quit as an employee for [REDACTED], but remained as a nanny two days a week. She provided [REDACTED] with a schedule of days she could work. [REDACTED] could adjust her schedule around [REDACTED]’s schedule. The firm contends she agreed to be a 1099 employee, when she requested to be classified as an employee, they requested she complete a W-4, as they had no problem with switching her to employee status. She refused to sign one and consequently stopped working.

The firm stated the worker was given an orientation of the house, introduced to the children and provided information on the necessary requirements to drop off and pick up the kids at their school. The only assignments provided were one household chore to completed each day she worked and any additional classes or programs that the kids may have had to attend. The worker created a form which she used to submit each day to inform them as to what she did, (samples provided.) She performed services one to two days a week, one additional day she would do housecleaning. She often adjusted the days, for personal matters, (copies of e-mails provided) She was required to perform her services personally. The firm would have paid any subs. The firm provided everything needed for the work in the home or for the children. The worker did bring her own supplies for activities which she was not reimbursed for. Either could terminate without incurring a penalty or liability. The worker failed to show up for work.

The worker indicated the firm set the work schedule and has provided copies of e-mails from [REDACTED] that shows the work schedules. She also provided e-mails between her representative and the firm’s representative, where the firm’s representative states they are misinformed that there is an employer portion and an employee portion for taxes. (whether on a W-2 or on a 1099-MISC. (That is incorrect, when income is reported on a Form 1099-MISC it is in fact making the worker responsible for the firm’s portion of employment taxes due as well as the worker’s portion.) Correspondence was also provided that stated the firm was willing to convert the worker to employee status, as was indicated by the firm.

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as “common law.” Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer’s right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term “employee” means any individual defined as an employee by using the usual common law rules.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker’s activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

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## Analysis

Remuneration paid for domestic services is not subject to federal income tax withholding, unless both the employer and employee voluntarily agree to it. See Code section 3401(a)(3). The domestic employee may make a request for income tax withholding by completing Form W-4, "Employee's Withholding Allowance Certificate," and may also request advance payments of the earned income credit by completing Form W-5 if he/she is eligible. However, there are no similar exceptions for FICA and FUTA taxes.

Because the worker's services constitute domestic services, the employer is responsible for withholding the employee's share of the FICA tax if the worker was paid up to a specific income threshold amount in each particular year. The wage threshold for withholding FICA tax in a specific year may be found in that year's Publication 926, Household Employer's Tax Guide.

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, 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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

## 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. The worker performed services in the firm's home as a nanny. There are specific employment tax rules, that govern whether a person is or is not an independent contractor. The worker was caring for the individuals children, therefore they retained the right to direct how the work was performed. A flexible work relationship, also does not constitute an independent contractor. The worker did not own a day care facility. She had been retained to provide personal in home housekeeping/nanny services, therefore she was a domestic employee. The firm stated she was originally put on a 60-90 day probationary period, another indication of an employer/employee relationship. The firm determined the rate of pay of \$12.00 - \$15.00 per hour. (not the rate a licensed day care provider would have charged). It is the firm's responsibility to correctly classify the individuals performing services for them, it is never a matter of choice whether taxes are or not withheld.