

SS-8 Determination—Determination for Public Inspection

Occupation

Personal Service 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 is seeking a determination of worker classification for services performed for the firm as a daycare worker from September 2024 until March 2025. The worker filed a Form SS-8 because they believe that they erroneously received a 1099-NEC from the firm.

The worker believes that they were an employee of the firm because the firm determined the worker's hours and pay, the worker had to request time off, the firm would inform the worker of daily plan or hour changes, the firm was responsible for addressing issues or concerns, and the worker had little say in any aspect of the job. There were no written agreements between the parties.

The firm states that they are a daycare. The worker provided services for the firm as a childcare provider, responsible for providing care for children. The firm classified the worker as an independent contractor because the worker signed a form W-9 to be paid as an independent contractor. There were only verbal agreements between the parties.

The firm states that they provided the worker with hands on training. The firm owner gave the worker job assignments in person and determined the methods by which job duties were performed. If the worker encountered any problems or complaints while working, they were required to contact the firm owner for problem resolution. There were no reports required of the worker. Childcare services were performed as scheduled at the firm's premises. The firm did not require the worker to attend meetings or to perform services personally. The worker could not hire helpers or substitutes and was not responsible for their payment. The worker states that the firm informed them on their job duties, daily schedule, job expectations, and instructed them on how to perform daily tasks and handle possible issues. The firm owner provided job assignments to the worker in person, by phone, and through text messages, determined how jobs were to be performed, and assumed responsibility for problem resolution. The firm required the worker to personally perform services. The worker had no hiring authority.

The firm states that they provided toys, cleaning supplies, craft supplies, and food. The worker did not provide anything and did not lease any space, facilities, or equipment. There were no job-related expenses incurred by the worker. Customers paid the firm. The firm paid the worker an hourly rate of pay with no access to advance pay. The firm did not carry worker's compensation insurance on the worker. Each individual worker was responsible for their own insurance, which was the worker's financial risk. The worker did not incur a financial loss in the performance of their job duties. The firm set the rate of pay for services performed. The worker states that the firm provided the facility. Food, materials and equipment for indoor and outdoor activities, sleep cots, cleaning supplies, and everything else needed. The worker did not provide anything. The worker would sometimes purchase wipes, snacks, paper towels, or craft supplies. These expenses would be reimbursed in full by the firm the same day the transaction occurred. The worker had no exposure to financial risk or loss while working for the firm.

The firm states that they did not provide benefits to the worker. The relationship between the parties could be terminated by either party without liability or penalty. The worker did not perform similar services for other firms or advertise their services to the public. There were no non-compete agreements in place between the parties. The firm represented the worker to customers as a contractor. The worker ended the work relationship. The worker states that the firm provided them with paid holidays as a benefit. The firm represented the worker to customers as an employee providing services under the firm's name.

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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. In this case, the firm provided the worker with hands on training. Furthermore, the services performed by the worker were integral to the firm's business operation as a daycare. The firm provided work assignments by virtue of the customers served, instructed the worker daily, 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. 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. Additionally, the firm set the rate of pay for the worker's wages and the worker had no real financial risk in the performance of their 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, but rather the services performed by the worker were a necessary and integral part of the firm's business as a daycare. 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.