

Department of the Treasury
Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation

CCP - Child Care 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 teacher from September 2024 until October 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 are an employee of the firm because the firm scheduled their hours, chose the worker's salary, chose the methods of payment for the worker, and required the worker to attend firm-provided training. Work was performed under a written agreement between the parties.

The firm states that they provide child caregiving services. The worker performed services for the firm as a caregiver, providing care for young children during the day. The firm classified the worker as an independent contractor because the worker provided services when available on an as-needed basis, the verbal agreement between the parties stated that the worker would be responsible for self-employment taxes, the worker could perform services elsewhere, no benefits were provided, and the worker's payments were expressed as contract labor. There were only verbal agreements between the parties.

The firm states that they provided the worker with recommendations for information from resources to facilitate quality work as specified with the firm. The firm's director or assistant along with the worker provided job assignments in person and over the phone. The state department and firm 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 owner for problem resolution. There were no reports required of the worker. Services were performed as needed and as available at the firm's premises. The firm did not require the worker to attend meetings but required the worker to personally perform services. The worker could hire helpers or substitutes with the firm's approval as long as they were designated as suitable to perform services. The worker was not responsible for paying helpers or substitutes. The worker states that the firm provided SIDS training, work policy trainings, and instructed the worker on government regulations pertaining to their job duties. The firm owner provided job assignments to the worker in person, determined the methods by which job duties were performed, and assumed responsibility for problem resolution. The firm required the worker to complete government-required reports and logs. Services were performed as scheduled at the firm's premises. The firm required the worker to attend staff meetings and to personally perform services. The worker had no hiring authority.

The firm states they provided the facility, furniture, and classroom equipment as required by the state. The worker provided transportation, any personal items they required, desired disposables, and food. These, along with travel expenses, were the worker's only job-related expenses. The worker did not lease any space, facilities, or equipment. Customers paid the firm. The firm paid the worker an hourly rate of pay as agreed upon in the verbal agreement, with no access to advance pay. The firm did not carry worker's compensation insurance on the worker. The worker's tax obligations, operating expenses, and providing their own benefits were the worker's financial risks. The worker had unreimbursed travel expenses so they could suffer a financial loss. The firm and worker mutually agreed upon the rate of pay for services performed. The worker states that the firm provided wipes, gloves, trash and sanitary bags, and toys. The worker provided anything that the firm ran out of during their work relationship. The worker had no job-related expenses. The firm paid the worker an hourly rate of pay. The firm carried worker's compensation insurance on the worker. The worker had no exposure to financial risk or loss while working for the firm. The firm set the rate of pay for services performed.

The firm states that they provided no benefits to the worker. The relationship between the parties could be terminated by either party without liability or penalty. The worker performed similar services for other firms and did not need approval from the firm to do so. There were no non-compete agreements in place between the parties. The firm represented the worker to customers as a caregiver performing services under the firm's name. The worker's services were no longer needed, so the parties mutually agreed to end the work relationship. The worker states that the firm provided insurance benefits to the worker. The worker did not perform similar services for other firms and did not advertise their services to the public. The firm represented the worker to customers as an employee performing services under the firm's name. The firm ended the work relationship.

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 integral to the firm's business operation as a childcare facility. The firm provided work assignments by virtue of services integral to the firm, gave the worker instruction, 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 job-related expenses mentioned by the firm as negligible because both independent contractors and employees alike have the same job-related expenses as long as they have a commute involved. 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. 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 of providing childcare services. 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.