

## SS-8 Determination—Determination for Public Inspection

Occupation

05CSI Care Provider

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 submitted a request for a determination of worker status in regard to services performed for the firm from March 2016 to March 2018 as an elderly care provider. The services performed included preparing daily meals, cleaning dishes, and washing laundry. The firm issued the worker Form 1099-MISC for 2016 and 2017. The worker filed Form SS-8 as she believes she was a household employee.

The firm's response, states the firm hired the worker to help take care of the firm's mother. The worker was engaged as an elderly care professional. The firm paid her directly for weekly part-time services rendered. There was no written agreement for the services performed.

The firm stated it had the worker shadow and keep logs of care. The firm wrote directions as needed. The firm determined the methods by which assignments were performed. The firm was to be contacted if problems or complaints arose and assumed responsibility for problem resolution. Verbal and elder care logs were required. The worker performed services two days a week, 5-8 hours a day depending on what was needed. Holidays and the firm's travel varied. Services were performed at the firm's home and at either doctor or dentist appointments when needed. There were no meetings required. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided the home, all hygiene products, and food supplies. The worker did not lease equipment, space, or a facility. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker did not establish the level of payment for the services provided.

The firm stated the work relationship could be terminated without penalty. The worker did not perform similar services for others. An agreement prohibiting competition between the parties was not applicable. The worker advertised online. The work relationship ended when the worker gave her two-week notice. The worker stated there were no benefits made available to the worker.

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## 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.

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 firm determined the methods by which assignments were performed, required the worker to document the 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, 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 worker. In this case, the worker has not invested capital or assumed business risks. As acknowledged by the firm, the worker does not incur economic loss or financial risk. Based on the hourly rate of pay arrangement the worker cannot 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 is not engaged in an independent enterprise, but rather the services performed by the worker are a necessary and integral part of the firm's household needs. Both parties retain the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performs similar services for others as an independent contractor. 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 payer has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is 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](http://www.irs.gov); Publication 4341 and Publication 926.