

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

Occupation

05CSI.36 Companion Sitter

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 2009 to 2012 as a 24/7 live-in caregiver. According to copies provided by the worker the firm issued her Form 1099-MISC for 2010 through 2012; Form W-2 was issued for 2012. A copy of the 2009 tax reporting document was not provided. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The worker believes she was an employee for the entire work relationship as the firm had all control over whom, what, when, where, and how she did her job. The worker followed all the firm's protocols and had no freedom to make decisions. The worker first performed services in 2007; however, she had no paper work at that time. A copy of Form I-797, Immigrant Petition for Alien Worker, documents the firm served as petitioner for the worker.

The firm's response consisted of a one-page letter. It stated, in part, the worker started on June 2010 and worked until May 2015. During this period, she worked with different assignments and as a full-time care provider she chose her own schedule to meet her personal needs such as weekends off. The worker was hired due to her merits and work ethics. The worker gave her best in meeting family expectations and personal care. From June 2010 through July 2012, the worker received Form 1099-MISC. From August 2012 through May 2015, she received Form W-2. Based on the worker's request and since she was a good worker, the firm granted her request to be reclassified as an employee.

The worker stated the firm provided her on-the-job training. The firm provided work assignments, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. The firm required the worker to journal information about the client served. Meetings were not required. Services, consisting of personal care needs, cooking, cleaning, etc., were typically performed in the client's home. If the client died and the firm did not have another client for the worker, she worked at the firm's facility which also provided 24/7 client care. The firm required the worker to personally perform services. The firm hired and paid substitutes.

The firm provided a cell phone. The client or client's family provided the supplies. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in performing services for the firm. Clients paid the firm. The firm paid the worker a daily rate of pay. It is unknown if the firm carried workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The firm established the level of payment for the services provided.

The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was an agreement that families could not directly hire the worker. The firm represented the worker as an employee to its clients. The work relationship ended when the firm did not have a client for the worker to care for.

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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.

For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of a 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.

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. 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 services performed by the worker were integral to the firm's business operation. The firm provided training and work assignments, determined the methods by which assignments were 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, 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. 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. 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. Based on the daily 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. 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](http://www.irs.gov); Publication 4341.