

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

Occupation

05ITE Instructors/Teachers

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 September 2017 to January 2018 as a co-teacher. The firm issued the worker Form 1099-MISC for 2017. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states it is a child day care services business. The worker was engaged to create lesson plans for special needs children. She evaluated children to determine which children had special needs and she designed lesson plans of daily activities for them. She set her work schedule. Services were performed under a 1099 contract agreement.

The firm stated it provided the worker orientation to the facility. The worker evaluated the children to determine those who could benefit from her expertise. The worker determined the methods by which assignments were performed. The firm's director was contacted if problems or complaints arose. The firm's director was responsible for resolution. The firm's director and the worker discussed the lesson plans. Copies of bi-weekly time sheets document the worker was responsible for recording hours worked by day, i.e. time in and time out. Time sheets were to be turned in by Monday of each pay week and all overtime had to be approved by the worker's supervisor. The copies provided document the supervisor's signature on all time sheets. Services were performed at the firm's facility. The firm required the worker to personally perform services. The worker stated she performed services on a regularly scheduled basis. Initially she worked 8:30 am to 5:30 pm. Her hours were then changed to 7:30 am to 4:30 pm. The firm required her to attend staff meetings. The firm was responsible for hiring substitutes or helpers.

The firm stated it provided craft materials, toys, books, and playground equipment. The worker provided some specific materials. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The worker stated the firm provided all supplies, equipment, and materials. She did not incur expenses in the performance of services for the firm. The firm established the level of payment for the services provided.

The firm stated benefits were not made available to the worker. The work relationship could be terminated by either party without liability or penalty. There was no agreement prohibiting competition between the firm and worker. The work relationship ended when the worker quit.

The 1099 contract states, in part, the worker would provide the following services to the firm: assist with creating lesson plans; plan and implement activities to meet the physical, emotional, intellectual and social needs of the children in the program; provide nutritious snacks and lunches; provide adequate equipment and activities; ensure equipment and the facility were clean, well maintained, and safe at all times; provide weekly and monthly schedules of activities; develop culturally appropriate programs and activities; develop activities that introduce math and literacy concepts; establish policies and procedures including acceptable disciplinary policies; be familiar with emergency procedures. Neither party could assign or transfer the contract without the prior written consent of the non-assigning party.

The worker stated she did not perform similar services for others or advertise.

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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, the firm's statement that the worker was an independent contractor pursuant to a written 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. The firm provided work assignments by virtue of the customers served, required the worker to report on weekly and monthly scheduled activities, in addition to bi-weekly time records, 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 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 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. 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.