

SS-8 Determination—Determination for Public Inspection

Occupation

05ITE Instructor/Teacher

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**

t is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. Luciana Ward, owner of the firm, responded to our request for completion of Form SS-8.

From the information provided the firm is a child care facility that cares for children six (6) weeks old to 3 years old from 7:30 a.m. to 2:30 p.m. The worker was engaged to take care of eight (8) children in a classroom ages two (2) to three (3). The worker's duties included talking, singing, taking the children outside to play, taking them to the bathroom and lunch room, and changing diapers. The firm states the worker was engaged by them but was told at the time that she was hired that she would receive a 1099 reporting her earnings and she agreed. The firm reported the worker's 2013 and 2014 earnings on Forms 1099-MISC.

The firm states the worker was instructed to make sure the children were constantly watched and that there was no abuse taking place. The firm states the worker was instructed on her assignments and they checked on the worker making sure everything was okay. The firm states they determined how the worker performed her services and the worker was required to notify them if any problems or complaints arose for their resolution. The worker was required to personally perform her services at the firm's premises from approximately 8 a.m. or later to 2:00 or 2:30 dependent upon whether the worker's classroom children were still in her class. The worker was required to submit verbal reports to the firm of the progress of the children. The firm states the worker was not required to attend meetings. The firm states they were responsible for the hiring and paying of substitutes or helpers.

The firm provided all equipment, supplies, and materials to the worker in order to perform her services. The firm states the worker incurred transportation expenses to and from work. If the worker purchased supplies, she would inform the firm and the firm would reimburse the worker for this expense. The clients paid the firm and the firm paid the worker at an hourly rate. The firm states they and the worker negotiated her rate of pay. The worker was eligible for an advance against future earnings which she was required to pay back. The worker could not incur a loss as a result of her services. The firm states if something broke, they paid to have it fixed, not the worker.

The worker was eligible for paid holidays. The worker did not perform similar services for others and she did not advertise her services. A confidentiality agreement existed between the firm and the worker. Either party could terminate the work relationship at any time without either party incurring a liability. The worker could quit her services with the firm at anytime she wanted and the firm states the worker could get fired only if she missed too many days, if she frequently came to work late, if she didn't call when she was late, or if the worker and co-workers fought with each other.

The worker had no responsibility in soliciting new clients. The clients sought out the firm's business and the firm placed the teacher in each of the classrooms.

Analysis

As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and her services should not be confused with the right to direct and control. The worker provided her services on behalf of and under the firm's business name rather than an entity of her own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and her services in order to protect their financial investment, their business reputation, and their relationship with their clients.

While the firm afforded the worker with some freedom of action as to the hours she worked, this, in and of itself, does not determine the worker's status as an independent contractor. The whole relationship needs to be analyzed to render the proper employment tax status of the worker.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided.

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.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

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, the firm's statement that the worker was an independent contractor pursuant to an 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.

Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.