

SS-8 Determination—Determination for Public Inspection

Occupation 05ITE Instructor/Teacher	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 August 2012 to June 2013 as a kindergarten teacher. The work done by the worker included preparing lessons, teaching, monitoring progress, and reporting to parents. The firm's business is a school for infants to school aged children and then a day care in the afternoon. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states it is a child care center business. The worker was engaged as a kindergarten teacher. The worker used the premises to run a kindergarten program; set the schedule, policies, and procedures; admitted and discharged students. There was no written agreement between the parties.

The firm stated it did not provide specific training or instruction to the worker. The worker determined the methods by which assignments were performed and assumed responsibility for problem resolution. Reports and meetings were not required. The worker set her own hours and the school program. The worker performed services at the firm's premises in the office area. Preparation was performed at the worker's home. The firm did not require the worker to personally perform services. The worker was responsible for hiring and paying substitutes or helpers. The worker stated the firm's director and assistant director provided verbal instruction related to work assignments. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. Report cards were issued to parents. The worker's routine consisted of working from 7:45 am to 3 pm, Monday through Friday; some extra nights were worked throughout the year. Services were performed solely at the firm's premises. 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 office space. The worker provided teaching supplies and personal equipment. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in performing services for the firm. Customers paid the firm. The firm paid the worker 100% of the fees generated for the program; 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 established the level of payment for the services provided. The worker stated the firm provided the space, copier, text books, furniture, paper, toys, and manipulatives. She provided art supplies and some toys. The firm reimbursed her for text books and school supplies. The firm paid her a fixed rate per student. The firm determined the level of payment.

The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others. The firm stated it referred customers to the worker and represented the worker's program as being separate. The work relationship ended when the worker stopped operations. The worker stated benefits were not made available to her. There was no agreement prohibiting competition between the parties. The worker posted photos online; everything had to be approved by the firm. Services were performed under the firm's business name. The work relationship ended when the worker quit.

The firm stated the worker met with students and parents. She had the sole discretion of acceptance or not. The staff and firm's director provided leads to prospective new customers.

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.

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. This fact evidences the firm was interested in the methods used and the work results. Therefore, 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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. 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. As acknowledged by the firm, the worker did not incur expenses, economic loss, or financial risk in connection with services performed.

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.