

SS-8 Determination—Determination for Public Inspection

Occupation 05ITE.67 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

Facts of Case

The worker submitted a request for a determination of worker status in regard to services performed from 2012 to present (2016) as a nursery teacher during Sunday morning service. The payer is a church. According to the payer's response, the worker originally performed services as a volunteer. In 2013, the worker started being paid for services performed. Form 1099-MISC was issued for 2013 and 2014. Remuneration was paid to the worker in 2015; however, a Form 1099-MISC was not filed (in error). The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The payer's response stated the relationship between the church paying the worker and the Diocese is somewhat unique. As the church has very limited resources, it receives a great deal of assistance from the Diocese. The Diocese pays three individuals who minister at the church and it issues Form W-2 to these individuals. As a result of this inquiry, it was discovered the church pays nursery workers and a sexton out of its own funds and it has been issuing these individuals Form 1099 under the Diocese's EIN for an undetermined number of years. The payer is seeking assistance to straighten out these complex issues as it wants to comply fully with all laws and regulations. The payer does not schedule workers, provides no benefits or training, and does not give instructions as to how the work is done. There is no written agreement between the parties.

The payer stated it does not provide specific training or instruction to the worker. The worker is free to work as many or as few services as she wants. No one determines the methods by which assignments are performed. The church treasurer or priest is contacted if problems or complaints arise. The treasurer or priest is responsible for resolution. Reports and meetings are not required. Services are performed at the church on Sunday during the morning service. The payer requires the worker to personally perform services. Substitutes are not hired as there are so many volunteers available. The worker stated the missionary priest provides handouts and lesson plans. The worker's routine is two hours every Sunday to teach and care for refugee children.

The payer stated it provides Sunday school supplies. The worker does not provide supplies, equipment, or materials. The worker does not lease equipment, space, or a facility. The worker does not incur expenses in the performance of services for the payer. The worker is paid a lump sum for each Sunday worked; a drawing account for advances is not allowed. The payer does not carry workers' compensation insurance on the worker. The worker does not incur economic loss or financial risk. The payer establishes the level of payment for the services provided. The worker stated she is paid an hourly rate of pay.

Benefits are not made available to the worker. The work relationship can be terminated by either party without incurring liability or penalty. The worker does not perform similar services for others or advertise. There is no agreement prohibiting competition between the parties. The payer stated it represents the worker as a nursery attendant to its church members.

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.

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 payer requires the worker to personally perform services. Furthermore, the services performed by the worker are integral to the payer's childcare needs for Sunday service. The payer provides work assignments by virtue of the church members served and church officials assume responsibility for problem resolution. These facts evidence the payer retains the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not need to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retains the right to do so if needed.

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 payer's customer for poor work, the payer shares the risk of such loss. Control of the payer over the worker would be necessary in order to reduce the risk of financial loss to the payer. 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 has not invested capital or assumed business risks. As acknowledged by the payer, the worker incurs no economic loss or financial risk. Based on the lump sum or 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 an integral part of the payer's childcare services which it offers to its church members. 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 or advertises business services to the general public. 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 payer can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.