Form **14430-A**
(July 2013)

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
05CCP Child Care Provider	☒ 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 regarding services performed for the firm from May 2019 to July 2019 as a childcare provider. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. There was no written agreement between the parties.

The firm's response states it is a daycare. The work provided by the worker was watching children at the daycare facility. The firm states that they classified the worker as an independent contractor because the worker was a student who provided services temporary and took time off when they wanted.

The firm states that the worker learned by observing the firm's childcare routines. The firm states that no specific job assignments were given, and the worker chose what tasks to perform. The worker performed services for a few hours on their workdays, playing with and taking care of the children. All services were performed at the firm's premises. There were no meetings or reports required of the worker, and the firm required the worker to personally perform services. Helpers and substitutes were not applicable to the job situation. The worker states that they were not provided with any specific training. The worker received job assignments from the firm verbally. Childcare services were performed as required. The worker was required to contact the firm's owner for problem resolution for any problems encountered on the job. The worker provided the firm with verbal reports. The worker performed services for 8 hours daily from Monday through Friday at the firm's premises. Meetings were not applicable, and the worker was required to perform services personally. All helpers and substitutes were hired and paid by the firm owner.

The firm states that they provided their home for the job duties. The worker provided nothing and did not lease any space, facilities, or equipment. The worker incurred no expenses during their job duties and was paid an hourly wage by the firm with no access to a drawing account for advances. Customers of the firm paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The worker did not face any economic loss or financial risk during the performance of their job. The firm established the level of payment for the services provided by the worker at the beginning of the work relationship. The worker states that all supplies were provided by the firm. The worker did not incur any expenses and the firm did not reimburse for any expenses. The worker was paid an hourly wage by the firm. The worker states that they had no exposure to economic loss or financial risk, and the firm owner set the level of payment for services provided.

The firm states that there were no benefits offered to the worker. The work relationship could be terminated by either party without liability or penalty. The worker performed babysitting services for other clients in the evenings. There were no non-compete agreements between the parties. The worker was not a member of a union and did not advertise their services to the public. The worker was represented by the firm as a helper. The firm states that the work relationship ended when the worker returned to school, graduated, and never contacted the firm again. The worker states that the firm did not offer any benefits and the worker did not perform similar services for other firms during the work relationship. The worker states that they did not advertise their services to the public. The worker states that they were represented by the firm as an employee of the firm. The summer job was completed, and the work was temporary, so the work relationship ended.

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, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or verbal 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 as a daycare. The firm provided work assignments by virtue of the customers served, required the worker to verbally report on services 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 nor did they provide any supplies, materials, or equipment for their job. 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; Publication 4341.