

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

Occupation Personal Service Providers	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 is seeking a determination of worker classification for services performed as a lead teacher for the firm from June 2019 until August 2019. The worker received a 1099-MISC from the firm for 2019. The worker feels that they were misclassified by the firm as an independent contractor because the firm owner determined the worker's job duties, and the worker was subject to the firm's assessment of their performance.

The firm states that it is a daycare. The worker was requested to provide services as a substitute lead teacher during the summer of 2019. The firm states that the worker was an independent contractor because the worker provided services on a temporary basis. The firm provided a copy of an email exchange between the parties.

The firm states that the worker was trained on routine company daycare policies. The worker was told what class to teach and what to teach the students. The firm's human resources and center manager determined the methods by which job assignments were completed. If the worker encountered any problems or complaints while working, they were required to contact the firm's center manager for problem resolution. There were no reports required of the worker. The worker performed services during the day for 2 months at the firm's daycare premises. There were no meetings applicable for the worker. The firm required the worker to perform services personally. The firm's manager would hire any helpers needed, and the human resources department was responsible for approving any helpers hired. The firm was responsible for paying any helpers and substitutes. The worker states that they received CPR and first aid training, as well as training in the daily responsibilities for the job. All job duties were overseen by the firm's manager, who assigned job tasks and determined how they were performed. The firm's HR manager was responsible for problem resolution. The worker provided the firm with results of TB tests. The worker's daily routine would start with breakfast for the students, then instruction, play time, lunch time, nap time, snack time, afternoon instruction, and then playtime until students were picked up. The worker performed services from 9:15am until 6pm at the firm's daycare premises. The worker was required to attend a summer meeting with the firm, and to perform services personally. The worker could recommend people to be hired by the firm, but the firm was ultimately responsible for hiring and paying all substitutes and helpers needed.

The firm states that the worker did not provide anything or lease anything for their job duties. There were no expenses incurred by the worker. The firm paid the worker an hourly wage with no access to a drawing account for advances. Customers of the firm paid the firm. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk during their job duties. There was a mutual agreement between the parties that determined the level of payment for services provided by the worker. The worker states that the firm provided food, teaching materials, daycare furniture, technology, and cleaning supplies. The worker did not provide or lease anything. The worker had no expenses and was paid an hourly wage. Customers paid the firm for services provided by the worker. The worker had no exposure to financial risk or economic loss. The worker states that the firm established the level of payment for services provided.

The firm states that they did not provide the worker with any benefits. The relationship between the parties could be terminated by either party without liability or penalty. There were no non-compete agreements in place between the parties. The worker was not a member of a union and did not advertise their services to the public. The work relationship ended when the worker went back to performing services for another firm after the summer was over. The worker states that they were provided with paid vacations, sick pay, and paid holidays. The worker was required to give 2 to 4 weeks of notice of resignation or face the penalty of having their paycheck docked by the firm. The worker did not perform similar services for other firms during the work relationship. The worker states that they were not allowed to perform similar services for other firms within a 5-mile radius within 5 years after their resignation. The worker states that they were represented by the firm in the building when the firm provided tours to potential customers. The work relationship was temporary and the season ended, ending the work relationship between the parties.

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## Analysis

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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, 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. The firm provided work assignments by virtue of the customers served, required the worker to 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. 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. The firm provided everything needed for the worker's job duties. 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.