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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
Personal Service Providers	[X] Employee [ ] Contractor
UILC	Third Party Communication: [X] 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 is seeking a determination of worker classification for services performed for the firm as a substitute teacher from January 2019 until December 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 they were paid a salary. There were no written agreements between the parties.

The firm states that it is a preschool. The worker was requested to be an on-call substitute childcare worker for the firm. The firm classified the worker as an independent contractor because the worker performed services on an as-needed basis. The firm would contact the worker on a weekly basis to discuss the worker's availability if coverage was needed. The firm attached an email from the worker requesting work from the firm.

The firm states that the worker received training from the firm that was specific to the firm's childcare facility. The firm would do a weekly check-in with the worker via phone if they needed substitute coverage. The worker had childcare training that was required for the position. If the worker encountered any problems or complaints while working, they were required to contact the firm's managing director for problem resolution. There were no reports required of the worker. The worker's schedule and hours varied as they were on-call and performed services as needed. The worker's typical childcare routine would involve assisting children with bathroom use, snacks and meals, and playtime. The worker performed services at the firm's preschool location. There were no meetings required of the worker. Helpers and substitutes were not applicable. The worker states that they received job assignments from the firm by phone call when work was needed. The school director determined the methods by which job assignments were performed and assumed responsibility for problem resolution. There were no reports required of the worker. The worker would perform services in a classroom setting and had flexible hours. All job duties were performed on the school campus. The worker did not have to attend any meetings or perform services personally. The firm was responsible for hiring and paying all helpers and substitutes needed.

The firm states that the firm provided everything needed at the preschool. The worker did not provide or lease anything. The worker did not incur any expenses. The firm paid the worker an hourly wage with no access to a drawing account for advances. Customers paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The worker had no exposure to economic loss or financial risk. The firm established the level of payment for services provided. The worker states that the firm provided all school supplies, equipment, and materials. The worker incurred expenses of teaching materials that were paid upfront. The firm reimbursed the cost of classroom materials that were prepared by the worker at the worker's expense. The worker was paid an hourly wage by the firm. Customers paid the firm. The worker had no exposure to economic loss or financial risk.

The firm states that there were no benefits offered by the firm. 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 did not advertise their services to the public. The work relationship ended when the worker's services were no longer needed. The worker state that they were provided with paid holidays as a benefit. The worker performed similar services for other firms and did not need approval from the firm in order to do so. The worker was not a member of a union and did not advertise their services to the public. There is no mention by either party on how the worker was represented to the firm's customers. The contract ended and so did the work relationship as a result.

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. 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 firm provided all supplies, materials, and equipment needed for the worker's job duties. The firm reimbursed the worker for any supplies expenses that the worker incurred on the 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 of providing childcare. 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.