

SS-8 Determination—Determination for Public Inspection

Occupation 05ITE.19 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 January 2013 to December 2013 as a preschool teacher. The work done by the worker included teaching children preschool materials two days per week and teaching dance and gymnastic basics one day per week. The firm issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as the firm had issued her Form W-2 since 2009. The worker believes the 2013 Form 1099-MISC was erroneously issued.

The firm's response stated it is a dance school business which teaches kids how to perform different types of dance routines, in addition to a preschool program. In 2012, the worker was engaged as the firm's assistant preschool teacher. She was required to follow the firm's directives. In 2013, the worker became the preschool director. While engaged as the director, the worker was in charge of the schedule, daily plans, supplies, and the general day-to-day operations of the preschool. The firm believes the worker was an independent contractor as she had free reign over the preschool program, was able to hire assistants needed, set the daily activity schedule, and was responsible for receiving tuition payments. There was no written agreement between the parties.

The firm stated the worker knew how to handle all aspects of the position based on her prior work experience with the firm. If she didn't, the worker could have obtained advice from the firm. The worker ran the program as she saw fit. The worker determined the methods by which assignments were performed. The worker handled problems and complaints. If unable to do so, the worker brought the issue to the firm. Reports and meetings were not required. The worker's routine consisted of coordinating classes, creating the daily schedule, designing the basic curriculum and teaching it to students, serving as the preschool teacher by giving whole group, small group, and individualized instruction, supervising students during all activities, serving as a customer service liaison between the parents and the studio director, scheduling and performing parent/teacher conferences, communicating with parents on student progress, scheduling field trip and school events, organizing school fund raisers, creating and providing a list of supplies needed by parents, creating and providing a list of major supplies needed by the studio director, providing miscellaneous materials needed for specific lessons and activities, selecting music and costumes for performances, selecting music for dance portion instruction, choreographing routines for classes and performances, developing and teaching progressive and individualized skill building exercises for students, and selecting an assistant, substitute teacher, or outside help as needed. Services were performed at the firm's premises. The firm did not require the worker to personally perform services. The substitute's pay came out of the worker's salary. The worker stated the firm instructed her as to the days on which to perform services. The firm was contacted and responsible for problem resolution. The worker's routine consisted of Tuesday, Wednesday, and Thursday from 8:30 am – 11:30 am. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided the preschool location, in addition to computers and equipment already in the location. The worker provided additional supplies needed and replenished office supplies as needed. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense of supplies needed for any new activities designed. Customers ultimately paid the firm. The firm paid the worker salary; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. It is unknown if the worker incurred economic loss or financial risk. The level of payment was already set by the firm before the worker took over the director position. The worker stated the firm provided all. The worker did not incur expenses in performing services for the firm and she did not incur economic loss or financial risk.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. Services were performed under the firm's business name. The firm represented the worker as its new preschool director to its customers. The work relationship ended when the worker was terminated.

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. The firm retained the right to provide instruction and assumed responsibility for problem resolution, in addition to collecting customer payments for services provided. 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 prior employment relationship with the firm it may not have been necessary for the firm to frequently exercise this right; however, the facts evidence the firm retained the right to do so if needed.

Payment by the hour, 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. Based on the salary 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 independent 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.