

SS-8 Determination—Determination for Public Inspection

Occupation

OFF02.240 AdministrativeAssist

Determination:

Employee

Contractor

UILC

Third Party Communication:

None

Yes

Facts of Case

According to the information and documentation submitted, the firm's business is a vacation rental [REDACTED] and an [REDACTED] in [REDACTED]. The worker performed services managing the office for an absentee owner. The worker provided her services in 2013 and 2014. The firm reported the worker's earnings on Form 1099-MISC at year end.

The firm furnished the office equipment for the worker to perform her services. The worker was paid on a weekly basis. The worker had no investment in a business providing similar services. The worker terminated her services without incurring any liabilities.

Analysis

According to the information and documentation submitted concerning the work relationship, the worker personally performed her services at the firm's properties. The firm provided the worker with the necessary office equipment for the worker to perform her services. The firm controlled the payment to the worker for her services. The worker had no investment in facilities and did not have the opportunity for profit or loss. The worker was free to terminate her services without incurring any liabilities.

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.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. See Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a

If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.

Therefore, the firm exercised direction and control over the services performed by the worker to establish that an employee/employer relationship existed.

Section 3121(g)(1) of the Internal Revenue Code, relating to the FICA, provides that the term "agricultural labor" includes all services performed on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur bearing animals and wildlife.

Section 31.3121(g)-1 of the regulations includes within the definition of the term "farm," stock, dairy, poultry, fruit, fur bearing animal, and truck farms, plantations, ranches, nurseries, ranges, orchards, and such greenhouses, and other similar structures as are used primarily for the raising of agricultural or horticultural commodities.

However, it is held that services performed by an employee of a company in connection with the racing of horses and exhibiting them at horse shows are not "agricultural labor" within the meaning of section 3121(g)(1) of the Federal Insurance Contributions Act and section 3306(k) of the Federal Unemployment Tax Act. This conclusion is also applicable for purposes of the Collection of Income Tax at Source on Wages (chapter 24, subtitle C of the Code).

Under section 3121(a)(8)(B) of the Internal Revenue Code, with exceptions not material here, when the cash remuneration paid to an individual farm worker in a calendar year is \$150 or more, or the employer's expenditures for agricultural labor in the year equals or exceeds \$2,500, the income is subject to FICA.

Section 3306(c)(1) of the Code provides in effect, that with exceptions not material here, remuneration paid to individuals for agricultural labor is not subject to FUTA taxes unless the agricultural labor is performed for a person who, during any calendar quarter in the calendar year or the preceding calendar year, paid remuneration in cash of \$20,000 or more to individuals employed in agricultural labor; or on each of some 20 days during the calendar year, each day being in a different calendar week, employed in agricultural labor for some portion of the day, 10 or more individuals.

Analysis

Continued.

Under section 3401(a)(2) of the Code the term “wages” does not include remuneration for services that constitute agricultural labor as defined in section 3121(g). However, beginning in 1990, the Revenue Reconciliation Act of 1989 modified that rule to provide that income tax withholding is applicable if the remuneration is subject to FICA withholding.

“Wages” for services other than “agricultural labor” are not to be reported on Form 943. Such wages are to be reported on Form 941 Employer’s Quarterly Federal Tax Return. However, if you file Form 943 and pay wages to household workers who work on your for-profit farm, you may include the wages and taxes of these workers on Form 943. If you choose not to report these wages and taxes on Form 943, or if your household worker does not work on your for-profit farm, then they should be reported on Schedule H, which is filed with your individual income tax return. Schedule H is also used to report FUTA taxes for household employees.

Accordingly, if only part of an employee’s services constitute “agricultural labor,” or if some of an employer’s workers perform services which constitute “agricultural labor” and others do not, it is necessary for the employer (1) to segregate the “wages” for “agricultural labor” from the other “wages” paid; (2) to file Form 943 reporting the Federal Insurance Contributions Act taxes due with respect to the “wages” for “agricultural labor;” and (3) to file Form 941 reporting the Federal Insurance Contributions Act taxes due with respect to the “wages” for other “employment.”

Therefore, in this case, as the employer of the worker, you are liable for FICA and FUTA taxes for the worker, absent the application of the foregoing limited exceptions. Whenever you pay the employee’s tax for federal income, social security and Medicare in lieu of collecting it from the employee, this amount must be included in the employee’s wages for income tax purposes. However, they are not counted as social security and Medicare wages or as federal unemployment (FUTA) wages.

For further information regarding agricultural employees, you may wish obtain Publication 51, Agricultural Employer’s Tax Guide.

The employment tax liabilities for income tax withholding and FICA generally also apply to resident and non-resident aliens, except that non-resident aliens may have an exception depending on their immigrant status. FUTA may also apply to the income earned by aliens, even when the income is not subject to FICA tax. However, agricultural workers that are here on temporary H-2A visas are usually exempt from social security and Medicare taxes, whether they are resident or non-resident aliens. Also, their income is not considered “wages” for withholding or the use of Form(s) 943 and W-2. If your worker is a resident or non-resident alien, and you need additional information, you may wish to obtain Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities.