

SS-8 Determination—Determination for Public Inspection

Occupation

05CCP Child Care Providers

Determination:

☒ 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 firm is a photography business and engaged the worker as a personal assistant to perform live-in nanny services as well as business assistant services. The firm indicated there was a verbal discussion that the firm does not have any employees only contract labor. The worker assisted on photo shoots, helped with errands, groceries and cared for the owners children. The firm assigned jobs through a job description and determined the methods to use in performance of the services. The firm required the worker to contact the firm owners regarding resolution of problems or complaints. The workers work schedule varied due to performing services on an as needed basis. The worker performed services at the firm's place of business, home, hotels and airports. The firm indicated the worker was not required to perform the services personally and the firm hired and paid substitutes or helpers if needed. The worker stated being required to perform the services personally.

The firm provided various items and covered all expenses incurred by the worker in performance of services. The worker provided a personal vehicle. The worker did not lease anything or incur any business expenses. The firm paid the worker a set amount and guaranteed a minimum amount of \$1,000.00. The firm was paid through customer purchases. The firm did not carry workers' compensation insurance. The worker could not suffer any economic loss and had no financial risk. The firm determined the level of payment for the services.

There were no written agreements, there was a verbal one. The firm provided the worker with paid vacations, sick pay, paid holidays, personal days, and place to live with car, gas, phone, and food benefits available. The relationship could be terminated by either party at any time without incurring any liability. The firm stated the worker did perform similar services for others and was encouraged to do so. The relationship ended after a 1 year term with a bonus and two week notice per the firm.

Analysis

When a firm determines or retains the right to determine directly or through designation what, how, when, and where workers perform services an employer/employee relationship exists. For federal employment tax purposes, it is not necessary for firms to exert direct or continuous control nor that services be performed full-time on a fixed scheduled basis, it is sufficient that the firm retains the right to change the workers services, as they deem necessary for business purposes. This control may come from verbal instructions, training, meetings, reporting, as well as supervision. Also, the methods used by workers to perform services are not only controlled through verbal instructions but also by equipment, materials, and supplies provided. In this case, the firm not the worker had control over the methods and means used in the performance of the services. These facts evidence behavioral control by the firm over the services performed by the worker.

When a worker does not have a significant financial investment in a business requiring capital outlays with business risks an employer/employee relationship is evident. In this case, the worker had no financial business investments and no control over profit and loss due to significant business capital outlays being made. The firm had the business investment and control over profit and risk of loss with regard to the services the worker performed for the firm's business and costs related to care for the firm's dependents in the home. These facts evidence financial control by the firm over the services performed by the worker.

There were no formal contracts between the firm and the worker. There was a verbal working relationship agreement entered into. It is noted that whether there is an employment relationship is a question of fact based on the autonomy of the work relationship and is not subject to negotiation between the parties. The worker did perform similar services for others per the firm and was not required to obtain the firm's prior approval to do so. Although this could be an important factor to consider in an independent contractor relationship, this factor alone would not make the worker to be an independent contractor. Many workers have more than one job at a time and may be an employee in one or all working relationships depending on the autonomy of each one. The worker did no advertising as a business to the public. The worker personally performed personal assistant services for the photography business at the firm's place of business and nanny services at the firm's home.

Both the firm and the worker retained the right to terminate the working relationship at any time without incurring any liability. The right to discharge a worker at any time without incurring a liability for termination is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired without a liability so long as the independent contractor produces a result that meets the contract specifications. Likewise, 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.

Based on the autonomy of the working relationship we have determined the worker to have been an employee under common law for the services performed for the firm's photography business and a domestic employee for child care services performed at the home of the firm's business owner.

In general, domestic services include services of a household nature in or about a private home performed by cooks, waiters, butlers, housekeepers, maids, valets, babysitters, janitors, laundresses, caretakers, handymen, gardeners, grooms, chauffeurs of family-use vehicles, and companions for convalescents, the elderly, or the disabled. A private home is a fixed place of abode of an individual or family.

Remuneration paid for domestic services is not subject to federal income tax withholding, unless both the employer and employee voluntarily agree to it. See Code section 3401(a)(3). The domestic employee may make a request for income tax withholding by completing Form W-4, "Employee's Withholding Allowance Certificate," and may also request advance payments of the earned income credit by completing Form W-5 if he/she is eligible. However, there are no similar exceptions for FICA and FUTA taxes. For further clarification of household employee issues, please see Publication 926, Household Employer's Tax Guide.