

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

In this case, the firm is an individual payer. The worker was engaged as a nanny for the payer's child. She received a 2017 Form 1099-MISC. There was no written agreement.

Initially, the payer explained their expectations for child care as well as set the work assignments and hours. According to the worker, the payer determined the methods by which the assignments were performed and would be contacted if any issue or problems arose. Only verbal reports were given regarding the worker's daily activities with the payer's child. The worker had a set weekday working schedule and worked at the payer's home or other payer-approved locations such as the baby gym or park. No meetings. Both parties agreed that the worker was to provide the services personally.

The payer provided the diapers, food, clothing, etc. needed by the child as well as the home. The payer noted that she reimbursed the worker for gas for transporting the child to other locations. Both parties agreed that the worker was paid an hourly rate and had no other economic risk. The payer established the level of payment for services.

There were no benefits. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. She had a listing on care.com. The relationship ended as it was only for the summer.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the payer retained the right to change the worker's methods and to direct the worker to the extent necessary to ensure the proper care of the child. The worker provided child care services in the payer's home and was essentially a domestic worker. 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 worker is a household employee if the payer can control not only what work is done, but how it is done. It doesn't matter whether the work is full-time or part-time or that the worker was hired through an agency or from a list provided by an agency or association. It also doesn't matter whether the worker is paid on an hourly, daily, or weekly basis, or by the job. In this case, the payer provided instructions and expectations, even if just initially and even if the work became routine. The payer retained the right to redirect the worker's activities as needed to ensure the care of its child whether or not it exercised that right. The worker's services were performed in the payer's home with the payer providing all needed materials and supplies. The worker worked set scheduled hours for an hourly rate of pay and had no other economic risk.

In this case, many elements of control existed. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control as well as the continuous nature of the worker's services. While the worker's services were for a brief period of time, those services were continuous. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. In addition, payment by the hour also supports an employer-employee finding.

It is acknowledged that the worker may have agreed to the status of an independent contractor and the acceptance of a Form 1099-MISC pay document. However, in *Bartels v. Birmingham*, 332 U.S. 126, 1947-2 C. B. 174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

Based on the above analysis, we conclude that the payer 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.

For further clarification of household employee issues, please see Publication 926, Household Employer's Tax Guide.