

SS-8 Determination—Determination for Public Inspection

Occupation

05CSI Companion Sitters

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 worker submitted a request for a determination of worker status in regard to services performed for the payer from March 2017 to September 2017. The worker was engaged to provide 24-hour live-in care for an individual. The payer issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The payer's response states it is a trust, not a business. The worker agreed to move in and receive free room, board, and groceries in exchange for keeping an eye on an individual and the house. The worker would make sure the individual ate and took her medicine. The worker would also purchase groceries with the individual's money, feed and water the birds, and keep things tidy. The worker's title was roommate. The worker operated as an independent contractor, verbally agreeing to a roommate agreement with the addition of earning money for watching after things. The worker did not have a boss and was not given any direction of what she was to do with her schedule. The worker decided what she did and when she did it; she set her own schedule. There was no written agreement between the parties.

The payer stated that per the roommate agreement, the worker was asked to pick up after herself and her cat, make sure the individual ate and took her medicine, purchase groceries with the individual's money, water house plants, and feed and water birds. The worker determined the methods by which assignments were performed. The payer's trustee was contacted if problems or complaints arose. The trustee was responsible for problem resolution. The worker was asked to keep receipts of purchases made with the individual's money. The worker was in charge of her schedule. Services were performed in the individual's home where the worker was living. Meetings were not required. The payer required the worker to personally perform services. Hiring substitutes or helpers was not applicable. The worker stated the payer provided specific written instruction as to the services to be performed, i.e. fix breakfast, lunch, and dinner; put dishes in the dishwasher; take her somewhere and have her move around; feed birds and clean cages; etc.

The payer stated the worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services. The payer paid the worker a fixed amount semi-monthly. The worker was not allowed a drawing account for advances. The payer did not carry workers compensation insurance on the worker. The worker incurring economic loss or financial risk was not applicable. The worker established the level of payment for the services provided. The worker stated the payer provided everything including the car to transport the individual. The payer paid her salary. She did not incur economic loss or financial risk.

Both parties agreed benefits were not provided. The work relationship could be terminated without liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The work relationship ended when the individual passed away.

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.

Therefore, the payer's statement that the worker was an independent contractor pursuant to a 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.

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.

Nurses' aides and other unlicensed individuals normally perform services that are expected of maids and servants. Such services include bathing the individual, combing his/her hair, reading to the individual, arranging bedding and clothing, and preparing meals. These services are also considered domestic services.

Because the worker's services constitute domestic services, the employer is responsible for withholding the employee's share of the FICA tax if the worker was paid up to a specific income threshold amount in each particular year. The wage threshold for withholding FICA tax in a specific year may be found in that year's Publication 926, Household Employer's Tax Guide.

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 payer required the worker to personally perform services. Furthermore, the domestic services performed by the worker were integral to the individual's ability to remain in her home. The payer required the worker to provide receipts in connection with items purchased and assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer 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 payer 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 payer 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. As acknowledged by the payer, the worker did not incur economic loss or financial risk. Based on the fixed semi-monthly rate of pay arrangement the worker could not realize a profit or incur a loss.

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 payer's need to provide domestic services to an individual. 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 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.

The payer can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.