

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 in 2017 as an in-home caregiver. The work done by the worker included personal care and services, household services, record keeping, etc. 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.

Information provided on behalf of the payer states the worker was engaged to provide in-home healthcare. The cover letter was prepared to assist the payer's son who now has full power of attorney over the payer's financial affairs. It is believed the Form SS-8 questions don't apply to this situation as the worker was paid for in-home healthcare services. The worker signed a contract and received payment by check and cash for the hours worked. A 2017 Form 1099-MISC was filed for the money she received. The caregiver contract was terminated in July 2017 due to the worker's breach of contract stipulations.

The payer's response stated it did not provide specific training or instruction to the worker. Report requirements and the worker's daily routine were documented in the written contract. Services were performed in the home. The payer required the worker to personally perform services. The worker contracted substitutes and paid them from her wages. The worker stated specific instructions were outlined in the written contract. She performed services as approved by the payer's primary or secondary representatives, identified in the written contract. The representative(s) was contacted if problems arose. The representative(s) was responsible for problem resolution. The payer and his representative(s) required her to prepare records and daily logs, in addition to providing receipts. She performed services as contracted, i.e. minimum of six hours per day, seven days per week. Services were performed in the payer's home and while transporting him to various appointments, running errands, etc. The payer or his representative(s) was responsible for hiring substitutes or helpers. She sometimes paid respite workers hired by the payer; however, the payer reimbursed her.

The payer's response stated it provided everything that was needed to perform services. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the payer. The payer paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. It is unknown if the worker incurred economic loss or financial risk. The worker did not establish the level of payment for the services provided. The worker stated she did not incur economic loss or financial risk. Starting pay was negotiated during the hiring process.

The payer's response stated the work relationship could be terminated by either party without liability or penalty. It is unknown if the worker performed similar services for others. The work relationship ended when the contract was terminated. The worker stated she did not perform similar services for others or advertise as her work schedule with the payer did not permit other jobs. The payer represented her as an employee/caregiver to others. She was wrongfully terminated.

The caregiver contract, signed in January 2017, states, in part, the purpose of the agreement was to set out the terms of employment and to establish what assistance the worker would provide to the payer. The worker would assist the payer to live at home and to have as much control over the home environment and life as possible. The payer would participate in decision making when possible. The worker was responsible directly to the payer's primary representative to direct and approve her actions. Services included personal services, i.e. activities of daily living such as bathing, dressing, feeding, and medications; personal care, i.e. carrying out physicians' directions regarding care of the payer, carrying out the care plan, assisting with mobility and transfers, and record keeping; household services, i.e. meal preparation according to a plan approved by the payer's primary representative, shopping, errands, house cleaning, and laundry; record keeping, i.e. daily logs and receipts from cash and credit card purchases. Compensation would not be given without records being sent, electronically and hard copy, to the payer's primary representative. Compensation would be directly deposited into the worker's bank account on the 1st and 15th of each month after records had been reviewed and approved. The worker would write a record of any accidents or other sudden events bringing harm or risk to the payer. The worker would make use of emergency contact procedures to speak with the payer's primary representative about such incidents. The worker would not alter the work schedule without advance notice to the payer's primary representative. The worker would be provided funds for household expenses and she was required to keep detailed records and receipts. Weekly expenses over \$200 required the primary representative's approval, except for emergencies. The contract could be terminated by either party with a one-month advance written notice.

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 written 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.

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 and his representative(s) required the worker to personally perform services. Furthermore, the in-home caregiver services performed by the worker were integral in allowing the payer to remain in his home. The payer's representative(s) required the worker to perform services in accordance with its direction and approval, in addition to reporting on daily activities and expenses. The payer's representative(s) assumed responsibility for problem resolution. These facts evidence the payer and his representative(s) 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 and his representatives. Based on the worker's education, past work experience, and work ethic the payer and his representative(s) may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence they 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 in the payer's response, the worker did not incur expenses in the performance of services for the payer. Based on the hourly 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 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 payer's in-home needs. 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 and his representative(s) 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 and his representative(s) can obtain additional information related to worker classification online at www.irs.gov; Publication 4341 and Publication 926, Household Employer's Tax Guide.