

SS-8 Determination—Determination for Public Inspection

Occupation 05CSI Companion Sitters	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 payer is an individual requiring personal care services in his home. The worker was engaged by the payer to perform the desired services. The payer reported the worker's remuneration on Form 1099-MISC for 2017.

Information from the parties supports that the payer instructed the worker and provided her with her assigned duties. The payer, or his representative, determined the methods by which the worker performed her services. If problems or complaints occurred, the worker contacted the payer's representative for resolution. The worker generally performed her services in the evening, in the payer's home. She was required to perform her services personally.

The payer provided all necessary supplies. The worker did not incur expenses in the performance of her services. The payer did not cover the worker under workers' compensation. Neither party indicated an investment by the worker in a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The payer did not make benefits available to the worker. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the payer terminated the work relationship.

Analysis

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 an 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, although the payer relied upon the worker's prior training and experience to perform her services, the payer was responsible for resolving any problems or complaints that may have occurred, showing the payer retained the right to change the worker's methods and to direct the worker to the extent necessary to protect the financial investment and ensure the worker's services were performed satisfactorily. The worker was required to perform her services personally, meaning that she could not engage and pay others to perform services for the payer on her behalf. 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. These facts show that the payer retained behavioral control over the services of the worker.

Factors that illustrate whether there was a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. These facts show that the payer retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed her services on a continuing basis. 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. 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 care the payer received in his home. Integration of the worker's services into the business arrangement generally shows that the worker is subject to direction and control. When the success or continuation of a business arrangement depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the payer. Although the payer did not make benefits available to the worker, the payer terminated the work relationship without incurring liability or penalty. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. These facts show that the payer retained control over the work relationship and services of the worker.

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.