

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 worker submitted a request for a determination of worker status in regard to services performed for the firm from March 2017 to January 2018 as an assistant caregiver. The work done by the worker included caring for residents, i.e. assisting with feeding, bathing, changing clothes, changing linens, doing laundry, cooking, cleaning, etc. Our research indicates the firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she did not receive a tax reporting document. She asked for a Form W-2; however, was informed the firm had not paid payroll taxes.

The firm's response states its business supports its assisted living business, a ten-person assisted living facility. The assisted living facility provides care for individuals who cannot live by themselves due to either age or infirmity. The firm administers the business and financial affairs of the assisted living facility. The worker was engaged to provide housework and kitchen support to residents in support of the certified and approved caregiver staff. Services included, but were not limited to, cooking, room cleaning, laundry, etc., duties typically associated with a domestic helper. The worker was classified as an independent contractor as she was free to perform tasks at any time during the day. She was paid a monthly stipend, in addition to being provided free room and board. Services were performed under a verbal agreement.

The firm stated it did not provide specific training or instruction to the worker. The firm provided only general direction on what needed to be done. How or when the worker did the services were completely her decision. The worker determined the methods by which services were performed. The firm was given feedback by its staff if things weren't done. The firm's owners were contacted if problems or complaints arose. The firm was responsible for resolution. Reports were not required. The worker's daily routine was at her discretion. Services were performed at the assisted living facility. The worker was invited to attend staff meetings as scheduled. There was no penalty if she did not attend. The firm required the worker to personally perform services. To protect the privacy of its care residents, the firm was responsible for hiring substitutes or helpers. The worker stated there was no formal training provided by the firm. It was provided by an independent company. A senior caregiver initially provided direction related to work assignments, i.e. what to do, how to do it, and when to do it. Work assignments remained the same for the entire work relationship. The firm's manager determined the methods by which assignments were performed. She performed services on a regularly scheduled basis, in addition to providing additional shift coverage if needed.

The firm stated it provided all supplies, equipment, and materials. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid the worker a fixed monthly stipend. A drawing account for advances was allowed on a few occasions. The firm did carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker did not establish the level of payment for the services provided. The worker stated she was paid salary. The firm determined the level of payment for the services provided.

The firm stated the benefit of time off was available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The firm represented the worker as domestic help to its customers. The worker quit of her own volition as she was unable to produce documentation of her eligibility to be a certified caregiver, the original plan. The worker stated benefits were not provided. Services were performed under the name of the assisted living facility. The work relationship ended when she resigned.

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 firm'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.

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 firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of its customer and staffing needs, received feedback on whether the worker performed expected services or not, and assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's past work experience and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm 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 firm 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 firm 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 firm, the worker did not incur expenses, nor did she assume economic loss or financial risk. Based on the fixed monthly 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 business 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 firm's business. 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 firm 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 firm can obtain additional information related to domestic services and worker classification online at www.irs.gov; Publication 926 and Publication 4341.