

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 August 2016 to August 2018 as a personal caregiver. The firm issued the worker Form 1099-MISC for 2016, 2017, and 2018. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. There was no written agreement between the parties. The worker believes they are classified as an employee because the firm arranged the days and hours that the worker would perform services, the worker performed services in the home at the direction of the firm, and also decided what the pay would be for services rendered.

The firm's response states it is not a business but a client for whom personal care-giving responsibilities were provided. The work provided by the worker was that of a caregiver. The worker was requested to assist with daily living activities for the client during overnight hours. The firm did not provide supervision or direction. A business card advertising the worker as a CNA was provided by the firm.

The firm (client) states that the worker was a licensed professional and that they did not have to provide the worker with training. The worker provided the firm with their hours of availability and stated what services they would provide the client. If the worker encountered problems or complaints during their job duties, they were required to contact the firm. The firm states that they would be told of any details that were necessary instead of requiring reports from the worker. The worker's schedule was dictated by her evening availability. The worker performed all duties at the client's residential location. The worker was not required to attend meetings but was required to perform all services personally. The issue of substitutes or helpers never arose during the worker's job duties. The worker states that the firm scheduled staff meetings that all caregivers were to attend and advised the caretakers on any new and important changes with job duties. The firm assigned job tasks and determined the methods by which they were performed, as well as assumed problem resolution. The worker had to provide the firm with daily care log entries, medication log entries, and a time/pay log. The worker performed evening shifts and would cover any caregiver shifts when a caregiver was unavailable. All job duties were performed at the firm's client residential address. The worker was required to attend staff meetings and perform all duties personally. The firm hired and paid any substitutes and helpers.

The firm did not list any materials, supplies, or equipment that were needed during the job duties, nor were they aware of any equipment, materials, or supplies that the worker would need to lease. The firm states that the worker had no expenses incurred and was paid an hourly wage by the firm. The firm did not carry worker's compensation on the worker. The firm states that the worker established the hourly rate upon agreeing to enter into the work relationship. The worker states that the firm provided all materials, supplies, and equipment for the job duties. The worker did not have to lease any space, equipment, or materials. The worker did not have any expenses during their job duties. The worker was paid an hourly wage. The worker did not have any exposure to economic loss or financial risk during their job duties. The worker states that the firm stated the hourly wage for the worker at the start of the work relationship, with a raise after 6 months.

The firm states that they did not provide the worker with any benefits. The firm states that the relationship between the parties could be terminated at any point without incurring loss or liability. The firm states that the worker set her own hours and would determine whether or not they wanted to continue the work relationship. The worker did perform other similar services to other clients. The firm states that they did not control who the worker's other clients were, and the worker did advertise their services to the public. The firm provided a business card that had been given to them by the worker that advertised their services to the public. The firm states that they did not represent the worker to their client because they are not a business and their client was their family member. The firm states that the work relationship ended when the worker quit showing up for work and essentially abandoned the care of their client. The worker states that they were not offered any benefits. The worker states that they performed similar services to other clients at the time they worked for the firm and they did not need the firm's approval to do so. The worker states that they were not a member of a union. The worker states that they did not advertise their services to the public, and the work relationship ended when the worker was fired.

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, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or 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.

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 at the direction of the firm. The firm required daily medication and care logs to be completed by the worker 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 education, 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, day, 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. The firm provided all of the supplies, equipment, and facilities for the worker to complete their care-giving responsibilities. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. 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 business activities. In this case, the worker was not engaged in an independent enterprise but was a licensed professional providing a service to a client. 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 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 worker classification online at www.irs.gov; Publication 4341.