

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 January 2014 to May 2016 as a personal caregiver. The firm issued the worker Form 1099-MISC for 2014 to 2016. 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 firm's response states it is a personal care giver that subcontracts caregiving work. The work provided by the worker was that of personal caregiver. The worker was requested to provide care for the elderly. The firm did not provide supervision or direction. The firm states that they subcontract work when they have more caregiving responsibilities than they can perform themselves.

The firm states that the worker received a care plan verbally from the firm when a client was introduced to the worker. The firm assigned the worker job tasks by phone communication and the firm's client determined the methods by which job assignments are to be performed. The firm's client and the firm were responsible for problem resolution should any arise during the worker's job duties. The firm required a communication log between workers when performing client services. The worker's daily routine would vary greatly and would involve a variety of caregiving tasks. All work was performed at client locations and the shift length depended upon client needs. There were no meetings required by the worker was required to perform all services personally. Any hiring and paying of substitutes or helpers were the responsibility of the firm. The worker states that the firm provided the worker with instruction and a schedule of clients. The firm determined the methods by which job tasks were performed and assumed responsibility for problem resolution. The firm required time sheets and a daily sign in at client locations. The worker states that there were no meetings and they were required to perform all services personally. Helpers and substitutes were hired and paid for by the firm.

The firm states that the client provided all supplies for the job duties, and the worker did not have to lease space, facilities, or equipment. The worker incurred no expenses during their job duties. The worker was paid an hourly wage by the firm and did not have access to a drawing account for advances. The customer would pay the firm directly. The firm did not carry worker's compensation insurance on the worker. The worker did not have any exposure to economic loss or financial risk. The firm set the level of payment for all services rendered. The worker states that the only expense they incurred was unreimbursed mileage. The worker did not have to provide any materials, supplies, or equipment for their job duties. The worker states that they had no exposure to financial risk.

The firm states that they provided the worker with paid holidays as a benefit. The relationship between the parties could be terminated without loss or liability. The worker did not perform similar services for any other firm. There were no agreements prohibiting competition between the parties. The worker was not a member of a union. The worker was represented as a contractor under the firm by the firm. The work relationship ended when the client would no longer need services. The worker states that they received time and a half for holidays as a benefit. The worker states that they did not advertise their services to the public. The worker states that they were represented as an employee under the firm. The work relationship ended when the worker quit providing services for the firm.

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, 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 integral to the firm's business operation of care-giving. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed, 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 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 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 worker classification online at www.irs.gov; Publication 4341.