

SS-8 Determination—Determination for Public Inspection

Occupation 05CSI.6 Companion Sitter	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

Facts of Case

Information provided indicated the “firm” is an individual who has hired people to provide home care services for her husband in their home. The worker was hired as a healthcare provider and has been providing services since 2013. The firm has reported the income paid for the in home care on Form 1099-MISC. The firm indicated she did so because the worker held a business license. The firm indicated services were performed evening for five hours a day, four days a week. The worker was paid by the hour. Either party could terminate the work relationship without incurring a penalty or liability.

The worker indicated he was performed services as a CAN (certified nursing assistant.) He stated instructions were given on a day to day basis, as needed. He agreed services were performed four days a week Sunday through Thursday eight pm to six am. The firm provided all supplies and materials needed in the home for the care of her husband. He agreed he had been paid by the hour. Either party could terminate the work relationship without incurring a penalty or liability.

ANALYSIS

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker’s status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker’s methods and to direct the worker to the extent necessary to protect your financial investment. The worker(s) are given instructions as to the care required for [REDACTED]. Instructions may have only been given once at the beginning of the work relationship. As a licensed CNA they would also have completed training on minimum patient care.

Factors that illustrate whether there is 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. The worker in the instant case was paid by the hour. All services were performed at the home of the firm, and supplies were provided. The worker incurred no business operating expenses in the services provided.

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 to the appropriate care required for the patient. The fact the worker had complete a course and obtain his certificate as a nursing assistant, does no way give him training to operate a medical business practice, as indicated by the firm. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

Analysis

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.

Remuneration paid for domestic services is not subject to federal income tax withholding, unless both the employer and employee voluntarily agree to it. See Code section 3401(a)(3). The domestic employee may make a request for income tax withholding by completing Form W-4, "Employee's Withholding Allowance Certificate," and may also request advance payments of the earned income credit by completing Form W-5 if he/she is eligible. However, there are no similar exceptions for FICA and FUTA taxes.

Because the worker's services constitute domestic services, the employer is responsible for withholding the employee's share of the FICA tax if the worker was paid up to a specific income threshold amount in each particular year. The wage threshold for withholding FICA tax in a specific year may be found in that year's Publication 926, Household Employer's Tax Guide.

Remuneration paid in any medium other than cash to an employee for domestic services in the private home of the employer, or for his/her personal wants and comforts, and not in the course of the employer's trade or business is not subject to FICA (Code section 3121(a)(7)(A)). Domestic service performed by your spouse or by your child (under age 21) is not treated as employment subject to FICA. With some exceptions, domestic service performed by your parent or by an individual under age 18 at any time during the year, will also not be treated as employment subject to FICA if it is not the principal occupation of such employee.

If you paid cash wages of \$1000 or more for domestic services during any calendar quarter in the calendar year or the preceding calendar year, then those wages are subject to FUTA tax (Code sections 3306(a)(3) and 3306(c)(2)). Generally, you can take a credit against the FUTA tax for a contribution paid into state unemployment funds, although this credit cannot exceed 5.4 percent of the first \$7000 of wages.

The FUTA requirements are based on the total wages paid to all domestic employees, while the FICA wage threshold is based on the wages paid to each domestic employee. Therefore, an employer may be liable for FUTA tax, while not liable for FICA tax.

Domestic employers are required to satisfy their tax obligations by increasing their quarterly estimated tax payments or by increasing tax withholding from their own wages. This requirement became effective in 1998. Estimated tax penalties apply to underpayments attributable to these taxes.

CONCLUSION

Based on the information provided and common law we conclude that as the worker was a domestic employee of the firm. As the employer of the worker, you are liable for FICA and FUTA taxes for the worker, subject to the preceding thresholds. If you choose to pay your employee's share of social security and Medicare taxes in lieu of withholding it from the employee's wages, the amount must be added to the employee's wages for income tax purposes. However, it is not included as social security, Medicare, or FUTA wages.