

SS-8 Determination—Determination for Public Inspection

Occupation

05CSI.19 Companion Sitter

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ 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 firm is an elderly individual who requires 24 hour care in the firm's home. The firm engaged the worker to provide companion sitter care in the home. The firm's designated case manager provided the worker with instructions regarding medications and personal care services needed to be performed and the firm's designated individual handling the worker's affairs provided instructions on other services required to be performed in the home. The firm's designated individuals allowed the workers who performed these services to adjust assigned work days and times between each other. The firm assigned the worker work schedules based on the worker's availability and firm's personal needs. The firm required the worker to contact designated individuals regarding any problems or complaints for resolution. The firm, case manager, and worker determined the methods used to perform the services. The firm required the worker to provide time reports and the case manager required the worker to provide daily log check sheet reports on services performed and report any problems or concerns. The firm required the worker to perform the services at the firm's home or other designated locations as needed. The firm required the worker to perform the services personally on 24 hour shifts. The firm's designated individuals hired substitutes or helpers and the firm paid them.

The firm provided everything the worker needed to perform the assigned services. The worker did not lease anything or incur any business expenses. The firm reimbursed the worker for any personal expenses the firm requested. The firm paid the worker a set amount per 24 hour shift. The firm determined the level of payment for the services based on industry standards and negotiated with the worker. The firm did not carry workers' compensation insurance. The firm indicated the worker's economic loss and financial risk were related to possible elder abuse or theft issues. The worker indicated she could not suffer any economic loss and had no financial risk.

There was a signed agreement between the firm and the worker indicating the worker as an independent contractor, the duties the worker was required to perform during 24 hour shifts and how the worker would be paid and how income would be reported by the firm. The worker did perform similar services for others and was not required to obtain the firm's prior approval to do so. The firm indicated the worker advertised through word of mouth and the worker indicated she did no advertising to the public as being engaged in a business. Both the firm and the worker retained the right to terminate the working relationship at any time without incurring any liability.

Analysis

When a firm determines or retains the right to determine directly or through designation what, how, when, and where workers perform services an employer/employee relationship exists. For federal employment tax purposes, it is not necessary for firms to exert direct or continuous control nor that services be performed full-time on a fixed scheduled basis, it is sufficient that the firm retains the right to change the workers services, as they deem necessary for business purposes. This control may come from verbal instructions, training, meetings, reporting, as well as supervision. Also, the methods used by workers to perform services are not only controlled through verbal instructions but also by equipment, materials, and supplies provided. In this case, the firm not the worker had control over the methods and means used in the performance of the services. The firm engaged the worker to perform companion sitter services on 24 hour shifts at the firm's residence. The firm allowed the worker to work on a flexible schedule based on the worker's availability. The firm and firm designated individuals provided the worker with instructions on what and how to perform services as needed. The firm required the worker to contact the firm's designated individuals regarding any problems or complaints for final resolution. The firm required the worker to provide the firm with time reports and the firm's case manager required the worker to complete and provide daily log check sheets. The firm required the worker to perform the services personally at the firm's residence or other designated locations. The firm's designated case manager and personal affairs individual hired substitutes or helpers as needed and the firm paid them. These facts evidence behavioral control by the firm over the services performed by the worker.

When a worker does not have a significant financial investment in a business requiring capital outlays with business risk an employer/employee relationship is evident. In this case, the worker had no financial investment in a business and did not incur any business expenses. The firm provided everything the worker needed to perform the services. The worker did not lease anything or incur any business expenses. The firm reimbursed the worker for personal item expenses requested by the firm. The firm paid the worker a set amount for a twenty four hour shift. The firm determined the level of payment for the services. The worker could not suffer any economic loss due to significant business capital outlays being made. The worker did not have control over profit and loss with regard to the performance of the services. The issue of possible liabilities with regard to elder abuse or theft would not be considered control over profit and loss. These facts evidence financial control by the firm over the services performed by the worker.

There was a signed agreement provided indicating the worker to be an independent contractor. It is noted that whether there is an employment relationship is a question of fact based on the autonomy of the work relationship and is not subject to negotiation between the parties. The worker did perform similar services for others and was not required to obtain the firm's prior approval to do so. Although this could be an important factor to consider in an independent contractor relationship, this factor alone would not make the worker to be an independent contractor. Many workers have more than one job at a time and may be an employee in one or all working relationships depending on the autonomy of each one. The worker did no advertising to the public as being engaged in a business operation. The worker personally performed services for the firm on a regular continuous part-time scheduled basis over a period of several months. Both the firm and the worker retained the right to terminate the working relationship at any time without incurring any liability. The right to discharge a worker at any time without incurring a liability for termination is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired without a liability so long as the independent contractor produces a result that meets the contract specifications. Likewise, if the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.

In general, domestic services include services of a household nature in or about a private home performed by cooks, waiters, butlers, housekeepers, maids, valets, baby sitters, 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. 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)). For further clarification of household employee issues, please see Publication 926, Household Employer's Tax Guide.