

**SS-8 Determination—Determination for Public Inspection**

Occupation 05CSI.22 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

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 individual who needed in home care services provided for the firm's spouse. The firm engaged the worker through a referral to provided assistant nursing services in the home for the firm's spouse while the firm went to work. The firm did not need to provide the worker with any formal training due to worker's credentials and experience. The firm provided the worker with care instructions on what services needed to be performed. The firm and worker determined the methods used by the worker to perform the services. The firm required the worker to contact the firm regarding any problems or complaints for resolution. The firm required the worker to provide the firm with verbal daily reports on the services performed. The worker's daily routine was determined by the firm's spouses needs and wants. The firm required the worker to perform the services personally at the firm's home. The firm hired substitutes or helpers if needed and the firm would pay them.

The firm provided the worker with everything needed in order to perform the assigned services. The worker did not lease anything or incur any business expenses. The firm paid the worker an hourly wage. The firm did not carry workers' compensation insurance. The firm determined the level of payment for the services. The worker could not suffer any economic loss and had no financial risk.

There were no contracts between the firm and the worker. The firm indicated there was a verbal working relationship agreement entered into. The worker did perform similar services for others per the firm and was not required to obtain the firm's prior approval to do so. The worker indicated no similar services were performed for others while performing services for the firm. The worker did no advertising to the public as being engaged in a business operation. Both the firm and the worker retained the right to terminate the working relationship at any time without incurring any liability.

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## Analysis

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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. In this case the firm engaged the worker through a referral who had prior experience and the credentials needed to perform in home care services for the firm's spouse while the firm went to work. The firm provided the worker with the necessary instructions on what services needed to be performed. The firm assigned the work a work schedule and jobs to perform based on the firm's and firm's spouses personal needs. The firm and worker determined the methods used to perform the services. The methods used by workers to perform services are not only controlled through verbal instructions but also by equipment, materials, and supplies provided. The firm required the worker to contact the firm regarding resolution to any problems or complaints. The firm required the worker to provide the firm with daily activity reports. The firm required the worker to perform the services personally at the firm's residence. The firm would hire and pay substitutes or helpers if needed. These facts evidence behavioral control by the firm over the services performed by the worker.

The firm provided everything the worker needed in order to perform the services. The worker did not lease anything or incur any business expenses. The firm paid the worker an hourly wage. The firm determined the level of payment for the services. The worker could not suffer any economic loss due to on-going significant business capital outlays being made. The worker did not have control over profit and loss with regard to performance of the services for the firm. These facts evidence financial control by the firm over the services performed by the worker.

There were no contracts between the firm and the worker. The firm indicated there was a verbal working relationship entered into that the worker would 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 firm stated the worker did perform similar services for others while performing services for the firm 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 and continuous basis over several months at the firm's residence for the firm's spouse based on the firm's and firm's spouses personal needs.

Both the firm and 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)).