

SS-8 Determination—Determination for Public Inspection

Occupation 05CSI.26 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 engaged the worker, her nephew, to perform supervisory companion sitter services and other services when no companion sitters were present originally and subsequently only companion sitter services at the firm's home. The worker received no money compensation in 2010 but was provided with room and board. In 2011 the worker received room and board and cash payments as gifts from the firm so no year-end reporting documents were issued by the firm. Beginning in 2012 the firm issued Forms 1099-MISC under non-employee compensation or medical or health care payments. The firm and firm's insurance provider assigned jobs required to be performed and listed others that were not deemed necessary and would not be paid for through the insurance provider. The firm and worker determined the methods used to perform the services. The firm required the worker to contact designated family members or the insurance provider regarding any problems or complaints for resolution. The worker was required to provide job activity reports and time reports regarding services performed in order to receive insurance payments for performance of approved services. The worker's hours varied based on the firm's needs and insurance approvals for services performed for the firm. The firm required the worker to perform the services personally at the firm's home or other designated approved locations. The firm or firm's designated family members hired and paid substitutes or helpers as needed and approved by the firm's insurance provider.

The firm provided everything the worker needed to perform the assigned services. The worker did not lease equipment or space. The worker did not incur any business expenses. The firm reimbursed all expenses incurred by the worker for items needed by the firm. The firm paid the worker an hourly wage. The firm received payments through a personal insurance coverage provider to pay for approved deemed necessary care and products. The firm did not carry workers' compensation insurance. The worker could not suffer any economic loss and had no financial risk. The firm determined the level of payment for the services based on the insurance coverage provider's payments.

There were no contracts between the firm and the worker. The firm did not provide the worker with any benefits. Per 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 worker indicated no similar services were performed for others. The firm did not know if the worker advertised as a business to the public and the worker indicated no advertising as a business was done. 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. In this case the firm, firm's insurance provider, and firm's designated family members determined what, how, when, and where the worker performed the services. The firm required the worker to contact the firm's designated family members or firm's insurance provider regarding any problems or complaints for resolution. The firm, firm's family members and insurance provider assigned the worker services to perform based on the firm's needs. The firm and firm's family members determined the methods used by the worker 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 and firm's insurance provider required the worker to complete and submit weekly activity reports and time reports. The firm and firm's family members required the worker to perform the services personally at the firm's home. The firm or firm's family members hired and paid substitutes or helpers through the firm's personal resources. 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 in order to perform the services. The worker did not lease equipment or space. The worker did not incur any business expenses. The firm and firm's provider reimbursed personal need expenses incurred by the worker. The firm paid the worker an hourly wage. The insurance provider paid the firm for approved expenses and services performed. The firm and insurance provider determined the level of payment for the services, reimbursed expenses, and products needed or requested by the firm. 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 profits made nor the risk of losses being incurred with regard to performance of the services for the firm's personal care wants and needs. 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 the worker did perform similar services for others and was not required to obtain the firm's prior approval. 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. The worker personally performed services for the firm on a regular and continuous as needed variable scheduled basis over several years at the firm's home. 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)). 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. For further clarification of household employee issues, please see Publication 926, Household Employer's Tax Guide.