

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

## Occupation

05CSI.31 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 individual who needed companion sitter services in the home. The firm engaged the worker to provide companion sitter services on a flexible as available and needed basis in the firm's home. The firm provided no formal training but instructed the worker on duties needed to be performed and allowed the worker to choose what hours to work based on the firm's needs. The firm and worker determined the methods used to perform the services. The firm required the worker to contact a niece who resided at the firm's home regarding any problems or complaints for resolution. The worker's daily routines varied based on the firm's personal needs. The worker performed the services personally. The firm hired and paid substitutes or helpers that were referred by the worker as needed.

The firm provided everything the worker needed in order to perform the services. The worker did not lease anything or incur any significant on-going business expenses. The firm paid the worker an hourly wage. The worker could not suffer any economic loss and had no financial risk. The firm indicated the worker established her hourly wage and the worker stated the firm determined this issue.

There were no contracts between the firm and the worker. The worker did perform similar services for another related individual while performing services for the firm. The worker advertised her work history on line. Both parties could 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 fixed scheduled basis, it is sufficient that the firm retains the right to change the workers services, as they deem necessary for business purposes. 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 fact that the worker performed services on a flexible schedule as needed is irrelevant for federal employment tax purposes.

When a worker does not have a significant financial investment in a business requiring on-going 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 significant on-going business expenses. The firm had control over the costs with regard to the services being provided.

There were no contracts between the firm and the worker. A verbal working relationship was indicated. 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 a relative of the firm and had other jobs while performing services for the firm. 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 personally performed services for the firm in the firm's home on a regular and continuous as available and needed basis over several months. Both parties 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.

The criteria for Internal Revenue Code Section 3506 is not met in this working relationship as there was no "companion sitting placement service" business involvement.

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.

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.

For further clarification of household employee issues, please see Publication 926, Household Employer's Tax Guide.