

SS-8 Determination—Determination for Public Inspection

Occupation 05CSI.34 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 or payer in this case, is an elderly individual requiring assistance. The worker was a personal care assistant. She received a 2015 Form 1099-MISC for her services; she also provided services in 2014 and 2016 as well. There was no written agreement.

The worker indicated that there was a daily task sheet and log to complete for every shift worked. She was given only one assignment which was to provide private care giving to the individual; the payer (or payer's representative) noted that the worker usually worked the same day each week. Each party indicated that the other determined the methods by which the assignments were performed. The worker noted that a representative of the payer would be contacted if any issues or problems arose; the payer (or representative) noted that other workers would be contacted if the worker could not resolve. Only the worker mentioned daily logs showing the documentation of care provided to the payer. The worker's routine consisted of an overnight and weekend part-time position at the private home of the payer. The worker mentioned occasional phone call check-ins. Both parties agreed that the worker was required to provide the services personally.

The payer provided everything needed by the worker to provide her services such as supplies, tools, and materials. The worker incurred commuting costs for which she was not reimbursed. Both parties agreed that the worker was paid an hourly rate and had no other economic risk. The firm indicated that the worker established the level of payment for services.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others; the firm disagreed. The relationship ended when the worker quit.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the payer (or payer's representative) retained the right to change the worker's methods and to direct the worker to the extent necessary to ensure the payer's well-being. It was the payer (or representative) that provided the worker with at least initial instructions and her expected duties. She performed her services according to the payer's scheduled work hours and days which were based on the payer's needs. It is acknowledged that many of the worker's services became a part of the daily routine of caring for the payer. However, the payer retained the right to redirect the worker's services based on the needs of the payer. A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. In addition, the worker provided her services on a continuous basis, even if part-time, throughout the time period involved. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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 was provided with any equipment, tools, supplies, and materials needed to care for the payer. She simply received an hourly rate of pay and had no other economic risk. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job.

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 a care giver providing services in the payer's home. She was not engaged in an independent business venture. 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.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee and not an independent contractor operating a trade or business.

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. Therefore, we conclude that as the employer of the worker, the payer is liable for FICA and FUTA taxes for the worker. If the payer chooses to pay the 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.

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