

SS-8 Determination—Determination for Public Inspection

Occupation 05CSI.35 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 worker submitted a request for a determination of worker status in regard to services performed for the payer from September 2013 to March 2014 as an in-home caregiver. The worker stated the worker classification was not disclosed in the payer's job advertisement or discussed at time of interview. It was only after the worker had moved in was she told she would be receiving Form 1099. The payer issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The payer's response stated she and her spouse are retired seniors with disabilities who need caregiving services. In 2013, the payer advertised for a live-in caregiver. The work schedule was advertised as five hours per day, six days per week. In addition to an hourly rate of pay, free room and board with Wi-Fi, cable, and utilities would be provided. When hired, the worker knowingly and openly agreed to work as an independent contractor and understood her obligation for her own taxes. There was no written agreement between the parties.

The payer stated she did not provide specific training or instruction to the worker. The payer did request caregivers not wear any clothing or uniforms that would be suggestive of an institutional setting. If the worker's activities resulted in reducing the payer's overall stress and maintaining her overall good health, the payer would continue to engage the worker. If those results were not obtained, the payer would terminate the work relationship. If adjustments to the general work schedule were needed, the payer would accommodate such needs and allow the worker to do the work at a different time. The worker had the payer's permission to work for others as long as the parties could negotiate a reasonable schedule for the work that needed to be done in the payer's home, which also served as the worker's home at the time. Physical demands of the job, typically taking place in the late evening, during the night, and during the morning hours, included assisting the payer with dressing and undressing, nightly assistance, making the bed, making breakfast, light kitchen cleanup, laundry washing, folding, and placement in drawers, some gardening, and handling waste and recycling take outs. The worker stated the payer's spouse trained her and instructed her as to what to do in the home. The payer and spouse provided work assignments. The payer determined the methods by which assignments were performed. The payer and spouse were contacted and assumed responsibility for problem resolution. Services were performed in the payer's home with the exception of occasional grocery shopping. The routine consisted of being available from 9:30 pm until 9:30 or 10:30 am, daily, except for Saturday which was the worker's day off. The payer required the worker to complete a daily report form documenting the activities performed for the day and the number of hours worked. The payer required the worker to personally perform services. The payer and spouse hired and paid substitutes or helpers.

The payer stated the worker did not lease equipment, space, or a facility. The payer was not aware of any expenses incurred by the worker in connection with services performed. The worker was paid an hourly rate of pay; a drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The parties negotiated the level of payment. The worker stated the payer provided all supplies, equipment, and materials. The worker did not incur expenses in performing services for the payer. The worker did not incur economic loss or financial risk. The payer established the level of payment for the services provided.

The payer stated the benefits of live-in facilities and free board were provided. The work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others. The worker was; however, allowed to work for others. There was no agreement prohibiting competition between the parties. The worker submitted a resume during the application process. The work relationship ended when the worker quit. The worker stated the benefits of paid vacations and bonuses were made available. The worker did not advertise. The payer represented the worker as a caregiver.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the payer's statement that the worker was an independent contractor pursuant to a verbal agreement is without merit. For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties.

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.

Integration of the worker's services generally shows that the worker is subject to direction and control. When the success or continuation of a business, or in this case the payer's ability to remain in her home, depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the payer. In this case, the domestic services performed by the worker were integral to the payer's ability to remain in her home. The payer provided work assignments, required the worker to report the activities performed, and assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retained the right to do so if needed.

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. In such instances, the payer assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the payer has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. In this case and as acknowledged by the payer, the worker did not invest capital or assume business risks. Based on the hourly rate of pay arrangement the worker could not realize a profit or incur a loss.

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; and the permanency of the relationship. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of the payer's in-home needs. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

Based on the above analysis, we conclude that the payer 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.

The payer can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.