

SS-8 Determination—Determination for Public Inspection

Occupation

05CSI.37 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 elderly individual needing personal care services in the home. The firm's daughter and son who has a durable power of attorney court appointed document engaged the worker through a referral to perform companion sitting services as needed. The daughter assigned jobs needed to be performed for the individual. No training was provided by the daughter. The firm and worker determined the methods used to perform the services. The worker was required to contact the daughter regarding any problems or complaints that the worker could not resolve for final resolution. The worker's daily routines varied based on the worker's availability and the firm's personal needs. The firm allowed the workers to change assigned schedules as needed without obtaining the firm's approval. The worker was required to perform the services personally at the firm's home. The firm's daughter hired and the firm paid substitutes or helpers if needed.

The firm provided everything the worker needed to perform the services. The worker did not lease equipment or space. The worker did not incur any business expenses. The firm paid the worker an hourly wage through personal resources. The firm and daughter determined the level of payment for the services. The firm did not carry workers' compensation insurance. The worker could not suffer any economic loss and had no financial risk.

There were no contracts between the firm and the worker. The worker did perform similar services for others and was not required to obtain the firm's prior approval. The worker did no advertising to the public as being engaged in a business. Both the firm and 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 through a durable power of attorney designated the daughter and son-in-law to perform various services on behalf of the firm. The daughter engaged the worker through a referral to perform companion sitter services for the firm at the firm's home. The daughter assigned the worker jobs to perform as needed by the firm. 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 daughter required the worker to contact her regarding any problems or complaints for final resolution that the worker could not resolve. The daughter assigned the worker a work schedule based on the firm's personal needs and allowed workers to adjust work schedules if needed. The daughter required the worker to perform the services personally at the firm's home. The firm through the daughter hired and paid substitutes or helpers if needed. These facts evidence behavioral control directly and indirectly by the firm over the services performed by the worker.

The firm provided everything the worker needed to perform the services. The worker did not lease equipment or space. The worker did not incur any business expenses. The firm paid the worker an hourly wage through personal resources. The firm determined the level of payment for the services. The worker could not suffer any economic loss due to on-going business capital outlays being made. The worker did not have control over profits made nor the risk of losses being incurred with regard to the costs of the services performed 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 daughter indicated that there was a verbal working relationship agreement that the worker was an independent contractor and therefore was paid at a level per hour above local employee rates of pay for these services. 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 others 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. The worker personally perform services for the firm on a regular and continuous as needed and available basis over several months in the home of the firm.

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. The FUTA requirements are based on the total wages paid to all domestic employees.