

SS-8 Determination—Determination for Public Inspection

Occupation 05CSI.43 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

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Facts of Case

According to the firm, it is in the business of real estate investment. The worker was engaged to provide cleaning services as well as to provide in-home caregiving services for the firm's elderly mother. This was evidenced by copies of checks issued to the worker with a memo line indicating 'caregiver.' The worker received a Form 1099-MISC for her services in 2014 and 2015; according to the firm, she will also receive a 2016 1099-MISC as well. There was no written agreement.

The worker took care of and performed various duties for an elderly individual, presumably for one of the firm's members. The worker lived at the individual's home and was a 24/7 caregiver; the firm noted that the worker received her task assignment at the time of the contract/hire. Each party indicated that the other determined the methods by which the assignments were performed. The firm noted that it would be contacted if any issues or problems arose. Only the worker mentioned that verbal reports were given. The firm noted that there was no work schedule or hours assigned, just to clean as needed. The worker noted that she prepared meals, gave medications, shopped and cleaned the home. Both parties agreed that the worker was to provide the services personally with the worker noting that only the firm would hire and pay any substitute workers.

The worker noted that she and the firm provided groceries and supplies; the firm noted that the worker also provided supplies. The worker indicated that she incurred grocery expenses. The worker was paid a salary; the firm noted that she was paid on a monthly basis. Both parties agreed that the worker had no other economic risk. Each party noted that the other established the level of payment for services.

Both the firm and the worker agreed that there were no benefits. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. According to the firm, it was mutually agreed upon to end the work relationship.

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. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. 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 firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect the elderly individual. The firm provided the worker with general instructions, even if just initially. The worker provided her services at the parent's location as instructed. Her services were provided on a full-time basis. The term "full-time" may vary with the intent of the parties and the nature of the occupation since it does not necessarily mean working an eight hour day or a five or six day week. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses. The worker's was required to provide the services personally as well as continuously. This indicated that the firm was interested in how the work was accomplished as well as the results. In addition, a continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists.

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 paid a monthly rate 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. In such instances, the firm 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 firm 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.

Revenue Ruling 61-196 1961-2 C. B. 155 addressed nurses' aides, domestics and other unlicensed individuals. As most of their tasks would normally be defined as and performed by domestics, they would be subject to virtually complete direction and control in the performance of their services whether they work for a medical institution, physician or private household. Therefore they would be employees for Federal employment tax purposes. 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.

A household employee exists if hired to do household work and that worker is an employee. A worker is an employee if there is control not only what work is done, but how it is done; it does not matter whether full or part-time, or whether there was an agency or a list involved in the hire; it does not matter how the worker was paid whether hourly, weekly, daily or by the job. Household work is work done in or around the home such as babysitters, cleaning people, and domestic workers.

In this case, the worker was paid to live at a private home and provide home healthcare services on a 24/7 basis. While the worker provided her services largely unsupervised, the firm/payer never gave up their right to redirect her activities if they deemed it necessary to do so.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.