

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

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| Occupation<br>05PCP.11 Personal Care Worker | Determination:<br><input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor  |
| UILC  | Third Party Communication:<br><input checked="" type="checkbox"/> None <input type="checkbox"/> Yes |

**Facts of Case**

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The worker initiated the request for a determination of her work status as a caregiver to the care recipient in tax year 2013. The worker stated she was referred by a friend. She cared for a ██████████ woman; providing bathing and personal care, cleaning house, preparing meals, and doing laundry between 8 a. m. and 6 p m..

The firm’s response was signed by the durable POA and Trustee, and daughter of the recipient. The worker provided personal attendance, companionship, and household services for the recipient who was suffering from ██████████. The worker was referred and interviewed for the position. The payer’s response refers to IRC 3506 Companion Sitters.

According to the firm/payer response, the worker used her own discretion to perform the duties as the recipient was mentally incapacitated. The worker determined the methods by which the services were performed. The services were rendered 8 a m. to 6 p.m. with additional hours as needed if not in conflict with her other employment. The services were rendered in the recipient’s home. The worker was required to perform the services; any substitutes or helpers could be hired by the worker.

The worker indicated she was given instructions as to the needs of the recipient and the cooking and cleaning to be done. The job assignments were given verbally and it was the family that determined the methods by which the worker’s services were performed. Any problems encountered by the worker were directed to the recipient’s family for resolution. The services were rendered in the recipient’s home from 8 a m. to 6 p m.. The worker was required to perform the services personally; any additional personnel were hired and paid by the family/trust.

The firm/payer response indicated the firm provided nothing; however, the worker furnished her cell phone and car. The worker was paid an hourly fee. The worker was at risk for an economic loss as she had her cell phone, car, and subcontractor fees. The firm response was that the worker established the level of payment for services.

The worker stated the firm provided everything needed in the home and that she furnished nothing and did not incur expenses in the performance of the job. She was paid an hourly wage. The worker was not at risk for a financial loss in this work relationship. She indicated the family of the recipient established the level of payment for services provided.

Both parties acknowledged that no benefits were extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. Both parties concur that the worker did perform same or similar services for others during the same time frame. The work relationship ended when the recipient was moved from her home to a care facility.

Consideration was given to the firm/payer’s position that the worker was a Companion Sitter under IRC 3506. The criteria is not met. The determination is based on common-law and the application of the categories of evidence.

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## Analysis

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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.

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. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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 or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. See Rev. Rul. 74-389, 1974-2 C.B. 330.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. See Rev. Rul. 70-309, 1970-1 C.B. 199. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

We have considered the information provided by both parties and have applied the above law to this work relationship. In this case, the family of the recipient retained the right to change the worker's methods and to direct the worker to the extent necessary to protect the recipient. The worker was not operating a separate and distinct business; 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. Integration of the worker's services daily routine of the recipient shows that the worker was subject to direction and control. 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 to the well-being of the recipient.

## CONCLUSION

Based on the above analysis, we conclude that the family 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 worker's services constitute domestic services. 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.