

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP.19 Personal Care Worker	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

Facts of Case

The worker submitted a request for a determination of worker status in regard to services performed for the firm from January 2013 to present (2014) as a home health aide/caregiver. Duties include cooking and cleaning the home, providing daily hygienic care, and distribution of medication to the residents. The firm issued the worker Form 1099-MISC for 2013 and 2014. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states it is an adult care facility servicing the aged and invalid without skilled nursing needs. The worker performs resident care on a part-time/fill-in basis after her full-time job. Duties include helping with evening meals and putting residents to bed. The worker requested to be classified as an independent contractor as she performs similar services for others. There is no written agreement between the parties.

The firm stated the worker was hired because she was fully trained based on her full-time job. The firm verbally assigned two residents to the worker. The worker determines the methods by which assignments are performed. The owners are usually present. The firm is contacted if problems or complaints arise. The firm is responsible for resolution. The firm requires the worker to provide a verbal log of work completed. Meetings are not required. The worker's flexible routine is usually 5 – 9 pm, evenings and weekends. Services are performed at the firm's premises. The firm requires the worker to personally perform services. The worker stated she was provided on-the-job training by other employees. The firm provides work assignments, including meals to be made and cleaning duties to be performed. The firm determines the methods used. She is required to log the day's events for each resident. Her shift is normally 5 - 6 hours. The firm hires, fires, and calls in substitutes. The firm pays all workers.

The firm stated it provides food, bedding, cleaning supplies, and maintenance of property. The worker provides and incurs the expense associated with personal nurse gowns/smocks, some nursing equipment, protective clothing, and transportation. Other parties provide personal care items, clothing, and medical supplies. The worker does not lease equipment, space, or a facility. Customers pay the firm. The firm pays the worker an hourly rate of pay and mileage reimbursement; a drawing account for advances is not allowed. The firm carries workers' compensation insurance on the worker. The worker incurs the economic loss or financial risk associated with medical equipment, uniforms, and protective gear. The worker does not establish the level of payment for the services provided. The worker does privately transportation some of the firm's clients. The worker stated the firm provides all supplies, equipment, materials, and property. She packs her own lunch. Her sole expense is travel to/from the work place. She does not incur economic loss or financial risk. The firm determines the hourly rate of pay.

Benefits are not made available to the worker. The work relationship can be terminated by either party without incurring liability or penalty. The worker does perform similar services for others; the firm's approval is not required for her to do so. There is no agreement prohibiting competition between the parties. The firm stated it is unknown if the worker advertises. The firm represents the worker as a contractor if asked. In July 2014, the worker was still performing services for the firm. The worker stated she does not advertise. The firm represents her as a staff member to its customers. Both parties agreed the worker is not responsible for soliciting new customers.

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 firm'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.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. In this case, the firm requires the worker to personally perform services. Furthermore, the services performed by the worker are integral to the firm's business operation. The firm provides work assignments and assumes responsibility for problem resolution. These facts evidence the firm retains the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm.

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. In this case, the worker has not invested capital and she does not assume business risks. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. Based on the hourly rate of pay arrangement, the worker cannot 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; 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 is not engaged in an independent enterprise, but rather the services performed by the worker are a necessary and integral part of the firm's business. Both parties retain the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performs similar services for others as an independent contractor or advertises business services to the general public. 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 firm has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee, and not an independent contractor operating a trade or business.