

SS-8 Determination—Determination for Public Inspection

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| Occupation 05CSI Companion Sitters | 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 January 2018 to current year (2019) as a personal care giver to the payer and his wife. The work done by the worker includes distributing medications, preparing food, and performing housework. The payer issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The payer's response states it is in need of in-home assistance. The payer's daughter was referred to a planning service who facilitated introduction to the worker. The worker came into the home, helped with personal care, cooked meals, did laundry, grocery shopping, light housework duties, noted meds dispensed (which were put up weekly by a visiting nurse), and served as a companion. The parties entered into a verbal agreement where the worker would be paid an hourly rate of pay. Based on the verbal agreement and as the worker performed similar services for others, Form 1099-MISC was issued to her.

The payer stated it does not provide specific training or instruction to the worker. The monthly work schedule is set by the planning service. The worker determines the methods by which assignment are performed. If problems or complaints arise, the planning service or the payer's daughter are contacted and assume responsibility for problem resolution. Reports consist of general notes and notation of medication disbursement. Work hours vary and are flexible to accommodate the worker. Services are performed at the payer's home. Meetings are not required. The payer requires the worker to personally perform services. The payer's daughter is responsible for hiring and paying substitutes or helpers. The worker stated the payer's daughter determines the methods by which assignments are performed. Reports include texts to the payer's daughter or the planning service, in addition to phone calls. The worker's daily routine consists of 8 pm to 10 am; Tuesday, Thursday, and Sunday.

The payer stated it provides everything. The worker does not lease equipment, space, or a facility. The worker does not incur expenses in the performance of services for the payer. The worker is paid an hourly rate of pay; a drawing account for advances is not allowed. The payer does not carry workers' compensation insurance on the worker. The worker does not incur economic loss or financial risk. The hourly rate of pay was agreed upon at interview before the work relationship began.

The payer stated benefits are not provided. The work relationship can be terminated by either party without incurring liability or penalty. The worker stated she does not perform similar services for others or advertise. She is represented as an employee to others.

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 is 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation 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.

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 payer requires the worker to personally perform services. Furthermore, the services performed by the worker are integral to the payer's ability to remain in his home. The payer or daughter provide work assignments, require the worker to report on services performed, and ultimately assume responsibility for problem resolution. These facts evidence the payer retains 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 to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retains 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. In this case, the worker has not invested capital or assumed business risks. As acknowledged by the payer, the worker does not incur economic loss or financial risk. 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 payer's household needs. 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 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 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.

The payer can obtain additional information related to worker classification online at www.irs.gov; Publication 4341 and Publication 926.