

SS-8 Determination—Determination for Public Inspection

Occupation

05CCP.27 Childcare Provider

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

The worker filed the SS-8 request for work classification for services performed for the firm as a babysitter for tax years 2013 and 2014. [REDACTED] (the firm) reported the income on form 1099-MISC. [REDACTED] feels the worker was an independent contractor because she provided babysitting services to others and also worked at a clothing store. The firm indicated the worker was aware she was an independent contractor. The worker would sometimes pick the children up from school and stay with them until 5-5:30. Services were performed at the firm's home as well as the workers home. The firm indicated she was paid by the hour and reimbursed for expenses incurred. The firm indicated she terminated the work relationship.

The worker stated she babysat for the firm's two children. The work schedule consisted of a two week period. One week Tuesday, Wednesday 2:45-5:45, the second week she worked Tuesday, Friday (same hours) and Saturday 9-5:45. She agreed she would pick up the children from school, babysit and cook until Adrienne arrived home. Services were performed 95% of the time at the firm's residence. Services were to be performed personally. She agreed she was paid by the hour.

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

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. We must examine the relationship of the worker and the business. We consider 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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your statement that the worker was an independent contractor pursuant to an 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.

Analysis

In general, domestic services include services of a household nature in or about a private home performed by cooks, waiters, butlers, housekeepers, maids, valets, babysitter/nanny, 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.

Remuneration paid in any medium other than cash to an employee for domestic services in the private home of the employer, or for his/her personal wants and comforts, and not in the course of the employer's trade or business is not subject to FICA (Code section 3121(a)(7)(A)). Domestic service performed by your spouse or by your child (under age 21) is not treated as employment subject to FICA. With some exceptions, domestic service performed by your parent or by an individual under age 18 at any time during the year, will also not be treated as employment subject to FICA if it is not the principal occupation of such employee.

If you paid cash wages of \$1000 or more for domestic services during any calendar quarter in the calendar year or the preceding calendar year, then those wages are subject to FUTA tax (Code sections 3306(a)(3) and 3306(c)(2)). Generally, you can take a credit against the FUTA tax for a contribution paid into state unemployment funds, although this credit cannot exceed 5.4 percent of the first \$7000 of wages.

The FUTA requirements are based on the total wages paid to all domestic employees, while the FICA wage threshold is based on the wages paid to each domestic employee. Therefore, an employer may be liable for FUTA tax, while not liable for FICA tax.

Domestic employers are required to satisfy their tax obligations by increasing their quarterly estimated tax payments or by increasing tax withholding from their own wages. This requirement became effective in 1998. Estimated tax penalties apply to underpayments attributable to these taxes.

CONCLUSION

Therefore, we conclude that as the employer of the worker, you are liable for FICA and FUTA taxes for the worker, subject to the preceding thresholds. If you choose to pay your employee's share of social security and Medicare taxes in lieu of withholding it from the employee's wages, the amount must be added to the employee's wages for income tax purposes. However, it is not included as social security, Medicare, or FUTA wages.

For further clarification of household employee issues, please see Publication 926, Household Employer's Tax Guide.