Form **14430-A**
(July 2013)

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
01PLW Plant & Land Maintenance Workers	[X] Employee [ ] Contractor
UILC	Third Party Communication: [X] None [ ] 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 is seeking a determination of worker classification for services performed for the firm as a foreman/driver from 2018 until 2019. The worker received a 1099-MISC from the firm for both 2018 and 2019. The worker feels that they were misclassified as an independent contractor by the firm because they were under the firm's control, they had a set schedule, the firm directed their activities, and the firm provided vehicles, equipment, and uniforms.

The firm states that it provides commercial and residential emergency tree services and landscaping services. The worker was requested to provide landscaping and lawn services. The firm classified the worker as an independent contractor because the worker was a sole proprietor that they subcontracted to help the firm's customers. The worker had their own business insurance, vehicle, and tools to provide services. The worker also determined their own schedule with the firm's customers. There were no written agreements between the parties.

The firm states that there was no training given to the worker. The worker was subcontracted to handle certain customer accounts via a route list provided by the firm. The worker contacted customers directly and determined the methods used to complete their job assignments. If the worker encountered any problems or complaints, they were required to contact the firm and customer for problem resolution. There were no reports required of the worker. The worker did not have any consistent schedule and would perform services at their discretion in agreement with the firm's customers. Jobs were performed at various customer locations. The worker was not required to personally perform services or attend any meetings. The worker was responsible for hiring and paying any substitutes or helpers. The worker states that there was no training provided. The firm would instruct the worker where to go and what jobs to perform at customer locations. The firm determined the methods by which jobs were performed and assumed responsibility for problem resolution. There were no reports required of the worker. The worker performed services from 7:30 am until 5 pm. The worker would drive the firm's vehicle and equipment to the job site and perform their job tasks using the firm's equipment. The worker performed job duties 95% of the time at customer locations and 5% of the time at the firm's premises. The worker was required to attend a weekly status meeting with no penalties for not attending. The firm required the worker to personally perform services. Helpers and substitutes were not applicable.

The firm states that they provided temporary equipment when the worker's equipment was broken, and the worker provided their own equipment. The worker did not lease anything for their job duties and no expenses were reimbursed by the firm. The worker's pay varied depending upon the worker's schedule for the week. The worker did not have access to a drawing account for advances. Customers paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The worker had no exposure to economic loss or financial risk. The worker established the level of payment for services provided. The worker states that the firm provided a vehicle, a uniform, and all equipment and supplies needed. The worker did not lease or provide anything for their job duties. The worker would rarely incur expenses related to gas for the firm's vehicle, and these expenses were reimbursed by the firm. The worker was paid by the day on a salary basis. Customers paid the firm. The worker faced no economic loss or financial risk in the performance of their job duties. The firm established the level of payment for services provided.

The firm states that there were no benefits offered to the worker. The relationship between the parties could be terminated by either party without liability or penalty. The worker provided similar services to other firms and did not need approval from the firm to do so. There were no non-compete agreements in place between the parties. The worker was not a member of a union and they marketed their services to the public. The firm represented the worker as a contractor to their customers. The work relationship ended when the subcontractor agreement ended. The worker states that there were no benefits offered by the firm. The worker states that they did not provide similar services to other firms. The worker was not a member of a union and did not advertise their services to the public. The worker was represented by the firm as an employee and foreman. The worker was fired over an argument about being classified as a subcontractor vs. an employee.

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, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or 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.

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 required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation of landscaping services. The firm provided work assignments by virtue of the customers served and assumed responsibility for problem resolution. The firm provided the worker with job assignments and customers, having control over the customer base of the firm. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

Payment by the hour, day, 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 did not invest capital or 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. The firm provided a vehicle and all equipment needed for the worker's job duties. Based on the daily rate of pay arrangement the worker could not 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 was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised 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 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.

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