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

Department of the Treasury - Internal Revenue Service

# SS-8 Determination—Determination for Public Inspection

| Occupation | Determination: |
|---|---|
| 02COO Marketing Coordinator | [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 submitted a request for a determination of worker status in regard to services performed for the firm from June 2018 to June 2019 as a marketing coordinator. The services performed included managing social media, creating marketing materials, redesigning the firm's website, implement digital advertising, report on results, and other duties as assigned. The firm issued the worker Form 1099-MISC for 2018 and 2019. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response, states it is a dental company. The worker was engaged in marketing and design. His responsibilities included assisting with marketing content development, social media platform content creation and administration, and work on website development. The worker was classified as an independent contractor as he requested to provide services on a contractual basis.

The firm stated the worker was to work under the direction of the firm. The firm provided work assignments. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. Marketing design reports were required. The worker created his own schedule. Services were performed at the firm's office. It is unknown if meetings were required. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers. The worker stated the firm provided training about the industry, how to market in the industry, the ways he should've went about his duties, and how they were to be performed. He was required to attend meetings.

The firm stated the worker was to utilize his own laptop. It is unknown if the worker incurred expenses and who the customers paid. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not establish the level of payment for the services provided. The worker stated the firm provided programs, equipment, and stock photos. The worker did not lease equipment, space, or a facility. Customers paid the firm. The worker did not incur economic loss or financial risk. The firm established the level of payment for the services provided.

The firm stated there were no benefits made available to the worker. The work relationship could be terminated without penalty. The worker did not perform similar services for others. There was no agreement prohibiting competition between the parties. The worker did not advertise. The firm represented the worker as marketing contractor. The work relationship ended when the worker resigned. The worker stated the benefit of insurance was made available to the worker. The firm presented the worker as an employee and referred him to as the marketing coordinator or as the firm's designer.

## 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, 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 under the direction of the firm. The firm provided work assignments and assumed responsibility for problem resolution. 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. Based on the hourly 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.