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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
02OFF Office 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 submitted a request for a determination of worker status in regard to services performed for the firm from January 2018 to 2019 as an office worker and teaching assistant. The services performed by the worker included handling and recording payment for sales, tuition, and registration; registering new students and keeping dancer records; organizing documents, answering phones, taking attendance, cleaning the studio, fitting dancers with new shoes, when needed, and measuring them for costumes; assisting with teaching for 3-4 year old dance class. The firm issued the worker Form 1099-MISC for 2018 and 2019. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states its business is providing dance and fitness instruction to all ages and abilities. The worker performed services as an assistant instructor. The services performed included assisting the primary instructor throughout the class. The worker also cleaned the studio after class. The worker was classified as an independent contractor as she set her own hours and could work as often as she liked. The worker was paid on a per class basis and no directions were given on how the work was to be performed. Services were performed under a signed independent contractor agreement.

The firm stated it did not provide specific training or instruction to the worker. The worker was expected to follow the lead of the primary instructor. Classes run on a pre-set schedule. The worker performed services when available. The worker determined the methods by which assignments were performed. If problems or complaints arose, the firm was contacted and assumed responsibility for problem resolution. The firm required the worker to report the hours worked. The worker determined her schedule. Services were performed at the dance studio. Meetings were not applicable. The firm required the worker to personally perform services. Substitutes or helpers were not applicable. The worker stated the firm provided specific training and instruction related to its point-of-sale application and how to fill-out/complete various forms. Work assignments were received online, in-person, via phone calls, and text messages from the firm's owner. The firm determined the methods by which assignments were performed. The worker performed services on a regularly scheduled basis, i.e. Monday and Thursday from 4 to 6:30 pm.; Wednesday from 4 to 8:15 pm; Saturday from 8:30 am to 3 pm. Her routine consisted of opening the studio, completing a light cleaning, forwarding the phone, taking class attendance, attending to dancers and parents, and closing the studio. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided the space/studio. The worker provided a computer and music. The worker did not lease equipment, space, or a facility. The worker incurred the expense associated with travel, athletic wear, and music. Customers paid the firm. The firm paid the worker per dance class; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker did not establish the level of payment for the services provided or the products sold. The worker stated the firm provided all supplies, equipment, and materials. She used her own laptop to communicate with the firm's owner and to share documents. She did not incur expenses in the performance of services for the firm. The firm paid her an hourly rate of pay. The firm established the level of payment for the services provided or the products sold.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others or advertised. There was no agreement prohibiting competition between the parties. Services were performed under the worker's name as she instructed the class. The worker stated she did not perform similar services for others or advertise. The firm represented her as an employee to its customers.

The written agreement states, in part, the worker was engaged to assistant teach classes to the best of her ability for the term January 2018 to December 2020. She would also provide the occasional administrative services of cleaning, filing, etc. Compensation was set at a fixed rate of pay per dance class. Duties, terms, and compensation were subject to amendment in writing from time-to-time. The firm would reimburse the worker for all reasonable and approved out-of-pocket expenses incurred in connection with the performance of duties. The worker's time traveling to and from the firm's facilities would not be reimbursed. The worker would devote time, energy, and abilities to the timely and productive performance of duties. The worker would carry liability insurance relative to services performed. The worker could not assign or delegate the performance of duties without the firm's prior written consent.

Both parties agreed the worker was 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 written 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. The firm provided work assignments by virtue of the customers served 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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. “Profit or loss” implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm’s customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the per class or 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.