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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
02OFF.37 Receptionist	[X] Employee [ ] Contractor
UILC	Third Party Communication: [X] None [ ] Yes

Facts of Case

The worker submitted a request for a determination of worker status in regard to services performed for the firm from June 2013 to 2014 as a front desk receptionist. Work done by the worker included filing, taking payments, and booking appointments. The firm issued the worker Form 1099-MISC for 2013 and 2014. The worker filed Form SS-8 as she filled out Form W-9, Request for Taxpayer Identification Number and Certification.

The firm's response stated its business is massage. The worker performed front desk services as a receptionist. The worker signed an independent contractor agreement. Her hours varied and she set her own schedule. The worker performed services for another entity and wanted to stay in the area while her children were in school.

The firm stated the worker was required to contact it if problems or complaints arose. The firm was responsible for problem resolution. Reports and meetings were not required. The worker's schedule varied according to her needs. The worker filled-in when she was not working her other job. Services were performed at the firm's premises. The firm required the worker to personally perform services. The worker stated the firm provided her specific training and instruction related to answering the phone, its computer booking software, and customer services. The worker received daily work assignments as needed. The firm determined the methods by which assignments were performed. The worker was asked to attend meetings as scheduled. There was no penalty for not attending.

The firm provided the desk, telephone, and appointment book. The worker did not provide supplies, equipment, or materials. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in performing services for the firm. Customers paid the firm. 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 incur economic loss or financial risk in regard to this work relationship. The level of payment was agreed upon at time of hire.

The signed independent contractor agreement states, in part, the worker would provide front desk services. She agreed to dress in accordance with the standard created by the firm, in a style consistent with the firm's image, and provide services in accordance with the firm's philosophy. The worker would have access to the firm's reservation system. The worker would perform services within the guidelines set by the firm and use firm-furnished supplies and materials in the performance of services. Hours, set by the worker, would range from 20 – 30 hours per week depending on the worker's availability. Other days and times could be negotiated, as available, for special promotional events. The firm and worker could terminate the agreement at will; however, the firm requested the worker provide a two-week notice of her decision to leave.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The firm stated the worker performed similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. The worker did not advertise. The firm represented the worker as a front desk representative to its customers. The worker stated she did not perform similar services for 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 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.

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 written agreement documents 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.

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 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 and as acknowledged by the firm, the worker did not incur economic loss or financial risk.

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.