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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
Construction/Technical Services/Trades	[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 cleaning services performed for the firm from November 2017 until November 2019. The worker received a 1099-MISC from the firm for 2017, 2018, and 2019. The worker feels that they were misclassified by the firm as an independent contractor because they performed the same services for another firm prior and was treated as an employee. There were no written agreements between the parties.

The firm states that it provides cleaning services to an apartment complex. The worker was requested to vacuum all halls, dust, and clean all glass in the complex. The firm states that they classified the worker as an independent contractor because the worker performed services on their own schedule and was made aware that they needed to pay their own taxes.

The firm states that the apartment complex issued the firm a list of things that needed to be done. The worker established their own routine and determined the methods by which jobs were performed. If the worker encountered any problems or complaints, they were required to contact the firm's owner for problem resolution. There were no reports required of the worker. The worker had previously performed the same job duties for a different firm, so they had an established routine already for their job duties. The worker would perform services for 4 hours on their workdays and did not have to attend any meetings. The firm required the worker to personally perform services. Helpers and substitutes were not applicable. The worker states that no training was needed as they performed the same services at the same building, just under a different firm's name. Condo association personnel would relay to the firm what tasks they needed performed, and the firm assigned those tasks to the worker. The firm determined the methods by which jobs were performed and assumed responsibility for problem resolution. The worker was not required to provide the firm with any reports. The worker performed services for the firm Monday through Friday from 8am until 1pm, and Sundays from 12pm until 2pm. Their routine would include sweeping, dusting, cleaning, and vacuuming various locations within the structure. On Sunday, their focus was removing and discarding trash and recyclables from the condo premises. All job duties were performed at the condo premises. There were no meetings required of the worker. The firm was responsible for hiring and paying all helpers and substitutes needed.

The firm states that they provided a sweeper, the worker provided nothing, and the condo association provided all supplies needed. The worker did not lease anything and did not incur any expenses. The firm paid the worker a salary and the worker did not have access to a drawing account for advances. Customers would pay the firm for services provided. The firm carried worker's compensation insurance on the worker. The worker states that the firm provided a mop head, vacuum cleaner, brooms, dusters, cleaning spray, liquid spray cleaner, rags, and paper towels. The worker did not lease or provide anything. If the worker incurred any expenses relating to cleaning supplies, the firm reimbursed the worker. The worker was paid an hourly wage by the firm with no access to a drawing account. Customers paid the firm for services provided. The worker did not have any financial risk or economic loss exposure during their job duties. The firm's client established the level of payment for services provided.

The firm states that the relationship between the parties could be terminated by either party without liability or penalty. The firm states that the worker did not perform similar services for other firms during the work relationship. The worker would require approval from the firm in order to do so. The worker was not a member of a union and did not advertise their services to the public. The worker was not represented to customers by the firm. The work relationship ended when the worker wanted the firm to pay their taxes out of their paycheck. The worker states that the firm provided the worker with bonuses as a benefit. The relationship between the parties could be terminated by either party without liability or penalty. The worker states that the did perform similar services for 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 responsible for any advertising. The worker was represented by the firm as an employee of the firm. The worker was fired over a disagreement regarding worker classification.

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 integral to the firm's business operation. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed, 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.