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

Department of the Treasury - Internal Revenue Service

# SS-8 Determination—Determination for Public Inspection

| Occupation | Determination: |
|---|---|
| 03TRA Tradespersons | [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 payer from January 2017 to October 2017 as a laborer. The work done by the worker included demolishing apartments and subsequently reconstructing said apartments, replacement of shutters, maintenance requests as assigned, furniture storage, and all other duties as assigned upon reporting to work. The payer issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The payer's response states it is a subcontractor business for a property management company. The payer completes primarily seasonal projects and improvements at an apartment complex. If projects are larger than what the payer can complete or the payer is unable to perform services, it engages subcontractors, like the worker, to complete projects. The payer engaged the worker, under a verbal agreement, to work on available projects, i.e. short-term, seasonal projects. In 2017, the worker performed maintenance and repair work in apartment units, installed air conditioning units, and hung shutters. The worker was free to accept or refuse work assignments. If accepted, the worker set his own schedule and determined the methods by which assignments were performed. The payer did not train the worker or provide oversight. The worker independently completed assignments. The worker submitted hours for payment purposes. The worker used his own tools and he was not reimbursed for expenses incurred. The apartment complex provided some equipment on site and it sometimes required project completion reports.

The payer stated it did not provide specific training to the worker. Work assignments came verbally from the payer, apartment complex maintenance supervisor, property manager, or other subcontractor. The worker determined the methods by which assignments were performed. The payer was contacted if problems or complaints arose. The payer, apartment complex, or worker could potentially resolve problems or complaints. Reports and meetings were not required. The worker determined his daily routine. Services were performed at the apartment complex location. The payer did not require the worker to personally perform services. Hiring substitutes or helpers was not applicable. The worker stated the payer provided instruction on an as-needed basis, i.e. how electrical or plumbing work was to be done. The payer provided work assignments each morning and as-needed during the work day. The payer determined the methods by which assignments were performed and assumed responsibility for problem resolution. The worker's routine was typically Monday through Thursday, 7:30 am to 3:30 pm. The worker was sometimes required to work on Friday and he worked a few weekends. The payer required the worker to attend a daily morning meeting to be given the day's current assignment and to pick up the tools needed. The payer required the worker to personally perform services. The payer was responsible for hiring and paying substitutes or helpers.

The payer stated it and the apartment complex provided larger tools and equipment. The worker provided and incurred the unreimbursed expense associated with his personal tools and vehicle. The worker did not lease equipment, space, or a facility. The customer paid the payer. The payer paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The payer did not carry workers compensation insurance on the worker. The worker's economic loss or financial risk related to loss or damage or theft of tools or equipment. The worker did not establish the level of payment for the services provided. Payment was decided by the apartment complex. The worker stated the payer provided all tools, materials, and supplies necessary to perform daily assignments. The worker provided himself. He did not incur expenses in the performance of services for the payer and he did not incur economic loss or financial risk. The payer established the level of payment for the services provided.

The payer stated the work relationship could be terminated by either party without penalty. It is unknown if the worker performed similar services for others. There was no agreement prohibiting competition between the parties. The worker did not advertise. The payer represented the worker as a subcontractor to its customer. Services were performed under the payer's business name. The work relationship ended when the seasonal projects were completed. The worker stated benefits were not made available to him. He did not perform similar services for others. The payer represented him as an employee to its customer.

## 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 payer's statement that the worker was an independent contractor pursuant to a 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.

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. In this case, the services performed by the worker were integral to the payer's business operation. The payer provided work assignments by virtue of the customer served and it ultimately assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's past work experience and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retained the right to do so if needed.

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