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 firm from August 2018 to December 2018 as a painter. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as he believes he received Form 1099-MISC in error. There was no written agreement between the parties.

The firm's response states it is a painting/plaster/drywall contractor. The work provided by the worker was plaster. The worker was requested to perform certain functions, outlined in a scope of work, by a certain date. The firm did not provide supervision or direction. A consulting agreement, signed by the firm but not signed by the worker, was provided for our review.

The firm stated it provided the worker instructions concerning materials to be used and directions for completion of work in accordance with the customer's statement of work. The worker received work assignments via email or phone. The worker determined the methods by which assignments were performed. If problems or complaints arose, the firm was contacted and responsible for problem resolution. The firm required the worker to provide a weekly statement of work in progress or completed. The worker's routine or schedule was unknown to the firm. Services were performed at customer locations. Meetings were not required. The firm required the worker to personally perform services. The worker was responsible for hiring and paying substitutes or helpers. The worker stated he worked on an on-call basis. His supervisor determined the methods by which assignments were performed and assumed responsibility for problem resolution. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided paint and drywall in accordance with the customer's statement of work. The worker provided and incurred the expense of transportation and tools. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker an agreed upon amount per job; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to loss or damage to customer's premises, worker's equipment, or firm's materials. The worker established the level of payment for the services provided. The worker stated he did not incur expenses in the performance of services for the firm. The firm guaranteed him a minimum hourly rate of pay. Incurring economic loss or financial risk was not applicable to him. The firm established the level of payment for the services provided.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others; the firm's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. It is unknown if the worker advertised. The firm represented the worker as a contractor to its customers. The work relationship ended when the job(s) was completed. The worker stated if performing similar services for others, the firm's approval was required for him to do so. He did not advertise.

The consulting agreement, signed by the firm, documents, in part, the worker would provide support services on an as-needed basis in the area of plaster. The agreement was for a one-year period. Any new work would be issued under an amendment to the statement of work and compensation, signed by the firm's president. Services would be performed at facilities designated by the firm. Daily assignments were to be accepted by the worker if available. All work would be guaranteed, at no additional cost to the firm, by the worker for six-months from the project completion date. The firm would pay the worker a fixed daily or half-day rate of pay. The worker would perform services professionally and diligently and in such a manner as acceptable to the firm. The firm could terminate the agreement at any time, with or without cause, by giving notice to the worker. The worker would not enter into any agreement which might conflict with the provisions of the agreement. The worker could not assign, transfer, or delegate any rights or obligations without the firm's prior written consent. The worker did have the right to suggest a replacement, if unable to perform services, subject to the firm's approval. The worker was required to provide proof of insurance, with the firm named as the certificate holder and additional insured. There was no certificate of insurance provided for our review.

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 daily or half-day 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.