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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
04MAN Office Manager	[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 July 2019 to December 2019 as an office manager for its real estate brokerage firm. The services performed included coordination of communication between clients and employees, handling the front office reception and administrative duties, and organizing company training and events. Services were performed under an offer of employment letter dated June 17, 2019. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as she believes she received Form 1099-MISC in error.

The firm's response states the worker was engaged as a receptionist. The services performed included greeting customers and supporting in-house real estate agents. The firm believes the worker was an employee.

The firm stated that based on demand it provided the worker specific training, instruction, and work assignments. The firm's manager determined the methods by which assignments were performed and assumed responsibility for problem resolution. Requested reports were emailed. Services were performed at the firm's premises on a regular, recurring basis; hours were flexible. Meetings were not required. The firm was responsible for hiring and paying substitutes or helpers. The worker stated the firm typically required her to attend staff meetings and staff training sessions. The firm required she personally perform services.

The firm stated it provided the facility, computer, and copier. The worker provided a laptop, notes, and personal office supplies. The worker did not lease equipment, space, or a facility. The worker incurred the expense associated with transportation, meals, education, and travel. The firm reimbursed the worker for coffee and pastries purchased. Customers paid the firm. The firm paid the worker salary; a drawing account for advances was not allowed. The firm carried workers' compensation insurance on the worker. The worker did not establish the level of payment for the services provided. The worker stated the firm also provided printers, a telephone, office furniture, and office supplies. She did not provide supplies, equipment, or materials.

The firm stated the benefit of paid vacation time, sick pay, paid holidays, and bonuses was made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. Services were performed under the firm's business name. The parties mutually agreed to end the work relationship. The worker stated the firm required her to sign a non-compete and non-disclosure agreement; a copy was provided for our review. Business cards advertised the firm's business and identified her as its office manager. The firm represented her as an employee to its 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, 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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. In this case, the firm trained the worker and provided specific work instruction. The firm also provided work assignments, determined the methods by which assignments were 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, 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. As the worker likely used her laptop for personal needs, it is not considered a significant business investment. Based on the salary 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.