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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
05PCP Personal Care Providers	[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 November 2011 to July 2018 as a personal trainer. The work done by the worker included individual and group personal training services for member. The worker also helped maintain the facility by picking up and keeping everything tidy. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he received Form W-2 for tax years 2010 and 2011; Form 1099-MISC for 2011 - 2018. The actual services performed did not change.

The firm's response states it is a country club fitness center which offers group exercise classes and personal training. The worker was engaged as a personal trainer. The work done by the worker included one-on-one and group training to members. The worker was classified as an independent contractor as he had complete control of his own schedule and he had no duties associated with the club. He trained clients and was not managed in any way. Services were performed under a written agreement. From January 2011 to September 2011, the worker performed services at a different location as a fitness center attendant. The worker requested to be classified as an independent contractor at the new facility so that he could control his schedule.

The firm stated it did not provide specific training or instruction to the worker. The worker set his schedule with clients. The worker determined the methods by which assignments were performed. If problems or complaints arose, the firm's fitness director was contacted for resolution. Reports and meetings were not required. The worker had no daily routine. He trained clients throughout the day based on his own schedule. Services were performed at the firm's fitness center. The firm required the worker to personally perform services. Substitutes or helpers were not needed. The worker stated the firm instructed him to wear company logo shirts. The firm's fitness manager emailed potential client information and word-of-mouth provided work assignments. The firm required him to prepare daily billing sheets which the firm used to bill its members. His daily routine typically consisted of 6 am – 11 am; 3 or 4 pm – 7 pm. On Friday he worked until noon. He also worked some Saturdays and Sundays on an as-needed basis. Services were performed 40+ hours per week.

The firm stated it provided equipment at the gym facility. The worker provided any equipment he may have wanted to add to his workouts. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker commission; 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. The worker established the level of payment for the services provided. The worker stated he did not incur expenses. The firm guaranteed him 75% of the personal training revenue it collected. The firm determined prices, which were kept below market value as a membership perk. The firm also established the training session cancellation policy. The firm's training director was to be contacted for questions or to set up training sessions.

The firm stated the work relationship could be terminated by either party without 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. The firm represented the worker as an independent trainer/contractor to its customers. The work relationship ended when the contract ended. The worker stated that based on the time spent performing services for the firm, he did not have time to perform services elsewhere. The firm provided business cards and did all marketing. Services were performed under the firm's business name and logo. The firm ended the relationship when he challenged the structure.

The independent contractor agreement was signed by both parties on October 7, 2011. It states, in part, the firm offers its members, as an integral part of its club operations, fitness services. The worker would perform personal training and/or group fitness for the firm's members in the firm's fitness area. The worker was free to refuse specific requests made by the firm and he was free to perform services for non-members at places other than the firm. The firm did not guarantee the worker a specific amount or work or any specific level of compensation. The worker agreed to submit reports to the firm as required which detailed member activities. The firm would pay the worker a fixed rate per group fitness class and a fixed percentage of total revenue received for personal training sessions. The firm would make periodic payments to the worker. The length of each class would be determined by the firm's fitness director. The length of each personal training session would be agreed upon between the worker and member. The firm retained the right to use the services of other contractors to perform similar services. The worker would incur the expense associated with his clothing. He agreed to wear items appropriate for the fitness department. The worker was subject to all of the firm's rules of conduct. The firm would not exercise disciplinary control or authority over the worker. Benefits would not be provided to the worker.

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. 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 training services performed by the worker were integral to the firm’s business operation. The firm provided work assignments by virtue of its members, required the worker to adhere to its rules of conduct and report on daily sessions 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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. “Profit or loss” implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm’s customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. 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 acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the commission 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.