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 tax years 2016 to present, as a stylist. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she received Form 1099-MISC in error.

The firm's response states its business specializes in providing professional dancers and performers. The worker was classified as an independent contractor due to services being provided on her availability. There was no written agreement between the two parties.

The firm provided specific training and/or instruction to the worker. The firm provided work assignments to the worker. The firm determined the methods by which assignments were completed. The firm was responsible for problem or complaint resolution. The worker's schedule was typically two or three days per week at the firm's premises, and to be available for venues. The worker was required to attend meetings. The firm was responsible for the hiring of substitutes or helpers. The firm stated that the worker was not required to perform services personally. However, the worker disagrees.

The firm provided all materials, supplies, property, and equipment. The worker did not lease any equipment, space, or a facility from the firm. The worker incurred no expenses in the performance of her services for the firm. The worker was paid an hourly rate of pay; a drawing account for advances was not allowed. The firm established the level of payment for the services provided or products sold, and customers paid the firm. The firm did not carry workers' compensation insurance on the worker.

The worker received bonuses from the firm. The work relationship could be terminated by either party without incurring a liability or penalty. There was no agreement prohibiting competition between the parties. The worker did not advertise or maintain a business listing. The worker was not a member of a union. The work relationship is ongoing.

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 is characterized 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. The training of a worker 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.

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.

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.

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.