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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
02PDP.18 PublishEditProducing	☒ Employee ☐ Contractor
UILC	Third Party Communication: ☒ None ☐ Yes

Facts of Case

The firm is in business as an advertising agency. The worker was engaged by the firm to write and supervise the production of TV and radio commercials for its clients. The firm did not withhold taxes from the worker's remuneration in 2013 through 2016.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. The firm provided the worker with a list of TV and radio commercials to produce at the beginning of each month. The worker emailed the finished products to the firm for approval, and then made any necessary changes or adjustments. When approved, the worker uploaded them to various TV and radio stations. If problems or complaints occurred, the worker contacted the firm for resolution. The worker performed his services in his home office or various TV production companies, and occasionally at the firm's office for specific needs.

The worker used his own computer to perform his services. The firm paid the worker [redacted] per month as invoiced by the worker. It did not cover him under workers' compensation. Customers paid the firm directly at prices established by the firm. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm did not make general benefits available to the worker. The firm did not prohibit the worker from performing similar services for others during the same time period. There is no evidence presented that the worker advertised his services or maintained a business listing. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the firm terminated the work relationship.

Analysis

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm relied upon the worker's prior training and experience to perform his services. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. The firm was responsible for resolving any problems or complaints that may have occurred, showing it retained the right to change the worker’s methods and to direct the worker to the extent necessary to protect its financial investment and ensure its customers' satisfaction. The worker performed services from his home or at various production companies. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. There is no indication that the worker could engage and pay others to perform services for the firm on his behalf, presuming the person or persons for whom the services were performed were interested in the methods used to accomplish the work as well as in the results. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was a right to direct and control the financial aspects of the worker’s activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. “Profit or loss” implies the use of capital by a person in an independent business of his or her own. There is no evidence to suggest the worker’s computer was purchased exclusively for business purposes. Presumably these items were also used by the worker for his personal needs. Therefore, they are not considered a significant business investment. The firm paid the worker a set amount each month and the risk of loss was absent. 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. These facts show that the firm retained control over the financial aspects of the worker’s services.

Factors that illustrate how the parties perceived 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 were part of the service recipient’s regular business activities. In this case, the worker performed his services on a continuing basis. The worker was not engaged in an independent enterprise, but rather the production services performed by the worker were a necessary and integral part of the firm's advertising business. 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. The worker could have performed similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although the firm did not provide benefits to the worker, it terminated the work relationship without incurring a liability. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. These facts show that the firm retained control over the work relationship and services of the worker.

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.