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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
03PMW Repair/Maintenance Workers	[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 in 2017 and 2018 as a maintenance worker. The services performed by the worker included drywall and mold removal, painting, plumbing, electrical work, lawn maintenance, handling tenant complaints and emergency calls, and showing apartments. The firm issued the worker Form 1099-MISC for 2018. A copy of the 2017 tax reporting document was not provided for our review. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states it is an apartment complex. The worker was engaged as a handyman. The worker was informed at the time of hire that he was contracted, he would work as-needed, he was not prevented from getting another job, he did not wear a uniform, and he was not trained. The worker set his own schedule and provided his own tools. There was no written agreement between the parties, but it was understood the worker could make his own schedule as long as the repairs were made within a reasonable amount of time. The worker was paid weekly.

The firm stated it did not provide the worker specific training or instruction. Work assignments were provided via telephone or speaking with the worker as he lived in the apartment complex. The worker determined the methods by which assignments were performed. The firm's apartment manager was contacted and assumed responsibility for problem resolution. Reports and meetings were not required. The worker had no set routine or schedule. Services were performed at the apartment complex only. The firm required the worker to personally perform services. Hiring substitutes or helpers was not applicable. The worker stated the firm instructed him daily as to what services to perform. The firm determined the methods by which assignments were performed. As the parties communicated daily, reports and meetings were not required. His routine consisted of 9:30 am to 4:30 pm, Monday through Friday, in addition to being on-call for emergencies 24/7.

The firm stated it provided the building materials and parts. The worker provided and incurred the expense associated with his tools and equipment. The worker did not lease equipment, space, or a facility. The firm reimbursed the worker for materials needed for the job. Customers paid the firm. The firm paid the worker lump sum; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. It is unknown if the worker incurred economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated the firm provided any supplies, equipment, or materials needed. He did not incur expenses in the performance of services for the firm. The firm paid him salary. Copies of 2018 checks document he was paid a fixed weekly rate of pay. The firm established the level of payment for the services provided.

The firm stated the work relationship could be terminated without penalty. It is unknown if the worker performed similar services for others or advertised. There was no agreement prohibiting competition between the parties. The firm represented the worker as its maintenance man to its customers. Services were performed under the firm's business name. The work relationship ended when the worker left to pursue a job somewhere else. The worker stated the benefit of paid holidays and bonuses were made available to him. He did not perform similar services for others or advertise. The firm represented him as an employee to its customers. The work relationship ended when he hurt his back on the job.

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 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 maintenance services performed by the worker were integral to the firm’s business operation. The firm provided work assignments by virtue of the tenants served 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. Based on the fixed weekly 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.