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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
03TEC.26 Technician	[X] Employee [ ] Contractor
UILC	Third Party Communication: [X] None [ ] Yes

Facts of Case

[redacted]

The worker initiated the request for a determination of his work status as a diesel mechanic in tax years 2010 through 2014. The firm's business is described as diesel semi-truck and trailer repair. The worker responded that he was issued Form W-2 for the time he worked in the shop and was issued Form 1099-MISC for doing road calls.

The firm's response was signed by the Secretary/Treasurer. The firm's business is described as truck repair. The worker performed services as a mechanic. The firm responded that W-2's were issued for shop time and Form 1099-MISC was issued for road calls. Road calls paid at a rate of $35/hour so the mechanic had incentive to go out at night. After-hours road calls could be accepted or rejected by the mechanic and were paid at a contracted rate. The firm indicated they all understood that they have to pay taxes but may also claim tools, mileage, and phone to do this work.

According to the firm, the worker received basic information from the firm. The job assignments were verbal and via phone calls. The firm determined the methods to be used to perform the services when the worker was on duty, and the worker decided what methods to be used when he worked off duty. The worker was required to submit invoices The worker's routine was 8 a.m. to 4:30 p.m, and road calls were done off the clock. The worker was required to perform the services personally.
The worker indicated the job assignments came from his immediate supervisor or via a company-provided cell phone. The firm determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker was was required to submit the invoices detailing work done. He acknowledged that his services were rendered 40 hours per week in the shop and he was on-call 24 hours a day. He was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm and worker agreed that the firm provided the service vehicle and parts; the worker used his personal vehicle to get to the shop and furnished personal tools on occasion. The worker did not lease tools, equipment, space, or a facility. The firm paid the worker an hourly wage and a rate per hour worked. The customer paid the firm. The firm carried worker's compensation insurance on the worker. The worker did not establish the level of payment for services rendered or products sold. The worker was not at risk for a financial loss.

Both parties concur that the benefit extended to the worker consisted of paid vacations. Either party could terminate the work relationship without incurring a liability or penalty. The worker indicated he was not performing same or similar services for others during the same time frame; the worker stated there was a verbal agreement that he not work on any truck or equipment for personal gain. It was unknown to the firm if the worker was performing same or similar services for others during the same time frame.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. 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. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See Rev. Rul. 71-524, 1971-2 C.B. 346.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities. See Rev. Rul. 71-524, 1971-2 C.B. 346.

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. See Rev. Rul. 70-309, 1970-1 C.B. 199. "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.

We have considered the information provided by both parties and have applied the above law to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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. 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.

CONCLUSION

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 for the service road calls, and not an independent contractor operating a trade or business.