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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
03TRA Tradespersons	[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 March 2018 to December 2018 as a brick layer. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. There was no written agreement between the parties. The worker states that they should be classified as an employee of the firm because they were told where and when to work, how long to work, and how to do the work assignments.

The firm's response states it is a contractor. The work provided by the worker was brick laying. The worker was requested to lay bricks at new residential establishments. The firm did not provide supervision or direction. The firm states that the worker should be classified as an independent contractor because they had always paid the worker in cash.

The firm states that they did not provide the worker with any training or instruction for their job duties. The firm states that the worker received job assignments through contracts. The firm states that the address where worker would perform their services determined the methods by which job assignments were performed. The firm states that the firm's owner was responsible for any problem resolution should issues or complaints arise during job duties. The worker was not responsible for any reports for the firm. The firm states that the worker's schedule would revolve around the worker showing up at the location where job duties would be performed at the agreed upon time, doing their tasks, and then leaving the premises upon completion. The firm states that the worker performed services at various locations. The worker was not required to attend any meetings. The worker was required to perform all services personally. The worker did not have the ability to hire or pay substitutes or helpers. The worker states that the firm would tell the worker how they wanted the worker to lay the bricks. The worker states that they received their job assignments directly from the firm, and the firm owner determined the methods by which job assignments were performed. The worker states that the firm owner was responsible for problem resolution. The worker would drive to the job duties location, perform services, and only work the hours that the firm told them to do. The worker was required to perform all services personally. The worker states that if helpers or substitutes were needed, the firm's owner was responsible for hiring and paying the assistants.

The firm states that they provided the worker with cement and equipment for their job responsibilities whereas the worker only had to provide the labor. The worker did not have to lease space, facilities, or equipment for their job duties. There were no expenses realized by the worker during their job duties, and no expenses reimbursed by the firm. The worker was paid by the job in a lump sum payment. The worker did not have access to a drawing account for advances. The firm did not carry worker's compensation insurance on the worker. The firm set the level of payment for all services rendered. The worker states that the firm provided all of the equipment, supplies, and workers for the job duties. The worker only had to provide a brick laying tool and their measuring tape. The worker states that the only expenses they had incurred during the job duties were travel expenses to and from the work sites, vehicle maintenance as a result of this travel, and repair to any tools that they used for their job. The worker states that they were paid by piece work. The customers would pay the firm for all services rendered. The worker states that the only exposure to financial risk that they faced was the possibility of losing work and therefore losing income. The worker states that the firm set the level of payment for all services rendered.

The firm states that there were no benefits offered to the worker. The work relationship could be terminated by either party without loss or liability. The firm states that the worker performed similar services for other firms while working for the firm, and they did not require authorization by the firm to do so. There were no non-compete agreements in place between the worker and the firm. The worker was not a member of a union. There was no advertising done by the worker for the firm or for their services to the public. The work relationship ended when the worker left to work for another contractor. The worker states that they were not offered any benefits by the firm. The worker states that they did not perform similar services for any other firm at the time they worked for the firm. The worker did not advertise their services to the public. The worker states that they were never represented by the firm to their clients because they never spoke with customers of the firm. The worker states that they still take jobs from the firm when they have work available.

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.

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 services performed by the worker were integral to the firm's business operation of contracting work. The firm provided work assignments by virtue of the customers 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.

Payment by the hour, day, 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. 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 piece-work 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.