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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
04MAN Managers/Supervisors	[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 September 2016 to March 2018 as a design manager. The work done by the worker included daily client project activity and workflow during the firm's standard business hours, plus additional hours as needed. The firm issued the worker Form 1099-MISC for the period in question. From July 2006 to September 2016 the worker performed the same services for the firm and used the same equipment, software, and online sites. The firm classified him as an employee for these years. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC. He believes he should have received a Form W-2 for the entire work relationship.

The firm's response states it is an ad agency business performing strategic design and communication services for clients. The worker was engaged as a design manager handling various design and project management functions and executing project work for the firm's client. The worker was initially employed for about 10 years from 2006 to 2016. During this period, he worked at the firm's office along with other team members. In 2016, he informed the firm he was moving to another state. The firm agreed to try a plan with him as an offsite freelance contractor, like other freelance contractors it does business with. The firm could have terminated the worker's position; however, it made him a contractor to try to help him out.

The firm stated it originally trained the worker. The worker received work assignments via email and phone. The firm and/or the individual performing tasks determined the methods by which assignments were performed. The firm's director or customer were contacted if problems or complaints arose. The firm's director or the individual would be responsible for resolution. Reports and meetings were not required. As a contractor, hours varied and the worker was flexible to perform those services. The firm was less aware with little oversight for time. Employees worked a fixed schedule. As a contractor, the worker worked from his home in another state. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers. The worker stated work assignments were received daily through the firm's workflow system or from the firm's clients. The firm's director of operations determined the methods by which assignments were performed. Firm officials were contacted and assumed responsibility for problem resolution. Reports included project status reports and invoices documenting services performed. He performed services on a regularly scheduled basis, 8:30 am to 5 pm, in addition to other time as-needed. Services were performed from the worker's home (50% of his time) and the firm's office (50%). Meetings included staff meetings, client meetings, and mandatory trips to the firm's main office.

The firm stated it provided a computer (hardware and software), phone, and other tech support services. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The firm and worker agreed on the hourly rate of pay. The worker stated the firm established the level of payment for the services provided.

The firm stated that as a contractor, benefits were not provided. The work relationship could be terminated by either party without liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties, only the standard confidentiality agreement the firm had with contractors. The firm represented the worker as one of its contractors to its customers. The work relationship ended in March 2018 when the worker and others were laid off due to declining customer business. The worker stated the firm did not disclose his status change to its clients. The firm represented him as its design manager.

Both parties acknowledge the firm issued the worker a letter in September 2016 informing him of his change in status from a full-time employee to a contractor. The letter states, in part, a new status of home/office model was created for the worker's position at the firm. As a contractor, he would be paid an hourly rate of pay. He would continue to enter his time sheets via the firm's system and submit a weekly or bi-weekly invoice. The firm would pay the worker weekly or whenever an invoice for billable time was received. Taxes would not be withheld and the worker would receive a 1099 at year-end, i.e. responsible for his taxes.

An Agreement and Release of Claims, was dated and signed in March 2018. It documents, in part, the worker's services were being terminated effective immediately. The firm would pay the worker two weeks severance pay, paid over the normal biweekly pay cycle. The firm would also allow the worker to keep his laptop computer as part of the severance.

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 design management services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the clients served, required the worker to report on daily transactions, and ultimately 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 including his employment with the firm, 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, 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the hourly 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 for the entire work relationship, 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.