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 August 2018 to March 2019. He was initially contracted to provide start-up assistance. A few weeks later he was hired to replace the firm's plant manager. As a plant manager, he provided engineering and process knowledge and application. The firm issued him Form 1099-MISC for 2018. It is unknown what tax document was issued for 2019 as a copy was not provided for our review. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC. A copy of the firm’s employment offer letter, dated August 22, 2018, was attached for our review.

The firm’s response states it is a start-up of stretch film manufacturing. The worker was engaged as a plant manager. He was classified as an independent contractor as he signed an agreement and agreed to help and counsel the firm on its new plant. A copy of the independent contractor agreement, dated and signed August 6, 2018, was provided for our review.

The firm stated it did not provide the worker specific training or instruction. Work assignments were outlined in the contract. The worker determined the methods by which assignments were performed. The firm’s CEO was contact if problems or complaints arose and the CEO was responsible for resolution. The worker determined his own work schedule. Services were performed at the firm’s premises. The firm required the worker to attend meetings with its owner. The firm required the worker to personally perform services. The worker stated he received training from the supplier. Work assignments were provided through meetings and emails. He generally determined the methods by which assignments were performed; however, firm officials ultimately determined the methods. Reports included daily production reports and progress project reports. His routine was 8 am to 5 pm and available 24/7, as needed. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided a laptop. The worker provided tooling. 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 salary; a drawing account for advances was not allowed. The firm did not carry workers’ compensation insurance on the worker. The worker’s economic loss or financial risk related to loss of product and scrap produced. The worker established the level of payment for the services provided. The worker stated the firm provided an office and all plant resources. He incurred the expense of travel. The firm reimbursed him for all reasonable expenses. The parties mutually agreed to the level of payment for the services provided.

The firm stated it provided the worker the benefit of bonuses. The work relationship could be terminated by either party without incurring liability or penalty. The worker advertising was not applicable. The work relationship ended when the firm decided to stop the relationship. The worker stated the benefit of paid vacation time, paid holidays, and insurance benefits were also made available. He did not perform similar services for others. A non-compete agreement was signed. The firm represented him as an employee/plant manager to its customers.

The independent contractor agreement states, in part, the firm retained the right to modify the list of services provided by the worker on an annual basis or upon renewal of the agreement. The firm had the authority to review and approve the worker’s final work product. The worker would fully comply with all the firm’s policies and rules as established and amended from time to time. The firm retained the right to terminate the agreement if the worker was in violation of its company policies. If terminated, the worker agreed to return all products, equipment, training materials, etc. The worker could not assign the agreement without the firm’s prior written consent. The worker would not engage in any conduct which would reflect negatively on the firm, nor make any disparaging remarks concerning the firm.

The firm’s employment offer letter states, in part, the worker would be paid salary and eligible for a discretionary bonus. Specific individual goals were to be developed within the first 90-days of employment. As a full-time employee, the worker was eligible for two weeks paid time off. Either party could terminate the at-will employment arrangement. Skills, knowledge, and abilities included interpersonal skills, leadership skills, problem-solving skills, and time management. Typical work conditions included additional shifts or hours, as needed. Based on the use of potential high-risk machinery, the worker was to ensure proper safety standards were followed and adequate measures were taken to minimize any associated risks to people or equipment.

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 written 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. The firm provided work assignments by virtue of its business operations, it ultimately determined the methods by which assignments were performed, 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, 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 salary 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. 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.