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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
09DVC Drivers & Vessel Control	[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 January 2014 to September 2018 as a truck driver. The services performed included picking up and delivering loads. The firm issued the worker Form 1099-MISC for 2014 through 2018. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response, states its business is an owner operator, motor carrier permitted for [redacted] and [redacted] that hauls bulk freight. The worker was engaged as an independent contractor, pulling the firm's trailer. The work was done under a lease & contractor agreement.

The firm states it provided training on how to operate the trailer. Work assignments were provided through a tablet or device. The worker determined the methods by which assignments were performed. Based on the circumstance of the complaint or problem it varied who assumed responsibility for problem resolution. Monthly maintenance on tractor and trailer reports were required. The worker's schedule varied daily and there was no set routine. Services were performed at different locations, cities, and states. Meetings were not applicable. The firm required the worker to personally perform services. The worker stated monthly and quarterly safety videos were required by the firm. Work assignments were received from dispatchers. If the worker hired substitutes or helpers, approval was required by the firm.

The firm stated it provided trailer and device for work assignments. The worker provided the truck which he leased. The worker incurred the expense of fuel, fuel tax, insurance, license plate, tractor maintenance, and repairs. Customers paid the firm. The firm paid the worker a percentage rate of pay; a drawing account for advances was allowed. The worker received $100 cash per week and 250 gallons of diesel daily when working. The firm did not carry workers' compensation insurance on the worker. The firm established the level of payment for the services provided. The worker stated the firm did not reimburse any expenses.

The firm stated the work relationship could be terminated without penalty. The worker did not perform similar services for others. The worker was not to assign, "trip lease", broker, subcontract, interline, or otherwise arrange for the transportation to any other entity or person without the prior written consent of the firm. The work relationship ended when the worker quit. The worker stated he had the firm's logo on the side of his truck. The firm represented him as an employee to its customers. The work was done under the firm's business name.

The firm stated the worker was not responsible in soliciting new customers. The worker stated the firm provided leads with prospective customers. The firm books the loads and then dispatched them to the drivers. The firm determined the worker's territory.

Services were performed under an independent contractor operating agreement. Independent contractor agreement states the firm had the exclusive possession, control and use of the equipment utilized for performance and assumed responsibility for the safe operations of the agreement. The firm was responsible for approving the shipper, customer booking, signing the rate confirmation, and dispatch. If the worker refused to accept a shipment (s) after having agreed to transport the shipment(s), and as a result, the F incurred a loss consisting of the increase in the cost quoted, the worker may be liable to the firm for such loss and the firm may deduct said amount(s) from any settlements owed to the worker. Weekly work sheet needed to be completed at the end of each week listing the loads delivered through of Saturday of that week. The firm offered bonus programs; referral program, length of service awards, and clean DOT inspection gifts.

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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. In this case, the firm trained the worker on how to operate the trailer. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided assignments by virtue of the customers served and required the worker to report monthly maintenance for the services performed. 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 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the percentage 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.