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

Department of the Treasury - Internal Revenue Service

# SS-8 Determination—Determination for Public Inspection

| Occupation | Determination: |
|---|---|
| 02AAD Architects, Artists, and Designers | [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 2013 to July 2013 as an industrial designer. The services performed included designing, building, and installing goods for clients of the firm. The firm issued the worker Form 1099-MISC for 2013. The worker filed Form SS-8 as he believed to be misclassified.

The firm's response, states it's a design and furniture building business. The worker was engaged as designer and fabricator. Services performed included custom jobs from clients. He designed and fabricated independently in his own shop on his own time. The worker was classified as an independent contractor as his skills and work were used by other clients outside of the firm. He self-directed his hours, how to work, and provided his own tools.

The firm stated it provided clients and product requirements. When the firm received new projects they passed on the portion of the job that fit the worker skill. The worker determined the methods by which assignments were performed. The worker was responsible for resolving any fabrication. If problems or complaints from clients occurred the firm was to handle problem resolution. There were no reporting requirements. The worker set his own schedule. The firm provided a shop and the worker chose to work there for fabrication design work. There were no meetings required. The firm did not require the worker to personally perform services. The worker was responsible for hiring and paying substitutes or helpers. The worker stated the firm determined the methods by which assignments were performed. Daily progress reports were required to keep the firm up to date with the progress of each project. Reports were done on email, google documents or calendars, text messages, or in person. The firm required him to fill out time-cards to track which project was being worked on each hour in the office or shop. Expense reports were completed each month so that they could attribute specific expenses to their projects. When he first started his schedule varied on project to project basis. Then he was asked to work full time his normal schedule was from 7:00am to 5:00pm. He was required to attend any on site installation, scheduled meetings with clients, and any events. The firm required him to personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided materials and some equipment. The worker provided his own computer and equipment. The worker did not lease equipment, space, or a facility. The worker did incur the unreimbursed expenses of software, maintenance, repair on equipment, and insurance. Customers paid the firm. The firm paid the worker a lump sum 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 incur the financial risk of losing contract to a better skilled firm. Also, at the end of the contract he had the risk of lost or damaged equipment and software. The worker established the level of payment for the services provided. The worker stated the firm issued credit cards that were used for all purchases. No personal expenses were incurred by the worker. The firm reimbursed for mileage on personal vehicle and mileage recorded on time sheets. The firm paid the worker an hourly rate of pay. The worker did not incur economic loss or financial risk.

The firm stated the work relationship could be terminated without penalty. The worker did perform similar services for others and the firm's approval was not required. The firm provided materials and the worker provided the process pattern. The worker had to provide the finished product to the firm per contract. The firm represented the worker as a contractor to its customers. Services were performed under the firm's business name. The work relationship ended when the worker decided to move onto other contracts. The worker stated there was no written agreement prohibiting him to work elsewhere. The work relationship ended when the firm terminated him. He was let go as he was not available to supervise new employees in the shop over the weekend.

The independent contractor agreement signed by the firm, states the worker will not directly or indirectly engage in business that competes with the firm. The worker agreed to not enter into contracts with companies that he creates a relationship with during, and/or based upon his relationship. He would not directly or indirectly solicit business from, or attempt to sell, license or provide the same or similar products or services as are provided to, any customer or clients of the firm. The worker agreed that the firm will pay him bi-weekly.

## 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 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.

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 workers services were integrated into the firms business operations.

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. 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.

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.