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

Department of the Treasury - Internal Revenue Service

# SS-8 Determination—Determination for Public Inspection

| Occupation | Determination: |
|---|---|
| Construction/Technical Services/Trades | ☒ Employee ☐ Contractor |
| UILC | Third Party Communication: ☒ 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 is seeking a determination of worker classification for services performed for the firm as a carpenter from August 2023 until August 2024. The worker filed a Form SS-8 because they believe that they erroneously received a 1099-NEC from the firm.

The worker believes that they were an employee of the firm because the firm dictated their schedule, determined the work performed and methods by which tasks were done, determined the worker's hourly rate of pay, paid the worker according to the firm's pay schedule, and supplied all tools and materials. The firm would contact the worker with potential work shifts, and the worker would accept and perform their job tasks under the supervision and guidance of the firm's staff. There were no written agreements between the parties.

The firm states that they are a professional live theatre producing nationally recognized plays and musicals, educational programs, and community outreach. The worker performed services for the firm as an overhire and scenic, working at the discretion of the firm's technical director to support building and painting scenic designs for each of the firm's live theatre productions. The firm classified the worker as an independent contractor because the worker performed services on an as-needed contract basis, the worker was free to decline jobs and to set their own hours, and it is common industry practice to classify the worker as an independent contractor. The parties agreed upon the hourly rate of pay upon hire.

The firm states that they did not provide training or instruction to the worker. The firm's technical director and production manager provided job assignments to the worker in person. The technical director determined the methods by which they were performed. If the worker encountered any problems or complaints while working, they were required to contact the production manager. The production manager and/or the worker would resolve the issues. There were no reports required of the worker. Theatrical construction services were performed as available at the firm's premises. There were no meetings required of the worker. The firm required the worker to personally perform services. The worker could not hire helpers or substitutes and was not responsible for their payment. The worker states that the firm provided training to the worker on specific tool usage, instruction on what was to be built and how it was to be constructed, and where to install set pieces. The firm's production manager provided job assignments to the worker through emails. The technical director or master carpenter determined the methods by which job duties were performed. If the worker encountered any problems while working, they were required to contact the technical director or production manager. The production manager was responsible for problem resolution. Carpentry services were performed as needed at the firm's premises. The worker had no hiring authority.

The firm states that they provided shop supplies such as saws, tools, materials, and PPE. The worker did not provide anything. The worker did not lease any space, facilities, or equipment and had no job-related expenses. Customers paid the firm. The firm paid the worker an hourly rate of pay with no access to advance pay. The firm carried worker's compensation insurance on the worker. The worker did not take a financial risk or suffer a financial loss while working for the firm. The firm set the rate of pay for services performed. The worker states that the firm provided tools, raw materials, and PPE. The worker provided work gloves and did not incur any job-related expenses. The worker had no exposure to financial risk or loss while working for the firm.

The firm states that there were no benefits provided to the worker. The relationship between the parties could be terminated by either party without liability or penalty. The worker performed similar services for other firms and did not need approval from the firm. There were no non-compete agreements in place between the parties. The worker did not advertise their services to the public. The firm did not introduce the worker to customers. The work relationship ended when the job was completed. The worker states that services were performed under the firm's business name. The worker ended the work relationship.

## 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, co-adventurer, 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 providing theatre productions. The firm provided work assignments by virtue of the firm's production needs, supervised the worker and determined how jobs were to be performed at the firm's premises, and assumed responsibility for problem resolution. Additionally, all services were performed at the firm's premises instead of a separate location of the worker's choosing. 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. 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 stated by both parties, the worker had no job-related expenses or financial risk in the performance of their job duties. 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 of theatre productions. Both parties retained the right to terminate the work relationship at any time without incurring a liability. 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.