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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
05ITE Instructors/Teachers	[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 payer from February 2017 to November 2017 as an aquatic survival instructor. The work done by the worker included instructing students per the payer's guidelines. The payer issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The payer's response states its business is teaching self-rescue swim skills to babies and toddlers. The worker was engaged as a survival instructor. She taught children self-rescue swimming. From the beginning, the payer and worker had a conversation that the worker was independent and she would handle all her tax situations as so. The worker was provided free training in exchange for teaching at a 70/30 split. The worker stated she did not want to schedule her own students or deal with clients so it was agreed all students would come from one central schedule done by the payer. Since the worker moved away and the payer has been the only instructor for seven years, it did not occur to send the worker a Form 1099 until she emailed the payer in February 2018. The payer's accounting service contacted the worker and two days later it provided a Form 1099 to the worker. Services were performed under a signed agreement; however, after the worker quit, her file was thrown away with her signed agreements. Template copies of the payer's aquatic survival training agreement and employee agreement were provided for review.

The payer stated the worker was trained in behavioral techniques training pursuant to the job. Work assignments were provided through the main schedule. The worker determined the methods by which assignments were performed. The payer was contacted if problems or complaints arose. The payer was responsible for resolution. Reports and meetings were not required. The worker's daily routine consisted of teaching students during available pool hours. Services were performed at a designated location. The payer required the worker to personally perform services. Substitutes or helpers were not required as the payer filled in when the worker was out. The worker stated she had no input or control over which clients were assigned to her. The payer determined the methods by which assignments were performed. She provided paperwork to the payer which included student progress. The payer set the days, times, and duration of scheduled classes.

The payer stated it provided a grab bar, vest, and toys. The worker provided a grab bar and vest. The worker did not lease equipment, space, or a facility. The worker bought her own supplies for teaching. Clients paid the payer. The payer paid the worker a lump sum. The worker was not allowed a drawing account for advances. The payer did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker did not establish the level of payment for the services provided. The worker stated the payer provided implements and tools necessary to perform the job, in addition to renting the pool location. She provided anything additional she desired to perform the job. The payer paid her irregular payments every two weeks or so. The payer established the level of payment for the services provided. The signed employment agreement, provided by the worker, documents rates of pay per 30-minute class, rates per week, and other fixed rates of pay (not further defined).

The payer stated the work relationship could be terminated by either party without liability or penalty. The worker did not perform similar services for others. The worker advertised with business cards. The payer represented the worker as a friend to its clients. Services were performed under the payer's business name. The work relationship ended when the worker gave a 30-day notice. The worker stated the written agreement contained a non-compete clause. She advertised with the payer's business card which identified her as its aquatic survival instructor. The payer represented her as an employee to its customers.

The aquatic survival training agreement states, in part, the payer agreed to provide instruction to the worker. Upon the worker's successful completion of the training, the payer would accept the worker as instructor-qualified staff. The worker agreed not to compete with the payer for a period of seven years from the date training ended. The agreement could not be assigned by the worker without the payer's consent. The employee agreement states, in part, the payer had trained the worker and it desired to use the worker's services to help teach the payer's students. If the worker terminated her employment within three years of the hire date, she would reimburse the payer for the balance of the payer's training investment. The covenant not to compete was set for three years following termination of employment. By signing the agreement, the worker agreed to all terms of employment, included but not limited to a full background check and drug testing as a stipulation to being hired by the payer.

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 payer's statement that the worker was an independent contractor pursuant to a 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.

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 payer trained the worker. Furthermore, the instructional services performed by the worker were integral to the payer’s business operation. The payer provided work assignments by virtue of the clients served and assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's training and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer 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 payer’s customer for poor work, the payer shares the risk of such loss. Control of the payer over the worker would be necessary in order to reduce the risk of financial loss to the payer. 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 payer, the worker did not incur economic loss or financial risk in connection with services performed. Based on the various rates of pay schedule, 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 payer'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 payer 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 payer can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.