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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
05ITE.91 Instructor/Teacher	[X] Employee [ ] Contractor
UILC	Third Party Communication:
	[X] None [ ] Yes

Facts of Case

The worker submitted a request for a determination of worker status in regard to services performed for the firm from December 2013, hire date, to August 2014. The firm issued the worker Form 1099-MISC for 2014. It appears no remuneration was paid to the worker in 2013. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response stated it teaches digital technology courses to youths in after-school programs. The worker performed services as a teacher. She taught youths digital media courses (animation), filmmaking, and game design. The worker did not complete any sales. The worker was classified as an independent contractor based on a written agreement and as she was hired part-time.

The firm provided the worker in-person and online teacher training. The firm's teacher coordinator determined work assignments. The firm's policies and procedures manual determined the methods by which assignments were performed. The firm was contacted and assumed responsibility for problem resolution. The firm required the worker to complete a work log and to turn in student final projects. The worker's routine varied based on the client's schedule. The firm relies on the client to set the schedule. Services were performed in a community facility or school facility. The worker was required to meet with the firm's coordinator, from time-to-time, to pick up computer equipment. The firm required the worker to personally perform services. The firm paid substitutes.

The firm provided computers, cameras, work books, paper, and pencils. The worker provided her automobile for transportation to the work site. The worker did not lease equipment, space, or a facility. The firm reimbursed the worker for background checks and TB test, in addition to paying mileage. Customers paid the firm. The firm paid the worker an hourly 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 not incur economic loss or financial risk. The firm established the level of payment for the services provided.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The firm stated it is unknown if the worker performed similar services for others. The worker stated she did not perform similar services for others. The written agreement contained a non-compete clause. The worker did not advertise. All digital projects, completed or partially completed, were sent to and retained by the firm. The firm stated it represented the worker as a teacher (contractor) to its customers. Services were performed under the firm's business name. The work relationship ended when the worker informed the firm she was moving away from the work territory.

The Independent Contractor's Agreement was dated December 12, 2013. It states, in part, the worker had read and agreed to the firm's policies and procedures document. The worker would complete all projects in a timely manner and communicate, from time-to-time, with those who oversaw the worker. The worker was expected to arrive timely, i.e. 15 or 20 minutes prior to a regularly scheduled class. The firm would pay the worker an hourly rate of pay and the worker was responsible for faxing or emailing a log of worked hours and time billed, with descriptions of work and services provided. The term of the agreement was indefinite. The worker agreed to provide her own insurance unless otherwise provided through the firm and she was solely responsible to provide her own transportation to work. All equipment provided by the firm remained the property of the firm. The worker agreed to promptly return any and all equipment to the firm in good working condition. All work products would be owned exclusively by the firm. The agreement could not be assigned without the prior written consent of the other party.

The worker was not responsible for soliciting new customers as she did not sell for the firm.

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.

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 provided in-person and online training. The firm required the worker to adhere to its policies and procedures. The firm provided work assignments by virtue of the clients served, required the worker to report on services 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. 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. 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.