

## SS-8 Determination—Determination for Public Inspection

Occupation

02COO.4 Coordinator

Determination:

Employee

Contractor

UILC

Third Party Communication:

None

Yes

### Facts of Case

The firm is a limited liability company in the business of offering medical contract staffing to their clients. The worker was engaged by the firm as a staffing coordinator. The firm acquired the business in on November 1, 2013. At the beginning of the work relationship the firm treated the worker as a contractor until they got the business up and running.

The worker received on the job training from the firm. The worker received his assignments and how to perform those assignments from the firm. The worker relied upon the firm to resolve problems and complaints. The worker had a regular schedule from 8:30 a.m. to 5 p.m. Monday through Friday. The worker performed his services mainly at the firm's location. The worker was required to perform the services personally.

The firm provided the office, supplies and materials for the worker to perform his services. The worker did not lease any space to perform their services. The worker was paid on a salary basis. The customers paid the firm directly.

The worker received paid vacations, sick pay, paid holidays, personal days and bonuses. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others at the same time they performed services for the firm. The worker was represented as an employee of [REDACTED]. The worker resigned from his position.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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. See Rev. Rul. 55-695, 1955-2 C.B. 410.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. See Rev. Rul. 73-591, 1973-2 C.B. 337.

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

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. See Rev. Rul. 70-309, 1970-1 C.B. 199. "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.

Probationary employees, even though they may not qualify for benefits, privileges, or seniority protection, still are considered employees for federal employment tax purposes. Payments made to them as compensation for services are wages subject to employment taxes. Additionally, the withholding of employment taxes from the worker's wages is considered "treatment" of the worker as an employee, whether or not the tax is paid over to the Government. Since you withheld taxes from the worker's income after the probationary period, and there was no meaningful change in the work relationship, you effectively assigned an employee status to the worker for the whole time services were performed for you. IRS has no exceptions specific to probationary pay and considers it to be services performed by an employee.

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## Analysis

The worker was an employee according to common law. The information provided by both parties showed the worker was trained how to perform his services. The firm required the worker to perform his services personally which demonstrated the firm was interested in the methods used as well as being interested in the end result as an employer. The firm showed control over the worker's services as the firm gave the worker his assignments and then the firm determined how those assignments should be performed. The firm had the financial investment as the firm provided the worker with an office, supplies and materials the worker needed to perform his services. The worker could not suffer a significant loss since the worker was paid on a salary basis as an employee. Provided the worker with employee benefits is indicative of an employer-employee relationship. The worker services as staffing coordinator for the firm's staffing agency demonstrated the worker's services were integrated into the firm's daily operations.

The worker received a Form W-2 and a Form 1099-MISC from you in the course of the work relationship, and the services did not substantially change. As previously stated, the issuance of Form W-2 and/or the withholding of taxes on income for an individual would be considered treatment of the individual as an employee, and would apply in this case.

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.

Please go to [www.irs.gov](http://www.irs.gov) for further information.

Firm: Publication 4341

Worker: Notice 989