

# SS-8 Determination—Determination for Public Inspection

Occupation 02LAW.48	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

## Facts of Case

Information provided indicated the firm is a Biotech company. The worker filed the work classification request because she had an employment agreement with the firm that began in 2007. A copy of that agreement was enclosed. In 2014 and 2015 the firm reported the income earned on form 1099-MISC. The worker indicated at no time was there ever new negotiations, performed. She continued to have approved time off for vacations and sick time, medial reimbursements paid holidays. She continued to work Monday through Friday eight hours a day as she had for the prior seven years. She indicated she was laid off when the company relocated to [REDACTED].

[REDACTED], President of the firm responded to our request for information. He gives no explanation as to the change in classification from employee to independent contractor. He concurs the worker performed services as an administrative legal assistant. She had performed services since January 2007. He gave all work assignments. The worker would have reported to him if there were any issues. She was required to provide end of month and legal reports. Services were performed on the firm premises, Monday through Friday during office business hours. He agreed she was paid a set salary, personals days and paid holidays. He indicated the office closed.

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your statement that the worker was an independent contractor pursuant to an 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.

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**Analysis**

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The withholding of income tax or the Federal Insurance Contributions Act (FICA) tax from an individual's wages is "treatment" of the individual as an employee, whether or not the tax is paid over to the Government. The filing of an employment tax return and Form W-2 for a period with respect to an individual, whether or not tax was withheld from the individual, is "treatment" of the individual as an employee for that period.

**CONCLUSION:**

Based on the information provided we find this to have been an erroneous misclassification of employment. 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.