

# SS-8 Determination—Determination for Public Inspection

Occupation 02OFF Office Worker	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 firm is in the business of operating an ambulatory surgery center. The worker was engaged to provide billing and collection services. She received a 2014 Form 1099-MISC from the firm. She also received a 2014 Form W-2 and 2015 Form W-2 for services provided to the firm but issued from another entity. There was no written agreement.

The worker was given instructions on billing procedures. Both parties agreed that the firm's billing supervisor provided the worker with her work assignments via incoming correspondence, a monthly aged report, and incoming phone calls. Both also agreed that the firm determined the methods by which the assignments were performed and that the firm's supervisor would be contacted if any issues or problems arose. There were no reports. The worker worked set scheduled hours and days at the firm's location. Only the worker mentioned attendance at monthly billing meetings. Both parties also agreed that the worker was to provide the services personally.

Both the firm and the worker agreed that the firm provided everything such as the workspace, all equipment, supplies and materials. Both also agreed that the worker was paid an hourly rate and had no other economic risk. Both parties agreed that the firm carried workers' compensation insurance on the worker. The customer paid the firm and the firm established the level of payment for the services.

Only the firm indicated that there were benefits. Both parties agreed that either party could terminate the relationship without incurring a liability. The worker did not provide similar services for others. The worker performed services under the firm's name as a billing representative. The work relationship has ended as the worker eventually resigned/moved; but the 1099 relationship ended when she was hired as a full-time employee.

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## Analysis

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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. The relationship of the worker and the business must be examined. 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 should be considered. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm provided some initial instructions on their billing procedures as well as supervision. The worker worked set scheduled hours and days. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. She also worked at the firm's office location. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. In addition, she essentially worked full-time. The term "full-time" may vary with the intent of the parties and the nature of the occupation since it does not necessarily mean working an eight hour day or a five or six day week. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses. All of these elements that existed supported an employer-employee relationship.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. It was the firm that had the investment in the facility, all equipment, and supplies. The worker received an hourly rate of pay and had no other economic risk other than the loss of that compensation. 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.

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. There were no benefits and there was no written agreement. The worker was engaged to provide billing and collection services. She did so at the firm's location and worked according to their scheduled hours. Her services were a part of the firm's necessary business activities. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control.

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 for the entire time period and not an independent contractor operating a trade or business.

The firm eventually treated the worker as an employee and provided her with a Form W-2; her services had not changed. If the worker was hired for a trial or probationary period, even though not qualifying for benefits, privileges, or seniority protection, she still would be considered an employee for federal employment tax purposes. Since the firm withheld taxes from the worker's income, possibly after a probationary/trial period, and there was no meaningful change in the work relationship, the firm effectively assigned an employee status to the worker for the whole time services were performed.

Please see Publication 4341 for guidance and instructions for firm compliance.