

|-&gt;

Title 22@ Social Security

|-&gt;

Division 1@ Employment Development Department

|-&gt;

Subdivision 1@ Director of Employment Development

|-&gt;

Division 2.5@ WITHHOLDING TAX ON WAGES

|-&gt;

Chapter 1@ GENERAL PROVISIONS

|-&gt;

Section 4304-11@ Specific Application of Rules for Determination of Employment Status to Circumstances in the

Process Server's Industry

## **4304-11 Specific Application of Rules for Determination of Employment Status to Circumstances in the Process Server's Industry**

### **(a)**

To determine whether services are performed as an employee or independent contractor, refer to the common law rules contained in Section 4304-1 of these regulations. Section 4304-1 provides that "to determine whether one performs services for another as an employee, the most important factor is the right of the principal to control the manner and means of accomplishing a desired result." Section 4304-1 lists factors that are evidence of the existence or absence of the right of control to be considered when making an employment determination. Section 4304-11 provides standards to be used when applying the common law rules specifically to process servers and is intended to make clearer those circumstances under which a process server is an independent contractor or employee.

### **(b)**

Definitions: For the purposes of this regulation, the following definitions will apply:

(1) A "process" is any means used by the court to acquire or exercise its jurisdiction over a person or over specific property. (2) A "service" as used in the context of Service of Process is the exhibition or delivery of a legal document such as a writ, summons and complaint, criminal summons, notice, or order, by an

authorized person, to a person who is thereby officially notified of some action or proceeding in which he or she is concerned, and is thereby advised or warned of some action or step which he or she is commanded to take or to forbear. (3) A "process server" is a person authorized by law to serve process papers on an individual or entity. (4) A "principal" is any individual or entity for whom or for which the process server performs process serving services.

**(1)**

A "process" is any means used by the court to acquire or exercise its jurisdiction over a person or over specific property.

**(2)**

A "service" as used in the context of Service of Process is the exhibition or delivery of a legal document such as a writ, summons and complaint, criminal summons, notice, or order, by an authorized person, to a person who is thereby officially notified of some action or proceeding in which he or she is concerned, and is thereby advised or warned of some action or step which he or she is commanded to take or to forbear.

**(3)**

A "process server" is a person authorized by law to serve process papers on an individual or entity.

**(4)**

A "principal" is any individual or entity for whom or for which the process server performs process serving services.

**(c)**

Determination Factors: To determine whether one performs services for another as an employee, the most important factor is whether or not the principal has the right to control the manner and means of accomplishing a desired result. Each of the following factors shall be used to determine if an employment relationship

exists. Not all factors listed in this section (4304-11) are necessary to make a determination that a particular relationship exists. A determination of whether services are being performed as an employee or independent contractor will depend upon a grouping of the factors that are significant in relationship to the services being performed. (See following factors.)

FACTORS--PROCESS SERVERS	EVIDENCE OF:	FACTOR	EMPLOYEE	INDEPENDENT CONTRACTOR	WEIGHT
(1) Policies, Rules or Procedures of Conduct.	Set by the principal as evidenced by written or verbal instructions necessary as to the details (manner and means) or methods to serve a process. For example, the process server performs his or her services independent of any policies, rules or procedures of conduct (other than compliance with state and federal statutes or	The setting of policies, rules, procedures and instructions by the principal is an indication of direction and control over the process server's services and carries great weight.			
principal provides a manual for the process server to establish procedures or rules for dealing with various situations when performing a service, such as better ways of performing a service.	rules of court) when serving process.	Conveying instructions and/or requirements received from the client would not, by itself, be an indication of employment.			
(2) Supervision on the Job.	The process server is subject to supervision from the principal. The principal reviews the work performance as to how the process server conducts himself or herself on the job. For example, the principal requires the process server to report on the progress of his or her work on a daily basis. The process server is instructed by the principal on how to handle problems encountered while serving a process.	Details (manner and means) of the work are not subject to supervision by the principal. The process server is on his or her own to perform the service using any method they choose consistent with the direction of the client and in compliance with state and/or federal statutes. The			

process server may be required to provide a report of activities to the court, to substantiate a diligent attempt to serve process. To the extent that the principal exercises control over the work through supervision, it is evidence that the principal has the right to control the work, and that this right to control the work is complete and authoritative. This right to control (whether or not exercised) carries the greatest weight in making an employer-employee determination. The principal may review completed assignments to verify that the client's instructions, court rules and statutes were followed. (3) Reporting into the Office and/or Contacting the Principal. The principal requires the process server to report into the office in person or by phone on a routine basis. The process server reports into the office for new assignments or to get directions or instructions. He or she must notify the principal if he or she is sick, unable to work, or if problems arise while serving process. The process server is not required to report into the office. The process server performs services when he or she chooses. The process servers are on their own performing the services and the principal does not direct or instruct them in any way. Failure to report to work or contact the principal does not result in any adverse action taken against the process server although there can be instances where failure to go into the office results in loss of assignments. Requirements placed on process servers by the principal are indications of direction and control and carry great weight. Requiring a process server to report into the office in person or by phone on a routine basis restricts the process server from making independent business decisions regarding his or her business operations. (4) Reports. The principal requires the process server to submit reports regarding the service of process. (For example, reports regarding the process server's daily activities.) Failure of the process server to submit reports would result in adverse action taken by the principal, such as the withholding of commissions or

termination. The principal does not require the process server to complete any reports. However, the client or the court can require a process server to substantiate the completion of a proof of service or evidence of a diligent attempt to serve process. The completion of the proof of service declaration or similar documentation would not be considered a report required by the principal. The submission of Reporting requirements are an extension of the factor "supervision" and would be given medium to great weight depending on the purpose and the content of the reports. Reports may be either oral or written. Reports that are used to monitor the process server's performance are considered controls by the principal over the manner and means of the work. (These reports do not include the legally required proof of service documentation.) an invoice to the principal for services performed, does not constitute a report. A statutory or court directed requirement by itself would indicate employment but alone is not sufficient to establish an employer-employee relationship. These requirements are not for purposes of control over the manner and means of performing the services by the principal. However, reports required by the principal for the sole purpose and use of the principal would be an indication of employment. (5) Training. Training is provided to inexperienced process servers by the principal. The principal instructs the worker on details of the job, company policies or rules. The principal places the process server with an experienced process server for on-the-job training. Training is not provided. Attendance at training is not required. Process server is not paid for time at training. The act of conducting training to give the process server an orientation of the principal's business and products, by itself, is not a strong indication of employment. However, if by intent or fact the propose of the training is to convey instructions about performing the work, dress code, customer relations, or the like, it implies that the principal has the right to control the

services and would carry great weight. (6) Meetings. The principal conducts meetings and the process server's attendance is required or expected. The principal pays the process server for his or her time spent at meetings. The principal does not hold mandatory meetings. Attendance at meetings is not required and nonattendance is viewed without negative consequence. The act of holding informational meetings to communicate the requirements of statutory and court rules, by itself, does not indicate employment or independence. However, if by intent or fact the purpose of the meeting is to convey policies, rules, procedures or instructions, it implies that the process servers are not in control of their services and not independent. This should carry great weight. (7) Principal and Process Server Contract. Agreement between the principal and the process server gives the principal the right to direct and control the manner and means of the agreement forbids the principal from directing the process servers as to the details (manner and means) of the work. Terminology used in a written agreement is not conclusive of the relationship, but is evidence of the relationship intended. accomplishing the work. Agreement contemplates that the process server will perform the services personally. accomplishing the work. The process server holds the principal harmless by indemnifying the principal for losses. Agreement contemplates the process server is an independent contractor. Written agreements do not necessarily depict the actual practices of the parties in a relationship. The actual practices of the parties in a relationship are more important than the wording of an agreement in making an employer-employee relationship determination. An agreement in which the principal expresses only an interest in the end result and abandons the right to control the details (manner and means) of the work is evidence of independence. (8) Termination. Both the principal and the process server have the right to terminate the relationship at will, without prior notice or without cause, and without

any further contractualBy agreement or practice, the principal is required to pay for work not performed if the principal unilaterally terminates the relationship, other than forThe right to terminate conveys an inherent power of the principal over the process server. The right to terminate at will, without cause, is strong evidence of employment. liability (except for work already performed).cause. The contract makes the process server liable for damages if he or she fails to complete the terms of the contract for reasons other than good cause.The right to sever the working relationship without notice for breaches of statutory or regulatory requirements for the protection of the public or for a material breach by the process server is not evidence of employment. (9) Engagement in a Distinct Business.The process server does not operate his or her own business. Work performed is a direct and essential part of the principal's business. The process server does not advertise his or her services to the general public as a separateThe process server operates an independent business separate from that of the principal. The process server advertises under his or her own trade name, has a certificate of registration, surety bond, and business license whereIn spite of the fact that both the process server and the principal work in the general area of process serving, if the process server has established a separate business, distinct from that of the principal, great weight would be given toward independence. business. The process server performs services under the principal's business name. This includes signing the proof of service with the principal's name on it. The principal handles the billings and collections. The principal provides insurance coverage. The process server is prohibited from providing services for others while performing services for the principal. The principal is responsible for arranging for a substitute if the process server is unable to perform the services. The process server does not have an entrepreneurial risk of loss.required. The process server

provides his or her own insurance. If necessary, the process server arranges for his or her own substitute if he or she is unable to complete the services. Billings between the principal and the worker are independent, separate and apart from any other contractual obligations of the principal or the process server. Payment of services by the process server is contingent upon his or her fulfilling the requirements of the contract. The process server is not prohibited by the principal from providing services for others when performing services for the principal and is free to make business decisions which influence future profit and loss. The process server assumes an entrepreneurial risk of loss. (For example, a process server is paid to serve a process. He or she is paid the same amount regardless of the number of attempts needed to complete the service. Therefore, there may be instances where the costs exceed the payment for serving the process, thereby resulting in a loss.) If the process server does not have an established separate business in the field of process serving, distinct from that of the principal, great weight would be given towards an employment relationship since the work is an integral part of the regular business of the principal. (10) Required Level of Skill of the Process Server. Little skill or no experience is required. No particular education is needed. The process server is required to serve process under the most difficult situations and, as a result, he or she must possess a greater amount of skill and expertise. Level of skill, by itself, generally does not weigh heavily toward independence. However, a high level of skill will weigh more heavily when combined with other factors such as separate and distinct business. A low level of skill weighs in favor of employment, since as skill level declines, the worker has less room to exercise the discretion necessary for independence. (11) Duration of Services. The process server performs services on a continuous basis. The process server provides services on a sporadic, per job basis. Generally, independent



contractors perform work on a job basis for shorter, designated periods of time. Employment is usually of open-ended duration. A long series of short term assignments from a single principal will tend to show continuity and employment but will not, by itself, be conclusive when each assignment was separate for purposes of billings and performance expectations. However, where a process server performs services for multiple principals on a continuous basis, that is evidence of independence. (12) Whether the Principal or the Process Server Supplies the Instrumentalities, Tools, and Place of Work. The principal provides the process server with the supplies and equipment to perform the services, such as business cards, a beeper, telephone, or an automobile. The process server is expected to spend time in the principal's office. The process server pays for his or her own car, office, equipment, support services, forms, supplies and business cards. If the process server has established his or her own office, and pays all the expenses connected with that separate office, there is a strong indication of independence. On the other hand, if the process server generally works out of the principal's office where all necessities are provided and paid for by the principal, then there is a strong indication of an employment relationship. If the principal provides a place for the process server to wait until an assignment is received, that would be considered a neutral factor. The neutrality of this factor is contingent on the principal providing the waiting area for the convenience of the process server only. There can be no requirement by the principal that the process server use the waiting area at any time. (13) Custom in Industry and Location. Principals treat their process servers as employees. Process servers typically operate their own separately established business. Industry custom merely gives an inference or direction to the determination. The fact that the principal may utilize the services of both employee and independent contractor process servers is not an indication of

employment. (14) Method of Payment. Payment by the hour or piece rate.

Compensation set by the principal. Benefits are furnished at no cost to the process server. The principal reimburses the process server for his or her business expenses. The fees are negotiated including hourly fees for specific assignments, such as stake-outs. The process server pays for his or her own expenses. The principal furnishes no benefits to the process server. The principal may reimburse or advance fees, such as filing fees and witness fees. This factor is only an indication of the type of relationship. A process server may be paid solely by the job, but the controls are sufficient to create an employer-employee relationship. A process server could also be paid at regular intervals but because the controls are not sufficient, no employer-employee relationship would exist. provided for by statute, on behalf of the client. The advancing of witness or filing fees (statutory or other payments) by the principal, on behalf of the client to the process server would not be indicative of employment. (15) Belief of Parties. Both parties believe the relationship is one of employment. Both parties agree that the relationship is one of independence. The belief of the parties only implies the intent of the relationship.