



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

OFFICE OF  
CHIEF COUNSEL

November 17, 2000  
Michael A. Swim  
COR-116528-00

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UILs: 3101.00-00, 3111.00-00, 3121.02-05, 3121.02-06, 3121.02-07, 3121.04-00,  
3121.04-00, 3121.15-00, 3306.03-00, 3401.04-00. 3401.04-02, 6041.01-00, 6051.00-00

[REDACTED]

Frankfort, KY 40602-0557

Dear [REDACTED]:

Your May 23, 2000 inquiry, made on behalf of [REDACTED], to Charlie Harvel of the Office of Employment Tax and Compliance has been forwarded to this office for a response. In that letter you expressed concern over a SS-8 determination letter, issued May 5, 2000, which concluded that a city attorney for the City of [REDACTED] (City) was an independent contractor rather than an employee. You indicated that the city attorney is appointed by the Board of Mayor and Aldermen for a two-year term, that he can be reappointed without limits, and that his duties include attending council meetings, drafting resolutions and ordinances, providing legal counsel, and occasionally representing the City in lawsuits. Apparently, payments for all services, except those related to the occasional representation of the City in certain lawsuits, are reported on a Form W-2. Lawsuit representation payments are reported on a Form 1099. You asked whether this was the correct method for reporting these various payments.

Subsequently, the May 5, 2000 SS-8 letter was revoked in a June 23, 2000 SS-8 letter, which concluded that the city attorney was an employee while performing services for the City. In a September 13, 2000 telephonic conversation between Joe Spires, an attorney with this office, and [REDACTED], [REDACTED] was of the opinion that the June 2000 SS-8 letter resolved your questions and concerns except the issue of the appropriateness of reporting payments to the city attorney on both a Form 1099 (for lawsuit services) and a Form W-2 (for all other services).

As a general matter, apart from the procedure for issuing a formal opinion as described in Revenue Procedure 2000-1, 2000-1 I.R.B. 4, the Internal Revenue Service is not able to provide binding legal advice applicable to particular taxpayers. We are,

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however, able to provide general information. Accordingly, in response to your request, we have reviewed the facts provided to us and are furnishing general information relevant to the issue of determining the employment status for services rendered by public officials, which we hope will be helpful to you.

Section 6041(a) of the Internal Revenue Code (the Code) requires every person engaged in a trade or business to make an information return for each calendar year with respect to payments made during that calendar year in the course of a trade or business to another person of fixed or determinable commissions, fees, and other forms of compensation for services rendered aggregating \$600 or more. This return must be made on Forms 1096 and 1099. Treas. Reg. § 1.6041-1. Generally, section 6051(a) of the Code requires that every employer engaged in a trade or business who pays remuneration for services performed by an employee provide a written statement of certain required information. Section 6051(c) of the Code provides that this statement must comply with Treasury Regulations. Under the provisions of section 31.6051-1(a)(1) of the Employment Tax Regulations, when an employer is required by section 6051 of the Code to furnish a statement to an employee, the employer should use Form W-2 to furnish the statement. Therefore, wages paid to employees must generally be reported on Forms W-2 and payments made to independent contractors for services rendered must generally be reported on Forms 1096 and 1099.

As to the question of the worker's status for federal reporting and employment tax purposes, sections 3101 and 3111 of the Code impose, in general, Federal Insurance Contributions Act (FICA) taxes on wages paid by employers to employees, unless the payments are specifically excepted from the term "wages" or the services are specifically excepted from the term "employment." Section 3121(b)(7) generally excludes from the term "employment" those services performed in the employ of any state, any of its political subdivisions, or any wholly-owned instrumentality of a state or one of its political subdivisions.

For FICA purposes, however, section 3121(b)(7)(E) explains that "employment" includes services covered in an agreement under section 218 of the Social Security Act (section 218 agreement). Further, section 3121(b)(7)(F), effective for services performed after July 1, 1991, generally excludes from the term "employment" only those services of an employee of a state, political subdivision, or wholly-owned instrumentality who is a member of a qualified retirement system of such state, political subdivision, or instrumentality. However, under section 3121(u)(2)(C), all state or local government employees hired after March 31, 1986 are still subject to the hospital insurance portion of the FICA taxes even if they are members of a qualified retirement system.

Additionally, the FICA exclusions related to section 218 agreements are dependent upon whether the services covered under such agreement. Indeed, section 3121(d)(4) defines an employee as any individual who performs services included under a section

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218 agreement. Therefore, the details of such an agreement, if one has been established, would provide additional information as to whether the services at issue are covered. Where such services are not included under a section 218 agreement, the determination of whether an individual is an “employee” for FICA purposes is decided by application of the common law rules relevant to determining the employer-employee relationship under section 3121(d)(2). Section 31.3121(d)-1(c)(2) of the Employment Tax Regulations explains that, generally, an “employee” is subject to the will and control of the employer regarding what shall be done and how it shall be done.

For purposes of the Federal Unemployment Tax Act (FUTA) tax, section 3306(c)(7) of the Code excludes from the definition of “employment” the services performed in the employ of a state, political subdivision, or wholly-owned instrumentality.

For federal income tax withholding purposes, section 3401(c) defines an employee as including officers, employees, and elected officials of a state, any of its political subdivision, or any of their agencies or instrumentalities. Section 31.3401(c)-1(a) of the Employment Tax Regulations further explains that the term “employee” includes both elected and appointed officers of a state, any of its political subdivisions, or any of their agencies or instrumentalities.

Additionally, where individuals are employees for federal employment tax purposes, they may not be employees with respect to all services that they provide. Revenue Ruling 58-505, 1958-2 C.B. 728, explains that

[t]he question to be resolved is whether their services in the two capacities . . . are interrelated. If their services are found to be interrelated, then it could not be said that they were acting in two separate and distinct activities. Interrelated services which, as a whole, contain the elements establishing the existence of a common law relationship of employer and employee would result in a conclusion that, with respect to all services performed by the individuals, they are employees for Federal employment tax purposes. If, however, the services in the two capacities are separate and distinct, that is, if there is no interrelation either as to duties or remuneration in the two capacities, then the status of each type of service must be considered separately.

The office of the New England District Director, after considering the City’s request for reconsideration, found that, for federal employment tax purposes, the city attorney was an employee while he performed all services for the City. The City may request that the district director reconsider the determination set forth in the June 23, 2000 SS-8 letter or request technical advice from the national office, as provided for under section 6.08 of Revenue Procedure 2000-1, 2000-1 I.R.B. 20-21.

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We hope you find the foregoing information helpful. If you have any additional questions, please contact Joe Spires (Identification No. 50-17971) of my staff at (202) 622-6040.

Sincerely,

Michael A. Swim  
Chief, Employment Tax Branch 1  
Office of Assistant Chief Counsel  
(Exempt Organizations/Employment  
Tax/Government Entities)

cc: Charlie Harvel

A large black rectangular redaction box covers the names and contact information of the recipients listed in the 'cc' field.