

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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subject: Tribal elected and appointed officials

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

Whether board members appointed by the Tribal Council or elected by members of the tribe are employees of the tribe?

FACTS

Indian tribal governments are sovereign governments that exercise many aspects of government authority similar to states. Generally, tribal governments are governed by the Tribal Council, consisting of elected tribal officials. Boards of directors or similar oversight committees (collectively, "boards") oversee the actions of the agencies that execute the tribal government's various authorities, such as housing authority, water authority, or police departments.

Members of the boards may be either appointed by the Tribal Council or elected by the members of the tribe. Often, board members receive a stipend, travel allowance, or both.

LAW AND ANALYSIS

Section 7871 of the Internal Revenue Code ("Code") treats Indian tribal governments as states for certain purposes. However, neither the employment tax provisions (chapters

21, 23, 24, and 25 of the Code) nor the self-employment tax provisions (chapter 2 of the Code) are listed in section 7871. Additionally, an Indian tribe is not a political subdivision of the United States or of a state. See Rev. Rul. 74-179, 1974-1 C.B. 279 (*citing Ex parte Morgan*, 20 F. 298 (W.D. Ark. 1883)).

Subtitle C of the Code sets forth the provisions for employment taxes, including withholding on wages. Chapter 21 imposes the Federal Insurance Contributions Act (FICA) tax upon both the employer and employee. Sections 3101 and 3111. Chapter 23 imposes the Federal Unemployment Tax Act (FUTA) tax upon the employer. Section 3301. Chapter 24 requires the employer to deduct and withhold income tax from wages paid to an employee. Section 3402(a).

Generally, the Code imposes employment taxes on wages paid by an employer to an employee for employment.¹ Section 3121(d)(2) of the Code provides that the term employee means any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. Treas. Reg. §§ 31.3121(d)-1(c)(1) and 31.3401(c)-1(a). Such a relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. Treas. Reg. §§ 31.3121(d)-1(c)(2), and 31.3401(c)-1(b). This determination is based on the facts and circumstances. With respect to the FUTA tax, section 3306(c)(7) excepts from the definition of "employment" services performed in the employ of an Indian tribe for purposes of FUTA tax. However, this exception applies only if the tribe has participated in the state unemployment system for the full year and is in compliance with applicable state unemployment law. Provided the Tribe satisfies the state unemployment requirements, no FUTA tax will apply. Section 3309(d).

As an example of how to apply the common law control test, the Service has developed a three-category test analyzing various factors to determine whether a common law

¹ For federal income tax withholding purposes, holders of public offices of the United States, states, or any instrumentality or political subdivision thereof are specifically considered employees. Section 3401(c). For FICA purposes, services performed in the employ of any such government entity are defined as employment, with several exceptions not relevant here. Sections 3121(b)(5) and 3121(b)(7)(F). If a public office holder is an employee of the government entity, payments paid for services performed will be subject to FICA taxes. However, as stated above, Indian tribal governments are not considered states for employment tax purposes. Furthermore, nothing in the Employment Tax Regulations justifies an expansion of the definition of "holders of public office." See, for example, Treas. Reg. §31.3121(e)-1(a) (*not including Indian tribal governments in the definition of the term "state"*). Thus, these statutory definitions of employee and employment do not apply to holders of Indian tribal government office.

employment relationship exists between workers and a particular entity. See, "Independent Contractor or Employee?" Training 3320-102 (Rev. 10-96) (available at www.irs.gov). The categories are behavioral control, financial control, and relationship of the parties. Each category contains types of information (facts) that illustrate the right to direct and control, or its absence. There is no specified number of relevant evidentiary facts that will decide the issue. Instead, all the facts must be weighed in evaluating the extent of the right to direct and control.

Notwithstanding the legal relationship between the taxpayer and the workers, a taxpayer may be relieved of its employment tax liabilities pursuant to section 530 of the Revenue Act of 1978. The taxpayer must have a reasonable basis for not treating the workers as employees and meet the following three requirements:

1. The taxpayer must not have treated the worker as an employee for any period. Section 530(a)(1)(A).
2. The taxpayer (or a predecessor) must not have treated any worker holding a substantially similar position as an employee. Section 530(a)(3). See Institute for Resource Management, Inc. v. United States, 22 Ct. Cl. 114 (1990) (no section 530 treatment available with respect to workers treated as independent contractors when a worker holding substantially similar position is treated as an employee).
3. The taxpayer must have filed all required federal tax returns with respect to the worker on a basis consistent with the taxpayer's treatment of the worker as not being an employee (for example, if a taxpayer treats a worker as an independent contractor, the taxpayer must have provided Form 1099). Section 530(a)(1)(B). See General Investment Corp v. United States, 823 F.2d 337 (9th Cir. 1987) (section 530 treatment not available for periods for which information returns were not filed).

In any worker classification examination, the examiner should first determine whether the taxpayer is entitled to Section 530 relief. If the examiner concludes that the taxpayer is not entitled to Section 530 relief than the examiner should apply the common law test to determine whether the worker is an employee.

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Please call (202) 622-0047 if you have any further questions.