

## Internal Revenue Service

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**January 28, 2001**

### Key:

Board =

Worker =

State =

Dear

This is in response to your request for a ruling concerning the Worker's status for federal employment tax purposes with respect to services she performs for the Board.

The applicable federal employment taxes are those imposed by the Federal Insurance Contributions Act (FICA) and the collection of income tax at source on wages. In cases that involve a possible employer-employee relationship, it is our practice to solicit information from the parties involved, so we requested information from the Worker as well.

The Worker performs services for the Board on a part-time, as-needed basis. The Worker holds licenses from the State as a soil evaluator and a registered sanitarian. As such, the Worker is entitled to witness percolation tests, to inspect the installation of septic systems, and to inspect restaurants and other facilities. The Worker conducts sanitation inspections and prepares inspection reports for the Board. The Board then decides on the appropriate course of action, pursuant to its statutory authority.

The Worker and the Board signed a contract according to which the Worker provides consulting services for a set hourly fee for the performance of specified services. The Worker is called upon as needed and performs on-site inspections and prepares reports without supervision. She furnishes her own tools and has a home office. She holds herself out to the public as a consultant and performs her services under her own name. She does not take an oath of office.

The Board does not have an employee who is licensed to perform the functions the Worker performs. It maintains a list of individuals who are so licensed and engages their services as needed for specific inspection jobs. The Worker also provides training to the Board members at their request.

The Worker was formerly an employee of the Board, but now holds another position. As an employee she performed inspection tasks similar to the ones she now performs. As an employee, she took an oath of office; she also approved plans, made decisions,

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and signed documents as agent of the Board. She no longer performs these functions.

#### Employee or Independent Contractor?

For FICA purposes, an individual is an employee if, under the usual common law rules, the relationship between the individual and the person for whom he or she performs services is the legal relationship of employer and employee. Generally this 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 but also as to the details and means by which the result is accomplished. In this connection, 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. Section 31.3121(d)-1(c), Employment Tax Regulations.

In applying the common-law rules, the IRS considers whether the service recipient has behavioral and financial control over the worker and evaluates the relationship between the parties, including how they view their relationship.

Behavioral controls are evidenced by facts which indicate whether the service recipient has a right to direct or control the how the worker performs the tasks for which he or she is hired. Facts which illustrate the right to control how a worker performs a task include the provision of training or instruction.

Financial controls are evidenced by facts which indicate whether the service recipient has a right to direct or control the financial aspects of the worker's activities. These include significant investment, unreimbursed expenses, making services available to the relevant market, the method of payment, and the opportunity for profit or loss.

The relationship of the parties is generally evidenced by examining the parties' agreements and actions with respect to each other, paying close attention to those facts which show not only how they perceive their own relationship but also how they represent their relationship to others. Facts which 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.

The Board does not have behavioral control of the Worker. It hires the Worker to perform specific inspections. It lacks the expertise to perform these tasks itself and hence does not supervise the Worker. It hires the Worker for short-term contracts, which are performed outside its office on the Worker's own time. It provides no instructions or training. Instead the Worker provides training to the Board when the Board believes it is necessary.

The Board does not have financial control of the Worker. She provides her own equipment, maintains her own licenses, and maintains a home office. She is paid by the hour and receives no employee benefits.

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The parties view the relationship as a contracting relationship, as shown by their written agreement. In her current capacity, the Worker does not act as agent for the board, but only makes recommendations, on which the Board makes the final decisions.

We therefore conclude that the Worker is an independent contractor. Consequently, the Board and the Worker are not subject to FICA taxes.

#### Public Official

Section 3401(c) of the Internal Revenue Code (the Code) provides that, for purposes of income tax withholding, the term “employee” includes an officer, employee, or elected official of a state or political subdivision of a state. If an individual performs the functions of a public office, that individual is subject to income tax withholding.

The Code does not define the terms “officer” or “official,” but section 1.1402(c)-2(b) of the Income Tax Regulations gives the following examples for the term “public official”: the president, the vice president, a governor, a mayor, the secretary of state, a member of Congress, a state representative, a county commissioner, a judge, a justice of the peace, a county or city attorney, a marshal, a sheriff, a constable, a registrar of deeds, or a notary public.

We conclude that the Worker is not a public official because her duties are fundamentally different from the duties of the officers named in the examples in the regulation. She does not administer or enforce the law. She is hired to perform specific advisory functions for the Board, which has the authority to make final decisions and enforce them. Therefore, the Worker is not subject to income tax withholding.

This letter does not constitute a Notice of Determination Concerning Worker Classification Under Section 7436 of the Internal Revenue Code.

This ruling is directed only to the taxpayer to whom it is addressed. Section 6110(j)(3) provides that it may not be used or cited as precedent.

Sincerely yours,  
Marie Cashman  
Senior Technician Reviewer  
Employment Tax Branch 2  
Office of Division Counsel/Assistant Chief Counsel  
(Tax Exempt and Government Entities)

Enclosure:  
Copy of ruling letter for 6110 purposes