

Council Meeting of May 14, 2014

Agenda Item No. 9f

REQUEST FOR COUNCIL ACTION

SUBJECT: Discussion and possible action regarding the status of City Council members as Employees of the City with W-2 tax reporting, or Contractors of the City with a 1099 tax reporting



Classification of Elected and Appointed Officials



Government Officials as Employees

Generally, any individual who serves as a public official is an employee of the government for whom he or she serves. Therefore, the government entity is responsible for withholding and paying Federal income tax, social security and Medicare taxes, and issuing Form W-2, Wage and Tax Statement, to a public official.

Public Officials and Public Officers

Although there is no precise definition for the term "public official" or "public officer," the courts have generally held that anyone who exercises significant authority pursuant to public laws is a public officer. This includes any official who administers or enforces public laws, whether the individual is elected by the public or appointed to an office.

The regulations for section 1402, addressing the applicability of self-employment tax, indicate that holders of "public office" are not in a trade or business and therefore not subject to self-employment tax. These regulations state that the performance of the functions of a public office does not constitute a trade or business. An exception applies for certain public officials paid solely on a fee basis. All other holders of public office, paid on a salary basis, are excepted from self-employment tax and are presumed to be employees receiving wages.

Generally, if there is any provision in a public law that authorizes the employment of the individual, and the individual is hired or elected under this authority, the individual is considered an employee of the state or political subdivision to which the provision applies.

The following facts indicate that an office is a "public office":

- The office was created by the constitution or through legislation, or by a municipality or other body with authority conferred by the legislature.
- The office was delegated a portion of the powers of a government body.
- The powers conferred and the duties to be discharged are defined either directly or indirectly law or through legislative authority.
- The duties are to be performed independently and without control of a superior power other than the law.
- The office has some permanency and continuity, and the officer takes an official oath.

Examples of public officers are: the President and the Vice President; a governor or mayor; the secretary of state; a member of a legislative body, such as a state legislature, county commission, city council, school board, utility or hospital district; a judge, a justice of the peace, a county or city attorney, a marshal, a sheriff, a constable and a registrar of deeds; tax collectors and assessors; and members of advisory boards and committees.

If there is not any authority in a public law to hire or elect an individual to fill a position, one, a determination must be made about the employment status of that position under the general common-law rules, discussed below.

Common-Law Rules

In applying the common-law rules, the IRS considers whether the recipient of the services, in this case a government body, has behavioral and financial control over the worker and evaluates the type of relationship between the parties.

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

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

A "type of relationship" determination is evidenced by facts that indicate whether the parties intended there to be an employee-employer relationship. These include a written contract that

describes the relationship the parties intended to create, whether the individual is provided with employee-type benefits, and the permanency of the relationship.

Exception for Fee-Based Public Officials

When a public office is compensated solely on a fee basis, then the person who serves in that capacity is considered to operate a trade or business and is not considered an employee. This exception only applies when the fees are received directly from the public rather than from the government. For example, a building inspector who is compensated solely from fees paid directly to him or her by clients is considered to operate a trade or business and is not treated as an employee of the government.

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