



To: MTA Member Township Boards (*via Clerk*)

From: Larry Merrill, MTA Executive Director

Date: July 31, 2009

**Re: Payroll Tax Classification of Township Assessors, Construction Code Inspectors, Ordinance Enforcement Officers, Law Enforcement Officers and Attorneys**

In response to questions from the Michigan Townships Association on behalf of a township, the Internal Revenue Service recently released to MTA a Chief Counsel Advisory regarding the employment classification of township assessors for payroll reporting and withholding purposes. In the Chief Counsel Advisory, the IRS has taken the position that a township assessor who certifies the roll is a public officer, and as such, must be classified as an employee, not an independent contractor, for income tax and FICA purposes.

MTA staff and Legal Counsel have analyzed the IRS Chief Counsel Advisory, along with state and federal statutes and case law, and have concluded that the IRS Chief Counsel Advisory does apply to Michigan assessors. MTA Legal Counsel have prepared a comprehensive written legal opinion addressing the employment classification of township assessors, as well as construction code and ordinance enforcement officers, law enforcement officers, and township attorneys. This letter is being sent to all MTA member township boards to provide you with a summary of the opinion.

The IRS Chief Counsel Advisory and MTA Legal Counsel opinion are attached as PDF files.

**I. How should the positions of assessor, construction code inspector, ordinance enforcement officer, law enforcement officer and township attorney be classified to comply with IRS requirements?**

The key issue is whether a position is required to be classified for payroll tax purposes as a township employee or as an independent contractor. For payroll tax purposes, "township employee" includes a "public officer" or an "employee." "If a position is classified as a public officer or employee, then a person holding that position cannot be classified as an independent contractor.

The IRS has adopted the following standards from a Sixth Circuit opinion, *Pope v. Commissioner*, to define the term "public office" for income tax withholding purposes:

"(1) It must be created by the Constitution of the legislature, or by a municipality or other body with authority conferred by the legislature. (2) There must be a delegation of a portion of the sovereign powers of government to be exercised for the benefit of the public. (3) The powers conferred and the duties to be discharged must be defined either directly or indirectly by the legislature or through legislative authority. (4) The duties must be performed independently and without control of a superior power other than the law. (5) The office must have some permanency and continuity, and the officer must take an official oath."

The IRS uses the common law rules applicable in determining the employer-employee relationship to determine whether a person is an employee or independent contractor for FICA (Social Security and Medicare) applicability. This includes consideration of whether the township has (1) behavioral and (2) financial control over the worker and (3) an evaluation of the relationship between the parties, including how they view the relationship. The common law rules are explained on pages 6 and 7 of IRS Publication 15-A.

Because a number of Michigan townships utilize independent contractors as their assessors, the MTA requested that MTA Legal Counsel make an independent determination of the classification status of township assessors, as well as construction code and ordinance enforcement officers, law enforcement officers, and township attorneys. The following points summarize the MTA Legal Counsel opinion:

**Assessor**

- The certified assessor who signs the assessment roll must be classified as a public officer for income tax withholding purposes and as an employee of the township for FICA purposes; that authority cannot be contracted to an independent contractor.
- If the Township Supervisor is not certified to perform the assessing function, then the assessor must be classified as a public officer for income tax withholding purposes and as an employee of the township for FICA purposes.
- The Supervisor position is always classified as a public officer for income tax withholding purposes and as an employee of the township for FICA purposes (as are other board members).
- If the Township Supervisor is certified at the proper level for the township and will certify the roll, the township may hire an independent appraisal firm or independent contractor to assist the Supervisor in performing the assessing function. But the Supervisor must supervise the preparation of the roll and sign off on the roll.
- If the Township Supervisor is not certified at the proper level for the township, it may be possible for a township to employ a certified assessor to sign off on the roll as a public officer and, at the same time, have the bulk of the work done through an independent appraisal firm. The appraisal firm can be an independent contractor. Arguably, the township assessor could also be an owner or employee of the appraisal firm, in addition to being a township employee. But great care would need to be taken since MCL 211.10d provides that the assessment roll must have a certificate executed by the certified assessor who prepared or supervised the preparation of the roll. If an assessor certifies an assessment roll in which the assessor did not have direct supervision, then the assessor is guilty of a misdemeanor.
- If a township is looking for help with its assessing, it should be noted that the county equalization department can assist a township assessing officer in the performance of their duties (MCL 211.34(3)). Further, if the township fails to have a certified assessor, then the county tax or equalization department or State Tax Commission shall make the assessment at the township's cost (MCL 211.10d(6)). It is also the opinion of MTA Legal Counsel that a township would have the right to contract with the county to make this assessment within the township when the township does not have a certified assessor. (See Article 7, Section 28 of the Michigan Constitution regarding intergovernmental cooperation.)

### **Construction Code Inspector**

The township construction code inspector position is not classified as a public officer and may be established as either an employee OR an independent contractor. But an independent contractor cannot issue or serve municipal civil infractions or misdemeanor appearance tickets.

### **Ordinance Enforcement Officer**

The township ordinance enforcement officer position is not classified as a public officer and may be established as either an employee OR an independent contractor. But an independent contractor cannot issue or serve municipal civil infractions or misdemeanor appearance tickets.

### **Law Enforcement Officer**

A law enforcement officer is not classified as a public officer, but the position must be established as a public employee, and cannot be an independent contractor.

### **Attorney**

A township is not required to classify an attorney as a public officer or employee, even if the attorney is performing ordinance enforcement or other governmental functions. An attorney with a township as his or her client can maintain independent contractor status in performing their trade and business in the legal profession.

## **II. What should a township do if it has misclassified a public officer or employee as an independent contractor?**

Internal Revenue Code Section 530 provides an employer relief under certain circumstances from the federal tax obligations created by misclassifying employees as independent contractors. It can relieve the township from past payroll tax liability and may allow the township to continue to treat the employee as an independent contractor. Qualification under Section 530 is not simple and the IRS will most likely challenge a claim in this regard.

A township that has misclassified a public officer or employee as an independent contractor should consult with its CPA and township attorney regarding the application of Section 530 and a proper course of action to rectify the misclassification. In general, the safest course of action would be to engage the individual in establishing a new employment agreement.

## **III. Do assessors now have to take an oath of office?**

To the extent that a position is determined to be a public officer, Article XI, Section 1 of the Michigan Constitution requires that the officer take an oath of office. The certified assessor who signs the assessment roll must be classified as a public officer, so that position will now be required to take the oath of office.

Although assessors have not previously been required to take the oath of office, if an assessor's work were challenged for failure to take the oath of office, it is the opinion of MTA Legal Counsel that the assessor's acts in office would still be binding on the public as those of an officer *de facto*. Generally, all that is required to make a public officer *de facto* is that the individual claiming the office possess that office under color of appointment and be performing its duties.

## **IV. Do construction code inspectors or ordinance enforcement officers now have to take an oath of office?**

To the extent that a position is determined to be a public officer, Article XI, Section 1 of the Michigan Constitution requires that the officer take an oath of office. A township construction code inspector or ordinance enforcement officer is not required to be classified as a public officer, so that position is not required to take the oath of office.

Michigan Townships Association  
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MTA recommends that construction code inspectors and ordinance enforcement officers take the oath of office because it tends to lend credibility to the position to which a person has just been appointed or assigned. It also provides an opportunity to create a “paper trail” for the township board to the date of appointment.

If an independent contractor construction code inspector or ordinance enforcement officer’s work were challenged for issuing or serving municipal civil infractions or misdemeanor appearance tickets, it is the opinion of MTA Legal Counsel that the person’s acts in office would still be binding on the public as those of an officer *de facto*. Generally, all that is required to make a public officer *de facto* is that the individual claiming the office possess that office under color of appointment and be performing its duties.

For more information, you may contact the MTA Member Information Services Department at (517) 321-6467.

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