International Municipal Lawyers Association, 2008 Mid-Year Seminar, Washington, D.C.

Work Session IV: Finance

City Attorneys in Private Practice---Employee or Independent Contractor?

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Attorney at Law

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Previous Contract

CITY OF HENDERSON EMPLOYMENT CONTRACT OF CITY ATTORNEY

In exchange for agreeing to perform the duties of City Attorney for the City of Henderson, Texas, the City of Henderson agrees to employ David P. Brown, Attorney at Law, under the following terms and conditions:

- Agrees to serve as City Attorney at the pleasure of the City Council and use his best efforts to represent the City in a workmanlike manner
- Attend 28 regular Council Meetings plus $xxx.xx each additional meeting
- Attend 28 Municipal Court Dockets plus $xxx.xx each additional docket
- Prepare and/or review all routine ordinances, resolutions, contracts, and other legal documents which are subject to action by the City Council (staff to provide samples or guidelines)
- Prepare written opinions on questions dealing with current ordinances as needed
- Serve as prosecutor of Class C Misdemeanors in the Municipal Court of the City of Henderson
- Assist with all routine personnel matters
- Give legal opinions on all matters before the City Council that appear on City Council agendas
- Will provide two (2) hours per month for miscellaneous legal matters for the City
- Receive an annual retainer of $xxx.xx
- Receive a billable rate of $xxx.xx per hour for legal services above and beyond duties not described in this agreement
- Receive health insurance coverage at no cost for himself and family as provided for other city employees
- Be covered by a life insurance policy as provided for other city employees

It is understood by and between the City of Henderson and David P. Brown that Mr. Brown is not a full-time employee of the City of Henderson but represents the City of Henderson as one of his clients for the above stated retainer and additional consideration.

SIGNED this **28th** day of **January, 2003**.

s/ Foy Brown
Foy Brown, **Mayor**

s/ David P.Brown
David P. Brown, **City Attorney**

City Manager. The Council may abolish or combine one or more departments created by it and may assign or transfer duties of any departments of the City from one department to another by ordinance.
(Amend. of 4-6-85, § 9)

Section 5. Directors of departments.

At the head of each department there shall be a director, whose qualifications may be prescribed by the Council, who shall be appointed by the City Manager for an indefinite term, subject to the consent of the City Council, and who may be removed by the City Manager. Such directors shall have supervision and control over their respective departments. The City Manager may authorize directors of departments to appoint and remove subordinates in each one's respective department. Two (2) or more departments may be headed by the same individual and the City Manager may head one or more departments.
(Amend. of 4-6-85, § 9)

Section 6. City attorney.

The City Council shall appoint a City Attorney from recommendations of the City Manager, or by any member of the City Council, who shall be duly licensed to practice law in the State of Texas. The City Attorney shall receive, for particular services, such compensation as may be fixed by the Council, and may be removed at any time by majority vote of the City Council.

The City Attorney shall represent the City of Henderson in all its litigation, serving as the legal advisor of and attorney and counsel for the City of Henderson, the Council and all boards, commissions and agencies, and all officers and departments thereof.

Notwithstanding the above provisions, the Council may engage special legal counsel to represent the City of Henderson in any specific matter or for the performance of any specifically delineated duties otherwise to be performed by the City Attorney.
(Amend. of 4-6-85, § 9)

Section 7. Municipal court and judge.

There shall be a Municipal Court of the City of Henderson which shall have such jurisdiction, powers, and duties as are prescribed by the Laws of the State of Texas, over which shall preside the Municipal Judge, whose qualifications shall be prescribed by the Laws of the State of Texas, and who shall be appointed by a majority vote of the City Council from recommendations of the City Manager or by any member of the City Council.
(Amend. of 4-6-85, § 9)

Section 8. City secretary.

The City Council by majority vote, upon the recommendation of the City Manager, shall appoint the City Secretary who shall serve at the discretion of the Council and who may be

Form 886A	Department of the Treasury - Internal Revenue Service **Explanation of Items**	Schedule No. or Exhibit pg 8 of 14
Name of Taxpayer City of Henderson		Year/Period Ended 2004 & 2005

Issue: Reclassification of City Attorney from Contract Worker to Employee

	2004	2005
Reclassified Wages		

FACTS:

The City of Henderson Texas entered into a section 218 agreement with the Social Security Administration effective January 1, 1951 to cover all employees of the Political Subdivision, except those performing emergency services and part time positions for Old-Age and Survivors Insurance coverage. In 1978, the City deleted their exclusion for part time positions.

David Brown is the City Attorney of Henderson. He was appointed to the position of City Attorney on October 9, 2001 by the City Council. Mr. Brown receives , per month and city insurance. The City pays for his health and life insurance. Insurance for his dependents is withheld from his pay each month. In addition to his work for the City Mr. Brown operates a law firm and performs legal work for a variety of clients.

For 2004 & 2005 Mr. Brown was issued a 1099 from the City of Henderson. The 1099 was issued in the name of David Brown with the ID number of his law practice. All checks were issued in the name of David Brown. The 1099 for 2004 only included his net pay from the city. It did not include insurance amounts withheld from Mr. Brown's pay or the insurance paid for Mr. Brown by the City. The taxpayer stated that the 1099 was issued for the net amount in error. During the examination the City filed corrected 1099's for 2004 & 2005 reflecting the correct gross amount for Mr. Brown. In addition to the 1099 issued to Mr. Brown for his work as City Attorney, Mr. Brown's firm received a 1099 for additional work done. For example, in 2004 the Firm of Minton & Brown, PLLC was paid for title work. The amounts paid to Minton & Brown for additional legal services performed were not disturbed. The payments in question are amounts paid to David Brown for his services as City Attorney.

An employment contract with the City was signed by the Mayor and David Brown on January 28, 2003. This contract was in effect for the years 2004 & 2005. The contract states the following "In exchange for agreeing to perform the duties of City Attorney for the City of Henderson, Texas, the City of Henderson agrees to employ David P. Brown, Attorney at Law, under the following conditions: agrees to serve as City attorney at the pleasure of the City council and use his best efforts to represent the City in a workmanlike manner". The contract outlines other duties as follows - attend 28 Council meetings, attend 28 municipal court dockets, prepare all routine ordinances and contracts, serve as prosecutor in the Municipal Court, assist with all routine personnel matters, give legal opinions on all matters before the council, provide 2 hours per month for miscellaneous matters. The contract stated Brown would receive an annual retainer of "receive health insurance coverage at no cost for himself and family as provided for other city employees", and "be covered by life insurance policy as provided for other city employees". The employment contract goes on to state that Mr. Brown is not a full-time employee of the City of Henderson but represents the City as one of his clients. A copy of the contract is attached to this report as page 13.

The Henderson Code Article IV section 6 gives the City council the authority to appoint the City Attorney. The article states "The City Council shall appoint a City Attorney from recommendations of the City Manger, or by any member of the City Council, who shall be duly licensed to practice law in the State of Texas. The City Attorney shall receive, for particular services, such compensation as may be fixed by the Council, and may be removed at any time by majority vote of the City Council. The City Attorney shall represent the City of Henderson in all its litigation, serving as the legal advisor of and attorney and counsel for the City of Henderson, the Council and all boards, commissions and agencies, and all officers and departments thereof." A copy of the City code section is attached to this report as page 14.

The City's insurance policies were examined. The City Attorney was enrolled for health insurance, life insurance and dental insurance. Health insurance is provided by IMA. The eligibility requirements for IMA state all active and retired employees of the employer are eligible. A person is eligible for employee coverage from the first day that he or she is a full time active employee of

the employer. An employee is considered to be full-time if he or she normally works at least 40 hours per week and is on the regular payroll of the Employer for that work. An employee must enroll for coverage by filling out and signing an enrollment application. David Brown completed an enrollment application for IMA which shows the City of Henderson at the employer, David Brown as the employee and the date he was employed as 10/01. Mr. Brown's name was not shown as a cafeteria plan participant.

When reviewing 2004 travel vouchers it was noted that the City paid David Brown's expenses for attending the City Attorneys' conference at South Padre Island, Texas. In March of 2005, the City began withholding health club dues from his pay and he enrolled as a City employee at a fitness club. Per the records examined David Brown enjoys all of the benefits of being an employee of the City of Henderson.

LAW:

The question presented is whether the Worker is an employee subject to FICA taxes and/or federal income tax withholding.

Section 3402(a) of the Internal Revenue Code (the Code) provides that every employer making payment of wages shall deduct and withhold federal income taxes.

Code section 3401(c) provides that, for purposes of this chapter, the term "employee" includes an officer, employee, or elected official of a state, or any political subdivision thereof. For this purpose, the regulations include both elected and appointed officials in the definition of "employee." Section 31.3401(c)-1(a), Employment Tax Regulations. The chapter referred to is Chapter 24, Collection of Income Tax at Source on Wages. In other words, section 3401(c) applies only for income tax withholding purposes.

For purposes of FICA taxes, employee status is defined as follows (1) any officer of a corporation; (2) any individual who, under the usual common law rules has the status of an employee; or (4) any individual who performs services that are included under an agreement entered into pursuant to section 218 of the Social Security Act. Code section 3121(d).

The Code does not define the term "public official," but section 1.1402(c)-2(b) of the Income Tax Regulations gives the following examples: 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.

Taxes under the Self-Employment Contributions Act (SECA) are imposed pursuant to sections 1401 and 1402 on the gross income, less applicable deductions, derived by an individual from any trade or business. For SECA purposes, the term "trade or business" has the same meaning as when used in Code section 162, relating to trade or business expenses.

Section 1402(c)(1) provides that the performance of the functions of a public office is **not** a trade or business for SECA purposes. Code section 1402(c)(1) and section 1.1402(c)-2(a)(2)(B), Income Tax Regulations, contain an exception, providing that the performance of the functions of a public office is a trade or business with respect to fees received for functions performed in a position compensated solely on a "fee basis," but only if the functions are not covered by an agreement under section 218 of the Social Security Act (218 agreement). Thus a fee-based public official who is not covered by a 218 agreement is subject to SECA tax.

Rev. Rul. 74-608, 1974-2 C.B. 275, clarifies that a fee-based public official is one who receives compensation in the form of fees directly from members of the public.

For FICA purposes, an individual is an employee if, under the 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 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 fact that an individual is employed part-time, or works for more than one employer, is not evidence of independent contractor status. A part-time worker may be an employee under the common-law rules.

While the Code does not define the term "public official," there is a body of case law defining the term. In Buckley v. Valeo, 424 U.S.1 (1975) [76-1 USTC ¶9189], the Supreme Court stated that anyone who exercises significant authority pursuant to the laws of the United States is an officer. The term "officers" embraces all appointed officials exercising responsibility under the public laws of the nation. 424 U.S. at 131 [76-1 USTC ¶9189]. Officers perform a significant governmental duty exercised pursuant to a public law. 424 U.S. at 141 [76-1 USTC ¶9189]. Officers administer and enforce the public law. 424 U.S. 139 [76-1 USTC ¶9189].

Metcalf & Eddy v.Mitchel, 269 U.S. 514 (1926) [1 USTC ¶157], specifically defines the term "officer." There the Supreme Court considered whether consulting engineers hired by states, municipalities, water supply and sewage districts were independent contractors or "officers and employees" of a state. The Court stated: "An office is a public station conferred by the appointment of a government. The term embraces the idea of tenure, duration, emolument and duties fixed by law. Where an office is created, the law usually fixes its incidents, including its term, its duties, and its compensation." 269 U.S. at 520 [1 USTC ¶157] (citations omitted). Officers and employees are agents of a state to administer its laws. 269 U.S. at 520 [1 USTC ¶157] (citations omitted). The independent contractor has liberty of action which excludes control or the right to control characteristic of the employer-employee relationship. 269 U.S. at 521 [1 USTC ¶157].

In Pope v. Commissioner, 138 F.2d 1006 (6th Cir. 1943) [43-2 USTC ¶9671], the Sixth Circuit, following Metcalf & Eddy, established the following standards to define the term "public office." (1) It must be created by the constitution or 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.

SECTION 530 of the REVENUE ACT OF 1978, as amended by Section 1706 of the Tax Reform Act of 1986 and as amended by the Small Business Job Protection Act of 1996, provides businesses with *relief from federal employment tax* obligations if certain requirements are met. It terminates the business's, not the worker's, employment tax liability under Internal Revenue Code (IRC) Subtitle C (Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes, federal income tax withholding, and Railroad Retirement Tax Act taxes) and any interest or penalties attributable to the liability for employment taxes (Revenue Procedure 85-18, 1985 C.B. 518).

Section 530(e)(3) as amended by the Small Business Job Protection Act of 1996, clarifies that the first step in any case involving whether the business has the employment tax obligations of an employer with respect to workers is determining whether the business meets the requirements of Section 530. If so, the business will not have an employment tax liability with respect to the workers at issue.

Section 530. Controversies involving whether individuals are employees for purposes of the employment taxes.

(a). Termination of Certain Employment Tax Liability. --

(1) In General. --IF--

(A) for purposes of employment taxes the taxpayer did not treat an individual as an employee for any period, and

(B) in the case of periods after December 31, 1978, all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on the basis consistent with the taxpayer's treatment of such individual as not being an employee,

then, for the purposes of applying such taxes for such period with respect to the taxpayer, the individual shall be deemed not to be an EMPLOYEE unless the taxpayer had no reasonable basis for not treating such individual as an employee.

(2) Statutory Standards providing one method of satisfying the requirements of paragraph (1). -- For the purposes of paragraph (1), a taxpayer shall in any case be treated as having a reasonable basis for not treating an individual as an employee for a period if the taxpayer's treatment of such individual for such period was in reasonable reliance on any of the following:

(A) JUDICIAL PRECEDENT, PUBLISHED RULINGS, TECHNICAL ADVICE WITH RESPECT TO THE TAXPAYER, OR A LETTER RULING TO THE TAXPAYER;

(B) A PAST INTERNAL REVENUE SERVICE AUDIT OF THE TAXPAYER IN WHICH THERE WAS NO ASSESSMENT ATTRIBUTABLE TO THE TREATMENT (FOR EMPLOYMENT TAX PURPOSES) OF THE INDIVIDUALS HOLDING POSITIONS SUBSTANTIALLY SIMILAR TO THE POSITION HELD BY THIS INDIVIDUAL; OR

(C) A LONG-STANDING RECOGNIZED PRACTICE OF A SEGMENT OF THE INDUSTRY IN WHICH THE INDIVIDUAL WAS ENGAGED.

(3). Consistency required in the case of prior tax treatment. - Paragraph (1) shall not apply with respect to the treatment of any individual for employment tax purposes for any period ending after December 31, 1978, if the taxpayer (or a predecessor) has treated any individual holding a substantially similar position as an employee for purposes of the employment taxes for any period beginning after December 31, 1977.

Section 530 was enacted to protect employers from the Internal Revenue Service re-classifying a person to status of an employee and asserting a liability for employment taxes, when such entity must compete with other like entities for the same worker. Section 530 only offers relief when there are facts that establish these workers are employees under the common law rules.

Treating a worker as an employee adds additional overhead and operational costs to an entity in the form of employment taxes and other employer provided benefits. If an entity must **compete** for labor, and it has been established that similar entities, within the same economic area, are treating similar workers as "non-employees", it would be unfair for the Service to require an entity, within that same economic area, to treat their workers as employees.

To assert that there is an "industry practice" of treating certain workers as a "non-employees" because like entities are treating the same class of workers as "non-employees" makes a statement that this entity is in competition with the other entities for that worker.

In the event that a Section 530 safe haven was established, it may only be applied to ***Income Tax withholding at the source.***

Technical Advice Memorandum (TAM) 93 TNT 189-21 discusses the issue of Section 530 as it can be applied to an entity that is under a Section 218 agreement. In this TAM the service ruled that relief retroactive income tax withholding under section 530 is available to state and local entities that can meet Section 530 requirements. Further, if relief from income tax withholding liability is applied for services covered by a Social Security Act section 218 agreement (but relief from FICA taxes is denied because the worker is covered under a section 218 agreement), the entity would be required to withhold income tax prospectively for those services.

The premise of section 530 is that, with respect to the employer's liability for federal employment taxes, an individual will not be treated as an employee despite his or her status as an employee. Thus, section 530 relief is not appropriate unless an individual has been classified as an employee. The classification of an employee under sections 3121(d)(1), (2), or (3), is made under rules that are provided in the Internal Revenue Code and the regulations thereunder. However, the classification of state and local employees as employees under section 3121(d)(4) is made specifically with reference to section 218 of the Social Security Act. If the individual is covered under a section 218 agreement, he or she is, by definition, an employee for FICA purposes. The determination of whether an individual is covered under a section 218 agreement is made by the Social Security Administrator and the Social Security Administration under section 210(j) of the Social Security Act. Section 530 relief for FICA taxes is inappropriate, because coverage under the section 218 agreement is dispositive of the individual's FICA tax status.

Another issue is whether an employer can obtain section 530 relief for income tax withholding liability if relief from FICA taxes is unavailable because the employee is covered under a section 218 agreement. There is no provision in Chapter 24, Collection of Income Tax at Source, similar to section 3121(d)(4), providing that a worker covered under a section 218 agreement is an employee. Because the Administrator's determination that an individual is covered under a section 218 agreement would generally be based on the common law rules, a similar result should be reached with respect to liability for income tax withholding after coordination with the Administrator. The Service, however, has jurisdiction over the determination of whether state and local workers are employees for federal income tax withholding purposes. There are distinctions between the definition of employee for purposes of income tax withholding and the definition of employee for purposes of the FICA (i.e., the existence of the statutory employee categories in the FICA) that give further support to differing section 530 treatment for FICA tax liability and income tax withholding liability of state and local employees covered under section 218 agreements.

The income tax withholding provisions have always been exclusively under the jurisdiction of the Service regardless of whether the workers are state and local employees under section 218 agreements. State and local governmental employees were, of course, subject to income tax withholding at the time of passage of section 530 and no exception was provided for application of section 530 to the income tax withholding liability arising from the services of such workers.

Because of the differing statutory definitions of employee under the FICA and the Collection of Income Tax at Source, we conclude that, if the requirements of section 530 are met, state and local employers may obtain section 530 relief respect to income tax withholding liability, regardless of whether the reclassified worker is covered under a section 218 agreement.

As a general rule, relief under section 530 continues as long as the employer satisfies the reporting consistency rule (by issuing Forms 1099 when required) and the substantive consistency rule. Under the substantive consistency rule, the employer must treat any workers in substantially similar positions as not being employees to obtain section 530 relief. The withholding of FICA taxes is treatment of a worker as an employee under section 3.03 of Rev. Proc. 85-18. In the case of state and local government entities that are granted relief from income tax withholding liability but not FICA taxes, the question is raised whether relief from income tax withholding liability will apply prospectively because the entities will be withholding and paying FICA taxes. The substantive consistency rule would seem to prevent the entity from obtaining continuing section 530 relief and require the withholding of income tax prospectively.

In summary, relief from retroactive income tax withholding liability under section 530 is available to state and local entities that can meet section 530's requirements. If relief from income tax withholding liability is applied with respect to service covered under a section 218 agreement (but relief from FICA taxes is denied because the worker is covered under a section 218 agreement), the taxpayer would be required to withhold income tax prospectively with respect to such service.

TAXPAYER'S POSITION:

The City contends that the City Attorney is a contractor and the City in no way controls his work. The City stated that the City does not supervise the City Attorney's work, does not provide him with a place to work, and does not provide him with secretarial help. The City stated that the City Attorney does not control any City monies or property and that there is no City employee who supervises the City Attorney. The City claims to have no control over the methods and means by which the City Attorney solves problems for the City. They believe that the City Attorney is an independent contractor not subject to employment taxes or federal income tax withholding.

CONCLUSION:

Is the City entitled to section 530? Entities under a 218 agreement with the Social Security Administration are not entitled to section 530 for FICA tax purposes, so section 530 will only be addressed for withholding tax purposes. The City did not rely on judicial precedent or prior audit for their determination that the worker was a contractor. The only arguments available to the City would be industry practice or reasonable basis. Based on the facts presented the City is not entitled to relief under section 530 for income tax withholding. The City does not compete with other Cities for City Attorney services.

Is the Worker a public official within the meaning of section 3401(c) for income tax withholding purposes? According to Buckely v. Valeo, an officer administers and enforces the public law. 424 U.S. 139 [76-1 USTC ¶9189]. Where an office is created, the law usually fixes its incidents, including its term, its duties, and its compensation. Metcalf & Eddy v. Mitchell, 269 U.S. at 520 [1 USTC ¶157]. The duties of the office are fixed by statute. The City Attorney position fulfills five of the six conditions for public office enumerated in Pope v. Commissioner, 138 F.2d 1006 (6th Cir. 1943) [43-2 USTC ¶9671]. It is legislatively created, there is a delegation of a portion of the sovereign powers, the duties are defined by statute and performed with a degree of independence under the law. The only condition not satisfied is that the Worker does not take an oath of office. Some municipalities, however, do require the Worker to take an oath. We conclude that the Worker is a public official.

Consequently the Worker is subject to federal income tax withholding. Section 3401(c).

Form 886A	Department of the Treasury - Internal Revenue Service **Explanation of Items**	Schedule No. or Exhibit Page 11 of 14
Name of Taxpayer City of Henderson		Year/Period Ended 2004 & 2005

Is the Worker subject to FICA? Per IRC 3121(d)(4) the City Attorney is an employee as an individual who performs services that are included under an agreement entered into pursuant to section 218 of the Social Security Act. The City of Henderson has no exclusions in their 218 agreement that would exclude the City Attorney from FICA coverage under the agreement. As a worker covered by the 218 agreement it was determined that the City Attorney is subject to FICA.

The position of City Attorney performs functions of public office and is therefore not a trade or business for SECA purposes per IRC Section 1402(c)(1).

Under the common-law rules the worker is an employee for FICA purposes. Section 3121(d)(2) . In the case of a public official, many of the statutory provisions which establish his status as an official are also relevant to the determination of whether he is an employee. These provisions provide facts tending to show that the City of Henderson and the City Council have a right to control the way in which the Worker performs his duties under the law, i.e., that the Worker does not operate with the freedom from control characteristic of an independent contractor. Per the Henderson Code the City Council shall appoint a City Attorney from recommendations of the City Manager or by any member of the City Council. The City Attorney shall receive such compensation as may be fixed by the Council and may be removed at any time by majority vote of the City Council. The City Attorney shall represent the City of Henderson in all its litigation, serving as the legal advisor of and attorney and counsel for the city of Henderson, the Council and all boards, commissions and agencies, and all officers and departments thereof. The City Attorney's employment contract states that the City Attorney serves at the pleasure of the City Council and outlines a list of duties. It is evident from the documents examined that the City Attorney answers to the City Council and the Council has the right to control his behavior as the City Attorney.

Provision of training and instruction is one type of behavioral control. While the City does not provide instruction to the City Attorney, it has the right to require him to change his methods if they do not conform to legal requirements. If the Attorney does not conform to required procedures, the City has the right to require him to change his procedures or to terminate his appointment.

The City Attorney operates with a certain amount of independence, but is constrained by the power of the law and the authority of the City. This is one of the characteristics of an officer in Pope v. Commissioner, as well as an indication of the control typical of employee status.

The Worker represents himself to the public as an agent of the City. The City could be held liable for the City Attorney's malfeasance in the exercise of his duties. We conclude that the evidence establishes the City has the right to exercise enough behavioral control over the Worker to create an employer-employee relationship.

The Worker has a considerable amount of financial independence. He maintains an office and has expenses for equipment and employees. He has a genuine risk of profit or loss different from that of a salaried employee. He does not work exclusively for the Town, but has a number of clients.

On the other hand, he does not have absolute financial independence. His salary is set by the City of Henderson. He receives benefits from the City. The City pays for his medical and life insurance as provided for other city employees. The worker purchases insurance for his dependents through the City's insurance plans. The worker when completing the insurance application form indicated date employed as 10/01. The City's insurance plans extend coverage to employees of the City of Henderson. The worker is a member of a health club as a City employee. Thus, while he bears a risk of profit or loss, he does not have the full measure of financial independence characteristic of an independent contractor.

The parties apparently see their relationship as one of service recipient and independent contractor. The Town reports its payments to the Worker on Form 1099, although payments for insurance were not reported on form 1099 as income to the worker. The worker's employment contract states the City agrees to employ the worker under certain conditions and agrees to provide insurance to the worker as provided for other city employees, then states that Brown is not an employee, but represents the City as one of his clients. The worker is obviously appointed per City code and Council minutes.

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Provision of training and instruction is one type of behavioral control. While the City does not provide instruction to the City Attorney, it has the right to require him to change his methods if they do not conform to legal requirements. If the Attorney does not conform to required procedures, the City has the right to require him to change his procedures or to terminate his appointment.

The City Attorney operates with a certain amount of independence, but is constrained by the power of the law and the authority of the City. This is one of the characteristics of an officer in Pope v. Commissioner, as well as an indication of the control typical of employee status.

The Worker represents himself to the public as an agent of the City. The City could be held liable for the City Attorney's malfeasance in the exercise of his duties. We conclude that the evidence establishes the City has the right to exercise enough behavioral control over the Worker to create an employer-employee relationship.

The Worker has a considerable amount of financial independence. He maintains an office and has expenses for equipment and employees. He has a genuine risk of profit or loss different from that of a salaried employee. He does not work exclusively for the Town, but has a number of clients.

On the other hand, he does not have absolute financial independence. His salary is set by the City of Henderson. He receives benefits from the City. The City pays for his medical and life insurance as provided for other city employees. The worker purchases insurance for his dependents through the City's insurance plans. The worker when completing the insurance application form indicated date employed as 10/01. The City's insurance plans extend coverage to employees of the City of Henderson. The worker is a member of a health club as a City employee. Thus, while he bears a risk of profit or loss, he does not have the full measure of financial independence characteristic of an independent contractor.

The parties apparently see their relationship as one of service recipient and independent contractor. The Town reports its payments to the Worker on Form 1099, although payments for insurance were not reported on form 1099 as income to the worker. The worker's employment contract states the City agrees to employ the worker under certain conditions and agrees to provide insurance to the worker as provided for other city employees, then states that Brown is not an employee, but represents the City as one of his clients. The worker is obviously appointed per City code and Council minutes.

While the relationship between the Town and the Worker has certain indicia of independent contractor status, we conclude that there is sufficient evidence of control and the right to control to establish an employer-employee relationship. In this decision, we gave great weight to the Supreme Court and appellate cases defining the term "public official" and holding public officials to be employees. Therefore the City and the Worker are subject to FICA tax on the Worker's compensation.

Both income tax withholding and FICA tax have been assessed.

Internal Revenue Service
Appeals Office
55 N. Robinson, Suite 939
MS 8000OKC:AXM
Oklahoma City, OK 73102-9231

Department of the Treasury

Person to Contact:
Adell McCarter, Jr.
Employee ID Number: 75-00466
Tel: (972) 308-7494
Fax: (972) 308-7284
Refer Reply to:
AP:FE:DAL:AM
In Re:
Employment Tax Liability
SSN/EIN Number:

Date: NOV 19 2007

CITY OF HENDERSON
400 W MAIN
HENDERSON TX 75652-3019

Tax Period(s) Ended:
03/2004 06/2004 09/2004 12/2004
03/2005 06/2005 09/2005 12/2005

Dear Sir or Madam:

The agreement we reached has been approved and we will complete our processing of your case.

Since there is no deficiency or overassessment, you do not need to take any further action.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely,

Charles Fisher

CHARLES FISHER
TEAM MANAGER

Internal Revenue Service
Appeals Office
4050 Alpha Road
Suite 517, MC:8000NWSAT
Dallas, TX 75244

Department of the Treasury

Person to Contact:
Adell McCarter, Jr.
Employee ID Number: 75-00466
Tel: (972) 308-7494
Fax: (972) 308-7284
Refer Reply to:
AP:FE:DAL:AM
In Re:
CITY OF HENDERSON
Tax Period(s) Ended:
03/2004 06/2004 09/2004 12/2004
03/2005 06/2005 09/2005 12/2005

Date: December 10, 2007

DAVID BROWN
P O BOX 1688
HENDERSON TX 75653-1688

Dear Mr. Brown:

The issue in the above referenced case was whether compensation paid by the City of Henderson to David Brown, an attorney, were wages subject to employment tax and withholding.

Based on the hazards of litigation, Appeals settled the case by recommending to the Government that it concede the issue in full.

If you have any questions, please contact me.

Sincerely,

Adell McCarter, Jr.
Appeals Officer