

Opinion No. 57-230

September 13, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Paul L. Billhymer, Assistant Attorney General

TO: J. M. Phillips, Secretary, State Racing Commission, P. O. Box 1693, Albuquerque, New Mexico

QUESTION

QUESTION

Is the State Racing Commission responsible for Withholding Tax and Social Security Tax on fees paid to "seasonal" employees?

CONCLUSION

Yes, with certain exceptions. See analysis.

OPINION

ANALYSIS

From your request, we note that you had particular reference to "State Stewards, Veterinarians and Identifiers." We understand that these groups are paid as "professional services" and "on a contract basis."

We shall first discuss the Withholding Tax obligation. The answer to the question depends upon whether these named job classifications are "employees." If they are employees, the Commission is responsible for Withholding Tax. The Common Law Rule for determining the employer-employee relationship is followed by the Federal Government. See Employer's Tax Guide, Publication No. 15, page 4, reading as follows:

"A. Common Law Rules. -- Every individual who performs services subject to the will and control of an employer, **both** as to what shall be done and how it shall be done, is an employee for purposes of these taxes. It does not matter that the employer permits the employee considerable discretion and freedom of action, so long as the employer has the **legal right** to control both the method and the result of the services."

"If the relationship of employer and employee exists, the description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor. The measurement, method, or

designation of compensation is also immaterial. Also it does not matter whether the individual is employed full or part time.

No distinction is made between classes of employees. Superintendents, managers, and other supervisory personnel are employees. Generally, an officer of a corporation is an employee but a director in his capacity as such is not an employee. However, an officer who does not perform any services or performs only minor services and who neither receives nor is entitled to receive any compensation is not considered to be an employee.

Whether the relationship of employer and employee exists under the usual common law rules will be determined in doubtful cases upon an examination of the particular facts of each case."

The crucial test is the element of control, i.e., does the employer control the method and result. If so, then there is the employer-employee relationship and under the law the Racing Commission is responsible for Withholding Tax. Note method of pay and job description is unimportant.

Turning now to the job classifications named in your request, we believe that veterinarians would not be classed as employees, particularly if they maintained their own independent business. However, we are of the opinion that state stewards and identifiers are employees and compliance with Withholding Tax provisions of the tax laws would have to be made for the amounts paid for the services rendered.

We next turn to the Social Security payments. Generally, the same rules apply so far as this tax is concerned as apply for the Withholding Tax. In other words, it is a fact question as to whether the particular relationship is that of employer-employee. (See § 210 (K) and § 218 (b) (3), Social Security Act.) One other factor is involved so far as Social Security is concerned, namely, the Federal-State Agreement. Section B (8) excepts:

"Service in any class or classes of positions the compensation for which is on a fee basis."

The State Racing Commission would not be liable for Social Security Tax on the veterinarians. However, Social Security Tax would have to be paid on state stewards and identifiers inasmuch as they do not come within any exempted classification under the New Mexico State Modification of the Federal-State Agreement.