October 27, 2015

Re: inquiry concerning Person "X"'s relationship with City

Dear Councilman,

You have asked for an MTAS legal opinion on an issue pertaining to the employment status of Person "X". Specifically, you ask if Person "X" is an independent contractor or an employee of the City. I have been provided a copy of the April 19, 2010 Agreement between the City and Company "Y", an entity owned by Person "X". I also have a copy of the document "Minimum Standards for Fixed Base Operators at _____ Airport," dated February 12, 2008.

There are numerous court opinions on the issue of classification of persons as independent contractors or employees. This issue has been developed extensively in the area of workers' compensation, as an independent contractor may recover damages beyond those amounts provided for employees under the law. Over time, the courts have adopted the same analysis when determining employment status for tort liability claims and for tax reporting purposes.

This is the language used in the Tennessee Workers' Compensation Law, to determine if a worker is an independent contractor or an employee:

> (D)(i) In a work relationship, in order to determine whether an individual is an "employee," or whether an individual is a "subcontractor" or an "independent contractor," the following factors shall be considered:
> (*a*) The right to control the conduct of the work;
> (*b*) The right of termination;
> (*c*) The method of payment;
> (*d*) The freedom to select and hire helpers;
> (*e*) The furnishing of tools and equipment;
> (*f*) Self-scheduling of working hours; and
> (*g*) The freedom to offer services to other entities; and
> (ii) A premium shall not be charged by an insurance company for any individual determined to be an independent contractor pursuant to this subdivision (11)(D);
>
> Tenn. Code Ann. § 50-6-102 (West)

A 2009 Tennessee Supreme Court case on the issue contains the following language, cited directly from this statute:

> When determining whether a plaintiff is an employee or an independent contractor, a court may consider many factors: "(A) The right to control the conduct of the work; (B) The right of termination; (C) The method of payment; (D) The freedom to select and hire helpers; (E) The furnishings of tools and equipment; (F) Self scheduling of working

> hours; and (G) The freedom to offer services to other entities." Tenn.Code Ann. § 50–6–102(11) (2005); *see also Galloway,* 822 S.W.2d at 586 (quoting *Bargery v. Obion Grain Co.,* 785 S.W.2d 118, 119–20 (Tenn.1990)). These factors do not preclude an examination of the work relationship as a whole but are merely a means of analysis. *Masiers v. Arrow Transfer & Storage Co.,* 639 S.W.2d 654, 656 (Tenn.1982).
> While no one factor is "entirely indicative," this Court has recognized that the primary factor in determining the plaintiff's status is the right to control the conduct of the work. *Id.* This Court has held that "[t]he test is not whether the right to control was exercised but merely whether the right to control existed." *Stratton v. United Inter–Mountain Tel. Co.,* 695 S.W.2d 947, 950 (Tenn.1985); *Carver v. Sparta Elec. Sys.,* 690 S.W.2d 218, 220 (Tenn.1985). A party may have some right to control the results of the work without creating an employer-employee relationship. *See id.; Wright v. Knox Vinyl & Aluminum Co.,* 779 S.W.2d 371, 374 (Tenn.1989).
> Lindsey v. Trinity Commc'ns, Inc., 275 S.W.3d 411, 418-19 (Tenn. 2009)

> In addition to the right of control, the right of termination has taken on "controlling significance" in our case law. *Masiers,* 639 S.W.2d at 656. "The power of a party to a work contract to terminate the relationship at will is contrary to the full control of work activities usually enjoyed by an independent contractor." *Id.* Moore testified that HFC could "send [Lindsey] home for any reason," and the trial court explicitly accredited this testimony.
> Lindsey v. Trinity Commc'ns, Inc., 275 S.W.3d 411, 419 (Tenn. 2009)

The Tennessee Supreme Court determined that Mr. Lindsey was an employee, not an independent contractor, due largely to the control Trinity had over the work performed and the right of Trinity to terminate Mr. Lindsey for any reason:

> The trial court found that three of the statutory factors offered some indication that Lindsey was an independent contractor: the freedom to select and hire helpers, the self-scheduling of working hours, and the freedom to offer services to other entities. We agree with the trial court that the time-sensitive nature of the job and Lindsey's hours of employment diminish the importance of these factors and that these factors do not outweigh the evidence that Lindsey was an employee.
> Finally, while Lindsey signed a form entitled "Joint Agreement to Affirm Independent Relationship for Certain Building and Construction Workers,"[3] this Court has held that a contract purporting to establish the plaintiff as an "independent contractor" is insufficient when the facts surrounding the arrangement indicate that the plaintiff is an employee. *See Boruff v. CNA Ins. Co.,* 795 S.W.2d 125, 126 (Tenn.1990). In addition, HFC did not withhold taxes from Lindsey's paycheck. We have held that "the fact that neither social security nor withholding taxes were deducted is not in itself controlling." *Carver,* 690 S.W.2d at 221; *see also Wooten Transports, Inc.,* 535 S.W.2d at 860.

> We therefore conclude that the evidence does not preponderate against the trial court's conclusion that HFC failed to carry its burden of proof to establish that Lindsey was an independent contractor.
> Lindsey v. Trinity Commc'ns, Inc., 275 S.W.3d 411, 419-20 (Tenn. 2009)

The most recent reported Tennessee case on the issue comes from a federal district court, which found an injured person to be an employee, not entitled to sue for greater damages than allowed in the workers' compensation statutes:

> If TVA was Plaintiff's statutory employer, then Plaintiff is precluded from recovering in tort against TVA. Tennessee's Workers' Compensation Law states that a "principal contractor ... shall be liable for compensation to any employee injured ... to the same extent as the immediate employer." Tenn.Code Ann. § 50–6–113(a). It follows that a principal contractor has the same immunity in tort as Plaintiff's direct employer. *Mathis v. Bowater, Inc.,* 985 F.2d 277, 279 (6th Cir.1993). The Tennessee Supreme Court has set forth the following test for determining whether an employer is a principal contractor:
>
> > (1) The company undertakes work for an entity other than itself;[2] (2) the company retains the right of control over the conduct of the work and the subcontractor's employees; or (3) the work being performed by a subcontractor's employees is part of the regular business of the company or is the same type of work usually performed by the company's employees.
>
> *Lindsey v. Trinity Commc'ns, Inc.,* 275 S.W.3d 411, 421 (Tenn.2009) (internal quotations and citations omitted).
> Of the above factors, Tennessee courts have emphasized that the "right of control" factor is the most important. *Id.* at 419. A principal contractor need not have exercised control over the work that was performed. Instead, it is enough for a principal contractor to have possessed the right of control. *Id.; see also Murray v. Goodyear Tire & Rubber Co.,* 46 S.W.3d 171, 176 (Tenn.2001) ("[T]he control test is satisfied if the proof demonstrates that the alleged employer had a *right to control,* regardless of whether this right was actually exercised.").
> Tennessee courts also consider the following six factors in analyzing whether a right of control exists:
>
> > (1) right to control the conduct of work; (2) right of termination; (3) method of payment; (4) whether the employee furnishes his or her own helpers; (5) whether the employee furnishes his or her own tools; and (6) whether the company is doing work for another.
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> *See Mathis,* 985 F.2d at 279 (*citing Stratton v. United Inter–Mountain Telephone Co.,* 695 S.W.2d 947, 950 (Tenn.1985)).

> Bray v. Tennessee Valley Auth., 742 F. Supp. 2d 911, 913-14 (W.D. Tenn. 2010)

The U. S. District Court found the plaintiff to be an employee, due to meeting most of the factors listed above, including right to terminate, the right to control the work, TVA's payment of all wages, benefits and payroll taxes for all employees, and TVA's providing of all tools and equipment used by the plaintiff.

But does this same analysis apply when examining the employment relationship in different contexts, such as retirement and tax liability? The Tennessee Attorney General explains:

> The question of whether a worker is an employee or independent contractor may arise in various contexts, such as workers' compensation cases or issues of employer liability for the acts of an agent. Under federal tax law, whether an employer is required to withhold and pay employment taxes on compensation paid to a worker depends upon the appropriate classification of the worker as employee or independent contractor. The question is a matter of common law, and the case law on the issue - both state and federal - is abundant. It is clear, however, that the determination of whether a worker is an employee or independent contractor depends on the facts and circumstances of the working relationship and not on the characterization of that relationship by the parties. A leading Tennessee case is *Stratton v. United Inter-Mountain Telephone Co.*, 695 S.W.2d 947 (Tenn. 1985). Stratton held that the factors to be considered are (1) the right to control the conduct of the work (not just the 'what' but the 'how' as well), (2) the right of termination, (3) the method of payment, (4) whether the alleged employee furnishes his own helpers, (5) whether the alleged employee furnishes his own tools, and (6) whether the alleged employee works full-time for the employer or also works for others. While no single factor is necessarily dispositive, "the importance of the right to control the conduct of the work has been repeatedly emphasized." *Id*. citing *Carver v. Sparta Electric System*, 690 S.W.2d 218 (Tenn. 1985); *Wooten Transports, Inc. v. Hunter*, 535 S.W.2d 858 (Tenn. 1976). In addition, the Internal Revenue Service has published a Revenue Ruling which sets forth the factors it deems relevant to determining whether an individual is an employee or an independent contractor. *See* Rev. Rul. 87-41, 1987-1 C.B. 296 (1987).
>
> Tenn. Op. Att'y Gen. No. 00-028 (Feb. 22, 2000)

The IRS ruling cited by the Attorney General states:

> The Service provides 20 "factors or elements" that may be used to assist us in determining whether there is an employer-employee relationship. These 20 factors are:
> - the right of one person to tell a worker when, where, and how he or she is to work;
> - one person training the worker;
> - integration of the worker's services into the business' general operations;
> - the requirement that services be rendered personally;
> - direction over hiring, supervising, and paying assistants;
> - a worker's continuing relationship with one business;

- set hours which the worker must work;
- the requirement that the worker devote full-time attention to one business;
- performing work on a business' premises;
- control over the order or sequence of work performed;
- the requirement that the worker submit reports to the person for whom work is performed;
- payment by hour, week, or month;
- compensation for business and/or traveling expenses;
- provision of tools and materials;
- the worker's investment in the facilities in which he works;
- a worker's direct interest in the profitability of the work accomplished;
- working for more than one firm at the same time;
- making services available to the general public;
- a person's right to discharge the worker; and,
- a person's right to terminate the work relationship.

Rev. Rule 87-41

The Internal Revenue Rule lists those 20 factors above, which do not vary greatly from the common law rule and statutory language relied upon by Tennessee courts. The 20 factors are more specific, but embrace the same elements concerning control over the work performed. In my opinion, the statutory factors listed in T.C.A. § 50-6-102 capture all of these 20 factors listed by the IRS, and should be relied upon when analyzing the employment relationship of Person "X" and the City.

The "Agreement" between the City and Person "X" provides in the section titled "General Terms":

1. Person "X" pays $500 per month in "rent" for use of the airport;
2. Person "X" agrees to provide "usual and customary services" for aircraft and further agrees "to have properly trained line personnel on duty" at least 8 hours per day;
3. Person "X" agrees to provide an adequate area to visiting pilots;
4. Person "X" agrees to provide "first class A & P service" at reasonable costs 5 days per week;
5. Person "X" agrees to purchase liability insurance of $1,000,000.00 and to name the City as an additional insured;
6. The City agrees Person "X" is entitled to use certain hangars and storage areas, and to receive profits from rental of such hangars (excluding T-Hangars); and,
7. Person "X" agrees to pay utility bills. [Note - This conflicts with Section 3, Subsection 2, last sentence, where it states "the City will continue to pay all utility bills associated with the Airport and its operations"]

Section 2 of the Agreement addresses "General Qualifications" of the operator, Person "X", and lists various services and items to be made available to pilots at the airport. The list is not greatly detailed and does not specify the manner of providing such items and services.

Section 3 of the Agreement states "Standards for Specific Aeronautical Services," which largely quotes sections from the document "Minimum Standards for Fixed Base Operations at _____ Airport." These standards are general and widely known in the airport fixed-based operator business, and are not any more specific than those agreements used by other municipal airports.

Section 4 of the Agreement states "Further Duties of the Operator" and provides that Person "X" shall maintain the property in a safe manner, service accidents and remove damaged planes, and provide notice of opening and closing. The hours of operation and the time for opening and closing are not specified, but are left to the determination of Person "X". This section further requires that Person "X" submit monthly reports of fuel sales to the City. No other reports are required of Person "X".

Sections 5 and 6 address length and modification of the agreement. Section 7 provides that the agreement may be terminated if Person "X" is in default, after the City provides notice of default and Person "X" has 30 days to correct or remedy the default. Person "X" may terminate the Agreement with 30 days' notice, without any alleged default by the City.

Section 8 of the Agreement states additional terms, including indemnity for the City for any claim for damages arising from the airport operations. Section 9 states an annual management fee will be paid in monthly installments to Person "X", and in return he will provide "all management services…..as an independent contractor of the city."

When each of the factors listed in Tennessee law for the determination of whether or not a person is an employee or an independent contractor is compared to the contract terms between these parties, it is clear Person "X" is indeed an independent contractor. Following are each of those factors, applied to the subject agreement:

(a) The right to control the conduct of the work;
The Agreement does not address conduct of the work, other than the requirement Person "X" abide by the fixed-based operator terms and laws and rules applicable to such services. Control of the work performed under the contract is not vested in the City. The Agreement requires that "usual and customary" services be performed by Person "X", without specificity, other than compliance with applicable laws and regulations.

(b) The right of termination;
Both parties have the right to terminate the Agreement. The city may only terminate after notice and the opportunity for Person "X" to cure his alleged default. Whereas Person "X" has the right to terminate upon 30 days' notice, with or without alleged

default by the City. The factor does not weigh in favor of finding Person "X" to be an employee, as his rights exceed the rights of employees in terminations.

(c) The method of payment;
The payment stated in the Agreement is in the form of a rental payment from Person "X" to the City, and a management fee paid to Person "X" as an independent contractor. Payment has no relation to hours required or quality of work performed.

(d) The freedom to select and hire helpers;
There is nothing in the Agreement limiting the authority of Person "X" to hire employees, or specifying how he is to select his workers, other than general requirements that employees working on planes be certified to perform such work. Person "X" has the right to hire, pay and terminate employees as he sees fit.

(e) The furnishing of tools and equipment;
Although the Agreement generally discusses hangars and equipment therein that will be used by Person "X", it does not list tools or equipment the City will provide. The Agreement rather states adequate equipment, tools, jacks, lifts, etc. shall be provided by persons working on engine and accessory maintenance on the site. Person "X" is to provide aircraft manuals, parts and various pilot supplies, while the City agrees to provide "cleaning supplies and condiments."

(f) Self-scheduling of working hours;
Person "X" agrees to have the airport open for a specific number of hours per day, but the scheduling of opening and closing and work are left to Person "X" to determine.

(g) The freedom to offer services to other entities;
The Agreement does not bind Person "X" to only working for the City, so he has the ability to contract with and offer services to others.

(ii) A premium shall not be charged by an insurance company for any individual determined to be an independent contractor…
The Agreement specifically requires that Person "X" procure his own liability insurance coverage, and indemnify the City from all claims.

Based on those factors listed above, as applied to the terms of the Agreement between the parties, it is clear Person "X" is an independent contractor and not an employee of the City. If the more specific 20 item list compiled by the IRS is applied to this Agreement, in my opinion the analysis and conclusion is the same.

Based on my review of the relevant documents and applicable legal authority, it is my opinion Person "X" is an independent contractor and not an employee of the City.

I hope this information is helpful,

Melissa A. Ashburn
Municipal Legal Consultant

Cc: City Manager
Cc: City Attorney