



Government Workers: Employees or Independent Contractors?

The question of whether someone who works for you is an employee or an independent contractor has important tax consequences. If you have employees, you have liability to pay and withhold Federal income tax, social security and Medicare taxes, and Federal unemployment tax, report wages and issue statements to employees. For independent contractors, generally no withholding is required.

For most workers, whether in the private or public sector, the same common-law tests are applied to determine whether someone is an employee or an independent contractor. However, there are special rules that apply to determine whether certain groups of government workers are employees, and additional rules that create exceptions to general rules for income tax, social security and Medicare tax withholding.

In general, someone who performs services for you is your employee if you can control what will be done and how it will be done. To make this determination requires an analysis of all the relevant facts. The courts have considered many facts in deciding whether a worker is an independent contractor or an employee. These facts fall into three main categories:

- Behavioral control,
- Financial control, and
- Type of relationship

These facts and relevant examples are discussed in detail in [Publication 15-A](#), and at the [Independent Contractor or Employee?](#) page. There are specific laws, however, that apply to certain categories of government workers. Some government workers may be deemed to be employees by law, and others may be considered employees but are subject to special legal provisions for withholding income, social security and Medicare taxes. Some of the important special rules are discussed below.

Workers Covered by a Section 218 Agreement: Some state and local government employees are covered by a voluntary agreement between their state and the Social Security Administration (SSA) to provide social security coverage for workers. If a position is covered by the Section 218 Agreement, any worker who holds that position is an employee and subject to social security and Medicare tax under the terms of the agreement.

The following are some types of workers that are covered by special rules:

Public Officials: Internal Revenue Code section 3401(c) indicates that an “officer, employee, or elected official” of government is an employee for income tax withholding purposes. If this is the case, generally these workers will also be employees for social security and Medicare tax purposes; however, in some special cases the law or a Section 218 Agreement may specify otherwise.

Elected Officials: Elected officials are employees for income tax purposes under the section 3401(c) provision that applies to public officials. They are subject to a degree of control that typically makes them employees under the common law, and are subject to social security and Medicare taxes. Very few elected officials could be considered independent contractors.

Fee-Basis Officials: A fee-basis public official receives and retains remuneration directly from the public. This work is considered self-employment under IRC 1402(c)(2)(E) and these individuals are not employees with respect to this work. An official who receives salary, even if it is called “fees,” is a common-law employee and is subject to social security and Medicare withholding. Fee-basis individuals are subject to self-employment tax.

A Position compensated by salary and fees is considered a fee-basis position if the fees are the principal



source of compensation, unless a state law provides that a position for which any salary is paid is not a fee-basis position. A Section 218 Agreement may provide an exclusion from social security tax for individuals.

Emergency Workers: Individuals hired on a temporary basis in case of fire, storm, snow, earthquake, flood, or other emergency are excluded from social security and Medicare under IRC 3121(b)(7)(F)(iii). This does not include permanent employees who work regularly in response to emergencies; these individuals are subject to social security and Medicare if they are common-law employees.

Election Workers: Election workers are common-law employees; however, under IRC 3121(b)(7)(F)(iv) an exception from FICA is provided for election officials and workers who earn less than a specified amount for a calendar year (\$1,500 for 2011). This provision applies to employing entities that do not have a Section 218 Agreement. If the employing entity has a Section 218 Agreement, the Agreement determines the treatment of election worker wages for social security tax. It may exclude election workers altogether from social security; it may specify a lower threshold at which social security tax is withheld; or it may provide no exclusion for election workers, in which case social security and Medicare taxes apply from the first dollar paid.

Medical Residents: Medical residents generally meet the tests to be common-law employees and are therefore employees of the hospital where they work. However, under IRC 3121(b)(10), enrolled students who work less than full-time and for whom education, not employment, is the primary purpose of the relationship, may be excepted from FICA. See [Revenue Procedure 2005-11](#).

Section 218 Agreements and all of the above classes of workers are discussed in detail in [Publication 963](#), Federal State Reference Guide.