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Person to Contact:

Telephone Number:

Refer Reply To:

CC:TEGE:EOEG:ET1-PLR-103782-02

Date:

February 24, 2003

Key:

Firm =

Worker =

Dear Sir or Madam:

This is in reply to a request for a ruling to determine the federal employment tax status of the above named Worker with respect to services performed as a park attendant for the Firm, a federal agency, from April 6, 2000 through Sept. 5, 2000. Federal employment taxes are those imposed by the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and the Collection of Income Tax at Source on Wages. This ruling is based on the information furnished by both the Worker and the Firm.

The Worker, who was part of a required two-person team, was awarded the Contract with the Firm after successfully submitting a low bid in response to a solicitation for contract bids. The relationship between the Worker and the Firm was governed by two documents referred to as the general specifications for park attendant services and the specific park sheets (Contract). The provisions of Contract and the activities that took place are discussed below.

The Worker was required to attend an orientation/training session prior to the beginning of the Contract at the Project Manager's office from April 6 through April 7 and April 10 through April 12 beginning at 8:00 a.m. each day. The Worker was also required to attend a debriefing at the Project Manager's office at 9:30 a.m. September 5. Training and debriefing days were part of the Worker's Contract period.

The Worker was trained on the ways to issue user permits and receipts, collect and account for user fees, operate applicable computer equipment and programs, process credit card transactions, reserve facilities, record pertinent data, and effectively deal with visitors. At the conclusion of the training, the Worker was required to demonstrate ability to proficiently operate required computer programs and credit card equipment. Contracts are not awarded to potential park attendants who are unable to demonstrate the required proficiency. An overview of park attendant responsibilities and policies outlined in the Contract and the Park Attendant Handbook was also presented at the orientation/training session.

During the Contract period, the Worker worked a seven-day week including federal holidays. The Worker maintained 24-hour surveillance at the park during the scheduled work days. The gatehouse hours for Monday through Thursday were 7:00 a.m. to 9:00 a.m. and 2:00 p.m. to 11:00 p.m. The Worker maintained ten hours actual on-duty time. The gatehouse hours for Friday, Saturday and Sunday were 7:00 a.m. until 11:00 p.m. On Memorial Day, July 4 and Labor Day, gatehouse hours were 7:00 a.m. until 11:00 p.m. The Worker maintained 16 hours actual on-duty time.

The Operations Manager has the authority to change scheduled workdays and duty hours as deemed necessary; however, only the Contracting Officer may amend the total number of required workdays per week and/or the amount of "on-duty" work hours. The Operations Manager is required to give the Worker at least a 24-hour notice of schedule changes initiated by the Firm. During on-call hours of the schedule, at least one of the park attendants is required to be available to provide visitor support as needed, including summoning medical or other emergency assistance and opening gates to allow those claiming an emergency to leave and/or allow emergency vehicles into the park.

The Worker was required to open and close campground and day-use area gates as the schedule required. The Worker was also required to assist Rangers with management and control of picnic pavilions and multi-use courts, including turning power on or off and posting reservations for both pavilions and individual campsites.

The Worker was required to furnish a factory built, self-contained recreational vehicle of the travel trailer or motor home type to serve as temporary living quarters for the duration of the Contract. The trailer or motor home must be parked near the entrance to the park at a location to be designated by the Operations Manager. The park attendants must be the sole occupants of their site. Family members and friends were not allowed to live with the Worker.

Overnight visitors of the Worker must stay in the Worker's living quarters. Otherwise,

they must pay the regular camping fee and occupy the site for which they are registered. No visitors will be allowed to access the Worker's hookups at any time or park additional recreational vehicles at or near the Worker's designated area. The Operations Manager may limit the number of visitors and length of stays.

The Worker was also required to provide and maintain a fully operational vehicle, which can be utilized independently of the recreational vehicle, for purposes of personal or contract related transportation. The Worker was required to make an inspection of the entire area and facilities every three hours. The last inspection tour must be between 10:00 p.m. and 11:00 p.m. During this inspection, the Worker was to advise visitors of the 10:30 p.m. checkout. Additional guidance was given during the orientation/training session.

The primary role of park attendants was to courteously assist visitors, and their secondary role was to tactfully and respectfully inform customers of the rules and regulations in an attempt to gain compliance. Park attendants were required to perform their duties with professionalism befitting a public servant and the Firm. Park attendants may not use profanity in dealing with the public, project personnel, or other park attendants. Within the context of the Firm policies and regulations, park attendants were required to provide for the needs of the visiting public and act as public relations representatives for the Firm. All work was required to be performed to the satisfaction of the Contracting Officer.

Park attendants were required to meet visitors in a friendly manner as they arrive at the park, and distribute information, such as pamphlets, brochures, maps, park rules and regulations, and project information, as needed or as directed by the Operations Manager. Park attendants were required to assist visitors courteously and professionally, by locating facilities, sites, park features and local attractions. As they enter the park, visitors were to be informed of the park hours, including applicable quiet hours and visitation hours. Visitors were also to be advised to utilize designated facilities only, including roadways, parking facilities and campsites, as applicable. When parking areas were full, visitors were to be directed to designated overflow parking, if available. Visitors should also be made aware that if problems occur, they should contact the Worker to forward the information to appropriate personnel. If visitors remain past allowable times, park attendants were to courteously ask them to depart, and if they refuse, report them to an on-duty Park Ranger.

While on duty, the Worker was required to dress in a neat fashion in properly fitting, clean clothing, that was in an acceptable condition. Bermuda-style shorts or knickers may be allowed, but excessively short and/or tight pants and skirts, swimwear, undershirts, tank tops, halter tops, cutoff shirts, sandals, thongs and similar attire were not allowed. The only cap or hat to be worn while on duty will be provided by the Operations Manager's office. Park attendants were required to promote a favorable image of the Firm through their personal appearance and actions.

Park attendants were required to collect a variety of user fees. Examples of user fees collected include those for campers, visitors, and day users. Collected user fees were

required to be properly secured. Cash on hand must at all times correspond with permit and related records. The Worker cannot commingle personal cash with collected fees. User fees and records were subject to audit by Government personnel at all times. Monies and credit card charges on hand must agree with permits sold. The Worker must reconcile all discrepancies. Unjustifiable differences may result in contract termination for default.

The Worker was required to purchase cashiers' checks or money orders any time that cash exceeds \$1000 or maximum of once each day. However, a deposit must be made at least twice weekly regardless of the amount of cash. The Worker was required to process all required documentation, such as cash collection vouchers, deposit slips and remittance registers in accordance with Firm policies. Detailed fee processing procedures were provided at the orientation/training session. The Worker was responsible for the fee for the cashier's checks or money orders and for transportation to and from the bank. Compensation for these items must be included as a part of the potential park attendant's bid price.

The Worker was required to take precautions to assure personal safety and security of fees, according to the instructions provided at the Park Attendant orientation/training session and in the Park Attendant Manual. Where provided, an approved safe located in the gatehouse was used by the Worker to secure all user fees until removed for deposit in the bank, conversion to cashiers' check or money order, transfer to authorized project personnel or remittance to Firm authorized accounts. The only exception will be change funds in the cash drawer during working hours. Cash drawer funds may not exceed \$250 at any time. Each time the safe was opened or closed, the Worker was required to note dates, clock times, and place initials on Standard Form 702. The transfer of fees to a bank, lockbox account, or to authorized project personnel was required no less than once a week or at any time cash on hand exceeds \$1000 in accordance with Firm policies.

The Worker was required to maintain a logbook of park activities, including, but not limited to: accidents, incidents, emergencies, complaints, and problems. The Worker was required to maintain a written record of vehicles entering the park with courtesy passes, if applicable, and a separate record of other vehicles entering the park for other purposes (e.g., maintenance contractors, law enforcement personnel, utility workers, service vehicles, etc.). The Worker turns the records into project management personnel as instructed.

The Worker was required to remain within hearing distance of Government furnished communications equipment. The gatehouse or entrance station will be locked when unattended.

The Worker was required to maintain all records necessary for the administration of the user fee program. Depending on the specific recreation area, this may involve the utilization of a computerized registration and reservation program such as the automated user fee program, national recreation reservations service/park office, credit cards scanners and printers, user fee permits, electronic cash registers, cash collection vouchers, remittance registers, rosters, campsites' status boards, passes, etc. Detailed procedures and policies were provided at the orientation/training session.

The Worker was required to interpret and comply with the rules and regulations, and promptly report to a Firm Park Ranger, all accidents, violations of law, disturbances, and situations that could affect the health and safety of visitors. Serious or life-threatening incidents and emergencies were required to be reported immediately to project personnel and/or local law enforcement. To the extent park attendants do not place themselves in danger, they were required to legally collect all information possible, such as tag numbers, descriptions of persons and possessions, names and addresses, witness statements, and any other pertinent information that may assist Rangers and/or law enforcement personnel. Other situations and incidents must be reported to Park Rangers as instructed in the Park Attendant Manual or orientation/training session.

Without exception, the Worker was required to immediately open park entrance gates for those claiming a need to leave for emergency reasons, and/or for those users who demand to be let out of the park. The Worker was also required to open gates to allow emergency vehicles access to the park and visitors.

The Worker's payment vouchers were processed once monthly for each date actually worked at the contract unit price. Payment vouchers were submitted for review and payment monthly, as instructed at Park Attendant orientation/training session. No payment was made for time not worked. The Operations Manager was required to be contacted and given as much advance notice as possible when absences were anticipated. Short periods of absence may be approved on an individual basis, based on need and workload. No payment was made for days not worked due to sickness or personal business.

The final payment voucher was not paid to the Worker until all funds and permits were reconciled. Any shortage of funds may be deducted from the Worker's final payment. Proper handling of and accounting for the funds was a condition of performance of the Contract. The Worker was responsible for user fee permits, collected monies, and equipment issued by the government. The Worker may be held liable for any losses, including any equipment issued by the Government that was lost or damaged due to negligence.

The Worker must shall be notified verbally and/or in writing of any serious or reoccurring minor deficiency in service observed by the Contracting Officer. Verbal notification will be recorded in a memorandum for record. Written notification and memorandum for record should be prepared in triplicate and become a part of the Worker's permanent file at the Operations Manager's office. Upon receipt of the notification of deficiency in service, the Worker must immediately correct deficiencies and/or take steps to prevent the occurrence of the deficiency. The Contract may be terminated by the Contracting Officer upon receipt of any notification of Contract deficiency. Termination is based on the seriousness of the deficiency. All Park Attendants were required to have their performance evaluated no less than midterm and at the conclusion of their Contract. Performance criteria will be distributed to the Park Attendants at the orientation/training session.

Failure of the Worker to provide items in full and to provide complete services listed in the Contract, may be grounds for termination. Breach of Contract and/or voluntary

termination of Contract without sufficient cause may jeopardize the Worker's standing for future contracts with the Firm. Inappropriate conduct or unacceptable actions of the

Worker may be grounds for termination of the Contract. Examples of actions meriting termination include the following: failure to maintain a neat, clean, well groomed personal appearance; recurring and written and/or verbal complaints from visitors and/or project personnel on the Worker's attitude, lack of cooperation and/or resistance to implementation of policies and programs as directed by the Operations Manager; failure to follow security procedures, including the allowance of unauthorized personnel inside the gatehouse or the Worker (non-public) work area of gatehouse/entrance stations; violations of public health and safety, including smoking in the gatehouse; and inability to perform duties and jobs responsibilities in accordance with the general specifications, specific park sheets and Park Attendant Manuals.

Subleasing of the Contract was not allowed except on emergency conditions or other reasons for approved by the Contracting Officer. Subleasing the Contract in order to assume another contract was strictly prohibited and such action was considered grounds for immediate termination of Contract.

Park Attendants were required to maintain their assigned motor home/trailers site and adjacent living areas in a clean, clutter free, sanitary condition at all times. No dog pens, horse corrals, poultry cages, or similar facilities for pets or raising of animals were allowed, except as provided for in the subsection titled pets. Where pets were allowed, they may be restricted to the interior of the Worker living quarters. If allowed outside, pets must be kept on a leash six feet or less in length, or otherwise physically restrained, at all times. The Operations Manager has the option of approving portable cages or containers for temporary daytime outdoor confinement of pets. No washers, dryers, or excessive personal items will be permitted in the outside living area, and the interior of the Worker furnished living quarters will be kept clean and free of clutter. Landscaping around the Worker's assigned site may be allowed after approval by the Operations Manager.

Section 3121(d)(2) of the Internal Revenue Code (the Code) defines "employee" as any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

The question of whether an individual is an employee under the common law rules or an independent contractor is one of fact to be determined upon consideration of the facts and the application of the law and regulations in a particular case. Guidance for determining the existence of that status is found in two substantially similar sections of the applicable Employment Tax Regulations: section 31.3121(d)-1 relating to the Federal Insurance Contributions Act (FICA), and section 31.3401(c)-1 relating to federal income tax withholding.

Section 31.3121(d)-1(c)(2) of the regulations provides that generally, the relationship of employer-employee exists when the person for whom the services are performed has the right to direct and control the individual who performs the services not only as to the result to be accomplished by the work, but also as to the details and means by which

that result is accomplished. It is not necessary that the employer actually direct or control the manner in which the services are performed, it is sufficient if he or she has the right to do so.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, it is of no consequence that the employee is designated as partner, coadventurer, agent, or independent contractor or the like.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or autonomy must be considered. In doing so, one must examine the relationship of the worker and the business. Relevant facts generally fall into three categories: (1) behavioral controls, (2) financial controls, and (3) the relationship of the parties.

Behavioral controls are evidenced by facts which illustrate whether the service recipient has a right to direct or control how the worker performs the specific tasks for which he or she is hired. Facts which illustrate whether there is a right to control how a worker performs a task include the provision of training or instruction.

Financial controls are evidenced by facts which illustrate whether the service recipient has a right to direct or control the financial aspects of the worker's activities. These factors include whether a worker has made a significant investment, has unreimbursed expenses, and makes 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 the parties' agreements and actions with respect to each other, including 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 Firm provided training and instructions on the methods to be used in completing the work. The Firm set specific hours for when the work was to be performed and required the Worker's personal services. The Firm required the Worker to maintain a logbook of park activities and records necessary for the administration of the user fee program. The Worker could not hire helpers. The Worker did not have a significant investment in facilities, inventory or tools to perform as a Park Attendant. The services of the Worker were not available to the general public and there was no opportunity for the Worker to realize a profit or incur a loss beyond the normal loss of pay.

Based on the information submitted, it is determined that the services performed by the Worker were sufficiently subject to the direction and control by the Firm to establish an employer-employee relationship. Accordingly, it is held that the Worker was an employee of the Firm and amounts paid to her for services provided were wages, subject to federal employment taxes and income tax withholding.

Section 3306(c)(6) of the Code, pertaining to the FUTA, provides that service performed in the employ of the United States Government are excepted from the definition of employment.

This ruling is applicable to any individuals engaged by the Firm under similar circumstances. The Firm is responsible for advising all of the affected workers of the results of this ruling.

This ruling is directed only to the taxpayer(s) to whom it is addressed. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent

Sincerely,
WILL E. MCLEOD
Chief, Employment Tax Branch 1
Division Counsel/Associate Chief Counsel
(Tax Exempt and Government Entities)

Enclosure:
Copy of ruling letter for 6110 purposes