

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

September 26, 2014

Mr. Mike Espy, Esq.
Madison County Board of Supervisors
Post Office Box 608
Canton, MS 39046-0608

RE: Constables

Dear Mr. Espy:

Attorney General Jim Hood received your request on behalf of the Madison County Board of Supervisors and assigned it to me for research and response. Unless otherwise indicated, all section numbers herein refer to the Mississippi Code of 1972, as amended.

Facts and Issue Presented

According to your letter, the IRS has instructed Madison County that it must begin treating constables as employees, instead of self-employed individuals, for purposes of income tax and Social Security withholding. You ask, "Does the change in employment classification required by the IRS convert the constable's fee income to a "direct payment" as contemplated by MCA 25-11-106(1)(b)(i)?"

Brief Response

No. The change in employment classification for IRS purposes does not affect the sources from which constables derive their income or how PERS contributions on that income should be paid.

Analysis

Constables derive their income from various fees as outlined in Section 25-7-27. Historically, fees have been handled differently depending on the fee type. As verified through a telephone call to the Madison County Comptroller, those fees paid to constables for direct services to the county, such as bailiff and failed case fees provided

for in Section 25-7-2(1)(e) and (f), have been paid through the county payroll and the constables have received an Internal Revenue Service (IRS) Form W-2, *Wage and Tax Statement*, for this income. As required by Section 25-11-106(1)(b)(i) and Section 25-11-123(f)(3)(ii), the County has paid the PERS employer contributions on this income as it comes directly from the county treasury. However, constables have been treated as self-employed for purposes of compensation earned through fees assessed to the public, such as those described in Sections 25-7-2(1)(a) – (d) and (3). Compensation derived from these fees has historically been paid to the constables through the county claims docket, and the constables have been issued an IRS Form 1099-MISC for this income. Pursuant to Section 25-11-106(1)(b)(ii) and Section 25-11-123(f)(3)(i), constables have been required to pay both the employee and employer PERS contributions on their net fee income, unless the board of supervisors has elected to pay the employer contributions as allowed under Section 25-11-106(1)(b)(iii).

Section 25-11-106(1)(b)(i) states "The county is responsible for employer contributions on all direct payments to the constable from the county." Section 25-11-123(f)(3)(ii) states "The county shall be responsible for the employer contribution on all direct treasury or county payroll income of constables." Section 25-11-106(1)(b)(ii) states "Except as otherwise provided for in subparagraph (iii) of this paragraph, the constable is responsible for the employee contributions on direct payments to the constable from the county and both the employer and employee share of contributions on his or her net fee income." Section 25-11-123(f)(3)(i) states "Constables shall pay employer and employee contributions on their net fee income as well as the employee contributions on all direct treasury or county payroll income." Section 25-11-106(1)(b) and Section 25-11-123(f) appear to use the terms "direct payments," "direct treasury" and "county payroll income" interchangeably as distinguishable from "net fee income," which is used consistently throughout both sections. To determine this net fee income, constables are required by Section 7-3-45 to file an annual financial report with the Secretary of State on a form supplied and designed by the State Auditor. This form distinguishes between payments for direct services for the county and other fees earned by the constable. A copy of this report must also be submitted to PERS pursuant to Section 25-11-106(1)(c), and the constable must "make complete payment of any required contributions on net earnings from his or her office, but not less than the contributions due on the governmental treasuries paid by the county in the prior calendar year."

The fact that the constables' fee income is now subject to income tax and Social Security withholding does not alter the fact that Section 25-11-106(1)(b)(ii) and Section 25-11-123(f)(3)(i) require constables to pay both the employee and employer PERS contribution on their net fee income, unless the Board of Supervisors has elected to pay the employer contributions as allowed under Section 25-11-106(1)(b)(iii). Likewise, the fact that Madison County may choose to utilize its computerized payroll accounting system to facilitate the required withholding does not convert this fee income into "county payroll income," as the fee income is still being paid through fees assessed to

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the public instead of directly from the county treasury. Further, it appears that this fee income must still be paid to constables through the claims docket pursuant to Section 19-13-31 even if a Form W-2 is issued, as it does not consist of a salary or hourly wage that has previously been approved by the board of supervisors and entered on the minutes.

Conclusion

The fact that the fee income of constables in Madison County is now subject to income tax and Social Security withholding does not alter the fact that State law requires constables to pay both the employee and employer PERS contribution on their net fee income, unless the board of supervisors has elected to pay the employer contributions as allowed under Section 25-11-106(1)(b)(iii).

Sincerely,

JIM HOOD, ATTORNEY GENERAL

OFFICIAL OPINION

By:

Jane L. Mapp

Jane L. Mapp
Special Assistant Attorney General