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Federal-State Reference Guide

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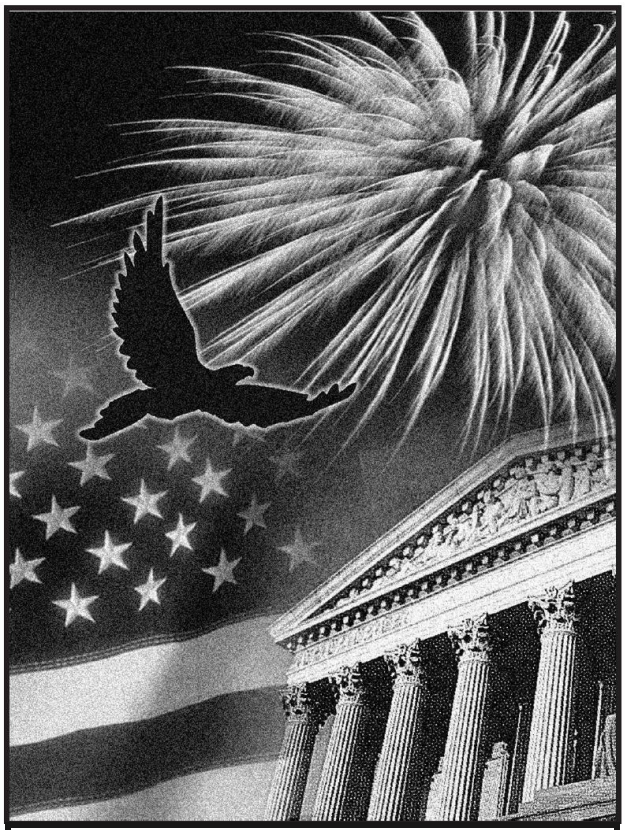

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Revenue Ruling 58-505 explains that for an individual to work in two capacities (employee and contractor), the services must not be interrelated. Stated differently, an individual does not work in two capacities when the same type of work, such as legal services, is divided into two components, one in an employee capacity and one in an independent contractor capacity. The services and remuneration for the two activities must be separate.

Section 530 Relief

State and local government entities under examination by the IRS may be entitled to relief from employment tax for certain workers under Section 530 of the Revenue Act of 1978 (Section 530). If applicable, Section 530 terminates an entity's federal employment taxes, including Social Security and Medicare, income tax withholding and any penalties attributable to the liability. See Revenue Procedure 85-18. This relief is not

available for services covered by a Section 218 Agreement.

If the requirements for Section 530 relief are met, but the services are covered by a Section 218 Agreement, the entity may obtain relief from liability for income tax withholding for prior years. However, Section 530 relief from income tax withholding will not apply with respect to wages paid after the date on which the entity is advised that the workers are covered under a Section 218 Agreement. This is because the entity would have begun withholding FICA taxes, which constitutes treatment of the workers as employees. See Revenue Procedure 85-18, section 3.03(C) and 3.04.

Section 530 provides relief for an entity that treated workers as nonemployees if the entity had a reasonable basis for the classification and acted consistently on that basis. To qualify for Section 530 relief, the entity must have a reasonable basis for treating the

worker as an independent contractor. Section 530 provides three safe harbors for satisfying the reasonable basis requirement:

1. Published ruling or judicial precedent;
2. Prior IRS examination of the taxpayer (if after 1996, the examination must have included a review of worker classification); or
3. Longstanding recognized practice of a significant segment of the industry. Alternatively, an entity may establish some other reasonable basis. For more information, see Revenue Procedure 85-18.

In addition, the entity must:

1. Have filed all federal tax returns (including information returns) on a basis consistent with treatment of the worker as a nonemployee; and

2. Not have treated the worker, or any other worker in a substantially similar position, as an employee.

For more information about the requirements for Section 530 relief, see Publication 1976, Do You Qualify for Relief Under Section 530?

Note: Section 530 is not part of the Internal Revenue Code. It was originally intended as an interim relief measure but was extended indefinitely in 1982.

Tax Consequences for Workers

In some cases, a government entity may be entitled to relief under Section 530, but workers find, through a determination letter or some other means, that they have been misclassified and are employees under the common law. Section 530 does not extend employment tax liability relief to workers. It does not convert them from employees to independent contractors. Misclassified employees remain liable for the employee

share of Social Security and Medicare taxes rather than for SECA (self-employment) tax. (See Form 8919 for this computation.) If the workers have been filing income tax returns as independent contractors, they should file amended returns for years for which the statute of limitations is open. As employees, they are not entitled to deduct unreimbursed business expenses on Schedule C. Because these Section 530 relieved employers are entitled to continue treating these workers as independent contractors, the workers will not be subject to income tax, Social Security or Medicare withholding and will generally have to make estimated tax payments to cover their tax liabilities. Information provided in Notice 989, Commonly Asked Questions When IRS Determines Your Work Status is "Employee", although not written specifically to Section 530 employees, provides information for filing their income tax returns or amended returns. Please note, however, that not all references of Notice 989 are

applicable, for example, the Section 530 employer will not be liable to provide a corrected Form W-2 in in this situation.

Frequently Asked Questions

1. What are the consequences of misclassifying a worker?

Generally, when an employer erroneously classifies an employee as an independent contractor and does not withhold federal payroll taxes, the employer is liable for the employer and employee shares of all applicable federal payroll taxes, as well as penalties and interest. [IRS]

2. What do you do if you cannot determine whether a worker is an employee?

The state or local entity or the worker can request a formal determination by submitting to the IRS

Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding. The IRS will review the facts and circumstances and officially determine the worker's status. [IRS]

3. Are volunteers considered employees?

The common law tests apply to determining the status of individuals regardless of whether they are deemed "volunteers." If an individual considered a volunteer meets the common law tests, any form of compensation or benefit they receive is considered wages, unless a specific exception applies. [IRS]

4. What effect does the presence of a Section 218 Agreement have on worker status?

If an existing Section 218 Agreement classifies a position as that of an employee covered by the Agreement then an individual in that position is an employee, subject to

FICA and income tax withholding; the common law tests are not considered.
Positions not covered by a Section 218

Agreement should be evaluated under the common law tests. [SSA/IRS]

Chapter 5

Social Security and Medicare Coverage

As discussed in Chapter 3, cash or noncash compensation for services is subject to income, Social Security and Medicare taxes unless certain exceptions apply. In addition, state and local employees may be exempted from Social Security (and in some cases, Medicare) taxes based on coverage under a public retirement system. A public employee may be covered for Social Security and Medicare, Medicare only, or may be exempt from both. The flowchart in Chapter 1, illustrates the process for determining the Social Security and Medicare coverage that applies to an employee. This chapter addresses various categories of employees and rules by which coverage is established, including the process for obtaining coverage under a Section 218 Agreement. As a supplement to the Social Security coverage information provided in this publication, refer

to the SSA State and Local Government Employers page. Additional information is also available at IRS.gov/FSLG.

All state and local government employees fall into one of three categories with respect to Social Security:

1. **Section 218 Agreement coverage (also called voluntary coverage).** These employees are covered for Social Security by a voluntary (coverage is requested by the state) Section 218 Agreement between the state and the SSA. They may or may not participate in a public retirement system.

2. **Mandatory Social Security coverage.** After July 1, 1991, employees are required to be covered for amounts deemed to be wages unless they are covered by a Section 218 Agreement or are members of a qualifying public retirement system.

3. **No Social Security coverage.** These employees are not covered by a Section 218 Agreement but are covered by a qualifying public retirement system and, therefore, exempt from mandatory Social Security.

Each of the three categories of employees is discussed below.

Employees Under Section 218 Agreement Coverage

State and local government employees can be covered for Social Security and Medicare through a Section 218 Agreement between the state and the SSA. This agreement may provide coverage for any of the following:

- Groups of employees in positions covered by a retirement system.
- Groups of employees in positions not covered by a retirement system.

- Employees in positions that are excluded from mandatory coverage provisions but are optional exclusions under Section 218 Agreements (for example, student services).
- Medicare Hospital Insurance (HI)-only coverage for employees hired prior to April 1, 1986, who are members of a public retirement system.

Each state's original agreement incorporates the basic provisions, definitions and conditions for coverage. Only the State Social Security Administrator can initiate a request for Section 218 Agreement coverage on behalf of an entity in the state. Additional coverage can be provided by modifications. Each modification, like the original agreement, is binding on all parties.

To establish an agreement, authority must exist under state law (state enabling legislation) to enter into an agreement and to extend coverage under an agreement. The

types and extent of coverage provided under an agreement must be consistent with federal and state laws.

State and local government employees who are covered under an agreement have the same benefits, rights and responsibilities as employees who have mandatory Social Security coverage. The cost to the employer of providing Social Security protection for state and local government employees is the same as that for employees in mandatory coverage.

Coverage under an agreement must be provided for groups of employees. An agreement may be modified to increase, but not to decrease, the extent of coverage. (An exception applies to election worker services and solely fee-based positions; see **Optional Section 218 Exclusions**, below.)

The effective date of coverage is the date specified by the state for coverage to begin. See SL 30001.375: Effective Dates of Coverage.

Important: The Internal Revenue Code limits the statutory period of assessment and collection of taxes to the three-year period after the tax return for a particular year was filed. This can come into conflict with SSA's Section 218 effective date of retroactivity when a state or local government seeks a retroactive modification to a Section 218 agreement covering a fiveyear period. Thus, SSA can only process and approve any modification to a Section 218 Agreement requesting a period of coverage in excess of the three years beyond the statutory period for FICA tax collection if the taxpayer agrees that it will execute a closing agreement with the IRS. See SL 40001.420: Modifications to the Agreement for more information on closing agreements.

Termination of Agreements

Before legislation was enacted in 1983, states could terminate coverage for any group of employees covered under the state's Section 218 Agreement. A state did this by providing a two-year advance notice to the federal government. Once it was terminated, the coverage for this group of employees could not be reinstated. The Social Security Amendments of 1983 rescinded this provision and prohibited states from terminating coverage on or after April 20, 1983, but permitted states to cover again any group terminated before this date.

Coverage Groups

Coverage under Section 218 Agreements can be extended only to groups of employees, referred to as coverage groups. Once an employee position is covered under a Section 218 Agreement, any employee filling that position is a member of the coverage group for Social Security and Medicare. There are

two types of coverage groups: (1) an absolute or nonretirement coverage group (employees not in a retirement system) and (2) a retirement system coverage group. Each state decides, within federal and state law, which groups to include under its agreement and when their coverage begins. The state can choose to cover non-retirement system groups, retirement system groups or both.

Absolute Coverage Groups (Non-Retirement System Groups)

An absolute coverage group includes the services of employees in positions not covered by a retirement system, except those whose services are mandatorily or optionally excluded from Social Security and Medicare coverage. They may also be referred to as non-retirement system groups or Section 218(b)(5) groups. A state may extend Section 218 Agreement coverage to an absolute retirement system group without considering the desires of the employees. An absolute

coverage group may consist of any of the following:

- All employees of a state engaged in performing services in connection with governmental (nonproprietary) functions
- All employees of a state engaged in performing services in connection with a single proprietary (other than governmental in nature) function
- All employees of a political subdivision of a state engaged in performing services in connection with governmental (nonproprietary) functions
- All employees of a political subdivision of a state engaged in performing services in connection with a single proprietary (other than governmental in nature) function
- Certain civilian employees working with the National Guard of a state

- Individuals employed under an agreement between a state and the United States to perform services as inspectors of agricultural products

Retirement System Coverage Group

A retirement system coverage group consists of employees working in positions covered by a public retirement system (also called a FICA replacement plan), as provided in Section 218(d)(4) of the Social Security Act (Act). This group may be provided Social Security and Medicare coverage under an agreement only if approved by a referendum. The Act gives the state the option, for referendum purposes, of breaking down a retirement system into its components. If a retirement system covers positions of employees of one or more political subdivisions of the state, the state may hold a referendum for:

1. All employees in positions under the retirement system,

2. State employees in positions under the system,
3. Employees of one or more political subdivisions in positions under the system,
4. Any combination of the groups in 2 and 3,
5. Employees of a hospital that is an integral part of a political subdivision,
6. Employees of two or more hospitals (each hospital must be an integral part of the same political subdivision), or
7. Employees of each institution of higher learning.

The referendum for retirement system employees is conducted either on a majority vote basis (allowed in all states) or on a divided system basis (allowed in certain states).

Majority Vote Referendum

Under this type of referendum, Social Security and Medicare coverage may be extended to employees in positions covered by a retirement system only if a majority of the eligible employees vote in favor of the coverage. A majority of all the eligible employees under the system (not a majority of the eligible employees casting votes) must vote in favor of coverage. All states are authorized by federal law to use the majority vote referendum procedures. Although the referendum itself is a state matter, federal law requires that the following conditions be met to establish coverage:

1. Eligible employees are given not less than 90 days notice of the referendum
2. An opportunity to vote is given and limited to eligible employees who were in an employment relationship with the employer both on the date the notice

was given and on the date the referendum is held

3. The referendum is held by secret ballot
4. The referendum is supervised by the governor (or designee)
5. A majority of the retirement system's eligible employees vote for coverage

Divided System Retirement Referendum

In addition to the majority vote referendum procedure, certain states and all interstate instrumentalities are authorized to divide a retirement system based on whether the employees in positions under the retirement system want coverage. Under the divided vote referendum, only those employees who vote "yes" and all future employees who become members of the retirement system will be covered. Members who vote "no" are not covered as long as they maintain continuous employment in a position within

the same public retirement system coverage group.

The states having this authority under Section 218(d)(6)(c) of the Act are:

Alaska	**Illinois**	**New Jersey**	**Tennessee**
California	**Kentucky**	**New Mexico**	**Texas**
Connecticut	**Louisiana**	**New York**	**Vermont**
Florida	**Massachusetts**	**North Dakota**	**Washington**
Georgia	**Minnesota**	**Pennsylvania**	**Wisconsin**
Hawaii	**Nevada**	**Rhode Island**	

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These “divided vote” states may choose between a divided system vote and a majority vote referendum.

States authorized to use the divided vote retirement system referendum to extend coverage may use either of two voting procedures:

1. ***Simplified One-Step Method:*** Poll all eligible members and divide the system into two parts, with each member placed in either the “Yes” or “No” group based on their choice (simplified one-step referendum), or

2. ***Original Two-Step Method:*** Subdivide the retirement system into two parts or systems – “Yes” and “No” groups – based on each individual member’s choice and then, after the individuals are separated based on this preference, conduct a majority vote referendum among the “Yes” group.

These individuals can then change their original poll vote.

The conditions for a divided vote referendum are the same as those given for the majority vote referendum with two exceptions: (1) the ballots are not secret because the individuals choosing coverage must be identified and (2) the individual must be in an employment relationship and a member of the retirement system when the vote is held (but not necessarily when the referendum notice was given).

At the discretion of the state, employees who become members of the retirement system after the referendum (division) date and before the execution of the modification extending coverage to the retirement system coverage group may be given a choice to receive coverage.

The referendum procedures must be conducted under the direction of the State Social Security Administrator.

Continuation of Coverage Rules

Once coverage is provided for state and local government employees, it generally continues unless an event occurs that results in termination of the coverage, such as a change in employer. The continuation rules are applied for each type of coverage group as follows:

Absolute Coverage Group: Social Security and Medicare coverage for non-retirement system groups continues as long as the continuing governmental entity exists. This is true even if the positions are later placed under a retirement system. (This provision includes police and firefighter positions that were first covered as an absolute coverage group.)

Majority Vote Retirement System Group: Following a favorable majority vote referendum, services under the retirement system, including positions brought under the retirement system in the future, are

compulsorily covered for Social Security under the state's Section 218 Agreement. Social Security and Medicare coverage will continue as long as the continuing governmental entity exists, even though the positions are later removed from under the retirement system, the system is abolished or the positions are placed under an additional retirement system.

Divided Vote Retirement System Group: If the use of the original two-step referendum results in a favorable majority, then the entire "Yes" group **and** all future members of the retirement system are covered.

As a result of the simplified one-step referendum all those retirement system members who voted "Yes" and all future retirement system members are covered for Social Security. If all current retirement system members vote against Social Security coverage (the "No" group), then only future retirement system members will be covered

for Social Security and make up the “Yes” group.

Under a divided retirement system, employees carry the “No” or “Yes” vote with them if they transfer to another position within the same retirement system coverage group.

Social Security coverage is not terminated because the positions are later covered under an additional retirement system.

If the divided vote retirement system is later abolished or positions are removed from coverage under it, the “Yes” group (those employees who voted “Yes” in the referendum and those subsequently hired retirement system members) continue to be covered for Social Security. New employees hired into positions after the removal from, or abolishment of, the former retirement system, are not covered for Social Security because they would not be considered new members of that former retirement system.

Section 218 Coverage Exclusions

When a state or local government entity voluntarily enters into the state's Section 218 Agreement with the SSA, it's important to determine which employee services will be excluded from Social Security coverage. If services are excluded, any employees performing these services are not covered by the agreement.

Certain services – known as **required exclusions** – are excluded from voluntary Social Security coverage by Section 218(c)(6) of the Act.

Other services, however, are **optional exclusions** under Sections 218(c)(3), (5) and (8) and, therefore, may be covered under a voluntary Section 218 Agreement. Coverage under a Section 218 Agreement supersedes all other considerations. If optional exclusion services are covered under a Section 218 Agreement, these amounts are subject to Social Security and Medicare tax.

Required Section 218 Exclusions

Federal law requires the exclusion of the following services from Section 218 coverage under Section 218(c)(6) of the Act:

- **Services performed by individuals hired to be relieved from unemployment.** The intent of the program establishes whether the program is designed to relieve individuals from unemployment. This is usually determined from the statutes or other authorities that established the program. The exclusion does not include services performed by individuals under programs, such as work-study, where the primary purpose is to provide work experience and training to increase the employability of the person, because the primary intent of the programs is not to relieve them from unemployment.
- **Services performed in a hospital, home or other institution by a patient**

or inmate thereof as an employee of a state or local government. Generally, these services are performed by individuals who are not normally in an employment relationship with the state or political subdivision. In the case of work performed by inmates in a state prison or local jail, they are excluded from coverage, whether or not the services are performed outside the confines of the prison or jail, because in either case the inmates are normally not in an employment relationship with the state or political subdivision. However, services performed by inmates outside the prison or jail for an entity other than the state or local government operating the prison or jail, such as on a work-release program, may be covered if an employment relationship exists. The employer for tax purposes is determined under the common-law rules, discussed in Chapter 4. **Note:** Services performed by patients

or inmates as part of the rehabilitative or therapeutic program of the institution are not usually considered to be services performed by employees.

- **Covered transportation service.** This includes services performed by transportation system employees who are covered for Social Security under Section 210(k) of the Social Security Act.
- **Other services that would be excluded if performed for a private employer because the work is not defined as employment under Section 210(a) of the Social Security Act.** This includes services performed by a nonresident alien temporarily residing in the U.S. holding an F-1, J-1, M-1 or Q-1 visa, when the services are performed to carry out the purpose for which the alien was admitted to the U.S. (A state may optionally include certain agricultural services under a

Section 218 Agreement.) See Foreign Students, Teachers and Apprentices.

- **Services performed by an employee hired temporarily in case of fire, storm, snow, earthquake, flood or similar emergency.** This exclusion applies only to those who are hired on a temporary basis in response to a specific emergency. It doesn't include workers considered temporary for other reasons or individuals in a continuous employment relationship who perform services related to emergencies on a regular or continuing basis.
- **Service described in Section 210(a)(7)(F) of the Social Security Act that is included as "employment" under Section 210(a).** Services by individuals not covered by a public retirement system and subject to mandatory coverage are excluded from coverage under a Section 218 Agreement.

Caution: Required exclusions apply to **voluntary** Social Security coverage situations (through a Section 218 Agreement) and should not be confused with the different set of exclusions that applies to **mandatory** Social Security coverage situations.

Optional Section 218 Exclusions

Under a Section 218 Agreement, a state has the option to exclude from Social Security coverage the services listed below when they are performed by members of any coverage group, including retirement system coverage groups. If the agreement does not specifically exclude these services, they are covered.

The following are positions and services that may be excluded at the option of the state:

- **All services in any class or classes of elective positions.** These are positions filled by an election; they also may be referred to as “elected officials.” The election may be by a legislative body, a

board or committee, or by the qualified electorate of a jurisdiction. The method of selection must constitute an election under state law. The election may be conducted through open voting by the electorate at large, or by a chosen body from a list of candidates. Generally, elective positions fall into three classes: executive, legislative and judicial.

- **All services in any class or classes of part-time positions.** A part-time position is one for which the number of work hours normally required by the position in a week or a pay period is less than the normal time requirements for the majority of the positions in the employing entity. The part-time position exclusion is based on the normal time requirements of the position and not the time spent by an employee in the position. If a position is established as a full-time position, but the employee works part-time in this position,

the exclusion does not apply. Conversely, if a position is established as a part-time position and the employee works full-time in this position, the services of the employee are excluded. Whether seasonal or temporary positions that require full-time services for a period of short duration are part-time positions depends on the definition of part-time established for the coverage group. Where the part-time position exclusion is taken, the state should include a definition of "part-time" in the modification if one has not been previously established.

Note: The definition of "part-time" under Section 218 Agreement provisions may be different from the definition of "part-time" used to determine whether an individual is a qualified participant in a public retirement system (discussed in Chapter 6).

Example: A city provides Social Security coverage to some of its employees under a

Section 218 Agreement, but excludes services performed in part-time positions. The Section 218 Agreement defines part-time positions as positions normally requiring less than 50 hours of service per month. The city must apply the definition in the Section 218 Agreement to determine which employees are excluded from Social Security coverage under the agreement. Any employees excluded from coverage under the agreement may then be subject to mandatory coverage.

- Fee-based public officials services in any class or classes of positions compensated solely by fees received directly from the public, by an individual who is treated by the municipality as self-employed. See Fee-Based Public Officials.
- Agricultural labor, but only those services that would be excluded if performed for a private sector employer. A state that initially excludes agricultural labor may later modify its agreement to cover it.

However, if agricultural labor is not excluded initially, it cannot be excluded later. If a state has not taken the agricultural exclusion, then all remuneration for agricultural labor is covered for Social Security.

- Services performed by students enrolled and regularly attending classes at the school, college or university for which they are working. The student exclusion applies only during periods of regular school attendance, whether during the regular academic year or in summer session. The exclusion does not apply to work done during summer vacation if the student is not attending a summer session. Services performed by students during holidays, weekends, seasonal breaks and between semesters falling within the academic year when classes are not scheduled are excluded.

- Services performed by election officials or election workers paid less than the calendar year threshold amount mandated by law. (If the state's Section 218 Agreement does not have an election-worker exclusion, or the entity has an agreement that does not exclude election workers, Social Security and Medicare taxes apply from the first dollar paid.) See Election Officials and Election Workers.

Note*:* Effective July 2, 1991, elective and part-time positions, although optionally excluded under a Section 218 Agreement, must be covered under a qualifying public retirement system or else they will be covered for Social Security under the mandatory Social Security provisions.

Optional exclusions can be taken by the state in any combination and applied to both absolute and retirement system coverage groups. Any services a state excludes can be included later if permitted by federal and

state law and the state's agreement. Generally, if one of the types of work listed above has been included in a coverage group, it cannot later be removed from coverage, except for services performed by election officials/workers and solely fee-based positions.

Optional exclusions apply only to voluntary Social Security coverage under a Section 218 Agreement; there are no optional exclusions from mandatory coverage.

Note: The 1972 Amendments to the Social Security Act allowed states a limited period to exclude services in part-time positions and services performed by students, in cases where this exclusion was not initially chosen. An additional window to make this election was provided by Public Law 105-277, enacted October 21, 1998, which allowed states a limited period to exclude the services of students employed by the public school, college or university where they are regularly

attending classes. In those states exercising this option, the student exclusion was effective July 1, 2000. Where a state used either or both of these special one-time provisions for excluding services that had been covered previously, it cannot again cover these services under a Section 218 Agreement.

Employees Under Mandatory Social Security Coverage

Public Law 101-508 mandated full Social Security coverage beginning July 2, 1991, for state and local government employees who are not members of a qualifying public retirement system (also called a FICA replacement plan) and who are not covered under a Section 218 Agreement, unless a specific exclusion applies under the law.

If an employee is mandatorily covered for Social Security, then becomes a member of a qualifying public retirement system, mandatory coverage ends; Social Security

coverage would apply only if the position becomes covered by a Section 218 Agreement.

If an employee becomes a member of a public retirement system and is covered for Social Security under a Section 218 Agreement, the employee continues to be covered for Social Security and Medicare.

The determination of whether an employee is covered by mandatory Social Security is made individually. For example, a

Section 218 Agreement may exclude part-time positions and a public retirement system may exclude part-time employees for the same entity. If an employee is excluded from Section 218 coverage because of work performed in a part-time position (as defined under the agreement) and is also excluded from membership in a public retirement system because of part-time status, that employee is subject to mandatory Social Security.

Example: A city has a Section 218 Agreement that excludes part-time positions requiring less than 18 hours of work a week. City cafeteria positions require employees to work only 3 hours per day, or 15 hours per week. The city's public retirement system does not allow membership for employees unless they work 25 hours or more per week. The cafeteria workers are subject to mandatory Social Security.

Exclusions from Mandatory Social Security Coverage

Under Section 210(a) of the Social Security Act, the following categories of employees are not subject to mandatory Social Security coverage, even if they are not covered by a public retirement system:

- **Services performed by individuals hired to be relieved from unemployment.** The intent of the program establishes whether the program is designed to relieve individuals from

unemployment. This is usually determined from the statutes or other authorities that established the program. The exclusion doesn’t include services performed by individuals under programs, such as work-study, where the primary purpose is to provide work experience and training to increase the employability of the person, because the primary intent of the programs is not to relieve them from unemployment.

- **Services performed in a hospital, home or other institution by a patient or inmate thereof as an employee of a state or local government.** Generally, services performed by inmates in a state prison or local jail are excluded from coverage. This is true whether or not the services are performed outside the confines of the prison or jail, because the inmates are not normally in an employment relationship with the state or

political subdivision.
However, services performed by inmates outside the prison or jail for an entity other than the state or local government operating the prison or jail, such as on a work-release program, may be covered if an employment relationship exists. The employer for tax purposes is determined under the common-law rules, discussed in Chapter 4. **Note**: Services performed by patients or inmates as part of the rehabilitative or therapeutic program of the institution are generally not employment.

- **Services performed by an employee hired temporarily in case of fire, storm, snow, earthquake, flood or similar emergency.** This exclusion applies only to those workers who are hired on a temporary basis in response to a specific emergency. It doesn’t include workers considered temporary for other

reasons or individuals in a continuous employment relationship who perform services related to emergencies on a regular or continuing basis.

- **Services performed by election officials or election workers paid less than the calendar year threshold amount mandated by law, unless a Section 218 Agreement covers election workers.** See Election Officials and Election Workers, below.
- **Services in positions compensated solely by fees that are subject to self-employment tax, unless a Section 218 Agreement covers these services.** See Fee-Based Public Officials.
- **Services performed by a nonresident alien temporarily residing in the U.S. holding an F-1, J-1, M-1 or Q-1 visa, when the services are performed to carry out the purpose for which the individual was admitted to the U.S.**

See Foreign Students, Teachers and Apprentices.

- **Services performed by students enrolled and regularly attending classes at the school, college or university where they are working, unless a Section 218 Agreement covers student services.**
- **Services that would be excluded if performed for a private employer because the work is defined as employment under Section 210(a) of the Social Security Act, unless a Section 218 Agreement covers certain agricultural services.**

Note: Coverage under a Section 218 Agreement always takes precedence over other employment circumstances. When considering whether the mandatory Social Security coverage and exclusion rules apply to a worker's services, first determine

whether the services are covered by a Section 218 Agreement.

Election Officials and Election Workers

Prior to the Social Security Amendments of 1967, there was no specific provision for the exclusion of election officials or election workers. The Social Security Act was amended to allow states to modify their agreements to exclude the services of election officials and election workers whose pay was below an annually determined threshold amount.

The FICA tax exclusion for election officials and election workers is $1,900 for the 2020 calendar year unless those wages are subject to Social Security and Medicare at a lower threshold under the state's Section 218 Agreement.

If the entity is covered by a Section 218 Agreement, the agreement determines the treatment of election workers for FICA

purposes. The agreement may specify a lower threshold amount for election officials and election workers (for example, $50 a calendar quarter or $100 a calendar year). In these states, the Social Security and Medicare tax applies when the amount specified in the state's agreement is met. States may modify the agreement to exclude the services of election officials and election workers paid less than the threshold amount mandated by law. These modifications are effective in the calendar year the modification is mailed or delivered to the Social Security Administration.

If the Section 218 Agreement does not exclude election workers from coverage, or does not provide a threshold for coverage, Social Security and Medicare taxes apply from the first dollar paid. If the entity is not covered under a Section 218 Agreement, the rules for mandatory Social Security and

Medicare under Section 210(a)(7)(F) of the Social Security Act apply.

Go to SSA election workers for the latest FICA tax exclusion for election officials and elections workers. The election official/worker thresholds under mandatory Social Security for calendar years prior to 2021 are:

2020	$1,900
2017 – 2019	$1,800
2016	$1,700
2013 – 2015	$1,600
2009 – 2012	$1,500
2008	$1,400
2006 – 2007	$1,300
2002 – 2005	$1,200

2000 – 2001	$1,100
1995 – 1999	$1,000
1978 – 1994	$100

For calendar years 1968 through 1977, the threshold was $50 per calendar quarter.

Generally, Form W-2 is required for these workers; however, if the worker received only wages for election work and the total is less than $600 total for the year, Form W-2 is not required and no Social Security or Medicare tax withholding is required. The amount paid is includible in the gross income of the worker. Revenue Ruling 2000-6 provides reporting procedures for payments to election officials and election workers in different situations.

Contact your State Social Security Administrator concerning the status of election officials and election workers under

the state's Section 218 Agreement. Additional information and threshold amounts can be found at SSA.gov.

Fee-Based Public Officials

A fee-based public official receives and retains remuneration directly from the public. An individual who receives payment for services from government funds in the form of wages or salary is not a fee-based public official, even if the compensation is called a fee.

Beginning in 1968, services performed in positions compensated solely by fees are excluded from coverage under Section 218 Agreements unless the state specifically covers these services. If a state covered these positions before 1968, it may modify its agreement to exclude these positions prospectively. The exclusion is effective the first day of the year following the year in which the modification is mailed or delivered to SSA. If a state covered and later excluded

these positions, the state cannot again cover these positions.

Fee-Basis Exclusion – Positions Compensated Solely by Fees

Services in positions compensated solely by fees are excluded from coverage under Section 218 Agreements (except where the state specifically included these services) and are covered as self-employment and subject to self-employment tax.

Fee-Basis Exclusion – Position Compensated by Salary and Fees

Generally, a position compensated by a 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.

If the state law does include this provision, none of the compensation, including the salary, is covered wages under the state's

Section 218 Agreement. In this case, the salary payment, while excluded under the agreement, is subject to mandatory Social Security if the official is not a qualified participant in a public retirement system.

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Police Officers and Firefighters

Beginning August 16, 1994, **all** states were allowed to extend Section 218 Social Security and Medicare or Medicare-only coverage to police officer and firefighter positions covered under a retirement system through a referendum procedure conducted by the state. (Prior to August 16, 1994, only 23 states, and all interstate instrumentalities, were specifically authorized by Congress to do so.) Those states were:

Alabama	**Kansas**	**North Carolina**	**Tennessee**
California	**Maine**	**North Dakota**	**Texas**
Florida	**Maryland**	**Oregon**	**Vermont**
Georgia	**Mississippi**	**Puerto Rico**	**Virginia**
Hawaii	**Montana**	**South Carolina**	**Washington**
Idaho	**New York**	**South Dakota**	

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As noted earlier, all states may use the majority vote referendum procedure. Some states are also authorized under the Act to use the divided retirement system referendum, discussed earlier. (Interstate instrumentalities may use the majority or divided retirement system referendum procedures.) As with other retirement system employees, before referendums can be held and coverage extended to police officer and firefighter positions already covered by a retirement system, there must first be authority to provide the coverage under state law (state statutes and/or the enabling act) and the federal-state agreement (via a modification to the state's Section 218 Agreement).

Generally, state statutes and court decisions establish the definition of police officer and firefighter positions. For Social Security purposes, the terms do not include services in positions that, although connected with police

and firefighting functions, do not meet the definitions of police officer and firefighter positions.

Note: Police officers and firefighters are **not** considered emergency workers for purposes of the mandatory exclusion from Social Security and Medicare coverage for these workers. This exclusion applies only to services of an employee who was hired because of an unforeseen emergency to do work in connection with that emergency on a temporary basis to provide emergency assistance in fires or other disasters such as severe ice storm, earthquake, volcano eruption or flood.

Police and Firefighter Positions Not Covered Under a Retirement System

If police officer and firefighter positions are not covered under a retirement system, these positions are mandatorily covered for Social Security and Medicare unless the positions were already covered under a Section 218

Agreement as part of a non-retirement system (absolute) coverage group.

Foreign Students, Teachers and Apprentices

Individuals admitted to the United States under an F-1, J-1, M-1 or Q-1 visa are generally exempt from both Social Security and Medicare taxes. Wages earned within the United States are subject to income tax, whether or not the workers are U.S. citizens.

Nonresident students who are not U.S. citizens, permanent residents or resident aliens for tax purposes may be able to take advantage of treaty exemptions to exclude a portion of their U.S. source income from withholding. For more information on specific treaty provisions, contact the IRS or SSA. The following IRS publications have additional information on Social Security and Medicare coverage for foreign workers:

- Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities
- Publication 519, U.S. Tax Guide for Aliens
- Publication 901, U.S. Tax Treaties

Employees With No Social Security Coverage

The final category of workers includes those who are not subject to any voluntary or mandatory Social Security coverage.

This can only occur where the workers are covered by a FICA replacement plan and are not covered by a Section 218 Agreement. Employers of these workers will not withhold Social Security taxes or show any Social Security wages on Form W-2; they are generally covered for Medicare. Public retirement systems are the subject of Chapter 6.

Identifying Covered Employment

In addition to determining whether specific employees are members of a Social Security coverage group, questions may arise as to whether certain positions constitute employment. These determinations may be based on decisions regarding specific issues to which either federal or state law applies. It’s important to know whether federal or state law is applied in making a determination on a specific issue. Generally, questions involving interpretation or application of state law are resolved by the authorized legal officers of the state according to their state and local laws, regulations and the state court decisions. Jurisdiction for some of the major questions include:

Federal Law:

Does an employer-employee relationship exist?

Who is the employer?

Are the earnings wages?

What are emergency services?

What are student services?

State Law:

Who is an officer of a state or political subdivision?

Is an entity a political subdivision?

Is a function governmental (nonproprietary)?

Is a function other than governmental in nature (proprietary)?

Is a position under a retirement system?

Which employees are eligible for membership in a retirement system? Who is an employee for purposes of retirement system participation?

Although federal law determines whether earnings are wages subject to Social Security and Medicare, state laws have a bearing on the issue of employment, such as whether a

position is that of a public official of a state. Where this is the case, an opinion of the state legal officer may be requested. The state's opinion will be given weight in making the decision, but it will not be determinative of the issue. Before contacting IRS or SSA, contact the State Social Security Administrator for guidance.

The federal courts provide the ultimate determination of how Social Security and tax laws will apply in a given situation.

Note: Federal Circuit Court decisions are binding only in the circuit in which they are issued. For a map of federal Circuit Court jurisdictions, see the interactive map at www.uscourts.gov/court_locator.aspx.

Identity of the Employer for Social Security Coverage Purposes

Because entities have different Social Security and retirement plan situations, it's important to determine which of two or more entities,

organizations or individuals is the employer. In some cases, certain individuals, referred to as leased workers, are supplied or paid by one entity but work under the direction of another. Generally, if there is a provision in a statute or ordinance that creates a position and the individual is hired or elected under this authority, the individual is an employee of the state or political subdivision to which the provision applies. If there is no such authority, the employer is the entity that has the right to control the worker in the performance of the work, the common-law employer.

The employing entity is responsible for withholding and paying Social Security and Medicare taxes on its employees' wages, as well as reporting to SSA the amount of wages paid. These withholding, paying and reporting requirements apply to wages of individuals subject to mandatory Social Security and Medicare, as well as to wages of individuals

covered under a Section 218 Agreement. See Publication 15.

Indian Tribal Governments and Section 218

Indian tribal governments, while treated as states for other purposes, are not treated as states for Social Security and Medicare tax purposes under IRC Section 7871. Thus, Indian tribal governments do not enter into Section 218 Agreements with SSA and may not participate in a public retirement system as an alternative to paying Social Security and Medicare tax under IRC Section 3121(b)(7)(F). (However, Indian tribal governments can enter into agreements under Section 218A of the Social Security Act to provide coverage for certain Indian tribal council members.)

Mandatory Medicare Coverage

Prior to April 1, 1986, state and local government employees could only be covered for Medicare through voluntary

Section 218 Agreements between the state and the federal government. This changed with the enactment of the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, which mandated that all state and local government employees hired or rehired after March 31, 1986, must be covered for Medicare, and pay Medicare taxes regardless of their membership in a retirement system. Employees covered by Social Security under a Section 218 Agreement are automatically covered for Medicare.

Public employees already covered under a Section 218 Agreement are covered under Medicare and subject to the tax. Employees who are not covered by Social Security, but are subject to the Medicare-only portion of FICA, are referred to as Medicare Qualified

Government Employees (MQGE). Reporting procedures for MQGEs are covered in Chapter 3.

Employees who have been in continuous employment with the employer since March 31, 1986, who are not covered under a Section 218 Agreement nor subject to the mandatory Social Security and Medicare provisions, remain exempt from both Social Security and Medicare taxes, provided they are members of a public retirement system. (See Continuing Employment Exception, below.)

The flowchart in Chapter 1 shows how to determine whether Medicare coverage applies.

Continuing Employment Exception

Services performed after March 31, 1986, by an employee who was hired by a state or political subdivision employer before April 1, 1986, are exempt from mandatory Medicare

tax if the employee is a member of a qualifying public retirement system and **all** the following requirements are met:

- The employee was performing regular and substantial services for remuneration for the state or political subdivision employer before April 1, 1986,
- The employee was a bona fide employee of that employer on March 31, 1986,
- The employment relationship with that employer was not entered into for purposes of avoiding the Medicare tax, and
- The employment relationship with that employer has been continuous since March 31, 1986.

In general, the following employment changes are considered continuous employment and qualify the employee for the exception:

- From a state agency to another state agency in the same state.
- From an employer of one political subdivision to an employer in the same political subdivision.

The following are not considered continuous employment for this purpose:

- From a state agency to a political subdivision of that state.
- From a political subdivision to a state agency.
- From one political subdivision to another.
- From a state agency to an agency of another state.

See Revenue Ruling 2003-46, Revenue Ruling 86-88 and Revenue Ruling 88-36, for more information about the continuing employment exception.

The Centers for Medicare & Medicaid Services (CMS) is the federal agency that administers the Medicare program. For more information, go to CMS.hhs.gov.

Services Not Subject to Mandatory Medicare Coverage

The following are not subject to mandatory Medicare tax even though the services are performed by an employee hired after March 31, 1986. (**Note:** These are the same services that are excluded from mandatory Social Security coverage, discussed earlier.)

- Services performed by individuals hired to be relieved from unemployment. (This doesn't include many programs financed from federal funds where the primary purpose is to give the employee work experience or training.)
- Services performed in a hospital, home or other institution by a patient or inmate

thereof as an employee of a state or local government employer.

- Services performed by an employee on a temporary basis in case of fire, storm, snow, earthquake, flood or other similar emergency.
- Services performed by nonresident aliens with F-1, J-1, M-1 and Q-1 visas.
- Services in positions compensated solely by fees that are subject to SECA (unless a Section 218 Agreement covers these services).
- Services performed by a student enrolled and regularly attending classes at the school, college or university where they work (unless a Section 218 Agreement covers student services).
- Services performed by an election worker or official whose pay in a calendar year is less than the amount mandated by law

(unless a Section 218 Agreement covers election workers).

- Services that would be excluded if performed for a private employer because it isn't work defined as employment under Section 210(a) of the Social Security Act (unless a Section 218 Agreement covers certain agricultural services).

See Required Exclusions and Optional Exclusions for more details on these exclusions.

Voluntary Medicare Coverage

A Section 218 Agreement can be executed to provide Medicare-only coverage for employees who are qualified participants in a public retirement system and not covered under a Section 218 Agreement and not subject to the mandatory Medicare provisions. Contact your State Social Security Administrator for further information. (A list

of State Administrators is available at www.ncsssa.org.)

Frequently Asked Questions

1. Are any services excluded from mandatory Social Security and Medicare coverage?

Yes. The same exclusions apply to mandatory Social Security and mandatory Medicare; however, some services excluded from mandatory coverage under provisions of the Internal Revenue Code may be covered by a Section 218 Agreement. [IRS, SSA]

2. If a local government has a public retirement system that qualifies as a FICA replacement plan and does not have a Section 218 Agreement, can employees voluntarily elect to participate in Social Security?

No. An employee can only participate in Social Security if the position is covered either by the mandatory provisions or by a Section

218 Agreement. Only the State Social Security Administrator can initiate a request for Section 218 coverage. [SSA]

3. Do college students employed by a university during the summer months qualify for the student Social Security and Medicare exception from mandatory Social Security if they are not regularly enrolled and attending classes at the university during that time?

If an individual is not enrolled in classes during school breaks of more than five weeks, including summer breaks, the student Social Security and Medicare exception does not apply (other than during payroll periods of a month or less that fall wholly or partially within the academic term). See Revenue Procedure 2005-11, sections 7.04 and 7.05. [IRS]

4. Are elected and appointed officials considered employees?

For income tax purposes, elected (or elective) and most appointed officials are defined by IRC Section 3401(c) as employees of the public entity they serve (mayors, members of the legislature, county commissioners, city council members and board or commission members). In general, elected and appointed officials will meet the common-law tests to be considered employees. Regardless of the common-law tests, some positions may be defined as employment by state statute. Some fee-basis officials are by law treated as self-employed. An elected or appointed official who is an employee is subject to rules for mandatory Social Security and Medicare unless covered under a Section 218 Agreement or a qualified participant in a retirement system. All officials elected or appointed to their positions after March 31,

1986, are subject to Medicare withholding. See Chapter 4. [IRS]

5. How is "termination of employment" defined for purposes of determining whether the continuing employment exception for Medicare tax applies?

Whether an employment relationship has terminated must be determined based on facts and circumstances. Great weight, however, will be given to the state or political subdivision employer's personnel rules to determine whether an employment relationship has been terminated. (Revenue Ruling 86-88) [IRS]

6. An employee who was hired by the state before April 1, 1986, transferred after March 31, 1986, to another state agency. The transfer was made without terminating the employee's employment with the state. Does the employee qualify for

the continuing employment exception?

Yes. An employee hired by a state employer before April 1, 1986, who transfers after March 31, 1986, to another state employer of the same state may qualify for the continuing employment exception, provided the transfer was made without a termination of the employee's overall employment relationship with that state. The same rule applies to an employee hired before April 1, 1986, by a political subdivision employer, who transfers after March 31, 1986, to another employer of that same political subdivision. However, an employee hired before April 1, 1986, does not qualify for the continuing employment exception if after March 31, 1986, the employee transfers from a state employer to a political subdivision employer or from a political subdivision employer to a state employer. Likewise, an employee does not qualify for the exception if the employee

transfers from a political subdivision employer in one political subdivision to a political subdivision employer in a different political subdivision, or from a state employer in one state to a state employer in a different state. [IRS]

7. Can employees who were hired prior to April 1, 1986, and who are not currently paying into Medicare, enroll in Medicare in the future?

Individual employees can never elect voluntarily to participate in Social Security or Medicare. State or local public employers can voluntarily choose to cover one or more groups of employees under Medicare-only, even if they are otherwise exempt because of the continuing employment exception. To elect this coverage, the state or local government (through the state) must enter into a modification of the state's Section 218 Agreement. Contact your State Social Security Administrator for further information

about a Medicare-only modification. If an individual’s state or local government employment is not covered under Social Security or Medicare, the individual may not have enough work credits for Medicare based on their own wages. That individual may be entitled to coverage based on sufficient other work covered for Social Security or Medicare on their own earnings record or that of an insured spouse. [SSA]

Chapter 6

Social Security and Public Retirement Systems

Effective July 2, 1991, Congress made Social Security coverage mandatory for state and local government employees who are neither covered by a Section 218 Agreement nor qualified participants in a FICA replacement plan. States

can provide employees with membership in a public retirement system as an alternative to mandatory Social Security coverage.

As a supplement to the Social Security and public retirement systems information provided in this publication, refer to IRS.gov/FSLG.

This chapter provides information about the requirements a retirement system must meet to qualify as an alternative to Social Security coverage.

Public Retirement Systems (FICA Replacement Plans)

A public retirement system, as defined in IRC Section 3121(b)(7)(F) and Treas. Reg. Section 31.3121(b)(7)-2, is a pension, annuity, retirement or similar fund or system maintained by a state or local government that provides a retirement benefit to the employee comparable to the benefit provided under the Old-Age portion of the Old-Age,

Survivors and Disability Insurance (Social Security) part of FICA.

To be a retirement system for this purpose, the plan must provide a minimum retirement benefit. In this context, the term “employer” is a state, political subdivision or instrumentality. The term “employee” is used here only to refer to an employee of a state, political subdivision or instrumentality.

Note: A “public retirement system” for this purpose is not required to be a qualified plan within the meaning of ERISA. The ERISA provisions relate to the tax treatment of contributions and benefits of employee plans and are irrelevant to the coverage issues addressed here. To avoid confusion, this publication does not use the term “qualified” to refer to public retirement systems. For mandatory coverage purposes, the employee may be a member of any type of retirement system, including a system that is nonqualified under ERISA (for example, a

Section 457 plan), as long as the plan provides the minimum level of benefits required for a public retirement system. These requirements are discussed below and in Treas. Reg. Section 31.3121(b)(7)-2(e) and Revenue Procedure 91-40.

For purposes of determining whether mandatory coverage applies for an employee holding more than one position, Social Security is NOT a public retirement system.