



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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MEMORANDUM FOR THOMAS R. HULL
NATIONAL DIRECTOR, SPECIALTY TAXES
Attn: Thomas Burger, Director, Office of Employment Tax
Administration and Compliance

FROM: Patricia M. McDermott, Senior Technical Reviewer,
Office of Associate Chief Counsel, EBEO:Br.2

SUBJECT: Memorandum Received From the District Office
Regarding Assistance Previously Provided in Connection
With the State and Local Government Employer Compliance
Initiative

This is in response to your memorandum dated September 10, 1998, by which you forwarded a request from a revenue agent for clarification of advice that our office had previously provided in connection with the State and Local Government Employer Compliance Initiative. We understand that you will forward this response to the agent. The following is general information only and does not address the liability of specific taxpayers.

1. Are elected school district board members employees for purposes of section 106?

Section 106 of the Code provides that gross income of an employee does not include employer-provided coverage under an accident or health plan. Section 1.106-1 of the Income Tax Regulations provides that the gross income of an employee does not include contributions which his employer makes to an accident or health plan for compensation (through insurance or otherwise) to the employee for personal injuries or sickness incurred by him, his spouse, or his dependents, as defined in section 152.

Neither section 106 nor the regulations thereunder define the term "employee." In Revenue Ruling 56-400, 1956-2 C.B. 116, the Service stated that section 106 applies to individuals who are employees under the common law.

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We do not agree with the revenue agent's assumption that elected officials generally are not employees under the common law. In addition, a statutory employee under a particular Code provision is not necessarily an employee for purposes of other Code provisions. As in all worker-classification cases, an independent determination must be made based upon the facts in each case. See the training materials on employee versus independent contractor status. "Independent Contractor or Employee?" Training 3320-102 (Rev. 10-96) TPDS 84238I. The revenue agent correctly states, however, that the Service must analyze whether direction and control exists; and in this regard, the Service must determine the degree to which the laws of the state or local government vest some body with the authority to direct and control the elected school board members. We would encourage the agent to consult the local District Counsel in determining worker classification.

2. Are health plan benefits received by elected school board members under a school district's employee health plan subject to FICA and income tax withholding?

Section 3121(a)(2) of the Code provides that the term "wages" does not include the amount of any payment made to, or on behalf of, an employee or any of his dependents under a plan established by an employer which makes provision for his employees on account of medical or hospitalization expenses in connection with sickness or accident disability, or death. Therefore, employer-provided health benefits received by school board members are not subject to FICA.

Sections 3401(a) of the Code provides that, for income tax withholding purposes, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash.

Section 3401(c) provides that the term "employee" includes an officer, employee, or elected official of the United States, a state, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing.

If a board member is a common law employee, employer-provided health plan benefits are excludible under section 106, and are therefore not subject to income tax withholding. Conversely, if a board member is not a common law employee, health benefits, which are includible in gross income, are subject to income tax withholding because elected school board members, as public officers, are statutory employees for income tax withholding purposes.

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3. When is a retiree under a qualified retirement system excepted from FICA upon returning to work?

A retiree under a retirement system, who returns to work for the same employer, and who is either in pay status, or has reached normal retirement age, is deemed to be a qualified participant regardless of whether he continues to accrue a benefit. In addition, this rule also applies in the case of a retiree who returns to work for another governmental employer provided that employer maintains the same retirement system as the former employer. Treas. Reg. § 31.3121(b)(7)-2(d)(4)(ii).

The revenue agent asks how the above rule would be applied when a retiree under a qualified retirement system is rehired as an independent contractor by the same employer, and is subsequently reclassified by the Examination Division as an employee. Provided the employee is in pay status when rehired, or has reached the normal retirement age, the employee is excepted from FICA coverage. The fact that the employee was rehired as an independent contractor does not change the application of the rules under section 31.3121(b)(7)-2(d)(4)(ii).

We hope the foregoing information is helpful in answering the revenue agent's questions. If we can provide further assistance, please contact John Richards of this office at 622-6040. In addition, for future reference, the Office of Chief Counsel has regional coordinators who may be of assistance in answering general questions. _____ is the Regional Coordinator for the Region.

Sincerely yours,

PATRICIA M. MCDERMOTT,
Senior Technical Reviewer
CC:EBEO:Br.2