



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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COR-107696-00
November 22, 2000

[REDACTED]

Attn: [REDACTED]

Dear [REDACTED]:

Reference: Reemployed Annuitants

This is in response to your inquiry, dated March 22, 2000, regarding the tax treatment of salary payments made to reemployed annuitants whose salaries are reduced because their former spouses are receiving a portion of their annuities. Specifically, you inquired about the application of taxes under the Federal Insurance Contributions Act (FICA) and federal income tax withholding to salaries that are reduced for this reason.

You explain the facts as follows. From time to time, [REDACTED] rehires former employees who are receiving annuities under the [REDACTED] retirement systems. There are two different systems, [REDACTED]

1 [REDACTED]

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Under the [REDACTED] (the Act), whenever an annuitant is reemployed on a full-time basis in the Federal government, that annuitant's annuity is terminated, and the employee receives the salary of the current position.² [REDACTED]

Some rehired annuitants have former spouses who are entitled to receive a portion of their annuities. Both the new and the old systems provide for a portion of a retiree's annuity to be paid to a former spouse. [REDACTED]

When an annuitant is reemployed, his or her annuity payments cease, and the individual is paid the full salary in the current position. The former spouse, however, continues to receive a share of the annuity. The portion of the annuity due to the former spouse is deducted from the employee's salary and deposited into the [REDACTED] (the Fund) for payment to the former spouse. [REDACTED]³ This amount will be referred to as the Spousal Annuity Amount.

Your first question is whether the Spousal Annuity Amount is subject to withholding and information reporting on the Form W-2 of the rehired annuitant.

The answer to this question depends upon whether the Spousal Annuity Amount is included in the rehired annuitant's taxable income. Section 61(a)(1) of the Internal Revenue Code (the Code) provides that gross income includes compensation for services. Under section 1.451-1(a) of the Income Tax Regulations, gains, profits, and income are to be included in gross income for the taxable year in which they are actually or constructively received by the taxpayer. Compensation is not constructively

² [REDACTED]

³ [REDACTED]

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received, however, if the money has not been paid or made unconditionally available to the employee or made subject to the employee's control. See section 1.451-2(a).

We conclude that the Spousal Annuity Amount does not represent income to the rehired annuitant. The rehired annuitant has no legal right to the Spousal Annuity Amount. The Act requires that this amount be deducted from the individual's salary and deposited into the Fund. The annuitant never actually or constructively receives the Spousal Annuity Amount, and the annuitant does not receive an economic benefit from it. See Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955), 1955-1 C.B. 207. The Spousal Annuity Amount therefore is not compensation to the employee.⁴

Under these facts, the Spousal Annuity Amount should not be reported on the employee's Form W-2. It is not subject to FICA tax or income tax withholding.

Second, you have asked what portion of the reemployed annuitant's salary is subject to FICA and income tax withholding.

Code sections 3101(a) and 3111(a) impose Old-Age, Survivors, and Disability Insurance (OASDI) taxes on employees and employers. Sections 3101(b) and 3111(b) impose Medicare taxes on employees and employers.

Generally, OASDI and Medicare taxes apply to wages paid on account of employment. For FICA purposes, section 3121(a) defines "wages" as all remuneration for employment, with certain enumerated exceptions. Section 3121(b) of the Code defines "employment" for FICA purposes as any service of whatever nature performed by an employee for the person employing him, with enumerated exceptions.

Certain exceptions from FICA tax may be applicable to rehired annuitants who were covered under the old retirement system. Under certain limited circumstances, section 3121(b)(5)(A) excepts from employment services which would be excluded if section 3121(b)(5) and (6) as in effect in January 1983 had remained in effect. If this condition is met, section 3121(b)(5)(B)(i)(II) excepts from the OASDI portion of FICA the services of an individual who returns to performance of service after being separated for a period of less than 366 consecutive days. Section 3121(b)(5)(A) and (B) contains additional exclusions from employment for OASDI purposes, including individuals who return to service after being detailed or transferred to an international organization, who are reemployed after accepting employment with the American Institute in Taiwan, after

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serving in the military service, or with a tribal organization. You have not asked about the application of these provisions and we do not have facts sufficient to address them.

Section 3121(b)(5)(A), (B)(ii) provides an exclusion from OASDI tax for the services of an individual who is covered by the old retirement system and who is currently receiving an annuity. Rehired annuitants do not qualify for the exception from employment in section 3121(b)(5)(B)(ii) because they do not receive annuities. They receive the full salary of their positions in lieu of their annuities. 22 C.F.R. section 19.10-6(a).⁵

Medicare taxes apply to all employees of the federal government, pursuant to section 3121(u)(1). The exclusions in section 3121(b)(5) do not apply for Medicare purposes.

Federal income tax withholding applies to all remuneration for employment, with specific exclusions. Code section 3401(a), (b). Section 3401(c) includes employees of the federal government in the definition of employee for withholding purposes.

Consequently, rehired annuitants are subject to Medicare tax. As a general rule, they are also subject to the OASDI portion of FICA. There are exceptions provided in section 3121(b)(5)(A) and (B) for individuals covered by the old system. We call attention to these provisions but do not address their applicability. Withholding of federal income tax applies to wages paid to employees of the federal government.

This letter will be made available for public inspection after names, addresses, and other identifying information have been deleted, as appropriate, under the Freedom of Information Act.

⁵Compare Rev. Rul. 90-32, 1990-1 C.B. 177, holding that a rehired federal annuitant whose salary is reduced by the amount of his annuity is eligible for the exception from employment in Code section 3121(b)(5)(B)(ii). Rev. Rul. 90-32 bases its treatment on the form Congress established for treatment of rehired annuitants.

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We hope that you find the information set forth above helpful. If you have any further questions regarding this matter, please contact Elizabeth Edwards of my staff (ID number 50-02101) at (202) 622-6040.

Sincerely,

Jerry E. Holmes
Branch Chief
CC:DC/ACC:TEGE:ET2