



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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The Honorable David L. Hobson
Member, U.S. House of Representatives
2112 South Broad Street, Suite 200
Lancaster, Ohio 43120-4389

Attention:

Dear Congressman Hobson:

This letter is in response to your inquiry dated February 16, 2006, on behalf of your constituents, . They raised several questions about Social Security coverage. In particular, they asked whether their employer could be required to enroll them for Social Security coverage and pay associated taxes under the Federal Insurance Contributions Act (FICA).

According to the letter you forwarded to us, when participated in the Retirement System (), the employer did not withhold FICA taxes from their wages. Subsequently, they elected to be covered under their employer-maintained Retirement Plan () and, as a consequence, no longer had coverage. Following their conversion to the , their employer is still not withholding FICA taxes from their wages and " of the employer contribution to" the "is still going to ." From the lack of withholding of FICA taxes from their wages, they are inferring that they do not have Social Security coverage and have inquired as to whether they can compel their employer to withhold and pay FICA taxes and get them Social Security coverage. The IRS has jurisdiction over the FICA, which provides for the imposition and collection of taxes to fund Social Security benefits. The Social Security Act, which sets the rules for coverage and benefits, is under the jurisdiction of the Social Security Administration. Interpretation of the two statutes is coordinated. The information we provide below addresses only the FICA.

FICA taxes consist of the old-age, survivors, and disability (OASDI) portion and the hospital insurance portion (Medicare tax) and are computed as a percentage of wages

paid by the employer and received by the employee for employment. [Internal Revenue Code (Code) sections 3101, 3111, 3121]. Generally, all remuneration an employer pays for services an employee performs is subject to FICA taxes unless the law specifically excepts the remuneration from the term “wages” or excepts the services from the term “employment.” [Code sections 3101, 3111, and 3121].

The law specifically excepts services performed by an employee of a State, political subdivision, or wholly owned instrumentality from employment for purposes of the OASDI portion of the FICA only if the employee is a member of a retirement system of the State, political subdivision, or wholly owned instrumentality, and so long as the employer has not entered into an agreement with the Social Security Administration to voluntarily extend Social Security coverage to the employee (commonly referred to as a “218 Agreement”). [Code section 3121(b)(7)(E) and (F)]. Whether a retirement arrangement is a retirement system generally depends on whether the retirement arrangement provides benefits equivalent to Social Security benefits.

The law generally considers the services an employee of a State, political subdivision, or wholly owned instrumentality performs to be employment for purposes of applying the Medicare tax. However, the Code provides an exception to the Medicare tax for employees hired prior to March 31, 1986, known as the “continuing employment exception,” if specific requirements are satisfied. [Code section 3121(u)(2)(C)].

Thus, wages paid to an employee of a State, political subdivision, or wholly owned instrumentality can be subject to both the OASDI and Medicare tax portions of FICA, only the OASDI portion, only the Medicare tax portion, or neither portion. The FICA taxation of a particular employee’s wages will depend upon whether that employee is a member of a retirement system, and when that employee was hired.

You included a private letter ruling from the Internal Revenue Service in the background materials that you forwarded to us along with your letter. In that ruling, the Internal Revenue Service determined that the is a retirement system under Code section 3121(b)(7)(F). Thus, services the participants perform while in the are not “employment” for FICA purposes, and wages paid to those participants by the employer who maintains the are not subject to the OASDI portion of the FICA. Whether the participants’ wages are subject to the Medicare tax portion of FICA will depend on when they were hired, and whether they have remained continuously employed by the .

Whether or not an employee receives Social Security coverage is determined under the Social Security Act. The FICA is coordinated with the Social Security Act. The incidence of tax and eligibility for coverage both rely on questions of employment. What constitutes employment for purposes of determining whether FICA taxes are owed generally also constitutes employment for purposes of determining whether Social Security coverage is available.

also raised a question about what they describe as their ongoing three percent employer contribution to the . The operation of the and the are matters of state law and regulations. should address questions on the employer's three percent contribution to the employer as it is a matter of plan operation.

I hope this information is helpful. Please contact me at if you need further assistance.

Sincerely,

Catherine E. Livingston
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(Tax Exempt & Government Entities)