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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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CONEX-114415-06

The Honorable John Shimkus
Member, U.S. House of
Representatives
508 W. Main Street
Collinsville, IL 62234

Attention:

Dear Congressman Shimkus:

This letter is in response to your inquiry dated March 3, 2006, on behalf of your constituent, . is receiving payments from a former employer to help pay his Consolidated Omnibus Budget Reconciliation Act (COBRA) insurance. The former employer is withholding Federal Insurance Contributions Act (FICA) taxes on these payments. wants to know if this is proper.

The law imposes FICA taxes on the wages that an individual receives [Internal Revenue Code (IRC) section 3101]. The law defines "wages" as all remuneration for employment with a specific exception for employer-provided payments made to, or on behalf of, an employee for coverage under an health insurance plan, such as a COBRA plan [IRC section 3121(a)(2)]. The law is the same even if the employer no longer employs the employee [Employment Tax Regulation section 31.3121(a)-1(i)]. Whether the payments in 's case fall within this exception and are not considered wages subject to FICA tax withholding is unclear and would depend on the extent of control, if any, that he had over the payments.

If had complete control of the disposition of the funds used to purchase the health insurance, then the payments are attributable to service performed by the employee for his employer, and these payments are included in the employee's wages and subject to FICA taxes. See Revenue Ruling 57-33, 1957-1 C.B. 303.

On the other hand, if the employer makes the payments for the health insurance directly to the insurer, then the payments are not included in the employee's gross income. See Revenue Ruling 61-146, 1961-2 C.B. 25. This holds true even if the payments are routed through the employee to the insurer, as long as the employee's right to dispose

of the funds is not unlimited. However, if the employer makes health insurance payments directly to the employee with only an understanding that the employee will purchase health insurance with them, and there is no verification of or control over the purchase, that amount is included in wages for employment tax purposes and would be subject to FICA taxes. See Revenue Ruling 75-241, 1975-1 C.B. 316. I hope this information is helpful. Please contact _____ of my staff or me at _____ if we can be of further assistance.

Sincerely,

/s/ Mike Swim

Michael Swim
Senior Technician Reviewer
Employment Tax Branch 1
Tax Exempt and Government Entities