



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
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The Honorable Diana DeGette
Member, U.S. House of Representatives
800 Grant Street, Suite 202
Denver, Colorado 80203

Attention:

Dear Congresswoman DeGette:

This letter is in response to your inquiry to the

dated
, on behalf of your constituent, . requested
a recalculation of liability for taxes under the Federal Insurance Contributions Act
(FICA) on amounts deferred under a nonqualified deferred compensation plan in light of
the fact that the plan was terminated. The forwarded your request to us.

The law requires that an employer withhold and pay FICA tax on amounts deferred under nonqualified deferred compensation plans before an employer distributes benefits under such plans. Unfortunately, an inherent feature of nonqualified deferred compensation arrangements is the risk that benefits will never be distributed, because such arrangements are unfunded and subject to the claims of an employer's creditors. Although I sympathize with 's situation, the FICA taxes imposed on amounts deferred under a nonqualified deferred compensation arrangement are not refundable just because benefits are never ultimately distributed as a result of plan termination.

A nonqualified deferred compensation plan is an arrangement between an employer and an employee to pay the employee compensation in the future. Nonqualified deferred compensation plans are generally unfunded arrangements whereby the employer's promise to pay the deferred compensation benefits in the future is not secured in any manner. Therefore, amounts deferred are subject to claims by the employer's creditors. Thus, the risk that an employee may not receive any benefits in the future is an inherent feature of nonqualified deferred compensation plans.

The law (sections 3101 and 3111 of the Internal Revenue Code (Code)) imposes FICA tax on the wages paid by employers to employees for employment. Generally, an employer must withhold and pay FICA tax on compensation deferred according to a nonqualified deferred compensation plan at the later of:

- When the employee performs the services that create the right to a deferral; or
- When there no longer exists a substantial risk that the employee's rights to the deferred amounts will be forfeited.

Section 3121(v)(2)(A) of the Code.

Nonqualified deferred compensation arrangements can be either account balance plans or nonaccount balance plans. A "nonaccount balance plan", such as the plan participated in, does not credit deferred amounts to particular participants' individual accounts. Employment Tax Regulation § 31.3121(v)(2)-1(c)(1)(i). If a nonqualified deferred compensation plan is a no account balance plan, a special rule permits an employer to delay withholding and paying FICA taxes until the amount deferred is "reasonably ascertainable." Employment Tax Regulation § 31.3121(v)(2)-1(e)(4)(A).

The law considers a amounts deferred under nonaccount balance plans to be reasonably ascertainable on the first date on which the amount, form, and commencement date of the benefits are known, so that an employer can compute their present value. When the present value of a benefit becomes reasonably ascertainable, the present value amount is subject to FICA tax. Employment Tax Regulation § 31.3121(v)(2)-1(d)(2)(C)(2)(ii). Under some nonaccount balance plans, retirement benefits do not become reasonably ascertainable until retirement. The present value calculation does not consider the probability that an employer will not make payments because of the unfunded status of the plan, the risk associated with any deemed or actual investment of the amounts deferred under the plan, or similar risks or contingencies. Employment Tax Regulation § 31.3121(v)(2)-1(c)(2)(ii).

I hope this information is helpful. If you have any questions, please contact me at () , or at () .

Sincerely,

Lynne A. Camillo
Chief, Employment Tax Branch 2
Office of the Associate Chief Counsel
Tax Exempt & Government Entities