



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

OFFICE OF
CHIEF COUNSEL

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CONEX-101298-08

The Honorable Carl Levin
United States Senator
477 Michigan Avenue, Room 1860
Detroit, Michigan 48226

Attention:

Reference:

Dear Senator Levin:

This letter is in response to your inquiry of January 8, 2008, on behalf of your constituent, . wrote about his Social Security benefits entitlement. He is concerned that he is not currently entitled to Social Security benefits because his employer did not withhold Federal Insurance Contribution Act (FICA) taxes as required. Although we are precluded by disclosure provisions in the Internal Revenue Code from discussing personal tax situation, we provide the following information for your use in assisting .

You also provided several additional enclosures related to concern including a letter from his employer, the which states that it established a 457 Deferred Compensation Plan in .

The letter indicates that “ .” The letter also provides that the provides for “ .”

The law provides that employment for FICA purposes generally includes service in the employ of a State, of any political subdivision thereof, or of any instrumentality of any one or more of the foregoing. There is an exception to this general rule if the employee is “a member of a retirement system.” Internal Revenue Code (Code) section 3121(b)(7)(F). In order for a defined contribution plan to be a retirement system for

purposes of Code section 3121(b)(7)(F) the plan must make “allocations to the employee’s account (not including earnings) ... [of] at least 7.5 percent of the employee’s compensation for service for the State, political subdivision or instrumentality...” Employment Tax Regulation (regulation) section 31.3121(b)(7)-2(e)(2)(iii)(A).

A retirement system may include a plan described in section Code section 457(b). Regulation section 31.3121(b)(7)-2(e)(1). Code section 457(b) defines an eligible deferred compensation plan, and section 457(e)(1)(A) provides that employers eligible to establish and maintain such a plan includes States, political subdivisions, and agencies or instrumentalities of the foregoing. You provided a copy of a Closing Agreement between the Internal Revenue Service (IRS) and _____ executed _____. The Closing Agreement states that the

Maintenance of a section 457(b) plan that qualifies as a retirement system would normally exempt an employer from providing FICA coverage for its employees. However, Code section 3121(b)(7)(E) provides that employment for FICA purposes includes service “included under an agreement entered into pursuant to section 218 of the Social Security Act”. _____ maintains a section 457(b) plan that appears to qualify as a retirement system, but, as indicated by the Closing Agreement, the IRS incorrectly notified _____ that services performed by its employees were not covered by a section 218 Agreement. The _____ office has apparently confirmed that _____ is part of _____, and as such, its employees are covered by a section 218 Agreement. The Closing Agreement resolves the question of FICA coverage for the employees of _____ for the years beginning after _____. The Closing Agreement suggests that the section 218 agreement is effective for years beginning after _____. The parties to the Closing Agreement agreed that FICA taxes would be paid with respect to wages paid to _____ employees beginning on _____ after _____. The _____ also agreed to provide Forms W-2c for years beginning _____, to employees whose wages they adjusted pursuant to the agreement.

The IRS is authorized to collect the FICA taxes, but does not have authority to determine whether an individual is eligible for Social Security benefits. That jurisdiction lies with the Social Security Administration. Social Security Act section 205(c)(5)(H) and 20 CFR 404.822(e)(5) permit the addition of earnings to an employee’s account at any time when an employer failed to report to the Social Security Administration any, or less than the correct amount of, wages for an employee. Those increased wages will then be used to determine that individual’s entitlement to Social Security benefits. To the extent any individual affected by the Closing Agreement described above, is concerned about his or her Social Security credits, we suggest that the individual

contact the Social Security Administration at the address below and provide copies of materials related to the wages the failed to report for FICA purposes. Copies of Forms W-2c and of the Closing Agreement as well as Forms W-2 for years from may be helpful in this regard. The individual should specifically ask what steps must be taken to have his or her earnings record adjusted for those periods in which the employer did not properly withhold and pay FICA taxes. The inquiry should be addressed to:

Social Security Administration
Office of Public Inquiries
Windsor Park Building
Baltimore, Maryland 21235

I hope this information is helpful. If you have any questions or need further assistance in this matter, please contact of my staff at () .

Sincerely,

Catherine E. Livingston
Deputy Division Counsel/Deputy Associate
Chief Counsel, (Exempt
Organizations/Employment Tax/
Government Entities)
(Tax Exempt & Government Entities)