



OFFICE OF
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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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The Honorable Dianne Feinstein
United States Senate
Washington, DC 20510

Attention:

Dear Senator Feinstein:

This letter responds to your inquiry dated April 14, 2008, on behalf of your constituent, . worked as a caregiver for her disabled daughter under the In-Home Supportive Services (IHSS) program of the California Department of Social Services (CDSS). The wages she received for performing those services were not subject to Federal Insurance Contributions Act (FICA) taxes because of the family employment exception in the Internal Revenue Code (IRC). Now that she is receiving social security benefits, her benefits are less than she expected. She is concerned that the family employment exception creates economic hardship for family caregivers.

The law imposes Federal Insurance Contributions Act (FICA) taxes on wages that an individual receives for employment [IRC section 3101]. FICA taxes include a tax for old-age, survivors, and disability insurance (OASDI). Generally, only wages subject to FICA taxes count towards old-age insurance benefit calculations.

The law defines "employment" as any service an employee performs for an employer, with a specific exception for family employment [IRC section 3121(b)(3)]. This exception applies to domestic service in a private home of the employer performed by an individual in the employ of his son or daughter. An employment relationship exists when the employer has the right to control and direct the employee as to the end result and the means to accomplish that result [Treasury Regulations section 31.3121(d)-1(c)(2)]. It is not necessary that the employer actually direct and control the employee, it is enough if the employer has the right to do so.

According to the legislative history, the Congress created the family employment exception to make it unnecessary to determine if an actual employer-employee

relationship existed between family members [H.R. Rep. No. 86-1799, at 18 (1960)]. Originally, the exception applied to all work one family member performed for another. However, in 1960, the Congress changed the law to provide a FICA exception only for domestic services performed in or around the home, or work not in the course of the employer's trade or business [See Social Security Amendments of 1960, P.L. 86-778, §104(b) (1960)]. As a result, wages paid for services performed in the family member's trade or business are now subject to FICA. This change was made to provide additional social security coverage for work done in the family member's trade or business. However, because of the difficulties in determining the facts of an employment relationship, the Congress kept the FICA exception for services performed around the home for a family member.

Because _____'s letter raises tax policy issues, we have forwarded a copy of it to the Office of Benefits Tax Counsel at the Department of Treasury.

I hope this information is helpful. Please contact _____ of my staff at _____ if we can further assist you.

Sincerely,

/s/ Nancy J. Marks/CEL

NANCY J. MARKS
Division Counsel/Associate Chief Counsel
(Tax Exempt & Government Entities)