



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

OFFICE OF THE CHIEF COUNSEL

May 4, 2011

Number: **2011-0044**
Release Date: 6/24/2011

CONEX-115436-11

UIL: 3121.02-07

The Honorable Judy Biggert
U.S. House of Representatives
2113 Rayburn House Office Building
Washington, DC 20515

Attention:

Dear Ms. Biggert :

I am responding to your inquiry of April 1, 2011, on behalf of your constituent. Your constituent asked about the interaction of section 457 plans and the Windfall Elimination and Government Pension Offset provisions for social security benefit payments.

The Social Security Act determines whether or not an employee receives social security coverage and the amount of an employee's social security benefits. The Social Security Administration (SSA) determines whether the Windfall Elimination and Government Pension Offset provisions apply to reduce the amount of an employee's social security benefits. Only the SSA can answer questions on the application of the Windfall Elimination and Government Pension offset provisions. The IRS has jurisdiction over the Federal Insurance Contributions Act (FICA), which provides for the imposition and collection of taxes to fund social security benefits. The IRS and the SSA work together to interpret the statutes. 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). Employers compute these taxes as a percentage of wages they pay to an employee [sections 3101, 3111, 3121 of the Internal Revenue Code (the Code)]. Wages paid to employees for services in the employ of a state or of any political subdivision or wholly owned instrumentality of a state are exempt from the OASDI portion of FICA only if the employees are members 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 SSA to voluntarily extend social security coverage to the employee (commonly referred to as a "218 Agreement") [section 3121(b)(7)(F) of the Code].

A retirement system is any pension, annuity, retirement or similar fund or system within the meaning of section 218 of the Social Security Act that a state, political subdivision, or instrumentality maintain to provide retirement benefits to its employees who are participants [section 31.3121(b)(7)-2(e) of the Treasury Regulations]. The regulations further state that a plan described in section 457(b) or 457(f) of the Code may qualify as a retirement system for purposes of section 3121(b)(7)(F) if the plan provides a retirement benefit to the employee that is comparable to the benefit provided under the old-age portion of the OASDI program. A section 457 defined contribution plan provides benefits comparable to those provided under the OASDI program if the allocation to the employee's account for a period is at least 7.5 percent of the employee's compensation during the period [section 31.3121(b)(7)-2(e)(2)(iii) of the Treasury Regulations].

I am forwarding your letter to SSA to address your question on the Windfall Elimination and Government Pension offset provisions.

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

Sincerely,

Lynne Camillo
Branch Chief, Employment Tax Branch 2
(Exempt Organizations/ Employment Tax/
Government Entities)
(Tax Exempt and Government Entities)

CC: