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**From:** [REDACTED]

**Sent:** Friday, May 17, 2019 4:45:45 PM

**To:** [REDACTED]

**Cc:**

**Bcc:**

**Subject:** Tribal Social Security Fairness Act question

Greetings

You have asked whether an Indian tribe's decision to enter into a 218A agreement and elect social security coverage for its tribal council members, or not enter such an agreement, affects the classification of those workers for other purposes such as income tax and retirement plan purposes. I apologize for the delay in responding to your question.

Section 3121(a) of the Federal Insurance Contributions Act (FICA) provides that the term "wages" means all remuneration for employment. Section 3401 of the Internal Revenue Code (the Code), pertaining to income tax withholding, provides a definition of "wages" similar to that for FICA purposes. Section 3121(b) of the FICA provides that the term "employment" means any service of whatever nature performed by an employee, unless otherwise excepted. Section 3121(d)(2) defines "employee" as including any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. Section 3121(d)(4) further defines "employee" as including any individual who performs services that are included under an agreement entered into pursuant to section 218 of the Social Security Act.

Rev. Rul. 59-354 concludes that the services performed by Indian tribal council members do not constitute "employment", and that the remuneration paid therefore does not constitute "wages" for FICA or income tax withholding purposes. The revenue ruling does not address whether Indian tribal council members are employees under the usual common law rules; indeed, the assumption is that they are common law employees because, in the absence of employee status, there would be no need for guidance clarifying that their services are excepted from employment and their remuneration does not constitute wages for FICA and income tax withholding purposes. Moreover, the Service has concluded in informal advice that Indian tribal

council members are common law employees for employment tax purposes. See e.g., CCA199906001, 1999 WL 65244; See also CCA 201119032, 2011 WL 1824503 (“It has been the Service’s position that a taxpayer in his capacity as an elected tribal council member is a common law employee for Federal employment tax purposes.”). To the extent other sections of the Code utilize the same definition of common law employee, tribal council members will be common law employees for purposes of those Code sections.

The Tribal Social Security Fairness Act, Pub. L. 115-243 (the Act), was enacted on July 24, 2018. The Act added section 218A to the Social Security Act (42 U.S.C. 418a). Section 218A provides that “[t]he Commissioner of Social Security shall, at the request of any Indian tribe, enter into an agreement with such Indian tribe for the purpose of extending the insurance system established by this title to services performed by individuals as members of such Indian tribe’s tribal council.” The Act also amended section 3121(b) of the Code, adding a new subparagraph (22) stating that the term employment does not include “service performed by members of Indian tribal councils as tribal council members in the employ of an Indian tribal government, except that this paragraph shall not apply in the case of service included under an agreement under section 218A of the Social Security Act.” Additionally, the Act amended section 3121(d)(4) to include within the definition of “employee” any individual who performs services that are included under an agreement entered into pursuant to section 218A of the Social Security Act. Notably, section 2(c) of the Act provides that “[n]othing in this Act or the amendments made by this Act shall be construed to affect application of any Federal income tax withholding requirements under the Internal Revenue Code of 1986.”

We conclude that the Act does not affect an Indian tribal council member’s status as an employee for any tax purpose other than FICA taxes. The Act adds section 3121(b)(22) to provide that service performed by members of Indian tribal councils in the employ of an Indian tribal government is excepted from employment for FICA purposes unless the service is included under a section 218A agreement. Although services performed by tribal council members not covered under a section 218A agreement are excepted from employment for FICA purposes, the tribal council members are presumably common law employees for other purposes, including for retirement plan purposes. Similarly, Indian tribal council members who are covered under a section 218A agreement are considered to be employees for FICA purposes, but their services may be excepted from employment for other purposes. Indeed, Rev. Rul. 59-354 continues as good authority for the proposition that services performed by such Indian tribal council members are excepted from employment and remuneration for such services is excepted from wages for income tax withholding purposes, irrespective of whether or not an Indian tribe has entered into a 218A agreement.

Please do not hesitate to let me know if I can be of further assistance in this matter.