DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF THE CHIEF COUNSEL

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The Honorable Dianne Feinstein
United States Senate
Washington, DC 20510

The Honorable Jackie Speier
Member, U.S. House of Representatives
Washington, DC 20515

Dear Senator Feinstein and Representative Speier:

I am responding to your inquiry dated November 28, 2016, to the Social Security Administration (SSA). You asked about decision to stop withholding certain employment taxes and no longer contribute the employer portions of these taxes. The SSA forwarded your inquiry to me to respond.

You asked several questions relating to the Federal Insurance Contributions Act (FICA), specifically—what is the tax liability of a non-American employer that has U.S. citizen employees working as crew members on an aircraft that is not an American aircraft? We appreciate your concerns about an employer's employment tax obligations and the importance of the Social Security system and unemployment and disability programs. We cannot comment on specific taxpayer situations, but we can provide general information about FICA taxes that relate to the Social Security system.

Under section 3121(b)(4) of the Internal Revenue Code (Code), if a U.S. citizen employee provides services for a non-American employer on or in connection with a non-American aircraft while outside the United States, the employee's services on or in connection with the aircraft (including those services performed within the United States) are not considered employment for FICA purposes and the remuneration paid for those services is not subject to FICA tax.

However, if an individual provides services exclusively within the United States, the exception under section 3121(b)(4) of the Code does not apply. Therefore, if an individual performs services exclusively within the United States, even in connection with a non-American aircraft for a non-American employer, those services are not excepted from the FICA definition of employment under section 3121(b)(4). Payment for those services is subject to FICA taxes unless another exception applies. For a complete list of exceptions to the term employment for FICA tax purposes, see sections 3121(b)(1) to (b)(21) of the Code.

Generally, FICA taxes are imposed upon wages, which is defined in section 3121(a) of the Code as "all remuneration for employment." As relevant here, section 3121(b) defines the term "employment" for purposes of FICA as any service performed:

> (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or
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> (B) outside the United States by a citizen or resident of the United States as an employee for an American employer.

Section 3121(b)(4) of the Code provides an exception to the FICA definition of employment. Under section 3121(b)(4), employment does not include service performed by an individual on or in connection with a vessel not an American vessel, or on or in connection with an aircraft not an American aircraft, if

> (A) the individual is employed on and in connection with such vessel or aircraft, when outside the United States and
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> (B)(i) such individual is not a citizen of the United States or (ii) the employer is not an American employer.

Section 3121(f) of the Code defines an "American aircraft" as an aircraft registered under the laws of the United States.

Section 3121(h) of the Code defines "American employer" as an employer which is:

1. The United States or any instrumentality thereof
2. An individual who is a resident of the United States,
3. A partnership, if two-thirds or more of the partners are

residents of the United States,
4. A trust, if all the trustees are residents of the United States, or
5. A corporation organized under the laws of the United States or of any state.

In addition to requesting clarification on the application of section 3121(b)(4) of the Code, you asked about an employer's obligation to notify prospective employees that they will not earn Social Security credit and whether a non-American employer must establish a substitute for Social Security. You also asked if foreign companies other than airlines are subject to section 3121(b)(4).

No provision of federal tax law requires an employer to notify prospective employees that they will not be earning Social Security credit if the employees' services are covered by the exception in section 3121(b)(4) of the Code. Nor does federal tax law require a non-American company to establish a substitute for the U.S. Social Security retirement system.

The FICA tax exception of section 3121(b)(4) applies only to services provided in connection with a non-American aircraft or a non-American vessel. As a result, individuals who provide services outside the United States for non-American companies on non-American ships, helicopters, airplanes, etc., would all fall within the exception. Services unrelated to service on vessels and aircraft, however, would not fall within the exception of section 3121(b)(4). However, as noted above, the underlying definition of employment relies on the status of the employer for services performed outside the United States.

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

Sincerely,

Victoria A. Judson
Associate Chief Counsel
Tax Exempt and Government Entities