WTA-N-104460-98
Br6:FJZech

APR 2 1998

National Director, Specialty Taxes CP:EX:ST
Attn: Thomas R. Burger

Assistant Chief Counsel CC:EBEO
(Employee Benefits and Exempt Organizations)

[redacted]

This replies to your memorandum of January 30, 1998, in which you raise student FICA, life insurance, and health insurance issues. Your remaining issues will be the subject of a separate reply.

Health and Life Insurance

According to the facts presented, the governing board of the school district is elected by the community. The board members are not paid a salary; however, the school district pays 100% of their dental, vision, and life insurance premiums and $[redacted] per month toward their medical insurance premium. Your question is whether the amounts paid by the district for the premiums is considered income to the board members.

Section 106 of the Internal Revenue Code provides that gross income of an employee does not include employer-provided coverage under an accident or health plan. Section 1.106-1 of the Income Tax Regulations provides that the gross income of an employee does not include contributions which his employer makes to an accident or health plan for compensation (through insurance or otherwise) to the employee for personal injuries or sickness incurred by him, his spouse, or his dependents, as defined in section 152. The employer may contribute to an accident or health plan either by paying the premium (or a portion of the premium) on a policy of accident or health insurance covering one or more of his employees, or contributing to a separate trust or fund which provides accident or health benefits.

In Rev. Rul. 56-400, 1956-2 CB 116, the Service stated that section 106 applies to individuals who are employees under the common law. Section 3121(d)-1(c) of the Employment Tax Regulations provides that generally, the relationship of common law employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to

what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.

Accordingly, if the board members in the instant case are common law employees, the premiums paid for dental, vision and medical insurance are excludable from their gross incomes under section 106 of the Code. If they are not common law employees, the amounts paid for these premiums are includible in income.

Section 79(a) of the Code provides that the cost of group-term life insurance on the life of an employee under a policy carried by his employer is only includible in the employee's gross income to the extent it exceeds the sum of (1) the cost of $50,000 of such insurance, and (2) the amount (if any) paid by the employee toward the purchase of such insurance.

Section 1.79-(0) of the Income Tax Regulations provides that "employee" is a person who performs services if his or her relationship to the person for whom services are performed is the legal relationship of employer and employee described in section 31.3401(c)-1. For income tax withholding purposes, section 3401(c)(1) of the Code provides that an employee per se includes an officer or elected official of a state, or any political subdivision thereof, or any agency or instrumentality of the foregoing.

Accordingly, pursuant to section 1.79-0 of the regulations, the term "employee" for section 79 purposes has the same meaning as the term "employee" for purposes of income tax withholding under section 3401. Because the board members under consideration are elected officials, they are per se employees for purposes of sections 3401. Thus, the cost of employer provided group term life insurance is excludable to the extent provided under section 79 regardless of whether the board members are common law employees. This result is different from the payment of accident and health premiums because neither section 106 nor its regulations cross reference the section 3401 definition of "employee."

Student FICA

You also requested assistance concerning the application of section 3121(b)(10) of the Code. Specifically, you ask (1) whether students who work at the school where they are currently enrolled are automatically exempt from FICA, (2) whether section 31.3121(b)(10) requires that the students not be working at the school for their livelihood and, (3) whether wages earned by students who work as coaching assistants in the summer are subject to FICA.

Section 3121(a) of the Code defines "wages" for purposes of FICA taxes as all remuneration for employment, with certain exceptions. Section 3121(b) of the Code defines "employment" as services performed by an employee for an employer, with certain exceptions.

Section 3121(b)(10) of the Code excepts from the definition of employment services performed in the employ of a school, college, or university (whether or not that organization is exempt from income tax), or an affiliated organization described in section 509(a)(3) of the Code, if the service is performed by a student who is enrolled and regularly attending classes at that school, college or university. Remuneration for services excluded from the definition of employment under section 3121(b))(10) of the Code is not subject to FICA tax.

Section 31.3121(b)(10)-2 of the Employment Tax Regulations provides that whether an employee has the status of a student is determined on the basis of the employee's relationship with the school, college, or university for which the services are being performed. An employee who performs services in the employ of a school, college or university as an incident to and for the purpose of pursuing a course of study at the school, college, or university has the status of a student in the performance of those services. Employment that is not incident to and for the purpose of pursuing a course of study does not qualify for the exception.

Section 218 of the Social Security Act (the Act), 42 U.S.C. section 418, allows states to provide Social Security coverage for services performed by students for the public school the student is attending under agreements established with the Social Security Administration. If a state has exercised its option under section 218 of the Act to provide for coverage of student services, those services will not qualify for the student FICA exception.

Accordingly, exemption from FICA for students working for the school where they are currently enrolled is not automatic, but depends upon whether the services are performed incident to and for the purpose of pursuing a course of study and whether the state has entered into a section 218 agreement concerning such services.

The Service recently published Revenue Procedure 98-16, 1998-5 IRB 19, (copy enclosed), which sets forth an elective safe harbor for applying the student FICA exception by institutions of higher education as defined in Department of Education Regulations at 34 C.F.R. section 600.4 (1997). Section 4.02 of Rev. Proc 98-16 provides that whether or not services for other institutions, such as secondary schools, qualify for the student

FICA exception is determined based on the facts and circumstances of each case.

Pursuant to the regulations and based upon the facts and circumstances of each case, employment that is not incident to and for the purpose of pursuing a course of study does not qualify for the student FICA exception. Whether students are working for the school for the purpose of earning their livelihood is one factor to take into consideration in making this determination. Under the elective provisions of Rev. Proc. 98-16 an Institution of higher education may not treat services performed by "career employees" as eligible for the student FICA exception. Whether or not an individual is a career employee for purposes of the revenue procedure depends upon whether the student is classified by the school as a career employee, or is eligible to participate in certain retirement or reduced tuition arrangements.

Section 3121(b)(10)(B) of the Code provides that the student FICA exception applies to services performed by a student who is enrolled and is regularly attending classes. Rev. Rul. 72-142, 1972-1 C.B. 317, holds that services performed for a school by a student during the summer vacation, when he is not enrolled or regularly attending classes, are not excepted from "employment" if he earns $50 or more in the calendar quarters of the summer vacation.

Under the elective provisions of Rev. Proc. 98-16 Institutions of higher education may not apply the student FICA exception to services performed by an individual who is not enrolled in classes during school breaks of more than five weeks (including summer breaks of more than five weeks), other than services performed during a payroll period of a month or less that falls wholly or partially within the academic term. Accordingly, wages earned by students who work for an institution of higher education as [redacted] during summer breaks of more than 5 weeks are not subject to the student FICA exception.

If you have any questions or need further assistance, please contact Felix Zech of my staff at 622-6080.

MARY E. OPPENHEIMER

Enclosure:
Rev. Proc. 98-16