Federal-State Reference Guide

Providing guidelines for social security and Medicare coverage and tax withholding requirements for state, local and Indian tribal government employees and public employers.
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Introduction

The *Federal-State Reference Guide* provides state and local government employers a comprehensive reference source on social security and Medicare coverage and Federal tax withholding issues. The *Guide* was first published by the Internal Revenue Service (IRS) in July 1995 with special assistance from the State of Colorado, and is a cooperative effort of the Social Security Administration, the IRS, and the National Conference of State Social Security Administrators (NCSSSA). Topics addressed in this publication include determination of worker status, public retirement systems (FICA replacement plans), social security and Medicare coverage and benefits, Section 218 Agreements, employment tax laws, and other tax issues. The tax information is generally applicable to Federal agencies, with some exceptions; for example, Section 218 Agreement information and section 530 relief are not applicable to Federal agencies.

Since 2002, the IRS office of Federal, State and Local Governments (FSLG) has produced the *Federal-State Reference Guide* annually, primarily as a web-based document, by FSLG. FSLG was created as part of the reorganization of the IRS, to be an office devoted exclusively to the Federal tax needs of governmental entities. The most recent version of Publication 963 can be downloaded from the FSLG website. This website also contains information about other related tax topics, upcoming events, the FSLG Newsletter, and the IRS. All IRS forms and publications referred to in this publication can be ordered without charge from the IRS at (800) 829-3676, or can be downloaded from the IRS website at www.irs.gov. Governmental taxpayers may get assistance with general or account-related questions by calling Customer Account Services at (877) 829-5500, Monday through Friday.

This publication also includes information to assist Indian tribal governments. Federal tax law establishes the role of Indian tribal governments as employers. Tribal governments are required to follow substantially the same procedures as other employers; however, tribes are not eligible for Section 218 Agreements, and other special statutory provisions apply to these entities. If you have questions about Indian Tribal governments, please visit the *office of Indian Tribal Governments (ITG) website* or telephone your local IRS ITG office. This website also contains Publication 4268, Employment Tax Desk Guide, containing further information that specifically addresses employment tax issues for tribal governments.

Frequently asked questions appear at the end of each chapter. After each answer, the primary contact for on the topic is indicated - “IRS,” “SSA,” or “STATE”.

The *Federal-State Reference Guide* is for informational and reference purposes only. Under no circumstances should the content be used or cited as authority for assuming, or attempting to sustain, a technical position with respect to employment tax, social security benefits, or other legal issues. The Internal Revenue Code (IRC), Social Security Act (Act) and related regulations, rulings and case law are the only valid citations of authority for technical matters.
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Chapter 1

Social Security and Government Employers

Federal tax requirements generally apply to public employers in the same way they do to private employers. However, there are some differences arising from the unique history of laws governing social security and Medicare coverage for state and local government employees. Special provisions apply to the application of these taxes as well as certain withholding requirements.

Historical Overview

Social security taxes were first collected in 1937. The funding mechanism for the social security program was officially established in the Internal Revenue Code as the Federal Insurance Contributions Act (FICA). Under the original Social Security Act of 1935, state and local government employees were excluded from social security coverage because of unresolved legal questions regarding the Federal government’s authority to impose taxes on state and local governments and their employees.

Beginning in 1951, states were allowed to enter into voluntary agreements with the Federal government to provide social security coverage to public employees. These arrangements are called “Section 218 Agreements” because they are authorized by Section 218 of the Social Security Act. Originally, government entities filed with the SSA, but since 1987, the IRS has been responsible for collecting these taxes from governmental employers. All 50 states, Puerto Rico, the Virgin Islands, and approximately 60 interstate instrumentalities have Section 218 Agreements with SSA, providing varying degrees of coverage for employees in the state.

Social security coverage of government employees varies greatly from state to state. In 26 states, at least 90% of state and local government employees work in positions covered by social security. By contrast, in California, Colorado, Louisiana, Nevada, and Texas, less than half of state and local government employees are covered. As of 2008, 27.5%, of the state and local government workforce, or 6.6 million, state and local government employees, were not covered by social security.

The largest proportion of uncovered government employees work at the local level. The majority of uncovered local government public employees are police officers, firefighters and teachers. Approximately one-fourth of the nation’s public employees are not covered for social security.

The following chart includes the major historical developments since state and local employees first became eligible for social security coverage in 1951.
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## Key Dates

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
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<tbody>
<tr>
<td>January 1, 1983</td>
<td>Beginning this date, states could voluntarily elect social security coverage for public employees not covered under a public retirement system (FICA replacement plan) by entering into a Section 218 Agreement with SSA. Prior to this date, there was no mandatory social security coverage.</td>
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<tr>
<td>January 1, 1955</td>
<td>Beginning this date, states could extend social security coverage to employees (other than police officers and firefighters) covered under a public retirement system.</td>
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<tr>
<td>July 1, 1966</td>
<td>Beginning this date, employees covered for social security under a Section 218 Agreement are automatically covered for Medicare.</td>
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<tr>
<td>April 20, 1983</td>
<td>Beginning this date, coverage under a Section 218 Agreement cannot be terminated unless the governmental entity is legally dissolved.</td>
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<tr>
<td>April 1, 1986</td>
<td>State and local government employees hired on or after this date, not already covered, are mandatorily covered for Medicare, unless the position is specifically excluded by law. For state and local government employees hired before April 1, 1986, Medicare coverage may be elected under a Section 218 Agreement.</td>
</tr>
<tr>
<td>January 1, 1987</td>
<td>Beginning this date, State Social Security Administrators were no longer responsible for collecting social security contributions from public employers or for verifying and depositing the taxes owed by public employers. After 1986, public employers pay Federal Insurance Contributions Act (FICA) taxes directly to the Internal Revenue Service (IRS) in the same manner as do private employers.</td>
</tr>
<tr>
<td>July 2, 1991</td>
<td>Beginning this date, state and local government employees became subject to mandatory social security and Medicare coverage, unless they are (1) members of a public retirement system, or (2) covered under a Section 218 Agreement.</td>
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<tr>
<td>August 15, 1994</td>
<td>The Social Security Independence and Program Improvements Act of 1994 established the SSA as an independent agency, effective March 31, 1995. This Act also increased the FICA exclusion amount for election workers from $100 to any amount less than the threshold amount mandated by law in a calendar year. (To verify the current year amount, see the <a href="https://www.ssa.gov">SSA website</a>.) States were authorized to amend their Section 218 Agreements to increase the FICA exclusion amount for election workers to the statutorily mandated threshold. The Act also amended Section 218 of the Act to allow all states the option to extend social security and Medicare coverage to police officers and firefighters who participate in a public retirement system. (Under previous law, only 23 states were authorized to do so.)</td>
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<tr>
<td>October 21, 1998</td>
<td>Public Law 105-277 provided a 3-month period for states to modify their Section 218 Agreements to exclude from coverage services performed by students. This provision was effective July 1, 2000, for states that exercised the option to take this exclusion.</td>
</tr>
<tr>
<td>March 2, 2004</td>
<td>Public Law 108-203 enacted, requiring public employers to furnish Form SSA-1945 to public employees hired after December 31, 2004, informing them that they are earning retirement benefits not covered by social security; also closed the Government Pension Offset (GPO) loophole, effective April 1, 2004.</td>
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Considerations for Social Security Coverage (Section 218 and Mandatory)

Social security coverage can vary widely within a state or even a local area. Do not make an assumption about Section 218 coverage for an entity and whether it is in compliance with all applicable laws merely because of the status of a similar entity, either in the same or a different state. For Section 218 coverage questions, contact your State Social Security Administrator (see www.ncsssa.org). For mandatory (non-section 218) coverage questions, contact an IRS FSLG Specialist (see www.irs.gov/govts for a directory). Related information can also be found at the SSA State and Local Government Employers website at www.ssa.gov/slge.

In general, to determine the correct coverage for a group of employees, a government employer must address the following questions:

If employees are covered by a Section 218 Agreement:

1. When did the state enter into a Section 218 Agreement to elect social security coverage for a particular political subdivision?
2. What optional exclusions and what coverage groups were listed in that Agreement or later modification?
3. Does the political subdivision have more than one modification?
4. Did the state or political subdivision terminate voluntary social security coverage, in its entirety or with respect to any coverage group(s), before April 20, 1983?
5. Has the state elected to provide Medicare-only for a particular entity?

If employees are not covered by a Section 218 Agreement:

1. Does the state or political subdivision have any employees who were hired prior to April 1, 1986, and who are exempt from mandatory Medicare?
2. Does the state or political subdivision have a public retirement system?* If so, employees who are qualified participants in the public retirement system are not subject to mandatory social security coverage that began July 2, 1991.

The following chapters discuss the types of employment and the rules for taxation in greater detail.

* Throughout this publication, the term “public retirement system” (or “FICA replacement plan”) refers to a retirement system administered by a state, political subdivision, or instrumentality thereof that meets the requirements of section 3121(b)(7)(F) of the IRC. See Revenue Procedure 91-40 in the Appendix. For section 218 purposes, it is irrelevant whether the retirement system meets the minimum benefit standards for a qualified plan under the Employee Retirement Income Security Act (ERISA). See Chapter 6.
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Steps To Determine Social Security and Medicare Coverage of State and Local Government Employees

The determination of social security coverage is different from the determination of Medicare coverage. Social security coverage under Section 218 is based on the position an employee occupies. Mandatory social security coverage is based on the situation of the individual employee.

If the position is covered under a Section 218 Agreement, any employee occupying that position is covered. This is the first coverage consideration for an employer. If, however, the position is not covered under an Agreement, then the employer must determine whether mandatory FICA coverage applies. To do this, the employer must first determine whether the employee is deemed to be a member of a public retirement system (or “FICA replacement plan”). This is a critical consideration in determining whether and how Section 218 or mandatory FICA coverage applies to an employee.

The following steps outline how a public employer should determine whether social security and Medicare coverage or Medicare-only coverage applies to an employee.

**Step 1:** Determine whether the employee’s position is covered by a Section 218 Agreement (Chapter 5, Social Security and Medicare Coverage.) If the answer is “yes,” the employee is covered for social security and Medicare under the Agreement, unless an exclusion applies for that position. If the answer is “no,” proceed to the next step.

**Step 2:** If the employee’s position is not covered under a Section 218 Agreement, determine whether the employee is a member of a public retirement system (Chapter 6, Social Security and Public Retirement Systems.) If “no,” the employee is subject to mandatory social security and Medicare, unless an exclusion applies. If “yes” (the employee is a member of a public retirement system), the employee is exempt from mandatory social security. Medicare is mandatory for public employees hired or rehired after March 31, 1986, regardless of membership in a public retirement system. Proceed to the next step to determine Medicare coverage for any employee hired prior to April 1, 1986.

**Step 3:** Determine whether the retirement system has a Section 218 Agreement that provides Medicare-only coverage for employees hired prior to April 1, 1986. If “yes,” the employee is covered for Medicare only. If “no,” proceed to the next step.

**Step 4:** Determine whether the Medicare continuing employment exception applies to the employee (Chapter 5). If “yes,” the employee is exempt from mandatory Medicare. If “no,” the employee is subject to mandatory Medicare, unless an exclusion applies.

The flowchart on the next page illustrates the above steps.
as defined in
SOCIAL SECURITY AND MEDICARE COVERAGE OF STATE AND LOCAL GOVERNMENT EMPLOYEES

Is the position or service covered for Social Security and Medicare under a Section 218 Agreement?

Yes

Withhold Social Security and Medicare, unless exclusion applies 1/

No

Is employee a qualified member of a public retirement system?

Yes

Is employee covered by a Section 218 Agreement that provides Medicare-only coverage for employees hired prior to April 1, 1986?

Yes

Withhold Medicare for those employees, unless exclusion applies 1/

No

No

Withhold Mandatory Social Security and Medicare, unless exclusion applies 2/

Does Medicare Continuing Employment Exception Apply? 3/

Yes

No Social Security or Medicare Withheld

No

No

No Social Security or Medicare Withheld

NOTE: This chart is meant as a guide only and is not a substitute for discussing complex Section 218 coverage situations with your State Social Security Administrator or FICA taxation issues with your IRS FSLG Specialist.

1/ Section 218 Mandatory and Optional Exclusions (see Chapter 5)
2/ Mandatory Exclusions from FICA (see Chapter 5)
3/ Medicare Continuing Employment Exception (see Chapter 5)
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IRS, SSA, State Social Security Administrators and Public Employer Social Security and Medicare Tax Responsibilities

The Social Security Administration is responsible for administering the Social Security Act and interpreting its provisions, including interpretation of Section 218 Agreements. SSA also administers benefits and maintains individual earnings records. See Chapter 7, Social Security Administration.

The Internal Revenue Service is responsible for administering the Internal Revenue Code, advising employers of their responsibilities, collecting taxes, and working with SSA and State Social Security Administrators on social security coverage and related tax issues. See Chapter 8, Internal Revenue Service.

The State Social Security Administrator is the designated official legally appointed to act for the state in negotiations with the Social Security Administration. This official acts for the state with respect to the initial Section 218 Agreement and modifications, the performance of the state’s responsibilities under the Agreement, and in all state dealings concerning the administration of the Agreement. Each state’s Section 218 Agreement (“Agreement”), and Social Security Regulation 404.1204, provide a legal obligation for each state to designate such an official. In many states the actual day-to-day responsibilities are delegated to the staff of the designated state official. See Chapter 9, State Social Security Administrators.

Where To Direct Questions

The IRS, SSA, and State Social Security Administrator have different responsibilities and areas of authority in dealing with issues related to social security coverage, taxation, and reporting. The following indicates the primary point of contact for many common questions.

Topics for the Internal Revenue Service:

- Federal income tax
- Worker classification (employee or independent contractor) for employees not covered by a Section 218 Agreement
- Collection of social security or Medicare tax
- Completion of Form W-2
- Employment tax returns (941, 943, 944)
- Definition of public retirement system (FICA replacement plan)
- Is an employee covered under mandatory social security?
- Are certain payments subject to social security or Medicare tax?
- Do I need a new employer identification number?

Topics for the Social Security Administration:

- Social security benefits
- Section 218 coverage determinations
Insert highlighted text from the original Pub. 963, Chapter 1 (see separate PDF document and summary of NCSSSA comments and suggested edits.)
• Individual earnings records and quarters of coverage
• Verification of Section 218 terms
• Form W-2 records
• Problems with social security number

Topics for the State Social Security Administrator:

• Existence or terms of a Section 218 Agreement
• Modifications to the Section 218 Agreement
• Treatment of a specific position under a Section 218 Agreement
• Other issues involving interpretation of state law

Frequently Asked Questions

1) **What is a Section 218 Agreement?** A Section 218 Agreement is a written voluntary agreement between one of the 50 states (or Puerto Rico, the Virgin Islands, or an interstate instrumentality) and the SSA pursuant to the provisions of Section 218 of the Social Security Act. This Agreement provides social security and Medicare, or Medicare-only, coverage for designated groups of state and local government employees. The term refers to the original agreement and all subsequent modifications. These agreements can cover services of employees who are covered by a public retirement system as well as those who are not. To determine whether your entity is covered under a Section 218 Agreement, or can execute one, contact your State Social Security Administrator. See list of State Administrators on-line at the NCSSSA website. [SSA/STATE]

2) **How may a Section 218 Agreement affect employees covered by a public retirement system?** An Agreement may provide social security and Medicare coverage for employees already covered by a public retirement system. This may include:

   a. Employees covered by a retirement system who elect coverage under a referendum. The social security and Medicare coverage applies in addition to retirement system coverage.

   b. Employees performing services that are excluded from mandatory social security coverage provisions, but are only optionally excluded under Section 218 Agreements, such as student services, and services of election workers who earn less than the threshold amount.

   c. Election workers, by establishing a dollar threshold for social security coverage lower than that set by the statutory requirement.

   d. Employees hired before April 1, 1986, who meet the continuing employment Medicare exception. [STATE]
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3) **Why might a Section 218 Agreement be modified?** Modifications to Section 218 Agreements are necessary to include additional coverage groups, to cover additional services in a group already covered (e.g., services previously optionally excluded), to cover ineligibles, to cover employees changing to the “Yes” group in a divided retirement system, to cover previously terminated groups, or to identify political subdivisions joining a covered retirement system. See Chapter 5. [STATE]

4) **I was told by the State Social Security Administrator that my town is covered for social security under the state’s Section 218 Agreement and cannot be terminated. Is this true?** Yes. By law, after April 20, 1983, coverage obtained under a Section 218 Agreement, cannot be terminated. Beginning July 2, 1991, any state and local government employees not covered for social security under a Section 218 Agreement who are not qualified participants in a public retirement system (FICA replacement plan), are covered under **mandatory** social security. [STATE/SSA]

5) **Are Indian tribal government employers eligible to enter into Section 218 Agreements?** No, Indian tribal governments are not considered states or subdivisions of states for this purpose. See IRC section 7871. [IRS]

6) **I have a question regarding social security and Medicare coverage requirements for employees of my city. Whom do I contact?** The State Social Security Administrator should always be an entity’s first contact on any questions regarding coverage under social security or Medicare. If additional assistance on coverage is needed, the SSA should be consulted. Questions about whether specific services are subject to mandatory social security and Medicare taxes should be directed to the IRS. [STATE]

7) **What is the responsibility of State Social Security Administrators with respect to non-Section 218 entities?** Under Section 218 of the Act, the primary legal responsibility State Social Security Administrators have is for Section 218 entities. However, responsibilities for non-Section 218 entities vary from state to state. Some State Administrators may not interact with non-Section 218 entities, while in other states the State Administrator may perform monitoring, quasi-regulatory and enforcement functions for them. If a non-Section 218 entity needs information regarding coverage under an agreement, the State Social Security Administrator should be contacted. [STATE]

8) **If an entity has a Section 218 Agreement in effect, and joins the state’s public employee retirement system, does Section 218 coverage continue?** After April 20, 1983, a Section 218 Agreement cannot be terminated for any reason as long as that entity exists. The addition of a retirement system does not alter the coverage under the Section 218 Agreement. [SSA]
Chapter 2

Government Entities and Federal Taxes

The Bureau of the Census estimated that there were 89,004 units of local government in the United States in 2012. These units of government employ more than 20% of the American workforce.

This chapter discusses the legal basis for different types of government entities and the specific tax questions that arise in connection with them. Many tax laws apply differently to government entities than to other organizations and individuals.

The income of certain government entities, including states, political subdivisions of states, or integral parts of states or political subdivisions, is generally not taxable unless specific statutes apply. The income of other government entities, such as instrumentalities, might be excludable from gross income under IRC §115 if that income is derived from the exercise of an essential governmental function and accrues to a state or political subdivision of a state.

Certain government entities, such as colleges or universities, that are agencies or instrumentalities of a state or political subdivision of a state, are subject to the tax on unrelated business income under IRC §511. For more information, see Publication 598, Tax on Unrelated Business Income of Exempt Organizations.

State Government

States are recognized as entities by the U.S. Constitution. However, different definitions of a “state” apply for different legal purposes. Federal employment taxes generally apply to all 50 states, the District of Columbia, and all U.S. Territories. For purposes of a Section 218 Agreement, a “state” may refer to any of the 50 states, Puerto Rico, the Virgin Islands, and interstate instrumentalities. It does not include the District of Columbia, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or Indian tribal governments.

Authority

The states have primary responsibility for many aspects of government. The 10th Amendment to the U.S. Constitution reserves to the states or to the people all powers not delegated to the Federal government nor prohibited by the Constitution to the states. Some services for which the state has primary responsibility include:

- Protection of lives and property by maintenance of a police force
- Regulation and improvement of transportation and roads within the state
- Regulation of business within the state
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- Education and maintenance of schools
- Condemnation of property through eminent domain

In many cases, the Federal and state governments share responsibility, with the Federal government providing most of the funding and the state distributing the services. Some common services involving shared responsibility include:

- Health care
- Public assistance for persons in need
- Protection of natural resources
- Improvement in living and working conditions

**Local Government and Subdivisions**

Local governments are generally political subdivisions of states and differ from state and Federal governments in that their authority is not based directly on a constitution. Each state constitution governs the procedure the establishment of local governments. In most cases, the state legislature must approve the creation or incorporation of a local government. The local government then receives a charter defining its organization, authority and responsibilities, including the means for electing governing officials.

Local government units bear a variety of names, such as city, county, township, village, parish, borough or district. The legal significance of these terms may vary from state to state.

**Authority**

The authority of local governments varies greatly among the states and individual jurisdictions. Generally, a local government has the authority to:

- Impose taxes
- Try people accused of breaking local laws or ordinances
- Administer local programs within its boundaries

In addition to funding provided by local taxes, fees, and other sources, local governments receive financial aid from state and Federal governments in providing these services according to need. Some of the services that local governments take primary responsibility for providing include:

- Conducting and coordinating elections
- Public safety
• Building and repairing local roads and streets
• Providing police and fire protection
• Collecting garbage and recycling
• Ensuring the safety of drinking water
• Maintaining courts, courthouses and jails
• Collecting state and local government taxes
• Keeping official records, such as for marriage, birth and death

**Instrumentalities**

An instrumentality is an organization separate from, but affiliated with a state or local government. It may or may not be created by or pursuant to state statute, but it is operated for public purposes. Generally, an instrumentality performs governmental functions, but does not have the full powers of a government such as police authority, taxation, and eminent domain (sovereign powers). Questions concerning the status of an instrumentality, for social security and Medicare purposes, should be directed to the IRS. Questions concerning a specific Section 218 Agreement should be addressed to the State Administrator or the SSA (see Chapter 7).

A wholly-owned instrumentality of one or more states or political subdivisions is treated as a state or local government employer for purposes of the mandatory social security and Medicare provisions. See IRC section 3121(b)(7)(F).

**Interstate Instrumentalities**

An interstate instrumentality is an independent legal entity organized by two or more states to carry on governmental functions. Examples include a regional planning authority, transportation system or water district. For purposes of Section 218, an interstate instrumentality is treated as a state.

For an interstate instrumentality to cover its employees with a retirement system, a referendum must be held prior to the execution of a Section 218 Agreement. All interstate instrumentalities are authorized to provide a retirement system either on a divided system basis or a majority vote referendum (see Chapter 5 for referendum procedures). Employees of an interstate instrumentality who are **not** covered for social security under a Section 218 Agreement, but who are qualified participants in a public retirement system, are not covered for social security even if the employer incorrectly continues to withhold and report such taxes.

**Characteristics of Instrumentalities**
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In Revenue Ruling 57-128, the IRS addressed the question of whether an organization is wholly-owned by one or more states or political subdivisions. This revenue ruling established the following factors as relevant to a determination of whether the entity is a government:

- Whether it is used for a governmental purpose and performs a governmental function
- Whether performance of its function is on behalf of one or more states or political subdivisions
- Whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner
- Whether control and supervision of the organizations is vested in public authority or authorities
- Whether express or implied statutory or other authority is necessary for its creation and/or use of the instrumentality, and whether such authority exists
- The degree of financial autonomy and the source of operating expenses

Schools, hospitals and libraries, as well as associations formed for public purposes, such as soil and water conservation districts, may be instrumentalities of government, depending on the facts and circumstances. State sponsorship of an organization, state regulation of its activities, the participation of its employees in a public retirement system, and operation with public funds are among the factors to be considered in determining whether an organization is an instrumentality. If an organization is essentially under private ownership and control, it is not an instrumentality of government. See Revenue Ruling 69-453.

Associations formed for conservation, protection and promotion, although carrying out a public purpose, may not rise to the level of state instrumentalities. The following associations may or may not be state instrumentalities:

- Soil and water conservation districts
- Fire associations that protect forestland
- Associations that promote a state or municipality

To determine the status of an entity, it is essential to review the documents that establish statutory authority. The following cases elaborate on the principles established in IRS Revenue Ruling 57-128.

**Soil and Water Conservation Districts** - Entities whose revenues are principally generated from fees collected from land owners within the district may or may not be instrumentalities of government, depending upon application of the factors listed above, including whether the district is under public or private control.

**Example:** A soil conservation district in Minnesota was established to carry out a state conservation program. The Soil Conservation Service of the U.S.
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Department of Agriculture furnished the district with technical and clerical personnel. The disbursements made by the district were made from fees collected from members (occupiers of the land within the district) for services rendered, from funds allocated by the U.S. Department of Agriculture, and from state appropriations. The soil conservation district was created by statute as a political subdivision of the state and was under the control of a board of supervisors elected or appointed in accordance with state law. The soil conservation district is a political subdivision of the state. [Revenue Ruling 57-120, 1957-1 C.B., 310]

**Example:** A Connecticut soil and water conservation district was formed as a private nonstock corporation by private individuals. The state had authority to assist private individuals in forming conservation districts, but did not have the power to operate them. The private individuals had complete control over the corporate operations, revenue and expenditures. Therefore, the soil and water conservation district is not a wholly-owned instrumentality of the state. [Revenue Ruling 69-453, 1969-2 C.B., 182]

**Fire associations** - Fire associations may or may not be instrumentalities of government, depending on whether they are under public or private control.

**Example:** A fire association was organized pursuant to an Oregon state law that required all forest land in the state to be adequately protected from the dangers of fire. While the fire association was organized as a result of an Oregon law, it was organized and operated for the mutual benefit of its members, and was not an instrumentality of the state. Furthermore, except for the work it performed on a cost basis for the state and Federal government, the association derived most of its support from assessments imposed on its members. [Revenue Ruling 70-483, 1970-2 C.B., 201]

**Example:** Under the laws of the state of Pennsylvania, townships have the authority to purchase fire engines and fire apparatus out of general township funds for use of the township and to appropriate money to fire companies located in the township in order to secure fire protection. These volunteer fire companies are instrumentalities under Pennsylvania state law, and the members of volunteer fire departments are employees of the political subdivision. [Revenue Ruling 70-484, 1970-2, C.B., 202]

**Associations that Promote a State or Municipality** - State sponsorship of promotional activities is not sufficient to raise an association to instrumentality status.

**Example:** A municipal league comprised of qualified officials of member cities or villages, but with no control and supervision vested in a public authority, is not a state instrumentality. The League’s activities consisted of publishing a monthly magazine featuring articles on governmental matters, conducting
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conferences, and sponsoring and participating in municipal law institutes and seminars. The state had no statute for the incorporation of a league of this nature as an instrumentality. [Revenue Ruling 65-26, 1965-1, 444]

**Note:** Some state statutes specifically create certain associations as instrumentalities. A review of the establishing legislation is required to make a status determination.

### Indian Tribal Governments

The legal relationship between the United States and Indian tribal governments is set forth in the Constitution, treaties, statutes, and court decisions. Congress may limit the authority of Indian tribal governments; but, within those limits, the tribal governments retain attributes of sovereignty over both their members and their territory. Generally, Indian tribal governments provide government services, such as transportation, education, and medical care to reservation Indians.

**Authority**

Tribal governmental power includes the authority to:

- Choose the form of tribal government
- Determine tribal membership
- Regulate tribal and individual property
- Levy taxes
- Establish courts
- Maintain law and order

### Employment Taxes

Generally, Indian tribal governments should follow general rules that apply to nongovernmental entities for employment tax. Publication 15, Employer’s Tax Guide, and Publication 15-A, Employer’s Supplemental Tax Guide, provide the basic rules for employers. There are, however, some special employment tax rules that apply to Indian tribal governments:

- An exception applies to the definition of “employment” for FUTA purposes for services performed in the employ of an Indian tribe. See IRC section 3306(c)(7) and Chapter 3. Thus, Federally-recognized Indian tribes are not subject to the FUTA tax, unless they so elect. For this purpose, the term “Indian tribe” has the meaning given in 25 USC Section 450b(e) (Section 4(e) of the Indian Self-Determination and Education Assistance Act), and includes any subdivision, subsidiary, or business enterprise wholly-owned by an Indian tribe. See IRC section 3306(u).
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- Amounts paid to members of Indian tribal councils for services performed as council members are not wages for purposes of FICA and income tax withholding (although such amounts are includible in gross income). Revenue Ruling 59-354, 1959-2 C.B. 24.

- Certain income derived by Indians from the exercise of their recognized tribal fishing rights is exempt from Federal income and employment taxes (IRC section 7873). Wages paid to a member of a tribe employed by another member of the same tribe, or by a qualified Indian entity for services performed in a fishing rights-related activity of the employee’s tribe, are exempt not only from Federal income tax, but also from both the employer’s and the employee’s share of the social security and Medicare tax (Notice 89-34, 1989-1 C.B. 674).

Extensive information specifically addressing Indian tribal governments and employment tax issues can be found in Publication 4268, *Employment Tax Desk Guide*, on the Indian Tribal Governments (ITG) website.

**Frequently Asked Questions**

1) **How is the tax treatment of governments different from that of other entities?**
   Under IRC §115, the income of certain government entities, including states, political subdivisions of states, or integral parts of states or political subdivisions, is generally not taxable. The income of other government entities, such as instrumentalities, might be excludable from gross income if that income is derived from the exercise of an essential governmental function and accrues to a state or political subdivision of a state. [IRS]

2) **Can the IRS issue a letter indicating that our entity is a tax-exempt government?**
   In order for a government entity to receive an official determination of its status as a political subdivision, instrumentality of government, or whether its income is excludable from gross income, exempt under Internal Revenue Code section 115, it must obtain a letter ruling by following the procedures specified in [Revenue Procedure 2014-1](https://www.irs.gov/pub/irs-pdf/p4303.pdf) or its successor. There is a fee associated with obtaining a letter ruling. [IRS]

   As a service to government entities, IRS can issue a “governmental information letter” free of charge. This letter describes government entity exemption from Federal income tax and cites applicable Internal Revenue Code sections pertaining to deductible contributions and income exclusion. Most organizations and individuals will accept the governmental information letter as the substantiation required for these purposes. Contact an FSLG Specialist or go to the [FSLG Customer Services page](https://www.irs.gov/service-center-locations) for more information. [IRS]
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Chapter 3

Wage Reporting and Employment Taxes

A government entity that has employees needs to be familiar with the responsibilities and requirements that apply to all employers, as well as some provisions that are unique to governments. This chapter briefly covers the main types of compensation that are included in employee wages and the applicable requirements for tax withholding and payments. Tax requirements for employers are discussed in detail in Publication 15, Employer’s Tax Guide (Circular E). This chapter highlights some key requirements for employers generally, and matters of special interest to governmental employers.

All governmental entities that employ workers are subject to Federal employment taxes on wages, except where the law provides specific exceptions. The Internal Revenue Code defines wages subject to income tax withholding under section 3401, and defines wages for social security and Medicare purposes taxes under section 3121.

The social security and Medicare taxes, also referred to as Federal Insurance Contributions Act (FICA) taxes, consist of Old-Age, Survivors and Disability Insurance (OASDI, or social security) and Medicare Hospital Insurance (Medicare) taxes. Internal Revenue Code (IRC) section 3101 imposes tax on the employee, and section 3111 imposes tax on the employer. State or local entities covered by social security and/or Medicare must withhold and pay over the employee share of the taxes and must pay the employer share. Under section 3402, employers are also generally required to withhold income tax from wages.

In general, all compensation provided to an employee is included in taxable wages unless an exception is provided by law. An exception may apply for FICA taxes, or Federal income tax withholding, or both. The following discussion addresses the treatment of certain items, focusing on some that are of particular interest to government employers.

Note: Workers are subject to social security, Medicare, or income tax withholding only when performing services as employees of the organization. The process for determining whether workers are employees is the subject of Chapter 4.

Social Security and Medicare Wages

IRC section 3121(a) provides that wages include all remuneration for employment, whether paid in cash or in some other form, unless specifically excluded by statute. Examples of wages for social security and Medicare purposes include salaries, fees, bonuses, prizes, awards and commissions. It is immaterial whether the payments are based on the hour, week, month, year, piecework, percentage of revenue, or other system. An important exception is provided by IRC 3121(b)(7)(F), which excludes state and local government employees from the OASDI tax, except where these employees are not
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covered by a public retirement system, or where a Section 218 Agreement exists. Chapter 5 discusses the application of the tax to governmental employees in detail.

The Social Security Administration establishes the maximum amount of wages subject to the social security tax per year. For 2014, this amount is $117,000. The amount is adjusted each year. (Since 1994, there has been no wage base limit for Medicare tax.)

### Social Security and Medicare Tax Rates and Limits

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<th>2012</th>
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<th>2014</th>
<th>2015</th>
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<table>
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<tr>
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<td>1.45%</td>
<td>1.45%</td>
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</tr>
<tr>
<td><strong>Maximum Wages Subject to Tax</strong></td>
<td>All Wages</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Employers must withhold Additional Medicare Tax of 0.9% on wages paid in excess of $200,000 to an individual in a calendar year, beginning after 2012. The total rate on the employee tax on these amounts in 2.35%. There is no employer matching share of this tax.

### Statutory Exceptions to Social Security and Medicare Coverage

Government employment not covered by a public retirement system (see Chapter 6) is generally subject to social security and Medicare coverage under IRC 3121(b)(7)(F). However, the Internal Revenue Code provides some statutory exceptions that exclude certain services from the definition of employment for purposes of mandatory social security coverage. These exceptions include services performed by:

- **3121(b)(7)(F)(i)** – individual employed to be relieved from unemployment
- **3121(b)(7)(F)(ii)** – inmate or hospital patient
This page contains no comments
In cases where social security coverage is provided by a Section 218 Agreement, the exclusion for some of these groups may apply differently. These are discussed in greater detail in Chapter 5.

**Other Forms of Cash Compensation**

In addition to stated salary or wages, employees may receive cash designated in various other ways. Below are some other common forms of cash compensation.

**Sick Pay**

Sick pay is an amount paid to an employee because of sickness or injury. Sick pay is generally subject to social security and Medicare taxes and income tax withholding if paid by the employer. The employer withholds from sick pay based on the employee’s Form W-4. Sick pay is sometimes paid by a third party, such as an insurance company or employee trust. The rules on third-party withholding, paying and reporting social security and Medicare taxes differ, depending upon whether the third party is acting as an agent of the employer or an independent insurer, and the terms of an agreement between the employer and agent or insurer.

If the third-party payer does not withhold income tax, the employee may request income tax withholding by completing and giving to the third party Form W-4S, Request for Federal Income Tax Withholding from Sick Pay.

See Publication 15-A, Employer’s Supplemental Tax Guide, for more details on third-party sick pay.

The following types of sick pay or injury pay are not subject to social security and Medicare taxes:

1. Payments received under a workers’ compensation act, or under a statute in the nature of a workers’ compensation act.
2. Payments, or portions of payments, attributable to the employees’ contributions to a sick pay plan.
3. Payments made for the same sickness or injury more than six months after the last calendar month in which the employee worked.
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**Vacation Pay**

Vacation pay is wages and is subject to social security and Medicare tax and income tax withholding. When vacation pay is made in addition to regular wages for the vacation period, withhold as if the vacation pay were a supplemental wage payment, discussed later.

**Military Differential Pay**

Military differential pay is any payment made by an employer to an individual during the period that the individual is called to active duty in the uniformed services for a period of more than 30 days, and represents part or all of the wages the individual would have received from the employer if the individual were performing service for the employer.

The Heroes Earnings and Relief Tax Act of 2008 defines military differential pay as wages, reportable on Form W-2, box 1, as wages for income tax purposes.

After December 31, 2008, the following rules apply:

1. Differential wage payments made to an individual on active duty for more than 30 days are subject to income tax withholding, but not to social security and Medicare (FICA) or unemployment tax (FUTA).

2. Employers may use either the aggregate or the separate method to calculate income tax withholding in these situations. For a discussion of these methods, see section 7, “Supplemental Wages”, in Publication 15, Employer’s Tax Guide.

3. The amount of differential wages must be reported on Form W-2.

**Deceased Employee’s Wages**

If an employee dies during the year, the employer must report the accrued wages, vacation pay, and other compensation paid after the date of death. Also, report wages that were available to the employee while he or she was alive, regardless of whether the wages actually were in the possession of the employee, as well as any other regular wage payment, even if is necessary to reissue the payment in the name of the estate or beneficiary.

**Payment made in the year of death** - If you made the payment after the employee’s death but in the same year the employee died, you must withhold social security and Medicare taxes on the payment and report the payment on the employee’s Form W-2 only as social security wages (box 3) and Medicare wages and tips (box 5) to ensure proper social security and Medicare taxes withheld in boxes 4 and 6. Do not show the payment in box 1.

**Payment made after the year of death** - If the payment was made after the year of death, it should not be reported on Form W-2 and social security and Medicare taxes should not be withheld.
This page contains no comments
Whether the payment is made in the year of death or after the year of death, report it in box 3 of Form 1099-MISC, Miscellaneous Income, as a payment to the estate or beneficiary. Use the name and taxpayer identification number (TIN) of the estate or beneficiary on Form 1099-MISC. See Revenue Ruling 86-109, 1986-2 C.B.196.

See the Instructions for Forms W-2 and W-3 and Publication 559, Survivors, Executors, and Administrators, for more information on the treatment of payments on behalf of a decedent.

**Back Pay**

Back pay is pay received in a tax year for actual or deemed employment in an earlier year. For social security coverage and benefit purposes, all back pay is wages, except amounts specifically and legitimately designated otherwise, such as interest, penalties, and legal fees. For tax purposes, back pay is treated as wages in the year received and is reported on Form W-2 for that year. Income, social security and Medicare tax withholding apply in the year of payment at the rates in effect for that period.

If the back pay is awarded under a statute (for example, under the Americans with Disabilities Act or Fair Labor Standards Act) the period for which back pay is credited as wages for social security purposes is different from the tax year it is reported. However, payments of back pay under a statute will remain posted to the employee’s social security earnings record in the year reported on Form W-2 unless the employer or employee notifies the SSA in a special, separate report. If this is done, SSA can allocate the statutory back pay to the appropriate periods for purposes of retirement benefit calculations. See IRS Publication 957, Reporting Back Pay to the Social Security Administration, for more information.

**Workers’ Compensation**

Amounts received by police officers, firefighters, and other employees or their survivors for personal injuries or sickness incurred in the course of employment are excludable from income and social security and Medicare taxes if they are paid under a workers’ compensation act or a statute in the nature of a workers’ compensation act that provides compensation to employees for personal injuries or sickness incurred in the course of employment.

This exclusion does not apply to retirement plan benefits based on age, length of service, or prior contributions to the plan, even if the individual retired because of an occupational sickness or injury.

Workers’ compensation benefits are fully excluded from gross income and are not subject to employment taxes, income tax withholding or reporting.

**Noncash Payments**
This page contains no comments
Generally, noncash payments are wages subject to social security and Medicare. The dollar value of wages paid in a medium other than cash should be computed based on the fair market value of the property at the time of the payment. The fair market value may be based on the prevailing value of the item in the locality or upon a reasonable value established for other purposes. Special rules may apply to noncash fringe benefits, discussed below.

**Fringe Benefits**

Fringe benefits, which generally include any compensation other than cash wages or salary, must be included in an employee’s wages unless an exception is provided by law. Examples of employer-provided fringe benefits include:

- Vehicles for personal use
- Meals
- Health or life insurance
- Tickets to entertainment or sporting events
- Holiday gifts
- Use of employer facilities
- Transportation passes

The tax treatment of some of these benefits is determined by specific statutes; others fall under general rules for broader categories of fringe benefits. IRS Publication 15-B, updated annually, addresses fringe benefits applicable to all employers. In addition, the office of Federal, State and Local Governments (FSLG) produces Publication 5137, Fringe Benefit Guide, especially for government employers. For a more comprehensive discussion of fringe benefits, you can view or download this publication on the FSLG website. Some common tax-exempt benefits are discussed below.

**Business Expense Reimbursements – Accountable Plan**

Payments to employees for travel and other ordinary and necessary expenses of the employer’s business generally are wages subject to social security and Medicare and income tax withholding unless paid under an *accountable plan*. There are three requirements for a reimbursement procedure to be treated as an accountable plan:

1) The expenses must qualify as deductible business expenses incurred while performing services for the employer;
2) The employee must adequately account for the expenses to the employer within a reasonable period of time; and
3) The employee must return any amounts received that exceed expenses within a reasonable period of time.

See IRC section 62(c), section 1.62-2 of the Income Tax Regulations, and Publication 15 for more information on accountable plans.
This page contains no comments
The use of per diem rates at or below the Federal rate for travel expenses can reduce and simplify the recordkeeping requirements for accounting for these expenses. See Publication 463 or the FSLG Fringe Benefit Guide for more information on per diem reimbursement systems.

**Reimbursements Not Made Under Accountable Plan**

If an employer provides reimbursements that do not comply with the accountable plan rules, these amounts are treated as wages and subject to all employment taxes. The employee may be able to deduct the expenses incurred on his or her individual income tax return.

**Hourly or Tool Rate Reimbursement**

The payment of an hourly rate to cover the cost of tools, equipment, etc., is not an accountable plan if the amount would be paid regardless of the amount of expenses incurred or whether expenses actually are incurred. Only if actual business expenses that are accounted for under the rules above are incurred can the amount be excluded from wages.

**Working Condition Fringe Benefit**

An employer may exclude from the wages of an employee the value of any property or services provided by the employer to the extent that, if the employee paid for the property or services, the payment would be allowable as a business expense deduction. This is called a working condition fringe benefit. See IRC section 132(a)(3). Working condition fringe benefits include property provided that is necessary to for employees to accomplish work. Common examples include vehicles or special clothing provided by the employer.

**Employer-Provided Vehicles**

*If an employer provides an employee with unrestricted use of a vehicle, the employee receives a noncash fringe benefit and the value of the use is required to be included in income. The value of the vehicle* for the tax year is included in income unless the employee substantiates its business use. See IRC section 274(d) and Regulation section 1.274-5T.

There are three methods for determining the value of the personal use of a vehicle:

- Cents-per-mile rule
- Commuting rule
- Lease value rule

The requirements for each of these rules are discussed in IRS Publication 15-B, and in the FSLG Fringe Benefit Guide.
This page contains no comments
The value of a “qualified nonpersonal use vehicle” can be excluded from income as a working condition fringe benefit. A qualified nonpersonal use vehicle is one that, due to its nature, is not likely to be used more than a minimal amount for personal purposes. This includes, for example, a clearly marked police, fire, or public safety officer vehicle, a flatbed truck, a school bus, or ambulance. An employee is not required to substantiate the business use of a qualified nonpersonal use vehicle in order to exclude its value from income. See IRC section 274(d)(i) or Publication 15-B.

**Clothing Provided by Employer**

The value of work clothing provided by the employer is not taxable to the employee if:

1) the employee must wear the clothing as a condition of employment, and  
2) the clothing is not suitable for everyday wear.

It is not enough that the employee wear distinctive clothing; the employer must specifically require the clothing for work. The second test is not met solely because the employee does not, in fact, wear the work clothes away from work; the clothing must not be suitable for taking the place of regular clothing. The value and upkeep of work clothes provided to firefighters, health care workers, law enforcement officers or letter carriers is nontaxable to the employee. The value of provided items such as safety shoes or boots, safety glasses, hard hats and work gloves provided and maintained by the employer are not taxable if the employer requires the items for work and the items are not suitable for everyday use.

**Health Benefits**

Under IRC sections 105 and 106, contributions to or benefits provided from an employer-provided health care plan, including reimbursements and paid insurance premiums, are generally excluded from the wages of the employees and are not subject to social security, Medicare taxes or income tax withholding. A health reimbursement arrangement (HRA) may provide for the carryover of benefits from year to year, and may specify the types of medical benefits that are covered. An HRA can only be financed by employer contributions, and cannot involve an employee election to participate. For more information, see Publication 969, Health Savings Accounts and Other Tax-Favored Health Plans.

**Cafeteria (Section 125) Plans**

Cafeteria plans, including flexible spending arrangements, are benefit plans under which employees can choose from among cash and certain qualified benefits. If the employee elects qualified benefits, employer contributions are generally excluded from the wages of the employees and are not subject to social security, Medicare taxes or income tax withholding. A cafeteria plan is a separate written plan maintained by an employer for employees that meets the specific requirements of section 125 of the Internal Revenue Code and associated regulations. It provides participants an opportunity to receive certain
This page contains no comments
benefits on a pre-tax basis. Participants in a cafeteria plan must be permitted to choose among at least one taxable benefit (such as cash) and one qualified benefit. If an employee elects to receive cash instead of any qualified cafeteria plan benefit, that amount is treated as wages subject to all employment taxes.

A qualified benefit is a benefit that does not defer compensation and is excludable from an employee’s gross income under a specific provision of the Code, without being subject to the principles of constructive receipt. Qualified benefits include:

- Accident and health benefits (but not Archer medical savings accounts or long-term care insurance)
- Adoption assistance
- Dependent care assistance
- Group-term life insurance coverage (including costs that cannot be excluded from wages)
- Health savings accounts, including distributions to pay long-term care services

Generally, qualified benefits under a cafeteria plan (including health and accident insurance) are excluded from the wages of the employees. The cost of group-term life insurance of up to $50,000 provided by an employer is excludable from income and social security, and Medicare wages. However, the cost of group-term life insurance that exceeds $50,000 of coverage is includible in income (but not to income tax withholding) and is subject to social security and Medicare taxes, even when provided as a qualified benefit in a cafeteria plan. The cost of group-term life insurance that is includible in income only because the insurance exceeds $50,000 of coverage is considered a qualified benefit. Adoption plans are also subject to social security and Medicare taxes. See IRS Publication 15-B for details.

Health benefits provided under a cafeteria plan may include insurance or a flexible spending account (FSA) for qualifying medical expenses. However, benefits must be used before the end of the year or they are forfeited, as discussed above. An employer may have both a Health Reimbursement Arrangement (HRA) and a cafeteria plan, but the salary reductions cannot be used to directly or indirectly fund an HRA (see Revenue Ruling 2005-24).

Any amounts paid for health benefits pursuant to a salary reduction election are considered paid by the employer; therefore, the employee is not entitled to exclude from income any amounts paid as “reimbursements” to the employees for benefits under the plan. See Revenue Ruling 2005-24 for more information on the interaction between an HRA and various reimbursement arrangements.

For plan years beginning after December 31, 2012, a cafeteria plan may not allow an employee to request salary reduction contributions for a health FSA in excess of $2,500. This amount will be indexed for future years. A cafeteria plan offering a health FSA must be amended to specify the $2,500 limit (or any lower limit set by the employer). While cafeteria plans generally must be amended on a prospective basis, an amendment that is
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adopted on or before December 31, 2014, may be made effective retroactively, provided that in operation the cafeteria plan meets the limit for plan years beginning after December 31, 2012. A cafeteria plan that does not limit health FSA contributions to $2,500 is not a cafeteria plan and all benefits offered under the plan are includible in the employees' gross income. For more information, see Notice 2012-40, 2012-26 I.R.B. 1046.

In general, all amounts credited to an employee in the plan must be used by the individual by the end of the calendar year or are forfeited. However, under a “grace period rule” an IRC 125 cafeteria plan may permit an employee to use amounts remaining from the previous year to pay expenses incurred for certain qualified benefits during the period of up to two months and 15 days immediately following the end of the plan year.

A plan may be amended to provide that up to $500 of unused amounts remaining at the end of a plan year in a health FSA to be paid or reimbursed to plan participants for qualified medical expenses incurred during the following plan year. However, if this provision is adopted, the grace period discussed above does not apply.

**Meals and Lodging Furnished by Employer**

The value of meals is excludable if the meals are furnished on the business premises of the employer and are provided for the convenience of the employer.

The value of lodging is excludable if it meets the test, stated above, for meals, and if the employee is required to accept the lodging as a condition of employment. See Publication 15-B for more information.

**Retirement Plans**

Regardless of social security coverage, most public employees are covered by some form of retirement plan. The terms of these plans may vary greatly, but in general provide for tax-deferred income placed in trust for the benefit of employees. These plans may involve employee or employer contributions, or both. Under certain provisions of the IRC, contributions may be deferred from tax until they are withdrawn. Plans covered under IRC section 401 are considered “qualified,” meaning they meet specific provisions of the Employee Retirement Income Security Act (ERISA) that enable them to offer certain tax advantages. Many public employees, however, are covered by nonqualified plans, generally under IRC sections 403(b) or 457, discussed below.

**Income Tax Withholding on Qualified Retirement Plans**

For income tax withholding purposes, employer and employee contributions made under qualified plans (up to the maximum allowable for the year) are deferred from income tax. The employee will be subject to tax on distributions of these amounts when they are withdrawn from the plan.

**Employer “Pick-Up” Contributions**
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IRC Section 414(h)(2) allows state government entities with section 401(a) plans to treat contributions that have been designated as employee contributions, but which are “picked up” (paid) by the employer, to be treated as employer contributions, and therefore as exempt from social security and Medicare tax. For more information on the conditions required for employer pick-up. See IRC 414(h)(2). For more information, visit www.irs.gov and search for “Employer pick-up contributions.”

Section 403(b) Plans

Plans under IRC section 403(b), also called tax sheltered annuities, are available to certain employees of public schools, employees of tax-exempt organizations, and certain ministers. These plans resemble qualified plans in many respects. Many public school employees are covered by 403(b) plans in addition to receiving social security coverage under a Section 218 Agreement.

Employer contributions to tax-sheltered annuities under section 403(b) for public school employees are exempt from social security and Medicare taxes. Eligible participants may defer amounts from income tax up to an annual limit ($17,xxx in 2015). This amount may be increased for certain employees with more than 15 years service. In addition, additional tax-deferred “catch-up” contributions may be made for employees age 50 or older.

Employee contributions, including those made by salary reduction arrangements, are subject to social security and Medicare tax. See IRC §3121(v)(1)(A).

For more information, see Publication 571, Tax-Sheltered Annuity Plans (403(b) Plans), and the section 403(b) page on the IRS Employee Plans website.

Section 457 (Nonqualified) Plans

Many public employees participate in nonqualified, or section 457, plans. These plans can be established by state and local governments or tax-exempt organizations. If they meet the requirements of IRC section 457(b), they are considered “eligible” plans; if not they are considered “ineligible” plans, and are governed by IRC section 457(f).

Section 457(b) – Eligible Plans

Governmental 457(b) plans must be funded, with assets held in trust for the benefit of employees. Plans eligible under 457(b) may defer amounts from income tax up to an annual limit ($17,xxx in 2015). In addition, “catch-up” contributions may be made to employees age 50 or older. Social security and Medicare taxes generally apply to all employer and employee contributions. For further information regarding social security and Medicare tax withholding and reporting on amounts deferred into eligible deferred compensation plans, see the section 457(b) page on the IRS Employee Plans website.

Amounts deferred from wages into an eligible section 457(b) deferred compensation plan are not subject to income tax withholding until they are distributed from the plan or made available to the participant or beneficiary. For further information regarding income tax
This page contains no comments
reporting and withholding upon amounts deferred into and distributed from eligible governmental deferred compensation plans, see the section 457(b) page of the IRS Employee Plans website, and Section IV of Notice 2003-20.

Section 457(f) – Ineligible Plans

Nonqualified state or local government plans that do not meet the requirements of section 457(b) are ineligible, or 457(f), plans. There is no limit on the annual deferrals on these plans, but to defer taxation, all deferrals must be subject to substantial risk of forfeiture. Distributions are generally subject to social security and Medicare taxes at the later of the time 1) when the services giving rise to the related compensation are performed, or 2) when there is no substantial risk of forfeiture of the rights to the amounts.

Employer Reporting Responsibilities

Basic Federal tax requirements that generally apply to all employers are discussed below. For a more detailed explanation, see Publication 15.

Employer Identification Number

IRS identifies individual taxpayers by using taxpayer identification numbers (TINs). For individuals, the TIN is the social security number. State and local entities use employer identification numbers (EINs) assigned by IRS to identify their accounts and tax returns. The EIN should be used on all employment tax returns (i.e, Form 941), information returns (i.e., Form W-2) and correspondence with the IRS. Generally, each county, city, school district and other governmental unit will have a unique EIN. However, this is not always the case within state governments. Many state agencies may use an EIN assigned to another agency; some larger state agencies may use a unique EIN.

When two entities are combined (such as when one municipality annexes another, or when school districts are consolidated) the EIN of the annexed area or abolished district should no longer be used, as it is no longer a separate entity. A continuing entity that absorbs or annexes another can retain its EIN. However, if a new entity is created from the dissolution of two or more preexisting entities, a new EIN should be obtained. When an unincorporated area is incorporated, it becomes a separate entity and must obtain its own EIN.

To obtain a new EIN, complete Form SS-4, Application for Employer Identification Number. Once you have received an EIN, ensure that it is accurate and complete on each tax document submitted. When an incorrect EIN is used, credit for tax payments can be delayed or applied incorrectly.

Note: For tax years prior to 1987, SSA assigned EINs beginning with the digits “69” for government employers to report earnings, but these are no longer used. Prior to 1987, these numbers were assigned for new modifications to Section 218 Agreements, and then used to process wage reports. Many states have a filing system based upon the 69 number
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and, therefore, continue to sequentially assign 69 numbers for internal recordkeeping purposes.

Form SSA-1945

State and local government employers are required to notify employees hired on or after January 1, 2005, in jobs not covered by social security, of the effects of the Windfall Elimination Provision and the Government Pension Offset. The law requires newly hired public employees to sign Form SSA-1945, indicating that they are aware of a possible reduction in their future social security benefit entitlement. For more detailed information about this law, see Chapter 7 or http://www.socialsecurity.gov/form1945.

Form W-2

An employer is responsible for furnishing Form W-2, Wage and Tax Statement, to each employee from whom income, social security or Medicare tax was withheld, or would have been withheld if the employee had claimed no more than one withholding allowance or had not claimed exemption from withholding on Form W-4. Statements to employees must be furnished by January 31 of the following year. The aggregate amounts are reported on Form W-3, Transmittal of Wage and Tax Statements. For more information, see the Instructions for Forms W-2 and W-3.

Employers who file 250 or more Forms W-2 must file them electronically. Statements may be furnished to employees electronically only if an affirmative consent has been received from the employee to do so. See Publication 1141 for more information.

An employer uses Form 941, Employer’s Quarterly Federal Tax Return (or for certain employers, the annual Form 943 or 944) to report wages paid and taxes withheld. After the calendar year ends, employers prepare individual employee reports on Forms W-2, Wage and Tax Statement, with Form W-3, Transmittal of Wage and Tax Statements, showing the total wages paid and taxes withheld for each employee during the year. An employer reports wage information to SSA for crediting to the employees’ earnings records. This is done either by sending SSA Copy A of the paper Form W-2 with a covering Form W-3, or by sending the Form W-2 information in the form of electronic reports.

If you need to talk directly to SSA about an electronic file or other wage reporting problem, you may contact an Employer Services Liaison Officer (ESLO) through the ESLO page on the SSA website, or call 1-800-772-6270 for assistance from an earnings report technician. Specifications for electronic reporting of Form W-2 information can be found at the SSA employer page or by calling the ESLO for your state.

Form 941

Form 941, Employer’s Quarterly Federal Tax Return, is used to report total wages, wages subject to social security and Medicare tax, and Federal income tax. Agricultural employers file Form 943, Employer’s Annual Tax Return for Agricultural Employers. Form 944, discussed below, is an annual version of the form, for employers with the
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smallest payrolls. Generally, annual Form 941 or Form 943 totals must match the aggregate wages shown on all Forms W-2 issued to employees for the same period.

To prepare Form 941, the total wages and compensation for the quarter must be determined. Wage payments are included in the quarter in which they are paid. For example, an employee works for the county in a pay period ending on March 20, but is not paid until April 5. In this situation, the employee's wage payment is included in the second quarter when the payment is made, not the first quarter when the work was done. Total wages and compensation entered on line 2 of Form 941 includes all payments to employees. Examples of these payments include:

1) Wages, salaries, commissions, fees, and bonuses
2) Vacation allowances
3) Dismissal pay and severance pay
4) Tip income
5) Noncash payments, including goods, lodging, food, clothing or services

Wages from which social security and Medicare tax must be withheld may differ from total wages. This may be because certain amounts are not included in wages for income tax purposes, but are subject to social security and Medicare tax (for example, deferred compensation in a nonqualified deferred compensation plan). Another common reason for a difference in the totals is that earnings exceeding the annual wage base are not subject to the OASDI portion of social security tax. The total income tax withheld (line 3) includes all Federal income tax withheld from all employees for the calendar quarter covered by the return.

Form 941 must be filed with the IRS by the last day of the month following the calendar quarter. For example, the first quarter return covering January through March is due by April 30. If all taxes are deposited when due, the employer has 10 additional days after the due date to file the return. If the return is not filed by this date, the employer may be subject to penalties and interest in addition to the tax due on the return.

**Form 944**

Certain taxpayers with small payrolls may report their employment taxes on an annual rather than a quarterly basis. The IRS will notify these taxpayers of their changed requirement. Instead of the quarterly Form 941, they file annual Form 944, Employer’s Annual Employment Tax Return. An employer may contact the IRS to request to file a Form 941 instead of a Form 944. See Revenue Procedure 2009-51. The deposit requirements, discussed below, are the same as for quarterly filers. For more information on eligibility, see Publication 15 or the Instructions for Form 944.

Except for the return due date, for purposes of the requirements discussed in this chapter, references to quarterly Form 941 are also applicable to filers of annual Form 944.
This page contains no comments
Form 941-X

Employers correct errors to Form 941 or 944 by filing Form 941-X, Adjusted Employer’s QUARTERLY Federal Tax Return or Claim for Refund, or Form 944-X, Adjusted Employer’s ANNUAL Federal Tax Return or Claim for Refund. Form 941-X is a stand-alone return that should be filed as soon as the error is discovered. The return for the period when the error is discovered is not affected. Additional requirements are discussed in the Instructions for Form 941 and in the Instructions for Form 941-X.

Special Reporting Situations for Government Employers

These are some circumstances commonly facing government employers that involve special reporting rules.

Multiple Employers and the Wage Base

Because each employer must withhold on wages up to the annual maximum, an employee who works for more than one employer in one calendar year may have excess social security taxes withheld. In order to get a refund of the excess social security tax withheld by the employers, the employee shows the overpayment on Form 1040. Employers are not responsible for making any adjustments and cannot claim a refund in this situation, because each employer is responsible for withholding and paying social security tax on wages paid to each employee up to the wage base.

For the purpose of determining responsibility for reporting wages, a state is considered to be one employer and each political subdivision is considered a separate employer. An employee who transfers from one state agency to another during a calendar year does not change employers. In this case, the state should withhold and pay social security tax only up to the wage base for that employee. However, an employee who transfers from a state agency to a political subdivision of the state, a city or county, has changed employers. Each employer must withhold and pay social security tax up to the wage base for that employee, regardless of other employment.

Medicare Qualified Government Employment (MQGE)

State and local employers that provide coverage under a public retirement system may have employees who are not subject to social security but are subject to Medicare tax. (As explained in Chapter 2, all employees hired after March 31, 1986, are subject to Medicare tax.) This is referred to as Medicare Qualified Government Employment (MQGE). MQGE Forms W-2 are filed separately from those for employees covered by social security and Medicare, or from Forms W-2 having no social security or Medicare wages. Paper MQGE Forms W-2 must be transmitted with a covering Form W-3 with “Medicare Govt. Emp.” checked in box b. See the Instructions for Forms W-2 and W-3 or contact your ESLO for more information.
This page contains no comments
Note: Electronically transmitted records should be grouped to follow a “Code RE” record with an Employment Code of "Q". All other W-2 records should be grouped to follow a Code RE record with an Employment Code of "R". Do not group MQGE W-2 records and non-MQGE W-2 records together after a single Code RE record. See SSA Publication 42-007, Specifications for Filing Forms W-2 Electronically (EFW2).

Employees Covered for MQGE and FICA

If they are employed in more than one capacity, some state and local employees may be subject to both Medicare-only withholding and full social security and Medicare in the same reporting year. When an employee is in a continuous employment relationship with the same employer for the year, and the employer has both types of employees, the employer has two reporting options:

1. Prepare a single Form W-2 with the total annual wages in box 1, the total Medicare wages and taxes from BOTH positions in box 5 and box 6. Social security and Medicare wages and taxes are entered in box 3 and box 4 (SSA prefers that this method be used in order to reduce errors), or

2. Use a separate Form W-2 for wage data from the Medicare-only position and a second Form W-2 for FICA wage data from the positions with both social security and Medicare coverage.

Information Reporting for Election Workers

If the compensation of an election workers is less than a statutorily established amount ($1xx,x00 for calendar year 2015), it is generally not subject to mandatory social security and Medicare tax. See IRC sections 3121(b)(7)(F)(iv) and 3121(u)(2)(B)(ii)(V). However, under a state’s 218 Agreement an election workers’ compensation may be subject to social security and Medicare taxes at a level below the statutory amount. In any case, compensation of election workers is not subject to income tax withholding.

If an election worker’s wages are subject to withholding of social security and Medicare tax, Form W-2 reporting is required for all compensation, regardless of the amount. If an election worker’s compensation is not subject to withholding of social security and Medicare tax, Form W-2 reporting is required for payments that aggregate $600 or more in a calendar year. See Revenue Ruling 2000-6 for a discussion of information reporting with respect to election workers.

Information Returns

Any entity, including a governmental organization, conducting a trade or business, is required to file with the IRS, and furnish to recipients, information returns for certain types of payments. In most cases, these payments are reported on Form 1099-MISC, Miscellaneous Income.
This page contains no comments
IRC 6041(a) states that all persons engaged in a trade or business and making payment in the course of the trade or business to another person of rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or other fixed and determinable gains, profits, and income (with certain exceptions) of $600 or more in any year must furnish an information return indicating the amount of such income and the name and address of the recipient of such payment. The return with respect to certain payments of compensation to an employee is made on Forms W-2 and W-3; never use Form 1099-MISC to report payments for services by an employee. The recipient of the payment is required to furnish to you the entity’s name, address and identification number. You should obtain this information before payments are made. This identification number must be included on the information return. Payments for nonemployee compensation are discussed in the Instructions for Form 1099-MISC.

Governments must file Form 1099-G, Certain Government Payments, for certain payments, including tax refunds, unemployment compensation, and certain grants. See the Instructions for Form 1099-G for more information. A variety of information returns are required to report various other types of payments.

Payers responsible for filing 250 or more information returns of one type (for example, Form 1099-MISC) are required to file these electronically. Regardless of whether the returns are filed electronically, a paper statement must be furnished to each recipient unless correct procedures are followed for establishing an electronic system for furnishing statements, including affirmative consent from each individual to receive the information electronically. For more information, see the General Instructions for Certain Information Returns and Publication 1179.

**Depositing Taxes**

In general, employers are required to deposit Federal employment taxes if the total tax liability for Form 941 for the current or previous quarter is $2,500 or more. These taxes are required to be deposited using the Electronic Federal Tax Payment System (EFTPS). You can no longer make deposits using paper coupons. A balance due on the Form 941 or 944 of less than $2,500 is not required to be deposited; it may be paid with the return.

*Note:* As of November 30, 2009, Federal agencies can no longer use FEDTAX II for deposits and must use EFTPS. Publication 966 explains the EFTPS system.

See Section IV.E of Notice 2003-20 for guidance on depositing and reporting of income tax withheld upon distributions from eligible section 457(b).

**When to Deposit**

An employer will use either the monthly or the semiweekly schedule for deposit of Federal employment taxes. These schedules indicate when a deposit is due after a tax liability arises (e.g., payday). Before the beginning of each calendar year, employers must determine which of the two deposit schedules they are required to use. The deposit
This page contains no comments
schedule used is based on the total tax liability reported on Form 941 or Form 943 during a four-quarter lookback period as discussed below. *The deposit schedule is not determined by how often employees are paid.*

**Lookback Period**

The deposit schedule an employer must use for a calendar year is determined from the total taxes reported on Forms 941 (line 8) in a four-quarter “lookback” period that applies to that year. The lookback period begins July 1 of the second preceding year, and ends June 30 of the preceding year. If the employer reported $50,000 or less of taxes for the lookback period, the employer is a monthly schedule depositor; if it reported more than $50,000, the employer is a semiweekly schedule depositor.

The rules for making deposits are summarized in the table on the next page.
This page contains no comments
## Summary of Federal Tax Deposit (FTD) Rules

<table>
<thead>
<tr>
<th>If the employer is a…</th>
<th>And the payroll date is…</th>
<th>Then a deposit must be made:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monthly schedule depositor ($50,000 or less during the lookback period)</td>
<td>Any time during the month</td>
<td>On or before the 15th of the month</td>
</tr>
<tr>
<td>Semiweekly schedule depositor (More than $50,000 during the lookback period)</td>
<td>Saturday, Sunday, Monday, Tuesday</td>
<td>On or before the following Friday</td>
</tr>
<tr>
<td></td>
<td>Wednesday, Thursday, Friday</td>
<td>On or before the following Wednesday</td>
</tr>
</tbody>
</table>

### Special Rules:

**$2,500 Rule:** Accumulated taxes less than $2,500 in a quarter do not have to be deposited if paid with a timely filed return.

**$100,000 Next Day Rule:** $100,000 or more within a deposit period must be deposited on the next banking day. Monthly depositors become semiweekly depositors on the next day and remain so for the remainder of the year and all of the following year.

**Accuracy of Deposits Rule:** An employer who inadvertently underdeposits will not be penalized if the shortfall does not exceed $100 or 2% of the amount of employment taxes required to be deposited. Balance due must be deposited by a shortfall make-up date. See IRS Publication 15 for details.

**Deposits on Banking Days Only:** If a deposit is required to be made on a day that is not a banking day, the deposit is considered timely made if it is made by the close of the next banking day. In addition to Federal and state bank holidays, Saturday and Sunday are treated as non-banking days.

**Special Rules for Non-banking Days:** Semiweekly depositors have at least three banking days following the close of the semiweekly period to deposit taxes accumulated during the semiweekly period. For more information, see IRS Publication 15.

### Deposit Requirements for Nonpayroll (Form 945) Tax Liabilities

The deposit rules and dollar thresholds to figure when deposits for nonpayroll tax withholding are the same as they are for employment taxes; however, they are aggregated separately, and the deposit thresholds above apply separately. Do not combine Form 945 with deposits for employment tax liabilities (Form 941 or Form 944). See the instructions for Form 945 for details on reporting nonpayroll withholding.

For more information on the deposit rules, see IRS Publication 15. For more information on using the Electronic Federal Tax Payment System (EFTPS), see IRS Publication 966.
This page contains no comments
Calculating Federal Income Tax Withholding

Employers are generally required to withhold Federal income tax from the wages paid to employees. The withheld amount is credited to the employees’ individual income taxes.

Each employee should submit a signed Form W-4, Employee’s Withholding Allowance Certificate, when employment begins. The amount of Federal income tax withheld on an employee depends on five factors:

1. Payroll period,
2. Employee marital status, as shown on Form W-4,
3. Amount of wages,
4. Number of withholding allowances claimed by the employee on Form W-4, and
5. Additional amounts the employee requests to have withheld.

Publication 15, furnished by the IRS to each employer at the beginning of each calendar year, contains the tax withholding tables and percentage tables to use to determine actual withholding based on the above criteria. Refer to Publication 15 for specific instructions on calculating withholding from your employees.

Federal Unemployment Tax Act

The Federal Unemployment Tax Act (FUTA) provides a Federal-state insurance system for workers who lose their jobs. Most private employers pay both a Federal and state unemployment tax. States and their political subdivisions are exempt from paying tax under FUTA. However, state and local government employees, with certain exceptions, must be covered by state unemployment insurance. Contact your state employment or labor agency for more information.

Interest and Penalties

Tax that is not paid when due or in the manner required may be subject to civil penalties as well as interest on the amount due.

Employment Tax Penalties

The following are the most commonly assessed penalties related to employment tax. There are penalties for filing a return late and paying or depositing taxes late, unless there is reasonable cause.
This page contains no comments
<table>
<thead>
<tr>
<th>IRC Section</th>
<th>Penalty Assessed For:</th>
<th>Penalty Rates:</th>
</tr>
</thead>
<tbody>
<tr>
<td>6651(a)(1)</td>
<td>Failure to file a tax return (failure to timely file)</td>
<td>5% of the tax due per month up to 25%</td>
</tr>
<tr>
<td>6651(a)(2)</td>
<td>Failure to pay tax shown on the return (failure to timely pay) (imposed if the amount of tax shown on the return is not paid on or before the prescribed date)</td>
<td>0.5% (one half of one percent) of the tax due per month up to 25%</td>
</tr>
<tr>
<td>6651(c)</td>
<td>Both failure to timely file and failure to timely pay</td>
<td>When both penalties apply for any month, the failure to file penalty is assessed at 4.5%</td>
</tr>
<tr>
<td>6652(b)</td>
<td>Failure to report tips</td>
<td>Imposes a penalty for tip income unreported to the employer; the penalty is 50% of the employee social security and Medicare tax on the unreported tip income</td>
</tr>
<tr>
<td>6656</td>
<td>Deposit penalties:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1-5 days late</td>
<td>2%</td>
</tr>
<tr>
<td></td>
<td>6-15 days late</td>
<td>5%</td>
</tr>
<tr>
<td></td>
<td>More than 15 days late, but paid by the 10th day after notice and demand (Notice and demand date is the assessment date)</td>
<td>10%</td>
</tr>
<tr>
<td></td>
<td>Taxes still unpaid after the 10th day following notice and demand</td>
<td>15%</td>
</tr>
<tr>
<td></td>
<td>Failure to deposit electronically</td>
<td>10%</td>
</tr>
<tr>
<td>6662</td>
<td>Underpayment of employment taxes due to disregard of the rules and regulations (accuracy-related)</td>
<td>20% of the underpayment attributable to negligence or disregard of rules and regulations</td>
</tr>
<tr>
<td>6672</td>
<td>Failure to withhold or pay over trust fund taxes</td>
<td>100% of unpaid tax (see below)</td>
</tr>
</tbody>
</table>

**Trust Fund Recovery Penalty**

Under section 6672, if withheld taxes that must be withheld are not withheld or are not deposited or paid, the trust fund recovery penalty may apply. The penalty is the full amount of the unpaid trust fund tax. This penalty may be imposed on all persons who are determined by the IRS to be responsible for collecting, accounting for, and paying over these taxes, and who acted willfully in not doing so.

A responsible person can be an officer, employee, or volunteer. A responsible person also may include one who signs checks for the business or otherwise has authority to cause the spending of funds. “Willfully” means voluntarily, consciously, and intentionally. A responsible person acts willfully if the person knows that the required actions are not taking place.
This page contains no comments
Information Reporting Penalties

The following are the most commonly assessed penalties as they relate to information reporting:

<table>
<thead>
<tr>
<th>IRC Section</th>
<th>Penalty</th>
<th>Rate for Returns Required To Be Filed January 1, 2011, or Later*</th>
</tr>
</thead>
<tbody>
<tr>
<td>6721</td>
<td>Failure to file correct information returns on or before the required filing date or failure to include all information required to be shown on the return (or where there is incorrect information shown)</td>
<td>The penalty for failure to file information returns without all required and correct information (including missing, incorrect and/or unissued TINs) is $100 for each failure to a maximum of $1,500,000 per calendar year</td>
</tr>
<tr>
<td>6722</td>
<td>Failure to furnish correct payee statements on or before the date prescribed to the person to whom such statement is required to be furnished, or a failure to include all of the information required to be shown on the payee statement or where the information is incorrect</td>
<td>The penalty is $100 for each failure, not to exceed $1,500,000 per calendar year, when there is failure to furnish a timely and correct payee statement</td>
</tr>
<tr>
<td>6723</td>
<td>Failure to comply with other specific information reporting requirements on or before the prescribed time (usually related to failure to furnish a TIN)</td>
<td>The penalty is $50 for each failure, not to exceed $100,000 per calendar year, when there is failure to comply with any information reporting requirement</td>
</tr>
</tbody>
</table>

* - Reduced penalties may apply for returns filed within 30 days, by August 1, or for entities with gross receipts no more than $5,000,000. See the Instructions for Certain Information Returns for more information.

Interest

Interest is assessed on any taxes due and unpaid, in addition to any penalties that may be imposed. However, the law allows an employer who has made an undercollection or underpayment of social security and Medicare taxes or income tax withholding to make an interest free-adjustment (IRC section 6205(a)(1)). The following two requirements must be met:

1) Correction of the error must be made in the period in which the error was ascertained, and

2) Payment of the tax must be made no later than the due date of the return for the return period in which the error was ascertained. Additional tax due as a result of an IRS examination or ruling may qualify for an interest-free adjustment.
This page contains no comments
Frequently Asked Questions

1) If board members are paid nominal amounts, for example, under $1,000 per year, must social security and Medicare taxes be withheld? Generally, yes. Elected and most appointed officials are employees of the public entity they serve, and are generally subject to the withholding rules that apply to other workers. Withhold social security and Medicare taxes for any official who is either 1) covered under a Section 218 Agreement, or 2) not a qualified participant in a public retirement system, and therefore subject to mandatory coverage. Any official elected or appointed after March 31, 1986, is subject to Medicare. See Chapter 4 for more information on who is an employee. [IRS]

2) What is the statute of limitations date for an adjustment or claim for refund of payroll taxes? The general rule is that an adjustment or claim for refund of any overpayment of Federal payroll taxes must be filed within three years from the date the return was due or three years from the date it was filed, if that date is later. For this purpose, a Form 941 return for any calendar quarter is considered filed on April 15 of the following calendar year, if it is in fact filed by that date. [IRS]

3) What is the social security tax treatment of prison inmate labor? Generally, services performed by inmates, for the state or local political subdivision that operates the prison are excluded from social security coverage, whether or not performed outside the confines of the prison. Inmates usually are not in an employment relationship with the state or political subdivision. In general, services performed by inmates, as part of the rehabilitative and therapeutic program of the institution, are not usually performed as employees. Services performed by inmates for an entity other than the state or local governmental unit, e.g., a work-release program, may be covered if an employment relationship exists. The relevant factor for determining social security coverage is whether an employer/employee relationship exists between the inmate and the non-governmental employer, not the place where the inmate is incarcerated. Services performed by inmates outside the institution for the same unit of government that operates it are considered performed in the institution. For more information, visit irs.gov and enter “prison industry program” in the search box. [IRS]

4) Are the services of police officers and firefighters emergency services excluded from social security and Medicare coverage? Police officers and firefighters are not considered emergency workers under the mandatory exclusion from social security and Medicare coverage. This exclusion applies only to services of an employee who was hired because of an unforeseen emergency to work in connection with that emergency on a temporary basis (for example, an individual hired to battle a major forest fire or to provide emergency assistance in other similar disasters such as volcano eruption, severe ice storm, earthquake or flood). Regular, long-term police and fire employees are not emergency workers for this purpose and subject to the same rules as other public employees to determine whether they are covered by social security. [IRS]
This page contains no comments
5) **How are tax deposits made?** As of January 1, 2011, employment taxes may no longer be made with paper coupons at Federal tax depositaries. They must be made electronically, or, in some cases, may be paid with the tax return. See *Publication 15*, Circular E. [IRS]
This page contains no comments
Chapter 4

Determining Worker Status

It is critical for any entity paying compensation to know the proper classification of its workers as employees or independent contractors. In some cases, workers may be designated as employees by a Section 218 Agreement. In other cases, workers may be defined as “statutory employees” or “statutory nonemployees” because specific laws address the occupation (see Publication 15-A for more information on these workers). In general, however, the determination of worker status is made by applying an established common-law standard that addresses the facts and circumstances concerning how the work is performed. Whether workers are employees has significant consequences for tax liability and reporting.

Generally, when workers are employees, the government entity that employs them must withhold and pay employment taxes and file employment tax returns. Employment taxes consist of Federal income tax withholding, Old-Age, Survivors and Disability Insurance (OASDI), or social security tax and the Hospital Insurance tax (Medicare tax). The social security tax and Medicare tax make up the Federal Insurance Contributions Act (FICA) contributions, which are paid through employer and employee shares. State and local governments generally pay the social security tax on employees covered under Section 218 Agreements and on employees not covered by a public retirement system (mandatory coverage), and generally pay the Medicare portion on all other employees hired after March 31, 1986. Wages paid by state and local governments are not subject to taxes under the Federal Unemployment Tax Act (FUTA) but state unemployment taxes may apply.

When workers are independent contractors, the governmental entity may have information-reporting and backup withholding responsibilities, but it is not required to withhold and pay employment taxes on behalf of those workers.

This chapter deals with the general rules for determining whether workers are employees, and the laws that apply to different categories of public employment.

Workers Covered Under Section 218 Agreements

As discussed in Chapter 1, states can enter into agreements with SSA to provide social security and Medicare coverage for their employees pursuant to section 218 of the Social Security Act (Section 218 Agreements). If a position is covered by a Section 218 Agreement, then anyone holding that position is an employee. Therefore, the first question for a government to ask in determining whether individuals are employees is whether the worker is in a position covered under a Section 218 Agreement. If Section 218 coverage applies, this fact takes precedence over other considerations, including the common-law tests discussed below and the mandatory coverage rules.
This page contains no comments
If you are not sure whether the Section 218 Agreement covers a specific position, contact your State Social Security Administrator, or the SSA Regional Office for assistance. If a group of workers is covered under a Section 218 Agreement, the Agreement cannot be terminated or modified to exclude that coverage group.

Employees who are not covered under a Section 218 Agreement are generally subject to social security and Medicare unless they participate in a public retirement system, discussed in Chapter 6. However, Medicare taxes generally apply to wages of all state and local government employees hired after March 31, 1986. See Chapter 5, Social Security and Medicare Coverage, for further information.

Indian tribal governments are not treated as states for purposes of Section 218. See IRC section 7871. For more information about social security coverage, Medicare, and tribal governments, see the IRS Indian Tribal Governments website.

**Common-Law Standard – Employee Status for FICA Purposes**

IRC 3121(d)(2) states that, for purposes of social security and Medicare, an employee is “any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee.” The IRS has interpreted the common-law test for determining whether a worker is an employee as whether the service recipient (i.e., the government entity) has the right to direct and control the worker as to the manner and means of the worker’s job performance. In other words, does the entity have the right to tell the worker not only what shall be done, but how it shall be done?

All the facts and circumstances must be considered in deciding whether a worker is an independent contractor or an employee. The facts fall into three main categories:

1) Whether the entity has the right to control the behavior of the worker;
2) Whether the entity has financial control over the worker; and
3) The relationship of the parties, including how they see their relationship.

These facts are discussed below, with emphasis given to governmental situations.

**Behavioral Control**

Facts that fall under this category show whether the entity has a right to direct and control how the worker performs the specific task for which he or she is engaged. Many times, when workers perform their tasks satisfactorily, the entity does not appear to exercise much control. The critical question, however, is whether there is a right to control. If the entity has the right to do so, it is not necessary that it actually direct and control the manner in which the services are performed.

The following table addresses the elements of behavioral control with respect to government employees:
This page contains no comments
Instructions, Training and Required Procedures

An employee is generally subject to the government entity's instructions about when, where, and how to work. The employer has established policies, which the workers are required to learn and follow. Daily or ongoing instructions regarding the expected tasks are especially indicative of employee status. Training is a classic means of explaining detailed methods and procedures to be used in performing a task. Periodic or ongoing training about procedures to be followed and methods to be used indicates that the employer wants the services performed in a particular manner. This type of training is strong evidence of an employer-employee relationship. For instance, police officers and firefighters must be trained to comply with departmental rules and regulations. They do not have the independence characteristic of independent contractors. Other examples include a state statute requiring that animal control officers receive state-sponsored training, or a statute requiring that inspectors of sanitary facilities be trained and state-certified. These facts are indicative of a right to control. Election workers are trained to follow uniform procedures established for the polling place. They are directed by a supervisor. These facts suggest they would typically be employees. Government employees often work subject to regulations and manuals, which specify how their jobs are to be done. Teachers are required to receive periodic training in departmental policies. They are required to attend meetings, to follow an established curriculum, to use certain textbooks, to submit lesson plans, and to abide by departmental policies concerning professional conduct. However, some types of training or minimal instructions may be provided to either an employee or an independent contractor, including orientation or information sessions about a government entity’s policies and voluntary programs for which there is no compensation.

Government Identification

Government workers may be required to identify themselves by wearing a uniform, driving a marked vehicle, etc. When an individual represents himself or herself as an agent of a government, that gives the individual an appearance of authority. Wearing a uniform, displaying government identification, or using forms and stationery that indicate one is representing a government are highly indicative of employee status.

Nature of Occupation

The nature of the worker’s occupation affects the degree of direction and control necessary to determine worker status. Highly-trained professionals such as doctors, accountants, lawyers, engineers, or computer specialists may require very little, if any, instruction on how to perform their specific services. Attorneys, doctors and other professionals can, however, be employees. In such cases, the entity may not train the individuals or tell them how to practice their professions, but may retain other kinds of control, such as requiring work to be done at government offices, controlling scheduling, holidays, vacations, and other conditions of employment. Again, the government entity should consult state statutes to determine whether a professional position is statutorily created. On the other hand, professionals can be engaged in an independent trade, business, or profession in which they offer their services to the public, including work for government entities. In this case, they may be independent contractors and not employees. In analyzing the status of professional workers, evidence of control or autonomy with respect to the financial details is especially important, as is evidence concerning the relationship of the parties as discussed below.
This page contains no comments
Evaluation Systems

Evaluation systems are used by virtually all government entities to monitor the quality of work performed. This is not necessarily an indication of employee status. In analyzing whether a government entity's evaluation system provides evidence of the right to control work performance, consider how the evaluation system may influence the workers’ behavior in performing the details of the job. If there is a periodic, formal evaluation system that measures compliance with performance standards concerning the details, the system and its enforcement are evidence of control over the workers’ behavior.

Financial Control

This second category includes evidence of whether the entity controls the business and financial aspects of the workers’ activities. Employees do not generally have the risk of incurring a loss in the course of their work, but generally receive a salary for as long as they work. An independent contractor has a genuine possibility of profit or loss. Facts showing possibility of profit or loss include: significant investment in equipment, tools or facilities; unreimbursed expenses, including the requirement to provide materials or hiring helpers; working by the day or by the job rather than on a continuous basis; having fixed costs that must be paid regardless of whether the individual works; and payment based on contract price, regardless of what it costs to accomplish the job.

The following table addresses the elements of financial control.

<table>
<thead>
<tr>
<th>Method of Payment</th>
<th>The method of payment must be considered. An individual who is paid a contract price, regardless of what it costs to accomplish the job, has a genuine possibility of profit or loss and therefore would not generally be considered an employee. An individual who is paid by the hour, week, or month is typically an employee. However, this is not always the case; for example, independent contractor attorneys usually bill by the hour. An individual who is paid by the unit of work, such as a court reporter, may or may not be an independent contractor, depending on the facts.</th>
</tr>
</thead>
</table>
| Offering Services to the Public | Another factor favoring independent contractor status exists when the individual makes his or her services available to the public or a relevant segment of the market. Relevant questions that indicate this include:  
  - Does the individual advertise?  
  - Does the individual use a private business logo?  
  - Does the individual maintain a visible workplace?  
  - Does the individual work for more than one entity? |
| Corporate Form of Business | If the individual is incorporated and observes corporate formalities associated with this status, this makes it unlikely that he or she is an employee of the government entity. (A corporate officer will be an employee of the corporation.) The mere fact of incorporation or use of a corporate name, however, does not transform an employee into an independent contractor. The corporation must serve an intended business function or purpose, or be engaged in business. |
This page contains no comments
Part-Time Status

The fact that workers work on a part-time or temporary basis, or work for more than one entity, does not make them independent contractors. A part-time, temporary or seasonal worker may be an employee or an independent contractor under the common-law rules.

Relationship of the Parties

The third category used to determine worker status is evidence of the relationship between the parties, including how they view their relationship. The relationship of the parties is generally evidenced by examining the parties’ agreements and actions with respect to each other, paying close attention to those facts that show not only how they perceive their relationship, but also how they represent their relationship to others.

For example, a fact illustrating how the parties perceive their relationship is the intent of the parties as expressed in a written contract. A written agreement describing the worker as an independent contractor is evidence of the parties’ intent, and in situations where it is unclear whether a worker is an independent contractor or employee, the intent of the parties, as reflected in the contract, may resolve the issue.

However, a contractual designation, in and of itself, is not sufficient evidence for determining worker status. The facts and circumstances under which a worker performs services are determinative. The substance of the relationship, not the label, governs the worker’s status. See Employment Tax Regulation §31.3121(d)-1(a)(3)). The following items may reflect the intent of the parties:

- Filing a Form W-2 or withholding payroll taxes for an individual indicates the entity's belief that the worker is an employee.
- A worker doing business in corporate form, with observance of corporate formalities, indicates the worker is not an employee of the government entity.
- Providing employee benefits, such as paid vacation, sick days and health insurance, is evidence that the entity regards the individual as an employee. The evidence is strongest if the worker is provided with benefits under a tax-qualified retirement plan, section 403(b) annuity or cafeteria plan because, by statute, these benefits can be provided only to employees.

The following are key considerations in evaluating the elements involving the relationship of the parties.
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Discharge or Termination

The circumstances under which a business and a worker can terminate their relationship have traditionally been considered useful evidence concerning the status of the worker. However, business practices and legal standards governing worker termination have changed since these general principles developed. Under a traditional analysis, a government entity's ability to terminate the work relationship at will, without penalty, provided a highly effective method to control the worker. The ability to fire at will is indicative of employee status. In the traditional independent contractor relationship, the government entity could terminate the relationship only if the worker failed to provide the intended product or service, thus indicating that the business did not have the right to control how the work was performed. In the current environment, however, a government entity rarely has complete flexibility in discharging employees. The reasons a government entity can terminate an employee may be limited by law, by contract, or by its own practices. Consequently, inability to freely discharge a worker, by itself, no longer constitutes persuasive evidence that the worker is an independent contractor.

Termination of Contracts

Historically, a worker’s ability to terminate work at will was considered to illustrate that the worker merely provided labor and tended to indicate an employer-employee relationship. In contrast, if the worker terminated work, and payment could be refused, or the worker could be sued for nonperformance, this traditionally tended to indicate an independent contractor relationship. Today, however, it is more common that independent contractors may enter short-term contracts for which nonperformance remedies are inappropriate, or may negotiate limits on their liability for nonperformance. For example, professionals, such as doctors and attorneys, are typically able to terminate their contractual relationship without penalty. Accordingly, the worker’s protection from liability for terminating the relationship does not necessarily indicate employee status.

Non-performance of Employees

Employers may successfully sue employees for substantial damages resulting from their failure to perform the services for which they were engaged. As a result, the presence or absence of limits on a worker’s ability to terminate the relationship, by itself, is less relevant in determining worker status. On the other hand, a government entity’s ability to refuse payment for unsatisfactory work continues to be characteristic of an independent contractor relationship. Because the meaning of the right to discharge or terminate is so often unclear, and depends primarily on contract and labor law, these facts should be viewed with great caution.

Permanency

The permanency of the relationship between the worker and service recipient is somewhat relevant to determining whether there is an employer-employee relationship. If a worker is engaged with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence of intent to create an employment relationship. However, a long-term relationship may also exist between a government entity and an independent contractor. There may be a long-term contract, or contracts may be renewed regularly due to superior service, competitive costs, or lack of alternative service providers. Part-time, seasonal or temporary workers may also be employees under the common law. The fact that workers do not have full-time, permanent status is irrelevant to their classification.
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Common-Law Standard - Summary

In many worker classification cases, some facts will support independent contractor status and others will support employee status. Independent contractors are rarely totally unconstrained in the performance of their contracts, and employees almost always have some degree of autonomy. The determination of a worker’s status, therefore rests on the weight given to the facts as a whole, keeping in mind that no one factor is determinative.

Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding

In difficult cases, the IRS can provide a determination as to whether a worker is an employee or an independent contractor. To obtain a determination from the IRS, file Form SS-8. Either a governmental entity or a worker may submit Form SS-8. The IRS will acknowledge receipt of the Form SS-8 and will also request information from the other party. If a contract has been executed between the worker and the entity, a copy of the contract should be submitted with Form SS-8. In some cases, the IRS will contact the State Social Security Administrator to determine whether the entity and position are covered by a Section 218 Agreement. The IRS will generally issue a formal determination to the entity and will send a copy to the worker.

Note: The SS-8 determination is not an examination. It does not reopen a closed examination or change the findings for years previously examined.

Employee Status for Income Tax Withholding

“Employment” for income tax purposes is generally governed by regulations under Code section 3401. As explained above, for purposes of social security and Medicare (FICA) FICA, employee status is determined under the common-law control test, unless a Section 218 Agreement is in place and specifically covers the position. In general, the common-law factors apply to the determination of whether a worker is an employee for income tax purposes as it does for FICA taxes. The regulations under IRC 3401(c) contain nearly identical language to the regulations under IRC 3121(d)(2), reciting the same “right to control” text that appears in 31.3121(d)-1(c). See Regulations 31.3401(c)-1.

However, IRC §3401(c) contains a specific provision for government employees for income tax withholding purposes; it states that “the term employee includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof.” Therefore, an officer, employee, or elected official of a state or local government is an employee for income tax withholding purposes.

Classification Issues Involving Government Employee

The following discussion addresses some special worker classification situations involving governmental employees.
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Public Officials

The term “public official” refers to someone who has authority to exercise the power of the government and does so as an agent and employee of the government. The Internal Revenue Code does not define the term “public official,” but Regulation §1.1402(c)-2(b), explaining the applicability of self-employment tax, indicates that holders of “public office” are not in a trade or business and are therefore not subject to self-employment tax. This Regulation states that the performance of the functions of a public office does not constitute a trade or business. If self-employment tax is not applicable to the services, the individuals who perform them are presumed to be employees.

An exception to this rule applies for certain public officials paid solely on a fee basis (see Chapter 5). The regulations give the following specific examples of positions that constitute “public office”:

- Governor
- Mayor
- Member of a legislature or elected representative (e.g., elective office)
- County commissioner
- State or local judge, or justice of the peace
- County or city attorney
- Marshal, sheriff, constable
- Registrar of deeds
- Tax collector or tax assessor
- Road commissioners
- Members of boards and commissions, such as school boards, utility districts, zoning boards, and boards of health

However, it may not always be clear whether a worker holds public office. In *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926), the U.S. Supreme Court addressed the definition of an officer, and whether consulting engineers hired by states or subdivisions of states were independent contractors or “officers and employees” of a state. The Court ruled that an office is a public station conferred by the appointment of a government. The term “officer” includes the idea of tenure, duration, emolument and duties fixed by law, and where an office is created, the law usually determines its term, its duties, and its compensation. The Court concluded that the consulting engineers were not officers of the state or a subdivision of it, and were independent contractors. Public officials will generally have the characteristics of common-law employees.

Therefore, depending on the facts presented, a worker who is compensated for services performed for a government may be an independent contractor and not a public official or employee.

If there is some question as to whether a worker is a public official and employee, a critical factor to consider is whether there is a provision of the state constitution or a statute.
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establishing the position. State statutes should be reviewed to determine whether they establish enough control for the individual to be classified as an employee under the common-law test. A statute may state that a specific position is that of a public official, in which case there is likely to be a right to control sufficient to make the individual an employee. Statutes may also specify the duties of a public office and generally establish the officer's superiors and subordinates, if any. Statutes establish an official's term of office and sometimes the compensation. They may require that a public official take an oath of office. Statutes often establish general and specific penalties for dereliction of duty. For instance, members of boards who are paid for each meeting they attend may face termination if they fail to attend a certain number of meetings.

Example. State A establishes the position of city attorney by statute, and indicates that the position holder is an officer and an employee. This statute defines the duties of the position. The city attorney is required to direct all litigation in which the city is a party, including prosecution of criminal cases; to represent the city in all legal matters in which the city or a city officer is a party; to attend meetings of the commissioners, advise commissioners, mayors, etc., on all legal questions, and approve all contracts and legal documents. A city manager appoints, supervises and controls the work of the city attorney. The city attorney must take an oath of office. These facts show the importance of state statutes in establishing a right of direction and control over a public official and thus classifying the individual as a common-law employee.

Elected Officials

For social security and Medicare purposes, elected officials (also referred to as “individuals in elective positions”), are subject to a degree of control that typically makes them employees under the common law, and therefore subject to these taxes. Elected officials are responsible to the public, which has the power to vote them out of office. Elected officials may also be subject to recall by the public or a superior official. Very few elected officials have sufficient independence to be considered independent contractors. Under IRC 3401, wages, for income tax withholding purposes, include all remuneration, other than fees paid to a public official. Because elected officials receive wages, not fees, they are employees for income tax withholding purposes, regardless of any determination for social security and Medicare purposes.

Home Care Service Recipients

A home care service recipient (HCSR) is an individual who receives home care services while enrolled in a program administered by a Federal, state, or local government agency that provides funding for that individual's home care services. Home care services include health care and personal attendant care services rendered to the HCSR. Generally, the HCSR is considered the employer of the service provider under the common-law rules. The provision of home care services also generally constitutes household employment.
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The HCSR may request that the IRS authorize, under section 3504, an agent to act on his or her behalf to withhold, report, and pay the Federal employment taxes with respect to the workers who provide home care services. See Revenue Procedure 70-6 and Form 2678, Employer/Payer Appointment of Agent. Special rules apply when a state or local government agency acts as the section 3504 agent. See Revenue Procedure 80-4 and Notice 2003-70. A state or local government agency acting as a section 3504 agent on behalf of a HCSR files an aggregate Form 941 and aggregate Form 940, attaching Schedule R (Form 941), Allocation Schedule for Aggregate Form 941 Filers, and Schedule R (Form 940), Allocation Schedule for Aggregate Form 940 Filers. Agencies must have an employer identification number separate from the one used to report taxes of its own employees for this purpose. The state agent may engage a reporting agent or subagent to perform the reporting and payment of employment taxes that the state agent would otherwise perform on behalf of the service recipient. See Notice 2003-70 for the correct reporting procedures.

**Volunteer Firefighters**

Compensation paid in an employer-employee relationship is taxable wages (unless an exclusion applies), regardless of whether the workers are termed “volunteers.” In some cases, rather than receive salaries, firefighters may receive amounts intended to reimburse them for expenses. They may also receive other cash or in-kind benefits that may be wages. Unless these reimbursements are paid under an accountable plan, discussed in Chapter 3, these reimbursements are taxable as wages.

Amounts that are termed reimbursements but that are not paid under an accountable plan are treated as wages and subject to income and social security and Medicare taxes. Therefore, a per diem or fixed amount paid to a firefighter (or other worker), that does not reimburse actual, documented expenses, is includible in income and subject to income tax withholding, social security and Medicare.

The services of volunteers are generally not eligible for the exclusion from FICA for emergency workers, discussed in Chapter 5. IRC §3121(b)(7)(F)(iii) provides that services performed by employees on a temporary basis in the case of fires, storm, snow, earthquake, floor or other similar emergency are exempt from employment. Firefighters who are on call and work part-time or intermittently do not qualify for the emergency worker exclusion. This exception applies only for temporary workers who are hired because of an unforeseen emergency.

**Medical Residents**

Medical residents are generally common-law employees of the hospitals for which they work, and therefore are subject to social security and Medicare taxes (unless they are excepted by a Section 218 Agreement). IRC 3121(b)(10) provides an exception for students employed by a school, college, or university (SCU) who are enrolled and regularly attending classes at the SCU. However, this exception is not available to full-time employees. Under regulation section 31.3121(b)(10)-2(d)(3)(iii), an employee whose normal work schedule is 40 hours or more week is always considered a full-time employee.
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Therefore, medical residents generally do not qualify to exclude payments for their services from social security and Medicare taxes.

Identity of the Employer for Tax Purposes

In certain cases it is clear that the work in question is performed by employees, but it may not be clear which of two or more entities, organizations, or individuals is the employer. This situation may arise when workers are supplied or paid by one entity but work under the direction of another (for example, leased workers).

The term “employer” is defined in IRC §3401(c), for income tax withholding and reporting purposes, as the person for whom an individual performs any service, of whatever nature, as an employee (IRC §3401(c)). However, an exception is provided if the person for whom the individual performs the services does not have control of the payment of the wages. In this situation, the term “employer” means the person having legal control of the payment of the wages. See IRC §3401(d)(1) and Regulation 31.3401(d)-1(f).

When a question is raised about the identity of the employer, all facts relating to the employment must be considered. If there is any provision in a statute or ordinance that authorizes the employment by a government entity of the individual, and the individual is hired under this authority, the individual is generally an employee of that governmental entity. Any statutory provisions relating to the relationship should be reviewed. If there is no applicable statutory authority, the identity of the employer must be determined under the common-law control test.

Employee Status for Other Purposes

A state or Federal agency may make determinations of employee status for Workers’ Compensation, minimum wage, or other purposes. The state or Federal agency may apply different standards from those used to determine worker classification for Federal employment tax purposes. Characterizations of individuals as employees based on state or non-tax laws should be weighed with caution, and in some cases disregarded, because the laws or regulations involved may use different definitions of an employee for their purposes.

Independent Contractor Reporting Responsibilities

Independent contractors are subject to social security and Medicare taxes under the Self-Employment Contributions Act (SECA). Generally, payments to independent contractors of $600 or more during a calendar year must be reported on Form 1099-MISC, Miscellaneous Income. Independent contractors are required to provide a taxpayer identification number (TIN) to the entity that pays them. Form W-9, Request for Taxpayer Identification Number, contains the required certification and can be used for this purpose.
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For more information about requirements for information reporting to independent contractors, see the Instructions for Form 1099-MISC.

Workers who have been treated as independent contractors but are later determined to be employees will need to file amended returns if they reported income on Form 1040, Schedule C, and calculated self-employment tax (SECA) on Schedule SE. A worker who has been determined to be an employee, but was treated as an independent contractor by the entity, uses Form 8919, Uncollected Social Security and Medicare Tax on Wages, to figure and report the employee share of the FICA tax. Entities that misclassify employees as independent contractors may be held liable for back taxes, penalties and interest.

Worker Providing Services as an Employee and as an Independent Contractor

Individuals who are employees with respect to some services may not be employees with respect to other services they provide. For example, a teacher may be retained to remove snow from school property. This individual may be an employee as a teacher but an independent contractor for the snow-removal activity. Apply the common-law rules separately to each activity to establish whether it is an independent trade or business. Revenue Ruling 58-505 explains that for an individual to work in two capacities (employee and contractor), the services must not be interrelated. Stated differently, an individual does not work in two capacities when the same type of work, such as legal services, is divided into two components, one in an employee capacity, and one in an independent contractor capacity. The services and remuneration for the two activities must be separate.

Section 530 Relief

State and local government entities may be entitled to relief from employment tax for certain workers under Section 530 of the Revenue Act of 1978 (“Section 530”). If applicable, Section 530 terminates an entity’s Federal employment taxes, including social security and Medicare, income tax withholding, and any penalties attributable to the liability. See Revenue Procedure 85-18. This relief is not available for services covered by a Section 218 Agreement.

If the requirements for relief are met, the entity may obtain relief from liability for income tax withholding for prior years. However, Section 530 relief from income tax withholding will not apply with respect to wages paid after the date on which the entity is advised that the workers are covered under a Section 218 Agreement. This is because the entity would have begun withholding FICA taxes, which constitutes treatment of the workers as employees. See Revenue Procedure 85-18, section 3.03(C) and 3.04.
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Section 530 provides relief for an entity that treated workers as nonemployees if the entity had a reasonable basis for the classification and acted consistently on that basis. To qualify for Section 530 relief, the entity must have a reasonable basis for treating the worker as an independent contractor. Section 530 provides three safe harbors for satisfying the reasonable basis requirement:

1) Published ruling or judicial precedent;
2) Prior IRS examination of the taxpayer (if after 1996, the examination must have included a review of worker classification); or
3) Longstanding recognized practice of a significant segment of the industry. Alternatively, an entity may establish some other reasonable basis. For more information, see Revenue Procedure 85-18.

In addition, the entity must:

1) have filed all Federal tax returns (including information returns) on a basis consistent with treatment of the worker as a nonemployee; and
2) not have treated the worker, or any other worker in a substantially similar position, as an employee.

**Tax Consequences for Workers**

In some cases, a government entity may be entitled to relief under Section 530, but workers find, through a determination letter or some other means, that they have been misclassified and are employees. Section 530 relief does not extend to workers. It does not convert them from employees to independent contractors. Misclassified employees are liable for the employee share of social security and Medicare taxes rather than for SECA (self-employment) tax. (See Form 8919, Uncollected Social Security and Medicare Tax on Wages.) If they have been filing income tax returns as independent contractors, they should file amended returns for years for which the statute of limitations is open. As employees, they are not entitled to deduct employee business expenses on Schedule C. Because their employers are entitled to continue treating them as independent contractors, the workers will not be subject to income tax, social security or Medicare withholding, and will generally have to make estimated tax payments to cover their tax liabilities.

For more information about the requirements for Section 530 relief, see Publication 1976, Do You Qualify for Relief Under Section 530?

**Note:** Section 530 is not part of the Internal Revenue Code. It was originally intended as an interim relief measure, but was extended indefinitely in 1982.

**Frequently Asked Questions**

1) **What are the consequences of misclassifying a worker?** Generally, when an employer erroneously classifies an employee as an independent contractor and does not withhold Federal payroll taxes, the employer is liable for the employer
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and employee shares of all applicable Federal payroll taxes, as well as various penalties and interest. [IRS]

2) **What do you do if you cannot determine whether a worker is an employee?**
The state or local entity and/or the worker can request a formal determination by submitting to the IRS Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding. When Form SS-8 is submitted to the IRS, all the facts are analyzed and the determination of the worker’s status is presented to the worker and the service recipient. [IRS]

3) **Are volunteers considered employees?** The common-law tests apply to determining the status of individuals regardless of whether they are deemed “volunteers.” If an individual considered a volunteer meets the common-law tests, any form of compensation or benefit he or she receives is considered wages, unless a specific exception applies. [IRS]

4) **What effect does the presence of a Section 218 Agreement have on worker status?** If an existing Section 218 Agreement classifies a position as that of an employee, covered by the Agreement, then an individual in that position is an employee, subject to FICA and income tax withholding; the common-law tests are not considered. Positions not covered by a Section 218 Agreement should be evaluated under the common-law tests. [SSA/IRS]
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Chapter 5

Social Security and Medicare Coverage

As discussed in Chapter 3, cash or noncash compensation for services is subject to income, social security, and Medicare taxes unless certain exceptions apply. In addition to the exceptions for certain payments, state and local employees may be exempted from social security (and in some cases, Medicare) taxes based on coverage under a public retirement system. A public employee may be covered for social security and Medicare, Medicare only, or may be exempt from both. The flowchart in Chapter 1, “Social Security and Medicare Coverage of State and Local Employees,” illustrates the process for determining the social security and Medicare coverage that applies to an employee. This chapter addresses various categories of employees and rules by which coverage is established, including the process for obtaining coverage under a Section 218 Agreement (“Agreement”). As a supplement to the social security coverage information provided in this publication, refer to the State and Local Government Employers page on the SSA website. Additional information is also available on the IRS FSLG home page.

All state and local government employees fall into one of three categories with respect to social security coverage:

1) Employees under Section 218 coverage (also called “voluntary coverage”). These employees are covered for social security by a voluntary Section 218 Agreement between the State Administrator and the SSA. They may or may not participate in a public retirement system. This chapter discusses coverage under Section 218 Agreements. (Public retirement systems are discussed in Chapter 6.)

2) Employees under mandatory social security coverage. These employees are required to be covered for amounts that are deemed to be wages, because they are not members of a qualifying public retirement system and are not covered by a Section 218 Agreement. Government employees not covered by a public retirement system or social security are subject to mandatory coverage after July 1, 1991.

3) Employees with no social security coverage. These employees are covered by a qualifying public retirement system, and are therefore exempt from mandatory social security. They are not covered by a Section 218 Agreement.

Each of the three categories of employees is discussed below.

1) Employees Under Section 218 Coverage
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State and local government employees can be covered for social security and Medicare through a Section 218 Agreement between the state and the SSA. This agreement may provide any of the following:

- Coverage for groups of employees in positions covered by a retirement system
- Coverage for groups of employees in positions not covered by a retirement system
- Coverage for employees in positions that are excluded from mandatory coverage provisions, but are optional exclusions under Section 218 Agreements (for example, student services).
- Medicare Hospital Insurance (HI)-only coverage for employees hired prior to April 1, 1986, who are members of a public retirement system.

Each state’s original Agreement incorporates the basic provisions, definitions, and conditions for coverage. Only the State Social Security Administrator can initiate a request for Section 218 coverage on behalf of an entity in the state. Additional coverage can be provided by modifications. Each modification, like the original Agreement, is binding upon all parties.

In order to establish an Agreement, authority must exist under state law (state enabling legislation) to enter into an Agreement and to extend coverage under an Agreement. The types and extent of coverage provided under an Agreement must be consistent with Federal and state laws.

State and local government employees who are covered under an Agreement have the same benefits, rights, and responsibilities as employees who have mandatory social security coverage. The cost to the employer of providing social security protection for state and local government employees is the same as that for employees in mandatory coverage.

Coverage under an Agreement must be provided for groups of employees. An Agreement may be modified to increase, but not to decrease, the extent of coverage. (An exception applies to election worker services and solely fee-based positions; see Optional Section 218 Exclusions below.)

Termination of Agreements

Before legislation was enacted in 1983, states could terminate coverage for any group of employees covered under the state’s Section 218 Agreement. A state did this by providing a two-year advance notice to the Federal government. Once it was terminated, the coverage for this group of employees could not be reinstated. The 1983 Social Security Amendments rescinded this provision and prohibited states from terminating coverage on or after April 20, 1983, but permitted states to cover again any group terminated before this date.
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Coverage Groups

Coverage under Section 218 Agreements can be extended only to groups of employees, referred to as coverage groups. Once an employee position is covered under a Section 218 Agreement, any employee filling that position is a member of the coverage group for social security and Medicare. There are two types of coverage groups: 1) absolute, or non-retirement, coverage groups (employees not in a retirement system); and 2) retirement system coverage groups. Each state decides, within Federal and state law, which groups to include under its Agreement, and when their coverage begins. The state can choose to cover non-retirement system groups, retirement system groups, or both.

Absolute Coverage Groups (Non-Retirement System Groups)

An absolute coverage group includes the services of employees in positions not covered by a retirement system, except those whose services are mandatorily or optionally excluded from social security and Medicare coverage. They may also be referred to as non-retirement system groups or Section 218(b)(5) groups. A state may extend Section 218 coverage to an absolute retirement system group without considering the desires of the employees. An absolute coverage group may consist of any of the following:

1) All employees of a state engaged in performing services in connection with governmental (nonproprietary) functions
2) All employees of a state engaged in performing services in connection with a single proprietary function
3) All employees of a political subdivision of a state engaged in performing services in connection with governmental (nonproprietary) functions
4) All employees of a political subdivision of a state engaged in performing services in connection with a single proprietary function
5) Certain civilian employees working with the National Guard of a state
6) Individuals employed under an agreement between a state and the United States to perform services as inspectors of agricultural products

Retirement System Coverage Group

A retirement system coverage group consists of employees working in positions covered by a public retirement system (FICA replacement plan), as provided in section 218(d)(4) of the Social Security Act (Act). Such a group may be provided social security and Medicare coverage under an Agreement only if approved by a referendum. The Act gives the state the option, for referendum purposes, of breaking down a retirement system into its components. If a retirement system covers positions of employees of one or more political subdivisions of the state, the state has the following choices. It may hold a referendum for:

1) All employees in positions under the retirement system
2) State employees in positions under the system
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3) Employees of one or more political subdivisions in positions under the system
4) Any combination of the groups in (2) and (3)
5) Employees of a hospital that is an integral part of a political subdivision
6) Employees of two or more hospitals (each hospital must be an integral part of the same political subdivision; or
7) Employees of each institution of higher learning

The referendum for retirement system employees is conducted either on a majority vote basis (allowed in all states), or on a divided system basis (allowed in certain states).

**Majority Vote Referendum**

Under this type of referendum, social security and Medicare coverage may be extended to employees in positions covered by a retirement system only if a majority of the eligible employees vote in favor of such coverage. A majority of all of the eligible employees under the system (not a majority of the eligible employees casting votes), must vote in favor of coverage. All states are authorized by Federal law to use the majority vote referendum procedures. Although the referendum itself is a state matter, Federal law requires that the following conditions be met to establish coverage:

1) Eligible employees are given not less than 90 days notice of the referendum
2) An opportunity to vote is given, and limited to eligible employees who were in an employment relationship with the employer both on the date the notice was given and on the date the referendum is held
3) The referendum is held by secret ballot
4) The referendum is supervised by the governor (or his/her designee)
5) A majority of the retirement system’s eligible employees vote for coverage

**Divided System Retirement Referendum**

In addition to the majority vote referendum procedure, certain states and all interstate instrumentalities are authorized to divide a retirement system based on whether the employees in positions under the retirement system want coverage. Under the divided vote referendum, only those employees who vote "yes" and all future employees who become members of the retirement system will be covered. Members who vote "no" are not covered as long as they maintain continuous employment in a position within the same public retirement system coverage group.

The states having this authority under Section 218(d)(6)(c) of the Act are:

- Alaska
- California
- Connecticut
- Florida
- Georgia
- Hawaii
- Illinois
- Kentucky
- Louisiana
- Massachusetts
- Minnesota
- Nevada
- New Jersey
- New Mexico
- New York
- North Dakota
- Pennsylvania
- Rhode Island
- Tennessee
- Texas
- Vermont
- Washington
- Wisconsin
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These “divided vote” states may choose between a divided system vote and a majority vote referendum.

States authorized to use the divided vote retirement system referendum to extend coverage may use either of two voting procedures:

1) **Simplified One-Step Method:** Poll all eligible members and divide the system into two parts, with each member placed in either the “Yes” or “No” group based on his or her choice (simplified one-step referendum), or

2) **Original Two-Step Method:** Subdivide the retirement system into two parts or systems – “Yes” and “No” groups - based on individual members’ choices and then, after the individuals are separated based on this preference, conduct a majority vote referendum among the “Yes” group. These individuals can then change their original poll vote.

The conditions for a divided vote referendum are the same as those given for the majority vote referendum with two exceptions: (1) the ballots are not secret, because the individuals choosing coverage must be identified, and (2) the individual must be in an employment relationship and a member of the retirement system when the vote is held (but not necessarily when the referendum notice was given).

At the discretion of the state, employees who become members of the retirement system after the referendum (division) date and before the execution of the modification extending coverage to the retirement system coverage group may be given a choice to receive coverage.

The referendum procedures must be conducted under the direction of the State Social Security Administrator.

**Continuation of Coverage Rules**

Once coverage is provided for state and local government employees, it generally continues unless an event occurs that results in termination of the coverage, such as a change in employer. The continuation rules are applied for each type of coverage group as follows:

**Absolute Coverage Group:** Social security and Medicare coverage for non-retirement system groups continues as long as the continuing governmental entity exists. This is true even if the positions are later placed under a retirement system. (This provision includes police and firefighter positions that were first covered as an absolute coverage group.)

**Majority Vote Retirement System Group:** Following a favorable majority vote referendum, services under the retirement system, including positions brought under the retirement system in the future, are compulsorily covered for social security under the
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State’s Section 218 Agreement. Social security and Medicare coverage will continue as long as the continuing governmental entity exists, even though the positions are later removed from under the retirement system, the system is abolished, or the positions are placed under an additional retirement system.

**Divided Vote Retirement System Group:** If the use of procedure (2) above – the original two-step referendum – results in a favorable majority, then the entire “Yes” group and all future members of the retirement system are covered.

As a result of procedure (1) – the simplified one-step referendum – all those retirement system members who voted “Yes” and all future retirement system members are covered for social security. If all current retirement system members vote against social security coverage (the “No” group), then only future retirement system members will be covered for social security and make up the “Yes” group.

Under a divided retirement system, employees carry the “no” or “yes” vote with them if they transfer to another position within the same retirement system coverage group. Social security coverage is not terminated because the positions are later covered under an additional retirement system.

If the divided vote retirement system is later abolished or positions are removed from coverage under it, the “Yes” group (those employees who voted “Yes” in the referendum and those subsequently hired retirement system members) continue to be covered for social security. New employees hired into positions after the removal from, or abolishment of, the former retirement system, are not covered for social security because they would not be considered new members of that former retirement system.

**Section 218 Coverage Exclusions**

When a state or local government entity voluntarily enters into the state’s Section 218 Agreement with the Social Security Administration, it is important to determine which employee services will be excluded from social security coverage. If services are excluded, any employees performing these services are not covered by the Agreement.

Certain services – known as **mandatory exclusions** – are excluded from voluntary social security coverage by Section 218(c)(6) of the Social Security Act.

Other services, however, are **optional exclusions** under Section 218(c)(3), (5) and (8) and, therefore, may be covered under a voluntary Section 218 Agreement. Coverage under a Section 218 Agreement supersedes all other considerations. If optional exclusion services are covered under a Section 218 Agreement, these amounts are subject to social security and Medicare tax.

**Mandatory Section 218 Exclusions**
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Federal law requires the exclusion of the following services from section 218 coverage under Section 218(c)(6) of the Social Security Act:

- **Services performed by individuals hired to be relieved from unemployment.** The intent of the program establishes whether the program is designed to relieve individuals from unemployment. This is usually determined from the statutes or other authorities that established the program. The exclusion does not include services performed by individuals under programs, such as work-study, where the primary purpose is to provide work experience and training to increase the employability of the person, because the primary intent of such programs is not to relieve them from unemployment.

- **Services performed in a hospital, home or other institution by a patient or inmate thereof as an employee of a state or local government.** Generally, these services are performed by individuals who are not normally in an employment relationship with the state or political subdivision. In the case of work performed by inmates in a state prison or local jail, they are excluded from coverage, whether or not the services are performed outside the confines of the prison or jail, because in either case the inmates are not normally not in such an employment relationship with the state or political subdivision. However, services performed by inmates outside the prison or jail for an entity other than the state or local government operating the prison or jail, such as on a work-release program, may be covered if an employment relationship exists. The employer for tax purposes is determined under the common-law rules, discussed in Chapter 4. **Note:** Services performed by patients or inmates as part of the rehabilitative or therapeutic program of the institution are not usually considered performed by employees.

- **Covered transportation service.** This includes services performed by transportation system employees who are covered for Social Security under Section 210(k) of the Social Security Act.

- **Other services that would be excluded if performed for a private employer because the work is not defined as employment under Section 210(a) of the Social Security Act.** This includes services performed by a nonresident alien temporarily residing in the U.S. holding an F-1, J-1, M-1 or Q-1 visa, when the services are performed to carry out the purpose for which the alien was admitted to the U.S. (A state may optionally include certain agricultural services under a Section 218 Agreement.) See the section Foreign Students, Teachers and Apprentices later.

- **Services performed by an employee hired on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency.** This exclusion applies only to those who are hired on a temporary basis in response to a specific emergency. It does not include workers considered temporary for other reasons, or individuals in a continuous employment relationship who perform services related to emergencies on a regular or continuing basis.
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• **Service described in section 210(a)(7)(F) of the Social Security Act that is included as “employment” under section 210(a).** Services by individuals not covered by a public retirement system and subject to mandatory coverage are excluded from coverage under a Section 218 Agreement.

*Caution:* Mandatory exclusions apply to voluntary social security coverage situations (through a Section 218 Agreement) and should not be confused with the different set of exclusions that applies to mandatory social security coverage situations.

**Optional Section 218 Exclusions**

Under a Section 218 Agreement, a state has the option to exclude from social security coverage the services listed below when they are performed by members of any coverage group, including retirement system coverage groups. If the Agreement does not specifically exclude these services, they are covered.

The following are positions and services that may be excluded at the option of the state:

- **All services in any class or classes of elective positions.** These are positions filled by an election; they also may be referred to as “elected officials.” The election may be by a legislative body, a board or committee, or by the qualified electorate of a jurisdiction. The method of selection must constitute an election under state law. The election may be conducted by open voting by the electorate at large or by a chosen body from a list of candidates. Generally, elective positions fall into three classes: executive, legislative, and judicial.

- **All services in any class or classes of part-time positions.** A part-time position is one for which the number of work hours normally required by the position in a week or a pay period is less than the normal time requirements for the majority of the positions in the employing entity. The part-time position exclusion is based on the normal time requirements of the position and not the time spent by an employee in the position. If a position is established as a full-time position, but the employee works part-time in this position, the exclusion does not apply. Conversely, if a position is established as a part-time position and the employee works full time in this position, the services of the employee are excluded. Whether seasonal or temporary positions that require full-time services for a period of short duration are part-time positions depends on the definition of part-time established for the coverage group. Where the part-time position exclusion is taken, the state should include a definition of “part-time” in the modification if one has not been previously established.
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Note: The definition of “part-time” under a Section 218 Agreement provisions may be different from the definition of “part-time” used to determine whether an individual is a qualified participant in a public retirement system (discussed in Chapter 6).

Example: A city provides social security coverage to some of its employees under a Section 218 Agreement, but excludes services performed in part-time positions. The Section 218 Agreement defines part-time positions as positions normally requiring less than 50 hours of service per month. The city must apply the definition in the Section 218 Agreement to determine which employees are excluded from social security coverage under the Agreement. Any employees excluded from coverage under the Agreement may then be subject to mandatory coverage.

- All services in any class or classes of positions compensated solely by fees received directly from the public, by an individual who is treated by the municipality as self-employed. See the section Fee-Based Public Officials, later.

- Agricultural labor, but only those services that would be excluded if performed for a private sector employer. A state that initially excludes agricultural labor may later modify its agreement to cover it. However, if agricultural labor is not excluded initially, it cannot be excluded later. If a state has not taken the agricultural exclusion, then all remuneration for agricultural labor is covered for social security.

- Services performed by students enrolled and regularly attending classes at the school, college or university for which they are working. The student exclusion applies only during periods of regular school attendance, whether during the regular academic year or in summer session. The exclusion does not apply to work done during summer vacation if the student is not attending a summer session. Services performed by students during holidays, weekends, seasonal breaks, and between semesters falling within the academic year when classes are not scheduled, are excluded.

- Services performed by election officials or election workers paid less than the calendar year threshold amount mandated by law. (If the state's Section 218 Agreement does not have an election-worker exclusion or the entity has an Agreement that does not exclude election workers, social security and Medicare taxes apply from the first dollar paid.) See the section Election Officials and Election Workers, later.

Note: Effective July 2, 1991, elective and part-time positions, although optionally excluded under a Section 218 Agreement, must be covered under a qualifying public
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retirement system or else they will be covered for social security under the mandatory social security provisions.

Optional exclusions can be taken by the state in any combination and applied to both absolute and retirement system coverage groups. Any services a state excludes can be included later if permitted by Federal and state law and the state’s Agreement. Generally, if one of the types of work listed above has been included in a coverage group, it cannot later be removed from coverage, except for services performed by (1) election officials/workers, and (2) solely fee-based positions.

Optional exclusions apply only to voluntary social security coverage under a Section 218 Agreement; there are no optional exclusions from mandatory coverage.

Note: The 1972 Amendments to the Social Security Act allowed states a limited period to exclude services in part-time positions and services performed by students, in cases where this exclusion was not initially chosen. An additional window to make this election was provided by Public Law 105-277, enacted October 21, 1998, which allowed states a limited period to exclude the services of students employed by the public school, college or university where they are regularly attending classes. In those states exercising this option, the student exclusion was effective July 1, 2000. Where a state used either or both of these special one-time provisions for excluding services that had been covered previously, it cannot again cover these services under a Section 218 Agreement.

2) Employees Under Mandatory Social Security Coverage

Public Law 101-508 mandated full social security coverage beginning July 2, 1991, for state and local government employees who are not members of a qualifying public retirement system (FICA replacement plan) and who are not covered under a Section 218 Agreement, unless a specific exclusion applies under the law.

If an employee is mandatorily covered for social security, then becomes a member of a qualifying public retirement system, mandatory coverage ends; social security coverage would continue only if the position becomes covered by a Section 218 Agreement.

If an employee becomes a member of a public retirement system and is covered for social security under a Section 218 Agreement, the employee continues to be covered for social security and Medicare.

The determination of whether an employee is covered by mandatory social security is made on an individual basis. For example, a Section 218 Agreement may exclude part-time positions, and a public retirement system may exclude part-time employees for the same entity. If an employee is excluded from section 218 coverage because of work performed in a part-time position, (as defined under the Agreement), and is also excluded.
from membership in a public retirement system because of part-time status, that employee is subject to mandatory social security.

**Example:** A city has a Section 218 Agreement that excludes part-time positions requiring less than 18 hours of work a week. City cafeteria positions require employees to work only 3 hours per day, or 15 hours per week. The city’s public retirement system does not allow membership for employees unless they work 25 hours or more per week. The cafeteria workers are subject to mandatory social security.

**Exclusions from Mandatory Social Security Coverage**

Under Section 210(a) of the Social Security Act, the following categories of employees are not subject to mandatory social security coverage, even if they are not covered by a public retirement system:

- **Services performed by individuals hired to be relieved from unemployment.** The intent of the program establishes whether the program is designed to relieve individuals from unemployment. This is usually determined from the statutes or other authorities that established the program. The exclusion does not include services performed by individuals under programs, such as work-study, where the primary purpose is to provide work experience and training to increase the employability of the person, because the primary intent of such programs is not to relieve them from unemployment.

- **Services performed in a hospital, home or other institution by a patient or inmate thereof as an employee of a state or local government.** Generally, services performed by inmates in a state prison or local jail are excluded from coverage. This is true whether or not the services are performed outside the confines of the prison or jail, because the inmates are not normally in an employment relationship with the state or political subdivision. However, services performed by inmates outside the prison or jail for an entity other than the state or local government operating the prison or jail, such as on a work-release program, may be covered if an employment relationship exists. The employer for tax purposes is determined under the common-law rules, discussed in Chapter 4. **Note:** Services performed by patients or inmates as part of the rehabilitative or therapeutic program of the institution are generally not employment.

- **Services performed by an employee hired on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency.** This exclusion applies only to those workers who are hired on a temporary basis in response to a specific emergency. It does not include workers considered temporary for other reasons, or individuals in a continuous employment relationship who perform services related to emergencies on a regular or continuing basis.
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• Services performed by election officials or election workers paid less than the calendar year threshold amount mandated by law, unless a Section 218 Agreement covers election workers. See the section Election Officials and Election Workers, below.

• Services in positions compensated solely by fees that are subject to self-employment tax (SECA), unless a Section 218 Agreement covers these services. See the section Fee-Based Public Officials, below.

• Services performed by a nonresident alien temporarily residing in the U.S. holding an F-1, J-1, M-1 or Q-1 visa, when the services are performed to carry out the purpose for which the individual was admitted to the U.S. See the section Foreign Students, Teachers and Apprentices below.

• Services performed by students enrolled and regularly attending classes at the school, college or university where they are working, unless a Section 218 Agreement covers student services.

• Services that would be excluded if performed for a private employer because the work is defined as employment under Section 210(a) of the Social Security Act, unless a Section 218 Agreement covers certain agricultural services.

Note: Coverage under a Section 218 Agreement always takes precedence over other employment circumstances. When considering whether the mandatory social security coverage and exclusion rules apply to a worker’s services, first determine whether the services are covered by a Section 218 Agreement.

Election Officials and Election Workers

Prior to the 1967 Social Security Amendments, there was no specific provision for the exclusion of election officials or election workers. The Social Security Act was amended for years beginning with 1968 to allow states to modify their Agreements to exclude the services of election officials and election workers whose pay was below a mandated threshold amount.

The Federal Insurance Contributions Act (FICA) tax exclusion for election officials and election workers is $1,xxx for the calendar year beginning January 1, 2015, unless those wages are subject to social security and Medicare at a lower threshold under the state’s Section 218 Agreement.

If the entity is covered by a Section 218 Agreement, the Agreement determines the treatment of election workers for FICA purposes. The Agreement may specify a lower threshold amount for election officials and election workers (for example, $50 a calendar quarter or $100 a calendar year). In these states, the social security and Medicare tax applies when the amount specified in the state’s Agreement is met. States may modify the Agreement to exclude the services of election officials and election workers paid less
Insert 2015 amount before publishing the Guide.
than the threshold amount mandated by law. Such modifications are effective in the calendar year the modification is mailed or delivered to the Social Security Administration.

If the Section 218 Agreement does not exclude election workers from coverage, or does not provide a threshold for coverage, social security and Medicare taxes apply from the first dollar paid. If the entity is not covered under a Section 218 Agreement, the rules for mandatory social security and Medicare under Section 210(a)(7)(F) of the Social Security Act apply.

The election official/worker thresholds under mandatory social security for calendar years prior to 2016 are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>$1,xxx</td>
</tr>
<tr>
<td>2013-2014</td>
<td>$1,600</td>
</tr>
<tr>
<td>2009-2012</td>
<td>$1,500</td>
</tr>
<tr>
<td>2008</td>
<td>$1,400</td>
</tr>
<tr>
<td>2006-2007</td>
<td>$1,300</td>
</tr>
<tr>
<td>2002-2005</td>
<td>$1,200</td>
</tr>
<tr>
<td>2000-2001</td>
<td>$1,100</td>
</tr>
<tr>
<td>1995-1999</td>
<td>$1,000</td>
</tr>
<tr>
<td>1978-1994</td>
<td>$  100</td>
</tr>
</tbody>
</table>

For calendar years 1968 through 1977, the threshold was $50 per calendar quarter.

Generally, Form W-2 is required for these workers; however, if the worker received only wages for election work and the total is less than $600 total for the year, Form W-2 is not required and no withholding of social security or Medicare tax is required. The amount paid is includible in the gross income of the worker. Revenue Ruling 2000-6 provides reporting procedures for payments to election officials and election workers in several different situations.

Contact the State Social Security Administrator concerning the status of election officials and election workers under the state’s Section 218 Agreement. Additional information and threshold amounts can be found on the SSA website.

**Fee-Based Public Officials**

A fee-based public official receives and retains remuneration directly from the public. An individual who receives payment for services from government funds in the form of wages or salary is not a fee-based public official, even if the compensation is called a fee.

Beginning in 1968, services performed in positions compensated solely by fees are excluded from coverage under Section 218 Agreements unless the state specifically covers these services. If a state covered these positions before 1968, it may modify its Agreement to exclude these positions prospectively. The exclusion is effective the first
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day of the year following the year in which the modification is mailed or delivered by other means to SSA. If a state covered and later excluded these positions, the state cannot again cover these positions.

**Fee-Basis Exclusion – Positions Compensated Solely by Fees**

Services in positions compensated solely by fees are excluded from coverage under Section 218 Agreements (except where the state specifically included these services) and are covered as self-employment and subject to self-employment tax (SECA).

**Fee-Basis Exclusion – Position Compensated by Salary and Fees**

Generally, a position compensated by a salary and fees is considered a fee-basis position if the fees are the principal source of compensation, unless a state law provides that a position for which any salary is paid is not a fee-basis position.

If the state takes this exclusion, none of the compensation, including the salary, is covered wages under the state’s Section 218 Agreement. In this case, the salary payment, while excluded under the Agreement, is subject to mandatory social security if the official is not a qualified participant in a public retirement system.

**Police Officers and Firefighters**

Beginning August 16, 1994, all states were allowed to extend Section 218 social security and Medicare or Medicare-only coverage to police officer and firefighter positions covered under a retirement system through a referendum procedure conducted by the state. (Prior to August 16, 1994, only 23 states, and all interstate instrumentalities, were specifically authorized by Congress to do so.) Those states were:

- Alabama
- California
- Florida
- Georgia
- Hawaii
- Idaho
- Kansas
- Maine
- Maryland
- Mississippi
- Montana
- New York
- North Carolina
- North Dakota
- Oregon
- Puerto Rico
- South Carolina
- South Dakota
- Tennessee
- Texas
- Vermont
- Virginia
- Washington

As noted earlier, all states may use the majority vote referendum procedure. Some states are also authorized under the Act to use the divided retirement system referendum, discussed earlier. (Interstate instrumentalities may use the majority or divided retirement system referendum procedures.) As with other retirement system employees, before referendums can be held and coverage extended to police officer and firefighter positions already covered by a retirement system, there must first be authority to provide such coverage under state law (state statutes and/or the enabling act) and the Federal-State agreement (via a modification to the state’s Section 218 Agreement).
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Generally, state statutes and court decisions establish the definition of police officer and firefighter positions. For social security purposes, the terms do not include services in positions that, although connected with police and firefighting functions, do not meet the definitions of police officer and firefighter positions.

**Note:** Police officers and firefighters are **not** considered emergency workers for purposes of the mandatory exclusion from social security and Medicare coverage for such workers. This exclusion applies only to services of an employee who was hired because of an unforeseen emergency to do work in connection with that emergency on a temporary basis to provide emergency assistance in fires or other disasters such as severe ice storm, earthquake, volcano eruption or flood.

### Police and Firefighter Positions Not Covered Under a Retirement System

If police officer and firefighter positions are not covered under a retirement system, these positions are mandatorily covered for social security and Medicare unless the positions were already covered under a Section 218 Agreement as part of a non-retirement system coverage group.

### Foreign Students, Teachers and Apprentices

Individuals admitted to the United States under an F-1, J-1, M-1 or Q-1 visa are generally exempt from both social security and Medicare taxes. Wages earned within the United States are subject to income tax, whether or not the workers are U.S. citizens. Nonresident students who are not U.S. citizens, permanent residents or resident aliens for tax purposes may be able to take advantage of treaty exemptions to exclude a portion of their U.S. source income from withholding. For more information on specific treaty provisions, contact the IRS or SSA. The following IRS publications have additional information on social security and Medicare coverage for foreign workers:

- [515](#), Withholding of Tax on Nonresident Aliens and Foreign Entities
- [519](#), U.S. Tax Guide for Aliens
- [901](#), U.S. Tax Treaties

### 3) Employees With No Social Security Coverage

The final category of workers includes those who are not subject to any voluntary or mandatory social security coverage at all. This can only occur where the workers are covered by a qualifying public retirement system (“FICA replacement plan”) and are not covered by a Section 218 Agreement. Employers of these workers will not withhold social security taxes or show any “social security wages” on Form W-2; they are generally covered for Medicare. Public retirement systems are the subject of Chapter 6.
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Identifying Covered Employment

In addition to determining whether specific employees are members of a social security coverage group, questions may arise as to whether positions constitute employment subject to the rules. These determinations may be based on decisions regarding specific issues to which either Federal or state law is applicable. It is important to know whether Federal or state law is applied in making a determination on a specific issue. Generally, questions involving interpretation or application of state law are resolved by the authorized legal officers of the state in accordance with applicable state and local laws, regulations and the state court decisions. Federal and state jurisdiction for some of the major questions is indicated in the table below:

Federal Law:
Does an employer-employee relationship exist?  
Who is the employer?  
Are the earnings wages?  
What are emergency services?  
What are student services?

State Law:
Who is an officer of a state or political subdivision?  
Is an entity a political subdivision?  
Is a function governmental or proprietary?  
Is a position under a retirement system?  
Which employees are eligible for membership in a retirement system?  
Who is an employee for purposes of retirement system participation?

Although Federal law determines whether earnings are wages subject to social security and Medicare, state laws have a bearing on the issue of employment, such as whether a position is that of a public official of a state. Where this is the case, an opinion of the state legal officer may be requested. The state’s opinion will be given weight in making the decision, but it will not be determinative of the issue. Before contacting IRS or SSA, contact the State Social Security Administrator for guidance.

Identity of the Employer for Social Security Coverage Purposes
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Because entities have different social security and retirement plan situations, it is important to determine which of two or more entities, organizations, or individuals is the employer. In some cases, certain individuals, referred to as “leased workers,” are supplied or paid by one entity but work under the direction of another. Generally, if there is a provision in a statute or ordinance that creates a position and the individual is hired or elected under this authority, the individual is an employee of the state or political subdivision to which the provision applies. If there is no such authority, the employer is the entity that has the right to control the worker in the performance of the work, i.e., the common-law employer.

The employing entity is responsible for withholding and paying social security and Medicare taxes on its employees’ wages, as well as reporting to SSA the amount of wages paid. These withholding, paying and reporting requirements apply to wages of individuals subject to mandatory social security and Medicare, as well as to wages of individuals covered under a Section 218 Agreement. See Publication 15.

**Indian Tribal Governments and Section 218**

Indian Tribal Governments, while treated as states for other purposes, are not treated as states for social security and Medicare tax purposes (IRC section 7871). Thus, Indian tribal governments do not enter into Section 218 Agreements with SSA and may not participate in a public retirement system as an alternative to paying social security and Medicare tax under the provisions of IRC section 3121(b)(7)(F).

**Mandatory Medicare Coverage**

Prior to April 1, 1986, state and local government employees could only be covered for Medicare through a voluntary Section 218 Agreements between the state and the Federal government. This changed with the enactment of the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, which mandated that all state and local employees hired or rehired after March 31, 1986, must be covered for Medicare, and pay Medicare taxes regardless of their membership in a retirement system. Employees covered by social security under a Section 218 Agreement are automatically covered for Medicare. Public employees already covered under a Section 218 Agreement are covered under Medicare and subject to the tax. Employees who are not covered by social security, but are subject to the Medicare-only portion of FICA, are referred to as Medicare Qualified Government Employees (MQGE). Reporting procedures for MQGE employees are covered in Chapter 3.

Employees who have been in continuous employment with the employer since March 31, 1986, who are not covered under a Section 218 Agreement nor subject to the mandatory social security and Medicare provisions, remain exempt from both social security and Medicare taxes, provided they are members of a public retirement system. (See Continuing Employment Exception, below.)
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The flowchart “Social Security and Medicare Coverage for State and Local Government Employees” in Chapter 1 shows how to determine whether Medicare coverage applies.

**Continuing Employment Exception**

Services performed after March 31, 1986, by an employee who was hired by a state or political subdivision employer before April 1, 1986, are exempt from mandatory Medicare tax if the employee is a member of a public retirement system and meets all of the following requirements:

- The employee was performing regular and substantial services for remuneration for the state or political subdivision employer before April 1, 1986,
- The employee was a bona fide employee of that employer on March 31, 1986,
- The employment relationship with that employer was not entered into for purposes of avoiding the Medicare tax, and
- The employment relationship with that employer has been continuous since March 31, 1986. In general, the following employment changes are considered continuous employment and qualify the employee for the exception:
  1) From a state agency to another state agency in the same state.
  2) From an employer of one political subdivision to an employer in the same political subdivision.

The following are not considered continuous employment for this purpose:

  1) From a state agency to a political subdivision of that state.
  2) From a political subdivision to a state agency.
  3) From one political subdivision to another.
  4) From a state agency to an agency of another state.

See Revenue Ruling 86-88, and Revenue Ruling 88-36, and Revenue Ruling 2003-46 in the Appendix for more information about the continuing employment exception.

The Centers for Medicare & Medicaid Services (CMS) is the Federal agency that administers the Medicare program. For more information, see the [CMS website](https://www.cms.gov).

**Services Not Subject to Mandatory Medicare Coverage**

The following are not subject to mandatory Medicare tax even though the services are performed by an employee hired after March 31, 1986. *(Note: These are the same services that are excluded from mandatory social security coverage, discussed earlier.)*

- Services performed by individuals hired to be relieved from unemployment. (This does not include many programs financed from Federal funds where the primary purpose is to give the employee work experience or training.)
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- Services performed in a hospital, home or other institution by a patient or inmate thereof as an employee of a state or local government employer.
- Services performed by an employee on a temporary basis in case of fire, storm, snow, earthquake, flood or other similar emergency.
- Services performed by non-resident aliens with F-1, J-1, M-1 and Q-1 visas.
- Services in positions compensated solely by fees that are subject to SECA, the Self-Employment Contributions Act (unless a Section 218 Agreement covers these services).
- Services performed by a student enrolled and regularly attending classes at the school, college or university where he or she is working (unless a Section 218 Agreement covers student services).
- Services performed by an election worker or official whose pay in a calendar year is less than the amount mandated by law (unless a Section 218 Agreement covers election workers).
- Services that would be excluded if performed for a private employer because it is not work defined as employment under Section 210(a) of the Social Security Act (unless a Section 218 Agreement covers certain agricultural services).

See the sections on Mandatory Exclusions and Optional Exclusions in this chapter for more details on these exclusions.

**Voluntary Medicare Coverage**

A Section 218 Agreement can be executed to provide Medicare-only coverage for employees who are qualified participants in a public retirement system and not covered under a Section 218 Agreement and not subject to the mandatory Medicare provisions. Contact your State Social Security Administrator for further information. (See a list of State Administrators at www.ncesssa.org.)

**Frequently Asked Questions**

1) **Are any services excluded from mandatory social security and Medicare coverage?** Yes. The same exclusions apply to mandatory social security and mandatory Medicare; see the lists in this chapter. However, some services excluded under provisions of the Internal Revenue Code may be covered by a Section 218 Agreement. [IRS, SSA]

2) **If a local government has a qualifying public retirement system and does not have a Section 218 Agreement, can employees elect to participate in social security on a voluntary basis?** No. An employee can only participate in social security if the position is covered either by the mandatory provisions or by a Section 218 Agreement. Only the State Social Security Administrator can initiate a request for Section 218 coverage. [SSA]

3) **Does a college student employed by a university during the summer months qualify for the student social security and Medicare exception from**
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mandatory social security if he/she is not regularly enrolled and attending classes at the university during that time? If an individual is not enrolled in classes during school breaks of more than five weeks, including summer breaks, the student social security and Medicare exception does not apply (other than during payroll periods of a month or less that fall wholly or partially within the academic term). See Revenue Procedure 2005-11, sections 7.04 and 7.05. [IRS]

4) Are elected and appointed officials considered employees? For income tax purposes, elected (or elective) and most appointed officials are defined by statute as employees of the public entity they serve, e.g., mayors, members of the legislature, county commissioners, city council members and board or commission members. In general, elected and appointed officials meet the common-law tests to be considered employees. Some positions may be defined as employment by state statute. Some fee-basis officials are by law treated as self-employed. An elected or appointed official who is an employee is subject to rules for mandatory social security and Medicare unless covered under a Section 218 Agreement or a qualified participant in a retirement system. All officials elected or appointed to their positions after March 31, 1986, are subject to Medicare withholding. See Chapter 4. [IRS]

5) How is “termination of employment” defined for purposes of determining whether the continuing employment exception for Medicare tax is applicable? Whether an employment relationship has terminated is a question of fact that must be determined on the basis of all the relevant facts and circumstances. Great weight, however, will be given to the personnel rules of the state employer or political subdivision employer to determine whether an employment relationship has been terminated. (Revenue Ruling 86-88.) [IRS]

6) An employee who was hired before April 1, 1986, by the state transferred after March 31, 1986, to another state agency. The transfer was made without terminating the employee’s employment with the state. Does the employee qualify for the continuing employment exception? Yes. An employee hired before April 1, 1986, by a state employer who transfers after March 31, 1986, to another state employer of the same state may qualify for the continuing employment exception, provided the transfer was made without a termination of the employee’s overall employment relationship with that state. The same rule applies to an employee hired before April 1, 1986, by a political subdivision employer, who transfers after March 31, 1986, to another employer of that same political subdivision. However, an employee hired before April 1, 1986, does not qualify for the continuing employment exception if after March 31, 1986, the employee transfers from a state employer to a political subdivision employer or from a political subdivision employer to a state employer. Likewise, an employee does not qualify for the exception if the employee transfers from a political subdivision employer in one political subdivision to a political subdivision employer in a different political subdivision, or from a state employer in one state to a state employer in a different state. [IRS]
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7) Can employees who were hired prior to April 1, 1986, and who are not currently paying into Medicare, enroll in Medicare in the future? Individual employees can never elect voluntarily to participate in social security or Medicare. State or local public employers can voluntarily choose to cover one or more groups of employees under Medicare-only, even if they are otherwise exempt because of the continuing employment exception. The state or local government (through the state) must enter into a modification of the state’s Section 218 Agreement to elect such coverage. Contact your State Social Security Administrator for further information about a Medicare-only modification. If an individual’s state or local government employment is not covered under social security or Medicare, the individual may not be insured (i.e., have enough work credits) for Medicare based on his/her own wages. That individual may be entitled to coverage based on sufficient other work that is covered for social security, or Medicare on his/her own earnings record or that of an insured spouse. [SSA]
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Chapter 6
Social Security and Public Retirement Systems

Effective July 2, 1991, Congress made social security coverage mandatory for state and local government employees who are neither covered by a Section 218 Agreement nor qualified participants in a public retirement system (also referred to as a “FICA replacement plan”). States can provide employees with membership in a public retirement system as an alternative to mandatory social security coverage.

As a supplement to the social security and public retirement systems information provided in this publication, refer to the FSLG web site.

This chapter provides information about the requirements a retirement system must meet to qualify as an alternative to social security coverage.

Public Retirement Systems (FICA Replacement Plans)

A public retirement system, as defined in IRC section 3121(b)(7)(F) and Regulation 31.3121(b)(7)-2 is a pension, annuity, retirement or similar fund or system maintained by a state or local government that provides a retirement benefit to the employee that is comparable to the benefit provided under the Old-Age portion of the Old-Age, Survivors and Disability Insurance (social security) part of FICA. To be a retirement system for this purpose, the plan must provide a minimum retirement benefit. In this context, the term “employer” is used to refer to a state, political subdivision, or instrumentality. The term “employee” is used here only to refer to an employee of a state, political subdivision, or instrumentality.

Note: A “public retirement system” is not required to be a qualified plan within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA). To avoid confusion, this publication does not use the term “qualified” to refer to public retirement systems. For mandatory coverage purposes, the employee may be a member of any type of retirement system, including a system that is nonqualified under ERISA (for example, a section 457 plan), as long as the plan provides the minimum level of benefits required for a public retirement system. These requirements are discussed below and in Regulation 31.3121(b)(7)-2(e) and in Revenue Procedure 91-40.

For purposes of determining whether mandatory coverage applies for an employee holding more than one position, social security is NOT a public retirement system.

Example: An individual holds two positions with the same political subdivision. The wages earned in one position are subject to social security and Medicare tax pursuant to a Section 218 Agreement; the
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other position is not covered. The social security system is not a retirement system for this purpose. Thus, mandatory social security coverage applies to service in the other (non-218) position unless the employee is a member of a public retirement system with respect to that position. See Regulation 31.3121(b)(7)-2(e)(1).

In general, there are two types of public retirement systems that may meet the minimum benefit requirement — the **defined contribution** plan and the **defined benefit** plan.

**Defined Contribution Plan**

A defined contribution plan provides an individual account for each participant and provides benefits based solely on the amount contributed to the participant’s account, and any income, expenses, gains or losses, etc. that may be allocated to that participant’s account. See IRC section 414(i).

A defined contribution plan that satisfies the definition of a retirement system under Regulation 31.3121(b)(7)-2(e)(2)(iii) must provide for an allocation to the employee’s account of at least 7.5 percent of the employee’s compensation during any period under consideration. A variety of plan types could meet the requirement; for example, plans established under IRC sections 401(a), 403(b), or 457. Contributions from both the employer and the employee may be used to make up the 7.5 percent. Matching contributions by the employer may be taken into account for this purpose. A plan with only employee contributions would also satisfy the minimum benefit requirement, provided the contributions constitute at least 7.5 percent of compensation. However, the 7.5 percent cannot include any earnings on the account.

**Definition of Compensation**

For a defined contribution plan, the definition of “compensation” used to determine whether the benefit is sufficient must include at least the employee’s base pay, provided that the definition of “base pay” is reasonable. Thus, for example, a defined contribution retirement system may disregard any of the following: overtime pay, bonuses, or single-sum amounts received on account of death or separation from service, amounts received under a bona fide vacation, compensatory time or sick pay plan, or amounts received under severance pay plans. Any compensation in excess of the social security contribution wage base for that year ($11x,xxx in 2015) may also be disregarded for this purpose.

**Example:** A political subdivision maintains an elective defined contribution plan that is a retirement system within the meaning of IRS regulations. The plan is on a calendar year. In 2014, an employee contributes to the plan at a rate of 7.5 percent of base pay. Assume that the employee compensation will reach the social security maximum contribution base in October. The employee is a qualified participant in the
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plan for the entire plan year, even if the employee ceases to contribute to the plan after reaching the maximum contribution base. See Regulation 31.3121(b)(7)-2(e)(2)(iii)(B).

Generally, for an employee who holds more than one position with the same employer, all compensation with that employer is considered in applying the 7.5 percent test. However, at the employer’s option, compensation from only one position may be considered, if that position is not part-time, temporary, or seasonal. See Regulation 31.3121(b)(7)-2(c)(2)(iv).

**Reasonable Interest Rate Requirement**

Generally, a defined contribution retirement system must credit the employee’s account with earnings at a reasonable rate, under all the facts and circumstances. Alternatively, employees’ accounts may be held in a separate trust subject to general fiduciary standards and credited with actual earnings of the trust fund. Whether the interest rate is reasonable is determined after reducing the rate to adjust for the payment of any administrative expenses. See Regulation 31.3121(b)(7)-2(e)(2)(iii)(C).

**Defined Benefit Plan**

For purposes of determining whether it qualifies as a public retirement system, a defined benefit plan is any plan other than a defined contribution plan. A defined benefit plan determines benefits on the basis of a formula, generally based on age, years of service and salary level.

A defined benefit retirement system that qualifies as an alternative to social security provides for a retirement benefit to the employee that is comparable to the benefit provided by the social security part of FICA. Generally, a plan meets the requirement if the benefit under the system is at least 1.5 percent of average compensation during an employee’s last three years of employment, multiplied by the employee’s number of years of service. Apply the formulas in Revenue Procedure 91-40 and the IRS regulations to determine whether a defined benefit retirement system meets this requirement.

**Who Is a Qualified Participant?**

For an employee to be excluded from mandatory social security coverage, the employing entity must maintain a retirement system within the meaning of IRC section 3121(b)(7)(F), and the employee must also be a qualified participant in that system, as defined in IRC section 3121(b)(7)(B) and Regulation 31.3121(b)(7)-2(d). This test must be applied to each employee separately. An entity may maintain a retirement system in which not every employee is a qualified participant. For both a defined contribution plan and for a defined benefit plan, the determination of whether an individual is a qualified
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participant is made as services are performed; however, there are different tests to determine participation, as discussed below.

**Qualified Participant in a Defined Contribution Retirement System**

An employee is a qualified participant in a defined contribution retirement system with respect to services performed on a given day if, on that day, the employee has satisfied all conditions (other than vesting) for receiving an allocation to his or her account (exclusive of earnings) that meets the minimum retirement benefit requirement. The benefit must be calculated with respect to compensation during a period ending on that day and beginning on or after the beginning of the plan year of the retirement system. This is the case regardless of whether the allocations were made or accrued before the effective date of IRC section 3121(b)(7)(F).

**Example 1:** A state-owned hospital maintains a non-elective defined contribution plan that is a retirement system within the meaning of IRS regulations. Under the terms of the plan, employees must be employed on the last day of a plan year in order to receive any allocation for the year. Employees may not be treated as qualified participants in the plan before the last day of the year.

**Example 2:** The situation is the same as in Example 1, except that under the terms of the plan, an employee who terminates service before the end of a plan year receives a pro rata portion of the allocation he or she would have received at the end of the year, e.g., based on compensation earned since the beginning of the year. If the pro rata allocation available on a given day would meet the minimum retirement benefit requirement with respect to compensation from the beginning of the plan year through that day (or some later day), the employee is treated as a qualified participant in the plan on that day.

**Example 3:** A political subdivision maintains an elective defined contribution plan that is a retirement system within the meaning of IRS regulations. The plan operates on a calendar year. It has two open seasons—in December and June—when employees can change their contribution elections. In December, an employee elects not to contribute to the plan. In June, the employee elects (beginning July 1) to contribute a uniform percentage of compensation for each pay period to the plan for the remainder of the plan year. The employee is not a qualified participant in the plan during the period January-June, because no allocations are made to the employee’s account during that time. If the level of contributions during the period of July-December meets the minimum retirement benefit requirement with respect to compensation during that period, however, the employee is treated as a qualified participant during that period.
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Example 4: Assume the same facts as in Example 3, except that the plan allows participants to cancel their elections in cases of economic hardship. In October, the employee suffers an economic hardship and cancels the election, effective November 1. If the contributions during the period July-October are high enough to meet the minimum retirement benefit requirement with respect to compensation during that period, the employee is treated as a qualified participant during that period. In addition, if the contributions during the period July-October are high enough to meet the requirements for the entire period July-December, the employee is treated as a qualified participant in the plan throughout the period July-December, even though no allocations are made to the employee’s account in the last two months of the year. There is no requirement that the period used to determine whether an employee is a qualified participant on a given day remain the same from day to day, as long as the period begins on or after the beginning of the plan year and ends on the date the determination is being made. See Regulation 31.3121(b)(7)-2(d)(1)(ii).

Qualified Participant in a Defined Benefit Retirement System

An employee is a qualified participant in a defined benefit retirement system with respect to services performed on a given day if (1) on that day, the employee is (or ever has been) an actual participant in the retirement system and (2) on that day, the employee actually has a total accrued benefit that meets the minimum retirement benefit requirement. An employee may not be treated as an actual participant or as actually having an accrued benefit for this purpose to the extent that such participation or benefit is subject to any conditions (other than vesting) that have not been satisfied. The disqualifying conditions might include a requirement that the employee attain a minimum age, perform a minimum period of service, make an election in order to participate, or be present at the end of the plan year in order to be credited with an accrual.

Example: A political subdivision maintains a defined benefit plan that is a retirement system within the meaning of IRS regulations. Under the terms of the plan, service during a plan year is not credited for accrual purposes unless a participant has at least 1,000 hours of service during the year. For purposes of determining whether mandatory social security coverage applies, benefits that accrue only upon satisfaction of this 1,000-hour requirement may not be taken into account in determining whether an employee is a qualified participant in the plan before the 1,000-hour requirement is satisfied. See Regulation 31.3121(b)(7)-2(d)(1)(i).

Part-Time, Seasonal, Temporary Employees

Special rules apply to part-time, seasonal and temporary employees for purposes of determining whether they are qualified participants in a public retirement system. To be
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exempt from mandatory social security coverage, these employees must not only be qualified participants; they must be fully vested in their benefits. This means the benefits cannot be forfeited. If a part-time, seasonal or temporary employee (as defined below) is not a qualified participant in a public retirement system with benefits fully vested from the first day of employment, that employee is subject to mandatory social security and Medicare tax until the employee becomes fully vested.

The special vesting requirement is considered to be met if a part-time, seasonal or temporary employee in a defined benefit plan has the right to receive a single sum payment of at least 7.5 percent of the compensation the employee earned while covered under the retirement system (plus interest) when the employee separates from employment.

**Part-Time Employees**

For purposes of applying the qualified participant test, part-time employees are those who normally work 20 hours or less per week. (This definition of “part-time” should not be confused with a definition of “part-time” that may be used for a Section 218 Agreement.) If mandatory coverage applies, part-time positions cannot be excluded; but part-time positions may be excluded from coverage under a Section 218 Agreement, at the option of the state. Contact the State Social Security Administrator to determine the definition of part-time positions under the state’s Section 218 Agreement.

A special rule provides that a teacher employed by a post-secondary educational institution (e.g., a community or junior college, post-secondary vocational school, college, university or graduate school) is not considered part-time if the teacher normally teaches classroom hours of one-half or more of the number of classroom hours normally considered to be full-time employment.

**Example:** A community college treats a teacher as a full-time employee if the teacher is assigned to work 15 classroom hours per week. A new teacher is assigned to work eight classroom hours per week. Because the assigned classroom hours of the teacher are at least one-half of the hours designated by the school as constituting full-time employment, the teacher is not a part-time employee. See Regulation 1.3121(b)(7)-2(d)(2)(iii)(A).

**Seasonal Employees**
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For purposes of applying the qualified participant test, a seasonal employee is any employee who normally works on a full-time basis less than five months in a year. Thus, for example, individuals who are hired by a political subdivision during the tax return season in order to process incoming returns and work full-time over a three-month period are seasonal employees. See Regulation 31.3121(b)(7)-2(d)(2)(iii)(B).

Temporary Employees

For purposes of applying the qualified participant test, a temporary employee is one who performs services under a contractual arrangement that is expected to last two years or less. Under this rule, a teacher under an annual contract may or may not be a temporary employee. Possible contract extensions must be considered in determining the duration of a contractual arrangement if there is a significant likelihood that the employee’s contract will be extended. Contract extensions are considered likely to occur if, on average, 80 percent of similarly situated employees have had bona fide offers to renew their contracts in the immediately preceding two academic or calendar years. Contract extensions are also considered significantly likely to occur if the employee has a history of contract extensions in the current position. See Regulation 31.3121(b)(7)-2(d)(2)(iii)(C).

Individuals Employed in More Than One Position

If an employee is not covered by a Section 218 Agreement, but is a member of a retirement system with respect to one full-time position, the employee is generally treated as a member of a retirement system with respect to any other position with the same employer.

**Example:** An individual is employed full-time by a county and is a qualified participant in its retirement plan with regard to that employment. In addition to this full-time employment, the individual is employed part-time in another position with the same county. The part-time position is not covered by the county retirement plan. Nevertheless, if the individual is a qualified participant in the retirement plan with respect to the full-time position, the part-time position is excluded from mandatory coverage. See Regulation 31.3121(b)(7)-2(c)(2).

This rule does not apply to employment by two different employers.

**Example.** An individual is employed full-time by a state and is a member of its retirement plan, and is also employed part-time by a city located in the state, but does not participate in the city’s retirement plan. The services of the individual for the city are not excluded from mandatory social security coverage, because the determination of whether services constitute employment for such purposes is made separately with respect to each political subdivision for which services are performed. See Reg. 31.3121(b)(7)-2(c)(2).
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Whether an employee is a part-time, seasonal or temporary employee is generally determined on the basis of service in each position in which allocations or benefits were earned. This determination generally does not take into account service in other positions with the same or different public employers. However, all of an employee’s service in other positions with the same or different employers may be taken into account for purposes of determining whether an employee is a part-time, seasonal or temporary employee with respect to benefits under the retirement system provided that:

- The employee’s service in the other positions is or was covered by *the same* retirement system;
- All service aggregated for purposes of determining whether an employee is a part-time, seasonal or temporary employee (and related compensation) is aggregated under the system for all purposes in determining benefits (including vesting); and
- The employee is treated at least as favorably as a full-time employee under the retirement system for benefit accrual purposes.

**Example:** Assume that an employee works 15 hours per week for a county and 10 hours per week for a municipality, and that both of these employers contribute to the same statewide public employee retirement system. Assume further that the employee’s service in both positions is aggregated under the system for all purposes in determining benefits (including vesting). If the employee is covered under the retirement system with respect to both positions and is treated for benefit accrual purposes at least as favorably as full-time employees, then the employee is not considered a part-time employee of either employer. The requirement of being fully vested for determining the applicability of mandatory coverage does not apply. See Regulation 31.3121(b)(7)-2(d)(3).

**Alternative Lookback Rule**

Under an alternative lookback rule, an employee may be treated as a qualified participant in a retirement system throughout a calendar year if he or she was a qualified participant in the system at the end of the plan year of the system ending in the preceding calendar year.

**Example.** An employee is a qualified participant in a retirement plan of a city on the last day of the plan year, May 31, 2014. If the alternative lookback rule is used, no liability for social security tax exists for the employee for calendar year 2015. See Regulation 31.3121(b)(7)-2(d)(3).

For the first year of participation, an employee who participates in the retirement system may be treated as a qualified participant during the year only if it is reasonable to believe that the employee will be a qualified participant on the last day of the plan year.

**Former Participants**
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In general, the rules regarding qualified participants apply to former participants who continue to perform services for the employer or who return after a break in service. Thus, for example, a former employee, with a deferred benefit under a defined benefit retirement system, who is reemployed by the same employer but does not resume participation in the retirement system, may continue to be a qualified participant in the system after becoming reemployed if the individual’s total accrued benefit under the system meets the minimum retirement benefit requirement (taking into account all periods of service, including current service). If this is so, the employer is not required to withhold and pay social security tax, or make additional payments to the retirement system on his behalf. The individual’s status as a qualified participant must be continually reevaluated, however, for employment of more than a short period. See Regulation 31.3121(b)(7)-2(d)(4)(i).

Rehired Annuitants

A rehired annuitant is a retiree who is rehired by his or her employer or another employer that participates in the same retirement system as the former employer. A rehired annuitant is either receiving a retirement benefit from that retirement system, or has reached retirement age under the retirement system.

Rehired annuitants are excluded from mandatory social security coverage.

**Example.** A teacher retires from service with a school district that participated in a statewide teachers’ retirement system and did not have a Section 218 Agreement. She begins to receive benefits from the system, and later becomes a substitute teacher in another school district that participates in the same statewide system. The employee is treated as a rehired annuitant and is not subject to social security tax. The teacher is subject to Medicare tax. See Regulation 31.3121(b)(7)-2(d)(4)(ii).

However, if an employee is rehired to perform services in a state or local government position that is covered for social security under a Section 218 Agreement, services in that position are covered for social security. If an individual returns to work for an employer under mandatory coverage, the employment is subject to the mandatory coverage.

**Note:** Retirees rehired after March 31, 1986, are subject to the Medicare tax regardless of whether they qualify as rehired annuitants for social security purposes.

**Frequently Asked Questions**

1) **What is a “public retirement system” as defined by the IRS?** A “public retirement system” (sometimes referred to as a “FICA replacement plan or simply as a “retirement system”) is a pension or other retirement plan maintained by a
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public employer that meets the requirements of IRC Section 3121(b)(7)(F). See Revenue Procedure 91-40 in the Appendix, and Section 31.3121(b)(7)-2 of the Employment Tax Regulations. These requirements must be met for a retirement system to be used as an alternative to mandatory social security coverage. A retirement system may be a pension, annuity, retirement or similar fund or system established by a state or political subdivision. The system need not be created by the legislature of the state, nor does it have to be a plan under which the benefits are guaranteed by the state constitution. A retirement system can include a group annuity policy purchased by the state or political subdivision from a private insurance company. Whether a system qualifies as a “public retirement system” does not depend on whether it meets the requirements be a qualified plan under the Employees’ Retirement Income Security Act of 1974 (ERISA). [IRS]

2) What does it mean to be a qualified participant in a retirement system? To be a qualified participant, a member must actually participate in the system. An employee who is eligible for an optional system, but decides not to participate, will be subject to mandatory social security tax. Under an alternate rule, an employer is entitled to treat an employee as a qualified participant for the entire year if he or she was a qualified participant in the retirement system on the last day of the plan year ending in the previous calendar year. [IRS]

3) How are part-time, seasonal and temporary workers defined for purposes of determining whether they are qualified participants in a public retirement system under IRC section 3121(b)(7)(F)? A part-time employee normally works 20 hours or less per week. A seasonal employee may work full-time, but for less than five months a year. In the case of teachers above the high-school level, part-time is defined as less than one-half the classroom hours designated as full-time by the school. A temporary employee performs services under a contractual arrangement of two years or less. Possible contract extensions must be considered in determining the duration of a contractual arrangement if there is a significant likelihood that the employee’s contract will be extended. Future contract extensions are considered likely if (1) on average 80 percent of similarly situated employees have had bona fide offers to renew their contracts in the immediately preceding two academic or calendar years, or (2) the contract history of an employee indicates that the employee is not a temporary employee. [IRS]

4) Are there special vesting rules for part-time, seasonal and temporary workers? For part-time, seasonal and temporary employees to be qualified participants in an employer-sponsored retirement plan, they must be immediately and fully (100 percent) vested in the plan. The vesting requirement for a defined contribution plan is met if an employee has a nonforfeitable right to receive a payment equal to 7.5 percent of the compensation the employee earned while participating in the system plus a reasonable rate of interest. [IRS]

5) If a local government participates in a statewide retirement system, is the plan considered “established” by the employer? Yes. The fact that each local
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government is a separate employer for tax purposes is irrelevant. Even though the plan is not maintained by the local government, it is offered through that entity as an employer and is considered established by the employer. [IRS]

6) **For new employees, entering a retirement system, is there any waiting period for coverage during which mandatory social security and Medicare taxes do not have to be paid?** If a full-time employee can be enrolled in the plan by the first day of the first full calendar month of service, social security and Medicare taxes do not have to be paid during the partial month in which he or she begins work. This rule does not apply to part-time, seasonal and temporary employees. [IRS]

7) **Is a retirement system that does not cover all employees a “retirement system” within the meaning of Regulations section 31.3121(b)7-2?** A retirement system is not required to cover all employees; it may be a retirement system for some employees and not for others. The coverage determination is made separately for each individual. [IRS]

8) **A teacher who is a participant in a retirement system during the academic year also works a few hours per week in the summer in the school library. The library job is not covered by a Section 218 Agreement or by the public retirement system because it does not fall during the normal 10-month school year. Are the wages for the summer job subject to social security and Medicare taxes?** The wages are not subject to social security taxes because the teacher is a qualified participant in the public retirement system with respect to her full-time job. A teacher who is expected to be employed on a continuing basis qualifies for treatment as employed simultaneously in multiple positions with the same entity. Consequently, the determination may be made solely by reference to service in the teacher’s full-time position. The Medicare tax applies, unless the employee is was hired prior to April 1, 1986, and qualifies for the continuing employment exception. [IRS]

9) **A teacher retires from a school district, starts collecting a pension under the state retirement system, and returns to work for the same school district as a bus driver. The bus driving position is not covered by a Section 218 Agreement and is not covered by the state retirement system. Is the employee subject to mandatory social security tax on the wages as a bus driver?** No. The employee is a rehired annuitant. He is deemed to be a qualified participant in the retirement system without regard to whether he continues to accrue a benefit. He is subject to Medicare tax because the continuing employment exception cannot apply because the original employment relationship terminated at retirement. [IRS]
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Chapter 7
Social Security Administration

This chapter discusses the functions of the Social Security Administration (SSA) that relate to employer tax and information reporting responsibilities.

SSA is the primary income security agency for Americans. It administers the Federal Old-Age, Survivors and Disability Insurance (OASDI) program, the largest income-maintenance program in the United States. The Supplemental Security Income (SSI) program provides monthly benefits designed to replace, in part, the loss of income due to retirement, disability or death. The SSI program provides or supplements the income of aged, blind or disabled individuals with limited income and resources. Children, as well as adults, can receive payments because of disability or blindness.

Organization

SSA’s organization features centralized management in Baltimore, Maryland, and a nationwide network of 10 regional offices overseeing 1,337 field offices (FOs), 138 hearing offices, 36 teleservice centers, 7 processing centers and a national data operations center.

All components within SSA’s central office perform a supporting role to SSA FOs by providing direction, guidance and material resources. FOs are located in cities and rural communities across the nation and are the agency’s main personal point of contact with beneficiaries and the public. Additionally, the Social Security Disability Insurance (SSDI) program depends on the work of 54 offices of Disability Determination Services in all 50 states, the District of Columbia, Guam and Puerto Rico.

For questions about social security coverage for specific workers or groups of workers, public employers should first consult the State Social Security Administrator for the state. Public employers who have questions regarding electronic filing or other SSA reporting processes or reporting applications, should contact the appropriate Employer Services Liaison Officer (ESLO) listed at the SSA ESLO page on the SSA website. Questions related to employer or employee tax liability should be directed to the IRS.

Inquiries regarding state and local coverage issues should be directed to the State and Local Coverage Specialist for your state or territory. A list is provided on the SSA state and local government employer's page. For all other inquiries, see the SSA home page.
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Parallel Social Security Office (PSSO)

The PSSO, in most cases located in the state capital, is the on-site representative of the SSA to the state under the leadership of the Regional Commissioner. The PSSO:

- Conducts day-to-day negotiations with the state;
- Assists the state in drafting Section 218 Agreements and modifications;
- Reviews agreements and modifications from the state for technical accuracy and appropriate documentation before forwarding to the Regional Office; and
- Makes coverage and wage determinations, as appropriate.

To locate a PSSO, use the SSA local office search.

Regional Office (RO)

RO staff works under the direction of the Regional Commissioner (RC). The RO provides leadership and technical direction in the coverage area for the state and local program within the region, consistent with established policy. Within the RO structure is the Assistant Regional Commissioner (ARC), who has ongoing responsibility for state and local coverage activities within the region. The Regional Office:

- Interprets, reviews, processes and executes Section 218 Agreements and modifications;
- Reviews supporting documentation to state notices to remove legally dissolved entities from coverage under Section 218 Agreements;
- Makes and reviews coverage and wage determinations consistent with established policy;
- Provides guidance and advice to states on proposed legislation and regulations that may have impact on the state's Section 218 Agreement;
- Interprets and advises states on established policies and procedures;
- Refers to Central Office questions for which no policy has been established, or for which present policy may require a change that may have national impact;
- Maintains file of original agreements and modifications;
- Maintains the summaries of state agreements; and
- Handles inquiries and answers questions about electronic filing and paper reporting of wages.

Office of Income Security Programs (OISP)

OISP is primarily responsible for administering the state and local coverage program. Organizationally, OISP is located under the Deputy Commissioner, Retirement and Disability Policy.
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Social Security Earnings Records

The social security number (SSN) is used for posting and maintaining the earnings and employment records of persons covered under the social security program. Employers withhold social security and Medicare taxes from employee paychecks and, with the employer tax, deposit these amounts or pay them with the tax return. (See Chapter 3 for information on reporting and deposit rules.) By the end of February (the end of March if Form W-2 data is submitted electronically), employers file wage reports with the SSA showing the wages paid to each employee during the preceding year. SSA shares this information with the IRS. SSA also sends weekly updates to IRS with information on newly established SSN records and corrected information for previously established SSN records. Reported earnings are posted to the worker’s earnings record.

When a worker or a worker’s family member applies for social security benefits, the worker’s earnings record is used to determine the eligibility for benefits and the amount of any cash benefits payable. It is thus critical that employers maintain accurate, up-to-date SSN information on their employees to make sure each employee’s earnings are correctly posted to that employee’s earnings record.

Under the Federal Insurance Contributions Act (FICA), social security and Medicare benefits are financed through taxes paid by employees and their employers. The social security and Medicare tax rates are set by law. The tax rate on wages for the Old-Age, Survivors and Disability Insurance (OASDI) program applies to earnings up to an annual maximum amount. This amount, called the earnings base, is adjusted annually based on changes in average wages. Medicare Hospital Insurance (HI) taxes are paid on total earnings; there is no wage base limit for Medicare tax. The Supplementary Medical Insurance (SMI) part of Medicare is financed by monthly premiums charged to beneficiaries and by payments from general Federal revenues.

Earning Credits

Individuals become eligible for social security benefits and Medicare hospital insurance based on credits for work covered by social security and/or Medicare. (In 2015, one credit is earned for each quarter with $1,xxx in earnings, for up to four quarters per year.) The amount of earnings required for each credit increases each year to reflect average wage increases. The table below shows the required amounts for recent years.

Credits earned remain on the worker’s social security earnings record even if the individual has a period of no earnings. The number of credits an individual needs to be eligible for social security and Medicare benefits depends on age and the type of benefit. Most people need 40 credits (10 years of work) to qualify for benefits. Younger people need fewer credits to be eligible for disability benefits, or for their family members to be eligible for survivors’ benefits in case of death.
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State and local government employees covered for Medicare-only must earn the same number of credits to qualify for Medicare as required for social security benefits. Beginning in 1957, basic pay earned from active military duty or training in military service may earn social security credits. In addition, military service before 1957 may qualify a person for additional earnings credits. A determination of these additional credits is made at the time a person applies for benefits.

If a question arises concerning the employment relationship of a worker for claims purposes, SSA determines whether there was a common-law employer-employee relationship for the purpose of determining the benefits of the claimant.

**Retirement Income**

Full social security retirement benefits are payable to individuals with 40 credits (10 years of work) at full retirement age (FRA). An individual can elect social security retirement benefits as early as age 62, but in that case, the individual’s monthly benefit is reduced by an established percentage. In 2003, FRA began to increase in gradual steps from age 65 to 67. This provision affects people born in 1938 and later.

If an individual receives social security benefits before reaching FRA, benefits are further reduced if the individual continues to work and earn more than an annual exempt amount. The annual exempt amount changes each year. A worker can earn up to that amount and not experience any additional reduction of social security benefits. If the worker is under FRA and earns over the exempt amount, the benefits will be reduced $1 for every $2 in earnings above the exempt amount. In the year the individual reaches FRA, benefits will be reduced $1 for every $3 in earnings above the exempt amount.

A spouse or former spouse may qualify for benefits upon a worker’s retirement or disability. Benefits are paid as early as age 62, or at any age if the spouse is caring for the worker’s child. In this case the child must be under 16 or disabled and receive benefits on the worker’s record. A spouse’s benefits will be one-half or less of FRA monthly benefit.

The table below indicates earnings requirements and exempt amounts for recent years.

<table>
<thead>
<tr>
<th></th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
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</thead>
<tbody>
<tr>
<td>Earnings required for one credit</td>
<td>$1,120</td>
<td>$1,130</td>
<td>$1,160</td>
<td>$1,200</td>
<td>$1,xxx</td>
</tr>
<tr>
<td>Exempt annual amount - under full retirement age</td>
<td>$14,160</td>
<td>$14,640</td>
<td>$15,120</td>
<td>$15,480</td>
<td>$15,xxx</td>
</tr>
<tr>
<td>Exempt amount - year attaining normal/full retirement age</td>
<td>$37,680</td>
<td>$38,880</td>
<td>$40,080</td>
<td>$41,400</td>
<td>$4x,xxx</td>
</tr>
<tr>
<td>Full retirement age or older</td>
<td>No limits effective January 2000.</td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

Benefits for divorced spouses age 62 or older may be payable if the insured former spouse is eligible for retirement benefits, even though not yet retired. Unmarried children under the age of 18 (under 19 if in high school) or any age if disabled before age 22 may qualify for social security benefits on a retired or disabled parent’s social security record.
This page contains no comments
**Note:** Although the full retirement age for social security may vary, Medicare (HI) eligibility is age 65 for everyone. Eligibility for HI is based on benefits as a retired worker, as a spouse of a retired or disabled worker or as a spouse of a deceased worker. The individual qualifies even if the individual is not receiving monthly social security retirement benefits because the individual or the individual’s spouse continues to work.

Special rules apply to uninsured persons who are at least 65 but who are not eligible for HI under the regular rules. See Chapter 5.

**Effect on Benefits from Work not Covered by Social Security**

There are two situations in which receipt of a pension based on employment not covered by social security will affect the amount of a social security benefit. Employees who participated in a public retirement system and also have a social security benefit based on another retirement system should be aware of these provisions.

The Windfall Elimination Provision (WEP) affects the way the social security retirement or disability benefit is computed for some individuals with non-covered employment.

The Government Pension Offset (GPO) affects the amount of the social security benefit received by a spouse or widow(er).

**Windfall Elimination Provision (WEP)**

The WEP affects some individuals who receive a monthly pension based in whole or in part on work not covered by social security. The weighting in the social security benefit formula is intended to help people who spend most of their working lives in low-paying jobs by providing them with a benefit that is higher in relation to their prior earnings than the benefit provided for workers with high career earnings. Before 1983, people who worked mainly in jobs not covered by social security had their benefits calculated as if they were long-term, low-wage workers.

Therefore, prior to the WEP, the benefit formula created an unintended advantage for workers who had pensions from non-covered employment in addition to social security coverage. It benefited people who worked for only a portion of their careers in jobs covered by social security but had their benefits computed as if they were long-term, low-wage workers. WEP was enacted to eliminate this unintended advantage by providing for a different, less heavily weighted benefit formula for persons who receive a pension based on non-covered employment.

If you receive a pension based on work not covered by social security, your social security retirement or disability benefit is computed using a modified benefit formula. The resulting benefit amount is lower than you would receive if you did not also receive a pension based on non-covered employment.
This page contains no comments
The modified formula applies to those who reach age 62 or become disabled after 1985 and first become eligible after 1985 for a monthly pension based in whole or in part on work not covered by social security. You are considered eligible to receive a pension if you meet the requirements of the pension, even if you continue to work.

Workers with relatively low pensions are less affected by the law because the reduction in the social security benefit cannot be more than one-half of that part of the pension attributable to earnings not covered by social security.

The Windfall Elimination Provision does not apply to:

- A Federal worker performing service on January 1, 1984, who becomes newly covered under social security on January 1, 1984, under the mandatory coverage provision in PL 98-21;
- An employee of a non-profit organization who is exempt from social security coverage on December 31, 1983, and who becomes covered for the first time as an employee of that organization on January 1, 1984, under the mandatory coverage provision of PL 98-21;
- Pensions based on earnings under the Railroad Retirement Act;
- Pensions based entirely on non-covered employment before 1957; or
- Persons who have 30 or more years of substantial earnings under social security; or
- Survivor benefits.

For more information about the WEP, see the SSA Windfall Elimination Provision page.

**Government Pension Offset (GPO)**

The Government Pension Offset (GPO) applies to a worker who gets a government pension that is based on employment not covered by social security and is also eligible for social security as a spouse or widow(er). Two-thirds of the government pension is used to offset any spouse’s or widow(er)’s social security benefit.

Before the GPO provisions were enacted in December 1977, many government employees qualified for a pension from their government agencies and for a spouse’s benefit from social security, even though they were not dependent on that spouse.

This situation was considered unfair to employees in social security covered positions because social security rules require that an individual’s benefit as a spouse or widow(er) be offset dollar for dollar by the amount of his/her own social security retirement benefit.

**Example.** Under GPO rules, a woman eligible for $1,200 in social security retirement benefits on her own work record and also eligible for
This page contains no comments
a spousal benefit of $900 receives only the higher of the two benefits - $1,200 in this case. But before enactment of the GPO provision, if that woman was a government employee who did not pay into social security and who earned a $1,200 government pension, there was no offset; and she would receive the $900 social security wife’s benefit as well as her $1,200 government pension. The GPO provision was enacted to prevent such inequities.

For applications filed before April 1, 2004, state and local government workers needed to be covered by social security only on the last day of employment with the government entity in order to be exempt from GPO. Many teachers, in particular, were able to take advantage of this exemption. Congress further tightened the GPO provision, and on March 2, 2004, the President signed the Social Security Protection Act of 2004.

The Social Security Protection Act of 2004 required that beginning with applications filed April 1, 2004, state and local government workers be covered by social security throughout their last 60 months of employment with the government entity in order to be exempt from the GPO. If the worker’s last day of government employment was covered by both social security and the pension system, and the last day occurred before July 1, 2004, the worker is exempt from GPO with respect to all current and future applications for spouse’s or widow(er)’s benefits. For example, a teacher whose last day of government employment in June 2004 was covered under social security and the pension system would be exempt from the GPO regardless of when he/she filed for benefits.

The Act did provide a transition for workers whose last day of government employment occurred within 5 years after the date of enactment (March 2, 2004). Any state or local government worker whose last day of government employment occurred after June 30, 2004, and before March 2, 2009, could have the requirement for 60 months of social security covered government employment reduced. For these workers, the requirement for 60 consecutive months of social security covered employment was reduced (but not to less than one month) by the total number of months that the worker had in social security covered government service under the same retirement system before March 2, 2004. If the 60-month period was reduced, the remaining months of service needed to fulfill the requirement must have been performed after March 2, 2004.

**Example.** Ms. Jones was working in a non-covered position at the time of enactment of the GPO, but had previously worked in a social security covered job in the same retirement system for 12 months in 1997. Because she had previously worked in social security covered employment for 12 months, the requirement that her last 60 months of employment be in a social security covered position would be reduced to 48 months, or four years. If Ms. Jones began working after March 2, 2004, in social security-covered employment under the same retirement system as her prior government work, and worked continuously in the covered position for at least the final 48-month period of her employment, and her last day of employment was before March 2, 2009, Ms. Jones would have been exempt from the GPO offset.
This page contains no comments
All other non-covered state and local government workers who first switched to government employment covered by social security and their pension plan after June 30, 2004, had to work in covered government employment for the entire final 60-month period of their government employment in order to avoid the GPO.

The Government Pension Offset does not apply to pension benefits that are:

- Not based on earnings, or
- Based on earnings in a job where the retiree was paying social security taxes, and
  1) the recipient filed for and was entitled to a benefit as a spouse, widow, or widower, before April 1, 2004, or
  2) the last day of employment that the pension is based on is before July 1, 2004; or
  3) the retiree paid social security taxes on earnings during the last 60 months of government service.

Benefits as a spouse, widow or widower will also not be reduced by the GPO if the individual:

- Is a Federal employee who elected to switch from the Civil Service Retirement System (CSRS) to the Federal Employees’ Retirement System (FERS) after December 31, 1987; and either:
  1) filed for and were entitled to spouse’s, widow’s or widower’s benefits before April 1, 2004; or
  2) the last day of service (that your pension is based on) is before July 1, 2004; or
  3) paid social security taxes on earnings for 60 months or more during the period beginning January 1988 and ending with the first month of entitlement to benefits; or
- Received or was eligible to receive a government pension before December 1982 and met all the requirements for social security spouse’s benefits in effect in January 1977; or
- Received or was eligible to receive a Federal, state or local government pension before July 1, 1983, and were receiving one-half support from the spouse.

For more information, see the GPO Fact Sheet on the SSA website.
This page contains no comments
Savings Plans for WEP or GPO Purposes

The WEP and GPO apply to pensions provided by state and local government entities. Some public employers not covered by social security have established alternative retirement plans, such as a savings plan, instead of a conventional pension plan.

A plan is considered a savings plan and is not a pension for WEP/GPO purposes if:

- An employee voluntarily contributes to a plan that is separate from and in addition to a primary retirement plan;
- The employer makes no contributions to the plan;
- The withdrawals from the plan do not exceed the employee’s contributions (plus interest); and
- Withdrawals are not based upon age, length of service or earnings.

In addition to savings plans, the following are not considered pensions for purposes of the WEP and GPO:

- A social security retirement or disability benefit
- An early incentive retirement payment

A survivor annuity is exempt from the Windfall Elimination Provision; however, social security survivor benefits may be affected by the Government Pension Offset.

Example 1: A part-time employee for a city is not covered by a Section 218 Agreement or mandatory social security. In July 1991, the employee elected to participate in the state’s public employees deferred compensation plan in lieu of mandatory social security coverage. The employee, upon retirement, will receive a payment from the deferred compensation plan based on employee and employer contributions to the plan, as this is the only plan to which the employee contributes. This plan is not considered a savings plan and the payment will be considered a pension and subject to the GPO or WEP provisions.

Example 2: A state employee is not covered by a 218 Agreement, but is covered by a state employee retirement system and has also elected to make contributions to a deferred compensation plan. The payment from this deferred compensation plan is separate from and in addition to the primary retirement plan. The employer made no contributions to the deferred compensation plan and the payment from the deferred compensation plan is not based on age, length of service or earnings. While the payment from the retirement system is subject to GPO or WEP, the payment from the deferred compensation plan is not.
This page contains no comments
SSA Publication 05-10045, covering the WEP, and SSA Publication 05-10007, covering the GPO, address these topics further. You can also request these publications from the Social Security Administration by calling 1-800-772-1213. Employers assisting in retirement planning are urged to provide copies of these publications to their employees.

**Medicare**

SSA is the primary public contact point regarding eligibility and premium issues for the Centers for Medicare & Medicaid Services (CMS), which is responsible for administering the Medicare program. SSA staff determines, and answers questions regarding Medicare eligibility. SSA also maintains records of Medicare eligibility and collects Medicare Part B premiums through withholding from social security payments.

The Medicare tax supports a Federally-funded health insurance program for people 65 years of age and older and people with certain disabilities. Medicare has four parts:

- Hospital insurance (Part A) that helps pay for inpatient care in a hospital or skilled nursing facility (following a hospital stay), some home health care and hospice care.
- Medical insurance (Part B) that helps pay for doctors’ services and many other medical services and supplies that are not covered by hospital insurance.
- Medicare Advantage (Part C) plans, available in many areas through third-party insurers. People with Medicare Parts A and B can choose to receive all of their health care services through one of these provider organizations under Part C.
- Prescription drug coverage (Part D) that helps pay for medications doctors prescribe for treatment.

You can get more information about Medicare at the CMS site [www.medicare.gov](http://www.medicare.gov).

**Medicaid**

In 32 states and the District of Columbia, eligibility for SSI benefits confers automatic entitlement to Medicaid. SSA provides information and referral services in support of Medicaid and is directly funded by the states and CMS.

For more information, see the CMS Medicaid site [cms.gov/MedicaidGenInfo/](http://cms.gov/MedicaidGenInfo/).

**Reporting Wages to SSA**

As discussed in *Chapter 3*, all employers are responsible for collecting social security numbers from employees, filing tax returns to the Internal Revenue Service, filing annual wage reports (Forms W-2) with the Social Security Administration, and furnishing copies
This page contains no comments
of Forms W-2 to employees. To avoid costly errors, it is crucial that Form W-2 filing be accurate.

All Forms W-2 sent to SSA are subject to:

- Balancing and validation programs to determine whether the reports are accurate and can be “read” by SSA systems; and
- Employee name and social security number (SSN) verification.

Reports that have errors, do not match, or do not meet edit conditions are returned to the employer (or submitter) for correction and resubmission.

All employers are subject to IRS late filing penalties (see Chapter 3).

**Note:** If the initial report was filed timely and later returned for corrections, the employer will be subject to late filing penalties if the corrected report is not resubmitted by the due date.

**Electronic Wage Reporting**

Employers with Internet access can submit their W-2 files using SSA’s [SSA Business Services Online](https://www.ssa.gov). This option is fast, free and secure. For security, a PIN and a password are required before you submit your W-2 file over this web page; most registrations can be completed on the web page. For more information, visit the [SSA employer page](https://www.ssa.gov) or call your ESLO (see list at website).

**Social Security Statement**

SSA sends a statement annually to workers and former workers aged 25 and older who have paid social security taxes during their working years. This statement shows all earnings on which a worker has paid social security taxes during his/her working years. The statements should be examined closely by the employee to ensure all earnings are properly credited. If the earnings shown on the statement are not correct, the employee should call SSA at 1-800-772-1213.

**Note:** Individuals who have worked only in non-covered employment (no social security and Medicare taxes) will not receive a Social Security Statement.

The Medicare portion of the Social Security Statement reflects the amount of earnings that was taxed and an estimate of the amount of taxes paid to support the Medicare program. The taxes are estimated because SSA does not keep records of Medicare taxes paid. If an employee had both social security earnings and government earnings that qualified for Medicare in the same year, the statement would reflect an estimate of the combined Medicare taxes paid.

Workers may access on-line benefit planning tools at the [SSA planning page](https://www.ssa.gov). These can be used to project potential benefits using various earnings scenarios.
This page contains no comments
Verifying Employee Names and Social Security Numbers

After wage reports have been entered into SSA’s system, each employee name and social security number (SSN) is compared to SSA’s records to verify that it is correct. Matched wage reports are updated to the individual employee’s record; reports that do not match are identified and the employer or employee is contacted and asked to provide a corrected name or SSN to SSA. Additionally, IRS may impose a penalty of up to $100 per misreported name and SSN. Accurate crediting of earnings to individual records is essential to the correct payment of social security benefits; this is one reason obtaining a correct name and SSN is very important. See IRS Publication 15, for a discussion of requirements for new hires.

Social Security Number Verification Service

The Social Security Number Verification Service (SSNVS) is a free, internet-based service of the SSA Business Services Online (BSO) where employers and third-party submitters can verify their employees’ names and SSNs against SSA’s records. For more information on SSNVS, see the SSA SSNVS Handbook. Employers are required to register with SSA to use the service.

With SSNVS, you may verify up to 10 names and SSNs online and receive immediate results. There is no limit to the number of times the SSN Verification web page may be used within a session. You may upload electronic files of up to 250,000 names and SSNs and will usually receive results the next government business day.

In addition to SSNVS, the BSO offers Registration Services and Employer Services. Registration Services offers a User Identification Number (User ID) assignment, password selection and various registration maintenance functions. Employer Services offers Form W-2 file upload, W-2 and W-2c online key-in functions (no special software or forms required) and the ability to track files and view processing results and notices. See the SSA BSO page for more information.

Note: SSNVS should only be used for the purpose for which it was intended. SSA will verify SSNs and names solely to ensure that the records of current or former employees are correct for the purpose of completing Form W-2.

Verifying Employment Eligibility

Under the Immigration and Nationality Act, employers must verify the identity and employment eligibility of anyone hired for employment in the United States. This includes citizens and non-citizens.

Form I-9 Employment Eligibility Verification, was developed by the former Immigration and Naturalization Service (INS) to verify that persons are eligible to work in the United States. Completion of this form is required for every employee hired after November 6, 1986. The functions of the INS are now carried out by the U.S. Citizenship and Immigration Service (USCIS). The USCIS operates I-9 Central, a free website providing
This page contains no comments
employers and employees access to resources, tips and guidance to properly complete Form I-9 and better understand the Form I-9 process.

USCIS also operates an electronic employment eligibility verification system, E-Verify, for employers. If you have questions about Form I-9, contact E-Verify Customer Support at 1-888-464-4218 or the E-Verify web page.

You can download copies of Form I-9 from www.uscis.gov. USCIS Publication M-274, Handbook for Employers, includes Form I-9 and addresses questions relating to the form and employment issues related to immigration. Print copies are available to employers at USCIS regional and district offices, as well as local Government Printing Office bookstores. For questions not addressed in the Handbook, visit the USCIS website at www.uscis.gov or call (202) 375-5283.

**Correcting Wage Reports**

Once information returns have been filed with SSA, you must make any corrections using Form W-2c and Form W-3c.

Forms W-2c may be filed on paper or via electronic transmission. Electronic submissions should be formatted following the instructions in SSA Publication 42-007, Specifications for Filing Forms W2 Electronically (EFW2), are available on SSA’s website or from any Employer Service Liaison Officer (ESLO). A list of the ESLOs is also available at this site.

*Note: As of February 28, 2006, SSA no longer accepts magnetic media submissions for wage reports. If you are required to file 250 or more Forms W-2c during a calendar year, you must file them electronically unless IRS grants you a waiver. For information on filing Form 8508, Request for Waiver From Filing Information Returns Electronically, contact IRS at 1-866-455-7438, or visit www.irs.gov.*

If the employee has a name change, the employee must notify SSA and request a new social security card. *Never* change an employee's name in your payroll system until the employee has shown you a new social security card showing the change. See IRS Publication 15 (Circular E) for rules on name changes.

If an error is identified before Form W-2 is filed with the SSA, but after providing the form to the employee, changes should be shown on a new original form. This form should be marked “Reissued Statement” at the top. Be sure to change the information submitted to SSA as well, either by marking the original paper W-2 "VOID" at the top (if you submit on paper) or by correcting the data file before filing electronically.

Form W-3c must accompany Copy A of Forms W-2c when they are sent to SSA. A separate Form W-3c must be used for each type of Form W-2 being corrected and must accompany a single Form W-2c or multiple Forms W-2c. Large numbers of Forms W-2c may also be filed electronically. Contact your ESLO for details.
This page contains no comments
Common Reporting Errors

Incorrect or missing Employer Identification Number (EIN). SSA and IRS maintain records by the EIN. Reports received with missing or erroneous EINs may be credited to the wrong record and result in IRS assessing penalties for failure to file correct reports.

Incorrect employee names and social security numbers. SSA cannot credit earnings to an employee’s record unless the employee’s name and social security number on the wage report matches the name and number in the SSA files. Use the name exactly as it is shown on the employee’s social security card.

Wage reports for years after employee’s death. Payments on behalf of a deceased employee made after the year of death cannot be credited as wages for social security purposes. Such payments should be reported to the employee’s estate on Form 1099-MISC, Miscellaneous Income. See Section 3.

Errors resulting in out-of-balance reports. Errors may occur due to application of an incorrect wage base for social security or a wage base limitation to the Medicare wages.

Tips. If an employee has tips, they must be reported in the “Social security tips” field of Form W-2. They are not included in the “Social security wages” field. These two fields are added together by SSA to obtain the total social security earnings.

Omitted wage or tax fields on wage reports. All fields must be completed.

Wrong tax year form used. SSA optical scanning and imaging systems are modified annually to meet changes in Form W-2 formats. The version of Form W-2 for the year reported must be used or SSA may be unable to read the form, or post the earnings to the wrong year.

Unscannable reports. Reports that are not scannable by the SSA’s optical equipment are more costly to process and subject to error.

Failure to file Copy A of Form W-2 with SSA. Employers must always file Copy A of Form W-2 with SSA, unless they submit the same data electronically.

“Void” indicator on Form W-2 checked in error. SSA will not credit wages shown on any Form W-2 that is void.

Wrong tax year entered. Make sure you show the correct tax year on the code “RE” records. Dollar totals ("RT" Record) are used by SSA to determine whether the report is in balance and, if not, to show where the error may be found. Make sure you report employee names and social security numbers correctly.

Missing/Incorrect submitter (Code “RA”). This information helps SSA properly identify and control each report. It provides contact information for use if there is a problem with the submission.

Unreadable reports. Reports must meet the requirements set out in EFW2 to be processable on SSA’s electronic equipment. Unprocessable reports will be returned to the
This page contains no comments
transmitter for correction and returned to SSA. Failure to return the correction reports timely may result in IRS penalty assessment.

**Incorrect or omitted Medicare wage/tip amounts.** Medicare wages/tips must be shown separately from social security wages on Forms 941 filed with the IRS. All Medicare wages/tips are subject to Medicare taxes.

**Showing non-covered amounts as social security and/or Medicare wages.** Examples of non-covered amounts include employee earnings that exceed the wage base for social security and payments to an independent contractor shown as wages. See “Special Rules for Various Types of Services and Payments” in Publication 15 for information on other non-covered payments.

**Failure to file Form W-2c and/or Form W-3c with SSA when adjusting prior year earnings on Form 941 and/or Form 941c.** Adjustments of tax liability filed with IRS that are based on changes in social security and/or Medicare wages must be matched by the filing of Forms W-2c and W-3c with SSA to allow entry of the wage changes on the employee’s social security earnings records.

**Filing of duplicate or partially duplicate Forms 941.** Social security and/or Medicare wages shown on duplicate Forms 941 may lead to costly and otherwise unnecessary reconciliations between SSA, the IRS and the employer.
This page contains no comments
Publications and Forms – Social Security Administration

To request SSA publications, telephone 1-800-772-1213 (toll-free), or TTY 1-800-325-0778, or e-mail to mailto:OPLM.OSWM.RQCT.Orders@ssa.gov. You can also download most forms and publications from the SSA employer page.

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<tr>
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<tr>
<td>SS-5</td>
<td>Application for a Social Security Card</td>
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<td>Social Security Number Verification Service (SSNVS) Handbook</td>
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<tr>
<td>SSA 42-007</td>
<td>Specifications for Filing Forms W-2 Electronically (EFW2)</td>
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<td>SSA 42-014</td>
<td>Specifications for Filing Forms W-2c Electronically (EFW2)</td>
</tr>
<tr>
<td>Form SSA-1945</td>
<td>Statement Concerning Your Employment in a Job Not Covered by Social Security</td>
</tr>
</tbody>
</table>

Other SSA Services

SSA Speaker’s Bureau

SSA can arrange to have speakers available for wage reporting seminars, pre-retirement sessions and other employer-sponsored onsite meetings with employees to discuss social security matters. For more information, contact any Social Security office or call 1-800-772-1213. For a local SSA office near you, see SSA contact page.

Statistical Information

SSA’s Office of Policy (OP) provides ongoing statistical data and research analyses of the Old-Age, Survivors, and Disability Insurance (OASDI) and Supplemental Security Income (SSI) programs. In quarterly, annual and one-time publications, Office of Research, Evaluation, and Statistics (ORES) keeps current on major issues that historically or currently have policy implications and program relevance for the nation’s major income security programs.

OP has a number of its publications and tables available on the SSA site. Publications may also be requested by calling 1-202-358-6274, by faxing OP at 1-202-358-6192 or by writing to the Division of Information Resources at 500 E Street SW, 8th Floor, Washington DC 20254.

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Employer Training Seminars

Each year, Employer Service Liaison Officers (ESLOs) provide a series of free training seminars to annual wage reporters. Call your local ESLO to find out when a seminar is held in your area. Or check the website for a list of seminars held around the nation.

Key SSA Web Pages

Employer Reporting Instructions and Information
This SSA website addresses employer reporting and other interests.

Social Security Online
SSA’s home page that lists available online services such as benefit planners, Social Security Statements, Medicare card replacement, etc.

State and Local Government Employers
This site is for state and local government employers who are responsible for withholding, reporting and paying social security and Medicare taxes for public employees.

Program Operations Manual System (POMS)

POMS State and Local Coverage Handbook
This page contains no comments
Frequently Asked Questions

1) **If the IRS is responsible for answering questions on withholding and paying social security and Medicare taxes, why do we get reporting information from SSA and why do we have to send IRS Forms W-2 to SSA?** SSA is responsible for keeping records of earnings, and for determining eligibility and amounts for individuals applying for retirement, disability or survivor benefits. The amount of benefits is based in part on an individual’s earnings over his or her working career. The information on an individual’s earnings record is taken directly from the social security and Medicare wage fields on the Form W-2 sent to SSA by the employer. After SSA processes this information, it is forwarded to the IRS. Either IRS or SSA can help you with Form W-2 reporting questions. [IRS/SSA]

2) **How does an employee verify the information that SSA shows on her/his earnings record?** A Social Security Statement is mailed annually to workers and former workers aged 25 and older who have worked in covered employment. There is no charge for this service. [SSA]

3) **What information can be provided by SSA to State Social Security Administrators to help them perform their responsibilities?** SSA may provide interpretations of the Social Security Act, Social Security regulations, rulings, the state Section 218 Agreement and its modifications, as they apply to a public employer. [SSA]

4) **Whom should I call when I have questions about Annual Wage Reporting?** Call your local SSA Employer Services Liaison Officer. See Chapter 7, or go to the SSA website for contact information. [SSA]

5) **My employees are paying into the State Teachers’ Retirement System and some have enough social security credits from former employment to be eligible for social security benefits. Will they receive benefits from both?** Yes, but the Windfall Elimination Provision may reduce social security benefits. Additionally, spouses’ benefits may be reduced by the Government Pension Offset formula. See Chapter 6, Social Security and Public Retirement Systems. [SSA]
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Chapter 8

Internal Revenue Service

The Internal Revenue Service (IRS), an agency of the U.S. Department of Treasury, is charged with the administration of the tax laws passed by Congress. For many years, the IRS was organized geographically with a national office in Washington and regional, district, and local offices throughout the country. With the Restructuring and Reform Act of 1998, the Internal Revenue Service began a major reorganization in an effort to improve compliance and customer service. This restructuring marked the most sweeping overhaul of the agency since 1952. The reorganization and its impact on Federal, state, and local government entities are discussed in this chapter.

More information about the programs and responsibilities of the IRS is available at www.irs.gov. For information about the IRS office of Federal, State, and Local Governments, see the FSLG website.

Organization

National Headquarters for the Internal Revenue Service, in Washington DC, develops nationwide policies and programs for the administration of the agency. The chief executive of the agency is the IRS Commissioner. Several functions report directly to the Commissioner, including:

- Chief Counsel
- Appeals
- National Taxpayer Advocate
- Communications and Liaison
- Office of Research, Analysis, and Statistics

Equity, Diversity & Inclusion

With the 1998 reorganization, the IRS is now organized around four specific “customer bases,” or groups of taxpayers with generally common interests and needs. Each operating division has a Commissioner and its own Counsel to provide legal expertise and guidance. This structure replaces the system of Regional and District Offices that existed under the previous, geographically-based organization.

The following are the four customer-based operating divisions:

*Wage and Investment (W&I)* is focused on individual taxpayers and income tax returns.

*Small Business/Self-Employed (SB/SE)* is oriented to S-corporations, partnerships, small corporations and sole proprietors.
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Large Business and International (LB&I), deals with the largest businesses and international tax issues. (This was formerly the Large and Mid-Size Business division).

Tax Exempt and Government Entities (TE/GE) serves all government organizations as well as nonprofit and other exempt organizations. Most or all of the IRS contacts that a government entity has will be with TE/GE, so it is discussed in more detail below.

Tax Exempt and Government Entities Operating Division

The Tax-Exempt and Government Entities (TE/GE) Operating Division was established in late 1999 and replaced the former office of Assistant Commissioner (Employee Plans and Exempt Organizations). It serves three distinct customer segments:

- Employee Plans (EP)
- Exempt Organizations (EO)
- Government Entities (GE)

TE/GE deals with entities that are or may be exempt from certain taxes under the Internal Revenue Code. Customers range from small local community organizations and municipalities to major universities, large pension funds, state governments, Federal agencies, Indian tribal governments and issuers of tax-exempt bonds. These organizations represent a large economic sector with unique needs. They are governed by often complex, highly specialized provisions of the tax law.

The Government Entities (GE) segment contains three offices:

- Federal, State, and Local Government (FSLG)
- Indian Tribal Governments (ITG)
- Tax-Exempt Bonds (TEB)

Federal, State, and Local Governments: Provides a clear point of contact for all government entities (other than Indian tribal governments) for their tax issues with the primary focus on information return reporting and employment tax issues. FSLG is responsible for administering the tax laws affecting these entities and ensuring compliance. It also develops and delivers communication and education programs and provides easily accessible and equitable voluntary compliance programs for its government customers.

The Federal, State and Local Governments website contains the most recent technical developments and links to additional information, including:

- How to contact an FSLG Specialist in your area
- How to e-mail FSLG with a question
- A toolkit providing all basic Federal tax reporting materials in one location
This page contains no comments
• Links to text of recent IRS rulings and announcements
• Fact sheets and frequently asked questions
• FSLG Fringe Benefit Guide (Publication 5137)
• Quick Reference Guide for Public Employers (Publication 5138)
• The semiannual FSLG Newsletter
• Announcements and registration information for educational events
• Explanation of the compliance process (examinations and compliance checks)
• Archived webinar and phone forum presentations on tax topics
• Links to related sites of interest

Customer Account Services

If you are authorized to represent a taxpayer, you can call toll-free at (877) 829-5500 concerning the following as they relate to government entities:

• Account-related questions
• Request for general information letter concerning tax exemption of a government
• Request for private letter ruling
• FSLG telephone numbers
• Local FSLG Offices

You may contact your local FSLG Specialist for assistance with any of the following:

• General information about a Section 218 Agreement between your state and the Social Security Administration
• Classification of a worker as an employee or independent contractor
• Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding
• Special employment tax rules for public employees (election workers, emergency workers, public officials, etc.)
• Withholding from nonresident aliens
• Other Federal tax issues for government entities

Indian Tribal Governments: Helps Indian tribes deal with their Federal tax matters, and provides a single point of contact for assistance and service. The Specialists in this area address issues and provide guidance to Indian tribes, whose concerns may relate to tribal governments as employers, distributions to tribal members, and the establishment of governmental programs, trusts, and businesses. For more information visit the Indian Tribal Governments website.

Tax-Exempt Bonds: Provides information to the tax-exempt bond community in the form of education and outreach programs. This office encourages voluntary compliance through ruling and agreement. It also administers and conducts the tax-exempt bond examination program. For more information, visit the Tax Exempt Bond website.
Publications and Forms — Internal Revenue Service

You can download most IRS forms and publications from the IRS website. To order by phone, call 1-800-829-3676 (toll-free). To request forms by fax, call 1-703-368-9694 from your fax machine. Forms and publications are also available at IRS walk-in offices.

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The IRS website also offers the following free of charge.
- Forms and Publications on CD/DVD
- IRS press releases and fact sheets
- TeleTax (automated) information on about 100 tax topics (1-800-829-4477)
- Educational Materials

Telephone assistance is available at 1-800-829-1040.

**Frequently Asked Questions**

1) **What information can IRS provide to a governmental unit about its social security coverage and tax liability?** The IRS is responsible for assessing and
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collecting all taxes, and interpreting and applying the tax law. By contacting Customer Account Services, an authorized person can receive tax information about an entity. Your local Federal, State, and Local Government (FSLG) Specialist can assist you with tax law questions, including identifying the services subject to income and social security taxes. Questions about Section 218 Agreement coverage should be directed to your State Social Security Administrator.

2) **What information can IRS provide to State Social Security Administrators to help them perform their responsibilities, especially when an audit or review is to be conducted of a public employer in his/her state?** Section 6103 of the IRC governs the disclosure of tax information by the IRS to other Federal and state agencies. Without the consent of the taxpayer, no provision in section 6103 authorizes the IRS to share specific taxpayer information with State Social Security Administrators. However, in performing a tax investigation, the IRS may request information from the State Social Security Administrator. State administrators are encouraged to share information, consistent with state law, with the IRS to help resolve matters of mutual interest. [IRS]

3) **Can I arrange for the State Social Security Administrator to receive my tax information or discuss it with the IRS?** If you have a Section 218 Agreement to provide social security coverage for your employees, you may wish to have the State Social Security Administrator consulted or otherwise involved in the examination. The State Administrator is not considered an official responsible for the administration of state or Federal tax laws under section 6103; therefore, there is no provision in the law allowing the IRS to disclose tax information in this situation. If you are reviewing an issue with the IRS involving section 218 coverage, and you wish to have the State Administrator or a representative participate in the discussion, you should complete either **Form 2848**, Power of Attorney or Declaration of Representative, or **Form 8821**, Tax Information Authorization, as appropriate. These forms are discussed on the Disclosure Laws page on the FSLG website.
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Chapter 9

State Social Security Administrators

SSA Regulation 20 CFR §404.1204 requires each state to designate at least one state official to act for the state in administering that state's Section 218 Agreement. This official, the State Social Security Administrator, acts for the state with respect to its responsibilities for maintaining and administering the provisions of the agreement and for the proper application of Social Security and Medicare.

The designated State Social Security Administrator (State Administrator) acts for the state in negotiations with the Social Security Administration. This includes acting for the state with respect to the initial Section 218 Agreement and modifications, the performance of the state’s responsibilities under the Agreement, and in all state dealings concerning the administration of the Agreement. Each state’s Section 218 Agreement (“Agreement”), and Social Security Regulations 404.1204, provide a legal obligation for each state to designate such an official. In many states, however, the actual day-to-day responsibilities are delegated to the staff of the designated state official.

The state is responsible for notifying SSA of any changes regarding its designated state official. That official should send a notification to the SSA Regional and Parallel Social Security Offices for that state.

The extent of the responsibilities of the State Administrator vary from state to state. Frequently, a State Administrator has other responsibilities, including some related to non-218 entities as well. In Section 218 Agreement purposes, the State Administrator:

- Administers and maintains the Federal-state Section 218 Agreement that governs voluntary social security and Medicare coverage by state and local government employers in the state;

- Negotiates modifications to the original Agreement to include additional coverage groups, corrects errors in modifications; conducts referendums and identifies additional political subdivisions that join a covered retirement system;

- Maintains in a secured location the state's master Agreements, modifications, dissolutions and intrastate agreements;

- Provides SSA with notice and evidence of the legal dissolution of covered state or political subdivision entities;

- Resolves coverage and taxation questions related to the Agreement and modifications with SSA and IRS; and
Insert link to SSA's state and local government entities' website:

http://www.socialsecurity.gov/slge/

AND to the POMS section that describes the State Administrator duties in detail: https://secure.ssa.gov/apps10/poms.nsf/lnx/1910001130.

A detailed list of State Administrator responsibilities is available on the Social Security Administration's website at: https://secure.ssa.gov/apps10/poms.nsf/lnx/1910001130.
• Negotiates with SSA to resolve social security contribution payment and wage reporting questions concerning wages paid before 1987;

• Informs SSA of name, title, and address of designated officials involved in Section 218 administration, and notifies SSA of any changes;

• Communicates regularly with SSA, IRS, employers, and stakeholders on Section 218-related issues;

• Provides information to state and local public employers covered under Agreements in accordance with the Act; and

• Determines necessary funding and staffing for administration of Section 218 program.

Note: Section 6103 of the IRC governs the disclosure of tax information by the IRS to other Federal and state agencies. Without the consent of the taxpayer, no provision in section 6103 authorizes the IRS to share specific taxpayer information with State Social Security Administrators. However, in performing a tax investigation, the IRS may request information from the State Social Security Administrator.

The State Administrator is the principal state official responsible for these functions. The Administrator serves as the main resource to state and local employers for information and advice about social security coverage, taxation and many reporting issues. SSA, IRS, public employers and employees should contact the designated Administrator to help resolve coverage questions concerning groups or individual employees. More detailed information is available at the SSA POMS web page.

A government entity may consent to have a State Administrator or representative receive tax information or discuss Federal tax matters with the Internal Revenue Service. See Q&A #3 in Chapter 8 for more information.

National Conference of State Social Security Administrators (NCSSSA)

The ever-changing and complex social security coverage statutes, withholding requirements, reporting obligations and associated employment tax regulations require constant monitoring and interpretation. For more than 50 years the National Conference of State Social Security Administrators (NCSSSA) has provided an effective network of communication for Federal, state, and local governments concerning social security coverage and Federal employment tax policy.

With the enactment of Section 218 to the Act in 1950, states could exercise the option of providing social security coverage for state and local employees. By the end of 1951, 30 states had executed Section 218 Agreements with the Federal government. The
Public employers and their legal and financial advisors should advise the State Social Security Administrator of any changes in a government entity's legal status, such as name changes, dissolutions, or consolidations.
responsibility for administering the social security program varied from state to state, depending on the particular state’s enabling legislation.

State Administrators began to operate in an area where no precedent existed. It became apparent that a forum was needed where the administrators could address the many problems and questions posed by the new program. The first forum between State Social Security Administrators and Federal officials was held in January 1952, in Bloomington, Indiana. As a result, the NCSSSA was established to provide a unified state perspective at the Federal level to provide an on-going medium for problem-solving and to maintain an open forum for the development of new policy.

Since its formation in 1952, the NCSSSA has worked closely with SSA and IRS to address social security (and later Medicare) coverage and employment tax issues raised by state and local employers and State Social Security Administrators throughout the United States. The NCSSSA works with the Federal officials to ensure that legislative and regulatory changes address state and local concerns. The NCSSSA provides leadership to state and local governments through accurate interpretation of Federal laws and regulations, communication of Federal tax policy, and resolution of problems arising at the state and local level. The NCSSSA hosts national workshops and annual meetings where SSA and IRS officials address the concerns of state and local government representatives in a face-to-face format. NCSSSA officials represent public sector employers on various SSA and IRS committees and work groups.

Audits and Reviews of Public Employers

When the IRS or SSA conducts an audit or review of a public employer, it may contact the State Administrator for that state to clarify the employer’s status, including:

- Whether the employees are covered under a Section 218 Agreement; and, if so,
- The specific exclusions (mandatory and optional) that are applicable to that entity that must be taken into account during the audit or review, including any that are unique to individual employees (for example, whether any employees are subject to the Medicare continuing employment exemption).

For further information about the NCSSSA, contact your State Social Security Administrator. (See the list at NCSSSA's website, www.ncsssa.org.)
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Glossary

**Absolute Coverage Group** (also called a “non-retirement coverage group) - for Section 218 coverage purposes, a group of employees whose positions are not covered under a public retirement system; also referred to as a “non-retirement system coverage group” or a “Section 218(b)(5) coverage group”.

**Alternative Lookback Rule** – An optional method for determining whether an employee can be treated as a qualified participant in a retirement plan for purposes of determining whether mandatory social security applies. Under this rule, an employer may treat an employee as a qualified participant in the first year of employment if it is reasonable to believe the employee will be a qualified participant on the last day of the plan year. An employer may treat an employee as a qualified participant in a calendar year if the employee was a qualified participant at the end of the previous plan year. See Section 31.3121(b)(7)-2(d)(3), Employment Tax Regulations.

**Continuing Employment Exception** – Exception from Medicare taxes and coverage applicable to services of a state or local government employee who is not covered by a Section 218 Agreement and is a participant in a public retirement system and meets all of the following requirements:

- The employee was performing regular and substantial services for remuneration for the employer before April 1, 1986;
- The employee was a bona fide employee on March 31, 1986;
- The employment relationship was not entered into for purposes of avoiding the Medicare tax; and
- The employment relationship with the employer has not been terminated after March 31, 1986.

**Coverage Groups** – Categories of state and local government employees with respect to a Section 218 Agreement. There are two types of coverage groups:

1. Absolute coverage groups, composed of employees in positions not covered under a retirement system; and
2. Retirement system coverage groups, composed of employees in positions covered by a retirement system.

The Social Security Act gives each state the right, within the limits of state and Federal laws, to decide which coverage groups are to be included under its Agreement and any modifications to the Agreement.

**Defined Benefit Plan** – An employer plan that determines retirement benefits under a formula, generally based on age, years of service and salary level.
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Defined Contribution Plan – An employer plan that provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant’s account, and any income, expenses, gains, losses and forfeitures of accounts of other participants that may be allocated to the participant’s account.

Earnings Record - The information maintained by the Social Security Administration on each individual’s social security and Medicare covered wages and self-employment income. Each individual’s record is accessed by social security number (SSN).

Employee – Generally any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, is subject to the employment tax requirements of IRC 3121 and 3401. The term is defined for social security and Medicare purposes in Sections 210(j) and 218(b)(3) of the Social Security Act and IRC section 3121(d).

Employer Identification Number (EIN) – A unique nine-digit identification number assigned by IRS to state and local governments, businesses, and other entities for tax-filing and reporting purposes, including withholding and paying FICA taxes. An entity can obtain an EIN by filing Form SS-4, Application for Employer Identification Number, with the IRS.

Entity – A separate legal “person,” that is not an individual; includes a corporation, partnership, LLC, or a political unit, including a state, a political subdivision, a wholly-owned instrumentality, a municipality, etc.

Federal Insurance Contributions Act (FICA) – Federal statute providing for payroll tax deduction to fund social security and Medicare coverage.

Federal Unemployment Tax Act (FUTA) – Federal statute imposing tax on employers in order to provide for payments of unemployment compensation to workers who have lost their jobs. States and political subdivisions of a state are exempt from paying FUTA, but under state unemployment law, most state and local government employees must be covered for state unemployment insurance.

Fee-Based Public Official – A public official who receives and retains remuneration directly from members of the public, e.g., a justice of the peace. An official who receives payment for services from government funds in the form of a wage or salary is not a fee-based public official, even if the compensation is called a fee.

FICA - Federal Insurance Contributions Act; refers to social security and Medicare taxes withheld from wages to fund the social security system.

FICA Replacement Plan – Alternate name for a public retirement system, as described in the regulations for section 3121(b)(7)(F). Refers to a pension, annuity, retirement, or
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similar fund or system established by a state or political subdivision for the purpose of providing retirement benefits to employees. See Public Retirement System.

**FRA (Full Retirement Age)** – The age at which unreduced social security benefits are payable. Depending on the date of birth, an individual’s FRA ranges from 65 to 67.

**Full Social Security** – Coverage for both the Old-Age, Survivors, and Disability Insurance (OASDI) program and Medicare Hospital Insurance (HI). Both the employer and employee pay these taxes.

**FUTA** - Federal Unemployment Tax Act; refers to tax paid by employers to fund unemployment insurance. Government employers are generally not subject to FUTA.

**Governmental Function** – Activity normally associated with the authority of government, legislative, executive, judicial, such as the control and prevention of crime, promoting the general welfare, and providing for public safety. Income derived from any essential governmental function is exempt from Federal income tax under IRC section 115.

**Government Pension Offset (GPO)** – A reduction in the social security benefits that applies to individuals who (1) receive a government pension from work not covered for social security and (2) are eligible for social security as a spouse or widow(er). Two-thirds of the government pension offsets any spouse’s or widow(er)’s social security benefit.

**HI** - Hospital Insurance (Medicare Part A).

**Identification Number** – A nine-digit number assigned by SSA prior to 1987 to every state and political subdivision included under a Section 218 Agreement, beginning with the prefix “69” (69-NNNNNNN). Many states continue to sequentially assign a 69-number for internal state record keeping purposes to entities brought under Section 218 coverage.

**Indian Tribal Government** – The governing body of any Federally recognized tribe, band, community, village or group of Indians or Alaska Natives that is determined by the Secretary of the Treasury, with the Secretary of the Interior, to exercise governmental functions, under IRC section 7701(a)(40). Under IRC section 7871, an Indian tribal government is treated as a state. Likewise, a subdivision of an Indian tribal government is treated as a political subdivision of a state if that the subdivision has been delegated the right to exercise one or more of the substantial governmental functions of the Indian Tribal government. However, a tribal government is not a “state” for purposes of Section 218 and is not eligible for a Section 218 Agreement.

**Interstate Instrumentality** – An independent legal entity organized by two or more states to carry out one or more governmental functions. For purposes of a Section 218 Agreement, an interstate instrumentality has the status of a state.
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IRC - Internal Revenue Code.

IRS - Internal Revenue Service.

**Mandatory Exclusions** – Categories of services that are not covered for social security under Sections 210 and 218 of the Social Security Act. These exclusions should not be confused with the different set of exclusions that apply to those services not covered under the Section 210 mandatory social security provisions.

**Mandatory Medicare (HI)** – Medicare tax and coverage not included as part of a Section 218 Agreement; imposed on all state and local government employees hired or rehired after March 31, 1986.

**Mandatory Social Security** – Required social security coverage for state and local government employees who are not members of a public retirement system and who are not covered by a Section 218 Agreement; effective July 2, 1991.

**Medicare** – Federally established health insurance program for people age 65 and older and certain people with disabilities. Part A (Hospital Insurance – HI) is financed through employer and employee taxes on covered wages/self-employment or by individual payment of monthly premiums. Part B (Supplemental Medical Insurance – SMI) is financed by individuals paying monthly premiums.

**Medicare Qualified Government Employment (MQGE)** – Services of state and local government employees subject to Medicare tax but not to social security tax.

**Modification** – An amendment to an original Section 218 Agreement to extend coverage to additional groups of employees or to implement changes in Federal and state laws. Each modification, like the original Agreement, is a legally binding document.

**MQGE** – Medicare Qualified Government Employment.

**NCSSSA (National Conference of State Social Security Administrators)** – Professional association of State Social Security Administrators. These state officials are authorized by state law to administer Section 218 Agreements with the Social Security Administration and responsible for all other activities associated with Federal and state laws addressing social security and Medicare coverage of state and local public employers. Additional duties of individual State Administrators vary from state to state.

**Non-Covered Employment** – Employment not covered by social security under the Social Security Act and the Internal Revenue Code.

**Nonproprietary Function** – Governmental activity integral to the operation of a state or political subdivision, i.e., maintaining order or levying tax, as opposed to activity in the nature of a private or commercial venture).
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Old-Age, Survivors and Disability Insurance Program (OASDI) – Program administered by the Social Security Administration, providing monthly benefits to retired and disabled workers, their spouses and children, and to survivors of insured workers.

Optional Exclusions – Categories of services that, under social security law, may be included or excluded from coverage under a Section 218 Agreement at the option of the state.

Parallel Social Security Office (PSSO) – The SSA office, usually located in the state capital, responsible for day-to-day negotiations with the states on state and local coverage issues.

Pension Plan – A plan that provides systematically for the payment of definitely determinable benefits to employees over a period of years, usually for life, after retirement. Retirement benefits are generally determined by factors such as an employee’s years of service, age, and compensation.

Political Subdivision – A separate legal entity of a state that has governmental powers and functions. Examples of political subdivisions include a county, city, town, village, school district and other similar governmental entities.

Proprietary Function – Function of a governmental entity, such as a business venture for profit or in competition with private industry, or other discretionary act on behalf of citizens, that by its nature is not an integral governmental activity.

PSSO – Parallel Social Security Office.

Public Retirement System – (Also called a “FICA replacement plan”) A plan, fund or system established by a state or political subdivision for the purpose of providing retirement benefits to employees that meets the tests under IRC section 3121(b)(7)(F) and section 31.3121(b)(7)-2(e) of the Employment Tax Regulations. A public retirement system may be a pension, annuity, retirement, or similar system. For this purpose, it is irrelevant whether a public retirement system is a “qualified plan” within the meaning of the Employees’ Retirement Income Security Act of 1974 (ERISA).

Qualified Participant – An individual who is (or has been) an actual participant in a public retirement system and who has a total accrued benefit under the retirement system that meets the minimum retirement benefit requirements of IRC section 3121(b)(7) and regulations thereunder. Section 31.3121(b)(7)-2(d) of the Employment Tax Regulations establishes standards for defined contribution retirement systems. See Rev. Proc. 91-40 in the Appendix, for safe-harbor formulas for defined benefit retirement systems.

Retirement System – See Public Retirement System.
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**Retirement System Coverage Group** – A group of employees whose positions are covered under a retirement system by referendum under the provisions of Section 218(d). The retirement system does not need to meet the tests under IRC Section 3121(b)(7)(F) and Section 31.3121(b)(7)-2(e) of the Employment Tax Regulations to secure coverage under a Section 218 Agreement.

**SECA** - Self Employment Contributions Act.

**Section 218 Agreement** – Voluntary agreement between a state and the Commissioner of Social Security (prior to March 31, 1995, the Secretary of Health and Human Services); allows states to voluntarily provide social security and Medicare or Medicare-only coverage for the services of state and local government employees. The Section 218 Agreements cover positions, not individuals; if the position is covered under the agreement, then any employee filling that position is subject to FICA taxes.

**Self-Employment Contributions Act (SECA)** – Federal statute imposing tax on the net earnings of self-employed individuals, to fund social security and Medicare.

**Social Security Act (Act)** – Federal statute providing Old-Age, Survivors and Disability Insurance (OASDI) and Hospital Insurance (Medicare), as well as other benefits.

**Social Security Administration (SSA)** – An independent agency in the executive branch of the Federal government responsible for administering the Old-Age, Survivors and Disability (OASDI) insurance program and for determining eligibility for Medicare benefits.

**Social Security Statement** – Annual statement issued by SSA to workers, with information about their individual social security and Medicare earnings as reported by employers, with estimates of the different types of benefits for which they and their family may qualify.

**Social Security Number (SSN)** – The identification number assigned by the Social Security Administration to individuals. It must always be used in reporting an individual’s earnings and in correspondence regarding specific employees. Each individual’s earnings record is maintained under this number.

**State** – For purposes of a Section 218 Agreement, one of the fifty states, Puerto Rico, the Virgin Islands and interstate instrumentalities. The term, for this purpose, does not include the District of Columbia, Guam or American Samoa.

**State Social Security Administrator (SSSA)** – The principal state official authorized by state law to administer the Section 218 Agreement with the Social Security Administration, responsible for all other activities associated with applicable Federal and state laws addressing social security and Medicare by state and local public employers in the state.
**Taxpayer Identification Number (TIN)** – The number used to identify employee (SSN) or employer (EIN) for tax reporting purposes.

**Wage Base** – The maximum amount of wages of each worker that is subject to the OASDI portion of social security tax in any calendar year. The social security wage base is adjusted annually. There has been no wage base limit for Medicare since 1994.

**Wholly-Owned Instrumentality** – An entity created by or pursuant to state statute to carry on a governmental function of a state or political subdivision. It is an independent legal entity with the power to hire, supervise, and discharge its employees and, generally, it may sue and be sued, may enter into contracts, and may hold or transfer property in its own name. Normally a wholly-owned instrumentality of a state or political subdivision does not exercise governmental powers, i.e., the police power, the taxing power and the power of eminent domain. An instrumentality can also be created by a state and a political subdivision, by more than one political subdivision, or by more than one state. See “Interstate Instrumentality.”

**Windfall Elimination Provision (WEP)** – A social security benefit formula that may be applied to workers who receive both a social security retirement or disability benefit AND a pension based on work not covered under social security. The WEP benefit formula produces a lower social security retirement or disability insurance benefit.
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