OFFICE OF
CHIEF COUNSEL

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

April 27, 2000

Number: **200025054**
Release Date: 6/23/2000

CC:EBEO:2
WTA-N-108173-00

UIL: 3121.02-07
3121.15-00

MEMORANDUM FOR ROBERT WESTHOVEN
SECTION 218 COORDINATOR
NEW ENGLAND DISTRICT

FROM: Jerry E. Holmes, Chief
CC:EBEO:2

SUBJECT: Request for Technical Assistance: Teachers

This is in response to your request for technical assistance dated October 27, 1999. We provided a response to some of your questions on February 11, 2000. That response has been incorporated into this response. We are providing an outline of the applicable legal and regulatory provisions as well as responses to your specific questions. Note, however, that your questions involve general situations. Our responses are informational only and are not determinative with respect to actual cases. Actual cases must be decided on the basis of all the relevant facts and circumstances.

LAW

Sections 3101(a) and 3111(a) of the Internal Revenue Code (the Code) impose the Old-Age Survivors and Disability Insurance (OASDI) portion of the taxes under the Federal Insurance Contributions Act (FICA) (sometimes called social security tax) on the wages of employees paid by employers with respect to employment. Sections 3101(b) and 3111(b) impose the Medicare portion of the FICA tax. In general, all payments of remuneration by an employer for services performed by an employee are subject to FICA taxes, unless the payments are specifically excepted from the term "wages" or the services are specifically excepted from the term "employment."

For FICA purposes, section 3121(b)(7) of the Code generally excludes from "employment" services performed in the employ of any state, or any political subdivision thereof, or any wholly-owned instrumentality of any one or more of the foregoing. The scope of the exceptions to this rule is very broad.

Section 218 Agreement

Section 3121(b)(7)(E) provides that the exclusion from employment in section 3121(b)(7) does not apply in the case of service included under an agreement entered into pursuant to section 218 of the Social Security Act (section 218 agreement). A state and the Social Security Administration may agree to extend social security coverage to services of employees of the state or its political subdivisions or instrumentalities under a section 218 agreement. If a worker's services are covered by a section 218 agreement, generally both OASDI and Medicare taxes apply.

Medicare Tax: Continuing Employment Exception

In general the Medicare portion of the FICA tax applies to employees of states and their political subdivisions, unless some exclusion applies. Section 3121(u)(2)(A) provides that, for purposes of Medicare tax, section 3121(b)(7), exempting state employees from FICA tax, does not apply.

Under section 3121(u)(2)(C), services performed by state or local government employees hired on or before March 31, 1986, are exempt from Medicare taxes (if section 3121(b)(7) otherwise applies), provided that the employees (1) were performing regular and substantial services for pay on or before that date, (2) were employed in good faith on that date, (3) were not hired for purposes of avoiding the Medicare taxes, and (4) have not at any time since that date experienced a termination of the employment relationship with the employer. This is referred to as the "continuing employment exception." The significance of these provisions is that the Medicare tax may be applied to employees of states and political subdivisions independent of the application of the OASDI tax, provided they are not covered by a section 218 agreement.

Rev. Rul. 86-88, 1986-2 C.B. 172, provides that the term "political subdivision" has the same meaning that it has under section 218(b)(2) of the Social Security Act, 42 U.S.C. section 418(b)(2). The term "political subdivision" ordinarily includes a county, city, town, village, or school district.

Consequently, if an employee ceased to work for one school district and began to work for another, he or she would have transferred from one political subdivision employer to another political subdivision employer and would not be eligible for the continuing employment exception to the Medicare tax. Rev. Rul. 86-88, Q&A 7. By the same rationale, an employee who was hired before April 1, 1986, who terminated employment after that date and who was subsequently rehired is no longer eligible for the continuing employment exception. Code section 3121(u)(2)(C)(iii), Rev. Rul. 86-88, Q&A 5.

A part-time employee may be eligible, however, for the continuing employment exception. Rev. Rul. 88-36, 1988-1 C.B. 343, Q&A 4, states that an individual hired to work as a part-time cook for two hours each Sunday on a continuous basis since September 1984 qualifies for the continuing employment exception because he was performing regular and substantial services before April 1, 1986.

Retirement System

Section 3121(b)(7)(F), effective for services performed after July 1, 1991, excludes from "employment" only the services of an employee of a state, political subdivision, or wholly-owned instrumentality thereof who is a member of a retirement system.

The term “retirement system” is defined as any pension, annuity, retirement or similar fund or system within the meaning of section 218 of the Social Security Act that is maintained by a state, political subdivision or instrumentality thereof to provide retirement benefits to its employees who are participants. Section 31.3121(b)(7)-2(e)(1), Employment Tax Regulations. A retirement system is therefore treated as a retirement system with respect to specific individuals in question. The social security system is not a retirement system for purposes of section 3121(b(7)(F). This rule is illustrated by the following example.

> Example 2. An individual holds two positions with the same political subdivision. The wages earned in one position are subject to FICA tax pursuant to an agreement (under section 218 of the Social Security Act) between the Secretary of Health and human Services and the State in which the political subdivision is located. Because the Social Security system is not a retirement system for purposes of section 3121(b)(7)(F), the exception from employment in section 3121(b)(7) does not apply to service in the other position unless the employee is otherwise a member of a retirement system of such political subdivision.

Section 31.3121(b)(7)-2(e)(1), Employment Tax Regulations.

A retirement system which satisfies the definition in the regulation must provide a minimum level of benefits, as defined in section 31.3121(b)(7)-2(e)(2). For a defined benefit plan, the system meets the requirements with respect to an employee if and only if, on a specific testing day, the employee has an accrued benefit under the system that entitles the employee to an annual benefit commencing on or before his or her social security retirement age that is at least equal to the annual Primary Insurance Amount the employee would have under

social security. Rev. Rul. 91-40, 1991-2 C.B. 694, sets forth safe harbor formulas applicable to defined benefit retirement systems.

For a defined contribution plan, allocations to the employee's account (not including earnings) must be at least 7.5 percent of the employee's compensation. Employees' accounts must be credited with earnings at a reasonable interest rate, or they must be held in a separate trust subject to general fiduciary standards and credited with actual earnings of the trust fund.

Qualified Participant

An employee is not a member of a retirement system at the time service is performed unless at that time he or she is a "qualified participant" (as defined in paragraph (d) of the regulation) in a "retirement system" that meets the requirements of paragraph (e) of the regulation (minimum benefits) with respect to that employee. Section 31.3121(b)(7)-2(c)(1), Employment Tax Regulations. The determination of whether a worker is a "qualified participant" is made on an employee-by-employee basis.

Section 31. 3121(b)(7)-2(d)(1)(i) of the regulations defines "qualified participant" for purposes of defined benefit retirement systems. The regulation provides that an employee is a qualified participant in a defined benefit system with respect to services performed on a given day if, on that day, he or she is or ever has been an actual participant in the retirement system and, on that day, he or she actually has a total accrued benefit under the retirement system that meets the minimum retirement benefit requirement of paragraph (e)(2) of this section. 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), such as 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, that have not been satisfied.

Section 31.3121(b)(7)-2(d)(1)(ii) of the regulations defines "qualified participant" for purposes of defined contribution retirement systems. The regulation provides that whether an employee is a qualified participant is determined as services are performed. An employee is a qualified participant with respect to services performed on a given day if, on that day, he or she 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 of paragraph (e)(2) of the regulation with respect to compensation during any period ending on that day and beginning on or after the beginning of the plan year of the retirement system.

Alternative Lookback Rule

The regulations provide an “alternative lookback rule” for the purpose of determining whether an individual is a qualified participant in a retirement system. An employee may be treated as a qualified throughout a calendar year if he or she was a qualified participant in a retirement system at the end of the plan year ending in the previous calendar year. Section 31. 3121(b)(7)-2(d)(3)(i), Employment Tax Regulations.

If the alternative lookback rule is used, an employee may be treated as a qualified participant on any given day during his or her first plan year if and only if it is reasonable on that day to believe that the employee will be a qualified participant on the last day of the plan year. If this reasonable belief is correct and the employee is a qualified participant on the last day of his or her first plan year of participation, then the employer is not required to withhold and pay FICA tax for that employee for that calendar year.

For this purpose, it is not reasonable to assume the establishment of a new plan until the plan is actually established. This rule, furthermore, may not be used to treat an employee as a qualified participant until the employee actually becomes a participant.

The regulation also provides a one-month rule of convenience. When a retirement system does not permit a new employee to participate until the first day of the first month beginning after the employee’s commencement of service, or some earlier date, a new employee who is not a part-time, seasonal or temporary employee may be treated as a qualified participant until that date.

If the alternative lookback rule is used, it must be used consistently from year to year and with respect to all employees of the employer. If a retirement system is sponsored by more than one state, political subdivision or instrumentality, the consistency requirement applies separately to each plan sponsor. Section 31.3121(b)(7)-2(d)(3)(v), Employment Tax Regulations.

Section 31.3121(b)(7)-2(c)(3)(iv), (ii) and (iii), respectively, rovide a special limitation on the lookback rule for defined contribution systems and special rules for the first and last years of participation.

The regulations contain a number of special requirements applicable to part-time, seasonal and temporary employees, employees working in more than one position, and former participants, including rehired annuitants. Your questions deal largely with these provisions.

Treatment of Former Participants

In general, the rules of paragraph 3121(b)(7)-2(d) apply equally to former participants who continue to perform service for the same state, political subdivision or instrumentality thereof or who return after a break in service. Thus, for example, a former employee of a political subdivision with a deferred benefit under a defined benefit retirement system maintained by the political subdivision who is reemployed by the political subdivision but does not resume participation in the retirement system may continue to be a qualified participant in the system after becoming reemployed if his or her total accrued benefit under the system meets the minimum retirement benefit requirement of paragraph (e)(2) of this section (taking into account all periods of service (including current service) required to be taken into account under that paragraph. Section 31.3121(b)(7)-2(d)(4)(i).

In order for a reemployed employee to be a qualified participant, it is not necessary that the employee accrue additional benefits under the plan on the basis of the service in the new position. Rather, the test is whether the employee's total accrued benefit under the retirement plan satisfies the minimum benefit requirement, taking into account all the employee's service with and compensation from the employer, including service and compensation in the new position. In other words, the total accrued benefit might exceed the minimum benefit requirement, providing a sort of cushion which would enable the employer to treat the reemployed individual as a qualified participant even though the individual is not accruing additional benefits under the plan.

In the case of an employee who is hired for an indefinite period, however, reliance on this provision would require repeated testing to determine whether the employee's accrued benefit still satisfied the minimum benefit requirement.

Part-Time, Seasonal and Temporary Employees

Section 31.3121(b)(7)-2(d)(2)(i) of the regulations provides that a part-time, seasonal or temporary employee is generally not a qualified participant on a given day unless any benefit relied upon to meet the requirements of paragraph (d)(1) of this section (the definition of qualified participant) is 100-percent nonforfeitable on that day. A benefit is considered nonforfeitable within the meaning of paragraph (d)(2)(i) of this section on a given day if on that day the employee is unconditionally entitled under the retirement system to a single-sum distribution on account of death or separation that is at least equal to 7.5 percent of the participant's compensation for all periods of credited service taken into account in determining whether the employee's benefit under the retirement system meets the minimum retirement benefit requirement of this section. In other words, part-time employees

are required to be 100-percent vested in their benefits at all times, while full-time employees are not.

A part-time employee is defined as any employee who normally works 20 hours or less per week. A seasonal employee is any employee who normally works on a full-time basis less than 5 months in a year. A temporary employee is any employee performing services under a contractual arrangement with the employer of 2 years or less duration. Possible contract extensions may be considered in determining the duration of a contractual arrangement, but only if there is a significant likelihood that the employee's contract will be extended. Future contract extensions are considered significantly 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 2 academic or calendar years. In addition, future contract extensions are considered significantly likely if the employee has a history of contract extensions with respect to the current position. Section 31.3121(b)(7)-2(d)(2)(iii), Employment Tax Regulations.

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 the employee is a part-time, seasonal or temporary employee if (1) the service in the other positions is or was covered by the same retirement system; (2) all service aggregated for purposes of determining whether an employee is a part-time, seasonal or temporary employee is aggregated under the system for all purposes in determining benefits (including vesting), and (3) the employee is treated at least as favorably as a full-time employee under the retirement system for benefit accrual purposes. Section 31.3121(b)(7)-2(d)(2)(iii)(D), Employment Tax Regulations. The following example illustrates this paragraph (d)(2)(iii)(D):

> 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 political subdivisions contribute to the same state-wide 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 under the retirement system, then the employee is not considered a part-time employee of either the county or the municipality for purposes of the nonforfeitable benefit requirement of paragraph (d)(2)(i) of this section.

Rev. Proc. 91-40, containing safe harbor formulas for defined benefit retirement systems, has analogous provisions applicable to part-time, seasonal and

temporary employees and contains a cross-reference to section 31.3121(b)(7)-2(e)(2)(iv) and (v) of the regulations concerning employees employed in more than one position with the same employer and employees who are participants in retirement systems maintained by more than one employer, respectively. For purposes of these questions, the answers will be the same whether the plan in question is a defined benefit or a defined contribution plan.

Multiple Positions

Section 31.3121(b)(7)-2(c)(2) of the Employment Tax Regulations states, concerning individuals employed in more than one position, that whether an employee is a member of a retirement system is determined on an entity-by-entity basis rather than a position-by-position basis. Thus, if an employee is a member of a retirement system with respect to service in one position, the employee is generally treated as a member of a retirement system with respect to all service performed for the same employer. This rule is illustrated by the following example:

> Example 1. An individual is employed full-time by a county and is a qualified participant (as defined in paragraph (d) of this section) in its retirement plan with regard to such 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, however, and neither the service nor the compensation in the part-time position is considered in determining the employee's retirement benefit under the county retirement plan. Nevertheless, if the retirement plan meets the requirements of paragraph (e) of this section with respect to the individual, the exclusion from employment under section 3121(b)(7) applies to both the employee's full-time and part-time service with the county.

Section 31.3121(b)(7)-2(e)(2)(iv) of the regulations deals with employees employed in more than one position with the same employer. This section states that all service and compensation of an employee must be considered in determining whether a benefit meets the minimum benefits requirement.

> However, for individuals employed simultaneously in multiple positions with the same entity, this determination may (but is not required to) be made solely by reference to the service and compensation related to a single position of the employee with [the employer] . . . provided that the position is not a part-time, seasonal or temporary position.

In other words, to determine whether a full-time employee is a qualified participant, that employee's benefit can be evaluated on the basis of the full-time job, without

consideration of any additional part-time position. The employer may, however, aggregate full and part-time positions if it chooses to do so.

When a school district employee is employed in one position during the school year and in a different position during the summer, the question arises as to whether the individual is "employed simultaneously in multiple positions." In the case of a teacher who is expected to be employed continuously from year to year, Rev. Rul. 60-114, 1960-1 C.B. 389, suggests the answer is yes.

Rev. Rul. 60-114 deals with an election, under prior law, by employees of a school described in section 501(c)(3) to waive exemption from FICA taxes. Two-thirds of a school's employees were required to concur in filing for the waiver, and the question arose as to whether a teacher was considered to be employed continuously by the school during the summer months. There was no written employment contract. Rev. Rul. 60-114 holds that, if there is a clear understanding that the teacher will remain on the faculty continuously from year to year, the employment relationship is considered to continue throughout the summer. If there is no such understanding, then the employment relationship is considered to have terminated at the end of the school year.

Further Aggregation Rule

In general, only compensation from and service with a particular employer that employs the employee on a given day are considered in determining whether the employee's benefit meets the minimum requirements. However, when the same retirement system is maintained by multiple employers, as in the case of a state retirement system, an employee's total allocations or benefits may be taken into account if:

> (A) The compensation and service on which the additional allocations or benefits are based are also taken into account in determining whether the employee's allocations or benefits satisfy the minimum retirement benefit requirement:
>
> (B) The retirement system takes all service and compensation of the employee in all positions covered by the system into account for all benefit determination purposes; and
>
> (C) if the employee is a part-time, seasonal or temporary employee, he or she is treated under the plan for benefit accrual purposes in as favorable a manner as a full-time employee participating in the system.

Section 31.3121(b)(7)-2(e)(2)(v), Employment Tax Regulations. This provision comes into play when a former employee goes to work for a second employer which may or may not participate in the same retirement system.

Treatment of Rehired Annuitants

A previously retired participant who is either "in pay status," i.e., currently receiving retirement benefits under the retirement system, or who has reached normal retirement age is deemed to be a qualified participant in the retirement system without regard to whether he or she continues to accrue a benefit or whether the distribution of benefits under the retirement system has been suspended pending cessation of services. Section 31.3121(b)(7)-2(d)(4)(ii) Employment Tax Regulations.

This rule also applies in the case of an employee who has retired from service with another state, political subdivision or instrumentality that maintains the same retirement system as the current employer, provided the employee is a former participant in the system by reason of the employee's former employment. Thus, for example, if a teacher retires from service with a school district that participates in a state-wide teachers' retirement system, begins to receive benefits from the system, and later becomes a substitute teacher in another school district that participates in the same state-wide system, the employee is treated as a rehired annuitant. Section 31.3121(b)(7)-2(d)(4)(ii), Employment Tax Regulations.

QUESTIONS

1. A teacher who is covered by a public 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 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 OASDI and Medicare taxes?

The wages are not subject to OASDI taxes because the teacher is a qualified participant in the public retirement system. A teacher who is expected to be employed on a continuing basis qualifies for treatment as an individual employed simultaneously in multiple positions with the same entity. Rev. Rul. 60-114. Consequently, the determination may be made solely by reference to service in the teacher's full-time position. Section 31.3121(b)(7)-2(c)(2). The applicability of Medicare taxes depends upon whether the teacher qualifies for the continuing employment exception of Code section 3121(u)(2).

2. Same facts as #1, but the summer position is covered by a section 218 agreement.

The teacher is subject to OASDI and Medicare taxes under the terms of the section 218 agreement. Code section 3121(b)(7)(E).

3. 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 218 agreement and is not covered by the state retirement system. Does the employee have to pay OASDI taxes on the wages as a bus driver?

No. The teacher 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. Section 31.3121(b)(7)-2(d)(4)(ii). He would, however, have to pay Medicare tax because the original employment relationship terminated at retirement. Code section 3121(u)(2)(C)(iii).

4. Same facts as #3, but the teacher returns to work in a second school district. The bus driving position is not covered by a section 218 agreement and is not covered by the state retirement system. Does the teacher have to pay OASDI taxes on the wages as a bus driver?

The answer to this question depends upon whether the second school district participates in the state retirement system in which the first school district participated. We will consider both alternatives: (1) the school district participates in the state retirement system and (2) the school district maintains its own retirement system rather than participating in the state retirement system.

In general the teacher's status as a participant in a retirement system is tested on an entity-by-entity basis. Section 31.3121(b)(7)-2(c)(2). However, under section 31.3121(b)(7)-2(d)(4)(ii), rehired annuitant status can apply with respect to service for another employer that maintains the same retirement system as the former employer. This provision allows a teacher retired from one school district to be treated as a rehired annuitant, and thus a qualified participant, in a school district that maintains the same retirement system in which the teacher participated. The regulations do not require that the current position be covered under the retirement system, but only that the second school district must maintain the same retirement system. For these reasons, the teacher can be treated as a rehired annuitant if the second district maintains the same state retirement system as the first.

If the school district does not maintain the same retirement system, the teacher is not treated as a rehired annuitant. Therefore, a teacher rehired as a bus driver would be subject to OASDI taxes unless he or she was a qualified participant

in another retirement system. Since this teacher is working for a second school district, the continuing employment exception would not apply, and he or she would be required to pay Medicare tax.

5. Same facts as #4, but the bus driving position is covered under the state retirement system under a participating local district agreement. Does the employee have to pay OASDI taxes on the wages as a bus driver?

No, as discussed above, the teacher is treated as a rehired annuitant if the new school district maintains the same retirement system under which the teacher retired. In addition, the employee is a qualified participant in a retirement system with respect to the current position if the minimum benefit requirement is met.

6. A new employee was hired by a school district as a substitute, part-time bus driver. He is currently drawing a state retirement system pension as a retired teacher for another employer and is also receiving social security benefits with respect to other employment. The school district does not participate in the state retirement system or maintain its own system.

Since the school district does not participate in the state retirement system, the teacher is not treated as a rehired annuitant. He is required either to be a qualified participant in a retirement system or to pay OASDI tax on his wages as a bus driver. Medicare tax applies because he does not qualify for the continuing employment exception.

7. A public school teacher worked part-time for years as a grounds maintenance person after school and during vacations and summer. He is now retired and draws a pension from the state retirement system with respect to his teaching position. He still works part-time for the entire school year and the summer doing grounds maintenance and, as needed, doing snow removal during the winter. Are his grounds maintenance earnings subject to OASDI tax? Would they be if the position were covered under a 218 agreement?

Since he is working for the same employer, the teacher is treated as a rehired annuitant. The employee is thus deemed to be a member of the state retirement system and not subject to OASDI tax for the grounds maintenance position.

If a position is covered by a section 218 agreement, generally both OASDI and Medicare taxes apply.

8. A school district employs an education technician for 20 hours per week in a position covered by the state retirement system. The same employee also

concurrently works 20-30 hours for the same school district in another position, which is not covered by the state retirement system. Is the non-covered position subject to OASDI and Medicare taxes? What if the district had a 218 agreement covering the position?

The education technician has a part-time position (20 hours per week), which is covered by a retirement system. (In stating that the position is covered by a retirement system, the facts assume that the retirement system meets the requirement that the benefits be nonforfeitable.) The other position would be full-time if the employee worked more than 20 hours, but it is not covered by a retirement system. Both positions may not be aggregated to determine whether the employee is treated as full-time because the service in both positions is not covered by the retirement system. The education technician position may not be considered to determine whether the employee is receiving a minimum level of benefits under the retirement system because it is not a full-time position. Section 31.3121(b)(7)-2(e)(2)(iv), Employment Tax Regulations. Consequently, OASDI tax must be paid with respect to the other, uncovered position. Whether Medicare tax applies depends on whether the continuing employment exception applies. If there were a section 218 agreement, the position would generally be subject to both OASDI and Medicare taxes.

9. A retired teacher is rehired as a substitute teacher and as a bus driver. The facts do not state whether the teacher is drawing a pension under the state retirement system. We will assume that he or she does draw a pension under the state retirement system. Medicare tax is currently being paid with respect to the substitute teaching position, and OASDI and Medicare taxes are being paid for the bus driving position. Is this treatment correct? What if the bus driving position were subject to a 218 agreement?

If the teacher is drawing a pension under the state retirement system, he or she should be treated as a rehired annuitant. This means the teacher is deemed to be a qualified participant in the retirement system without regard to whether he or she continues to accrue a benefit. Thus the OASDI tax is not due on either the teaching or the bus driver position. However, Medicare tax would apply to both positions, as the teacher no longer qualifies for the continuing employment exception.

If the teacher is not eligible to be treated as a rehired annuitant, both portions of the FICA tax are due on the wages from both jobs.

If the bus driver position is covered by a section 218 agreement, both OASDI and Medicare taxes generally apply under the terms of the 218 agreement.

10. Members of the kitchen staff work only during the school year, when they are covered by the state retirement system. They do not work, nor are they paid, during the summer. If a member of the kitchen staff worked during the summer as a grounds keeper in a position that was not covered by the state retirement system, would FICA tax be due on the compensation from the summer job?

The answer to this question depends upon two factors. If members of the kitchen staff are part-time, seasonal or temporary employees during the academic year, their service during the academic year is not counted in determining whether they are qualified participants in a retirement system. If they are full-time employees, and employed simultaneously in multiple positions, their service during the academic year is counted in determining whether they are qualified participants. Under the rule governing multiple positions, if an employee is not part-time, seasonal or temporary, the determination as to whether he is a qualified participant may be made solely by reference to the service and compensation related to a single, full-time position with that employer. Section 31.3121(b)(7)-2(e)(2)(iv).

Members of the kitchen staff are not seasonal employees because they work for more than 5 months out of the year. They are not part-time employees if they work more than 20 hours per week. They are not temporary employees unless they serve under a contractual arrangement of 2 years or less duration. Possible contract extensions may be considered in determining the duration of a contractual arrangement if, under the facts and circumstances, there is a significant likelihood that the employee's contract will be extended. The terms of a collective bargaining agreement, if any, would have to be considered.

Rev. Rul. 60-114 concluded that, when there is a clear understanding that teachers will be rehired by a school, the employment relationship is considered to continue throughout the period from the end of one school year to the beginning of the next. We think the best answer is that other school district employees who are not part-time, seasonal or temporary employees are also continuously employed during the summer if there is a clear understanding that they will return to work year after year. Hence they are treated as simultaneously employed in multiple positions. See Question #1 above.

If members of the kitchen staff who were employed prior to April 1, 1986, are treated as eligible for the continuing employment exception to the Medicare tax during the academic year, this would also indicate that the school district considers them to be continuously employed.

In conclusion, if the kitchen employees are full-time employees, we think the best answer is that the determination of whether they are qualified participants in a retirement system may be made with respect to their full-time positions. The regulations allow this to be done but do not require it. Therefore OASDI tax may be paid with respect to their summer earnings if the school district chooses to do so. In addition, Medicare taxes are due unless the continuing employment exception applies.

If any members of the kitchen staff are part-time or temporary employees during the school year, OASDI and Medicare taxes are due on the compensation they earn during the summer.

11. A state retirement system covers specific positions, as opposed to covering all the employees of an employer. Thus all teachers are covered by the state retirement system; additional positions may be covered by the state retirement system under a participating local district (PLD) contract, and still other positions may be subject to a section 218 agreement. When a retired teacher is rehired by a second school district in a different position, such as bus driver, is the teacher's status as a qualified participant in a retirement system tested with respect to the employer or with respect to the position?

See Question 4 above. The teacher's status as a qualified participant is tested with respect to the employer unless the second school district participates in the same state retirement system under which the teacher is drawing a pension. Then the teacher is treated as a rehired annuitant and deemed to be a participant in the retirement system.