



STATE OF KANSAS

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September 12, 1980

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ATTORNEY GENERAL OPINION NO. 80- 195

The Honorable Merle R. Bolton  
Commissioner of Education  
120 East 10th Street  
Topeka, Kansas 66612

Re: Insurance--Old-Age and Survivors Insurance for Public  
Employees--Employer's Liability for FICA Contributions

Synopsis: A school board may enter into an agreement with an employee of the board, pursuant to a negotiated fringe benefit package made available to the board's employees, whereby such employee, having selected one of the alternative benefits which results in additional taxable income for such employee, thereby increasing FICA contributions attributable to such employee's wages, agrees to pay to the school board the school board's share of such increased contributions. However, such agreement may not operate so as to transfer to the employee the school board's liability for making all payments of FICA contributions to the state, pursuant to K.S.A. 1979 Supp. 40-2305(c)(1). Cited herein: K.S.A. 40-2303, K.S.A. 1979 Supp. 40-2305, 72-5413 (as amended by L. 1980, ch. 220, §1), K.S.A. 75-4322, 26 U.S.C.A. §§3101, 3111.

\* \* \*

Dear Commissioner Bolton:

On your behalf, Dale M. Dennis, Assistant Commissioner for Financial Services, has inquired of this office "whether school employees who choose cash in lieu of health insurance under a negotiated fringe benefit package can agree to pay the employer's and the employee's share of social security." It is our understanding that a "negotiated fringe benefit package" is commonly referred to as a "cafeteria plan," because of an employee's right to select his or her own "menu" of

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fringe benefits. Essentially, we understand a cafeteria plan to be a written plan pursuant to which employees may select from two or more fringe benefits, which may be nontaxable benefits, cash, property or other taxable benefits. Benefits under a cafeteria plan may commonly include such items as health insurance, salary protection insurance, term life insurance, tax-sheltered annuities and cash.

In your request, you have specifically inquired as to a cafeteria plan providing school employees the option of choosing between health insurance or cash in lieu of such insurance. If an employee selects cash in lieu of health insurance, it will be taxable to the employee as income. Thus, since such employee's additional income will affect the amount of the school board's social security contributions, you have inquired whether the negotiated fringe benefit package may include a provision whereby an employee who chooses cash in lieu of health insurance agrees to pay the employer's share of such contributions.

The procedure whereby benefits of Title II of the Social Security Act may be extended to employees of political subdivisions is set forth in K.S.A. 1979 Supp. 40-2305. Under subsection (c)(1) thereof, political subdivisions in which said benefits have been extended to the employees thereof are required to pay to the director of accounts and reports, "contributions in the amounts and at the rates specified" in the agreement entered into by the director of accounts and reports pursuant to K.S.A. 40-2303.

Under K.S.A. 40-2303, the state has entered into the agreement necessary to extend social security benefits to employees of the state and the political subdivisions thereof. This statute also specifies various provisions to be included in said agreement. Subsection (a)(2) concerns the payment of contributions, providing that

"the state will pay to the secretary of the treasury, at such time or times as may be prescribed under the social security act, contributions with respect to wages, as defined in subsection (a) of . . . [K.S.A. 1979 Supp. 40-2302], equal to the sum of the taxes which would be imposed by the federal insurance contributions act if the services covered by the agreement constituted employment within the meaning of that act. . . ."

The Federal Insurance Contributions Act (FICA), which provides funds to implement the old-age, survivors, and disability insurance benefits prescribed in the Social Security Act, imposes both an employee

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and an employer tax. 26 U.S.C.A. §§3101, 3111. Thus, as required by K.S.A. 40-2303(a)(2), the agreement entered into by the state imposes liability on the state for contributions in an amount equal to the sum of the employer and employee taxes that would have been imposed under the FICA if the services covered by the agreement (i.e., services performed by employees of the state and political subdivisions) had constituted employment subject to the FICA.

Similarly, by virtue of K.S.A. 1979 Supp. 40-2305(c)(1), a political subdivision is obligated to the state for contributions in an amount equal to the sum of the employer and employee taxes that would have been imposed under the FICA if the services performed by employees of the political subdivision had constituted employment subject to the FICA. This fact is pertinent to your inquiry, since we are unaware of any provision of law which would permit shifting of the political subdivision's liability for the payment of all or any portion of such contributions to the political subdivision's employees. To the contrary, 26 C.F.R. §31.3111-4 provides that an "employer is liable for the employer tax with respect to the wages paid to his employees for employment performed for him." Also, while not conclusive as to our consideration here, we note as persuasive an interpretive ruling of the U.S. Internal Revenue Service with respect to liability for payment of the unemployment tax. In Rev.Rul. 68-518, the I.R.S. has declared it has no objection "to an agreement whereby the [employer] tax is assumed by another, but such an agreement does not affect the liability of the employer to file returns and, if the other party fails to make payments as agreed, to pay the tax to the Federal Government." See 26 C.F.R. §31.3306(a)-1.

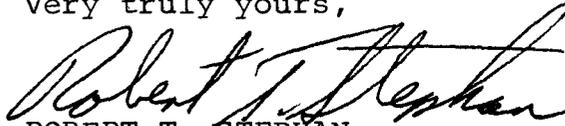
In our judgment, therefore, a school board may not enter into an agreement with one of its employees, whereby such employee assumes the school board's liability for payment of the school board's share of FICA taxes attributable to such employee's wages. We believe such conclusion is clearly required by the provisions of K.S.A. 1979 Supp. 40-2305(c)(1), and is supported by the other authorities cited herein. Moreover, the logic of such conclusions should be clearly evident. Since the state is obligated, by virtue of its agreement with the federal government under K.S.A. 40-2303, for the payment of contributions due from the school board to the state pursuant to K.S.A. 1979 Supp. 40-2305(c)(1), it would not be in the public interest to impose upon the state the duty of collecting contributions from an employee of the school board.

However, we do not question the ability of a school board to enter into an agreement with an employee of the board, pursuant to a negotiated fringe benefit package made available to the board's employees, whereby such employee, having selected one of the alternative

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benefits which results in additional taxable income for such employee, thereby increasing FICA contributions attributable to such employee's wages, agrees to pay to the school board the school board's share of such increased contributions. Certainly the authority for such agreement could be included in a negotiated fringe benefit package, agreed to either as "terms and conditions of professional service" [K.S.A. 1979 Supp. 72-5413(1), as amended by L. 1980, ch. 220, §1] or as "conditions of employment" [K.S.A. 75-4322(t)]. But, as previously noted, such agreement cannot effect any shifting of the school board's liability for FICA contributions.

Very truly yours,



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Attorney General of Kansas



W. Robert Alderson  
First Deputy Attorney General

RTS:WRA:phf