The purpose of this course is to understand the structure of Federal payroll taxes and also to consider the broader issues which these taxes raise. We will not get into the fine print (e.g., should you be withholding FICA on what you pay your babysitter?\(^1\), but will discuss, for example, the effect of the rules on the choice an entity or a structure used to carry on a business (such as the choice between a partnership and an S corporation or between a limited liability company and a limited partnership), the alignment of the taxes with the personal income tax and other connections between Government and private social and healthcare insurance programs and the personal income tax. Broader issues include, for example, whether it makes a difference whether these taxes are viewed as taxes on income or simply as payments made for specific retirement and/or medical benefits (and, depending on how that is answered, whether it might make sense to fund more of the Social Security and Medicare benefits out of general revenues, not payroll taxes).

Whether we will cover the 3.8% tax on net investment income, enacted as part of the Affordable Care Act, will depend on the likelihood of its repeal. For the sake of simplicity, the syllabus assumes that it will stay in place. If that turns out to be wrong, the course schedule will be adjusted.

Apart from assigned materials, additional readings are set out at the end of this syllabus. These are not required but are for those who want to go beyond the assigned readings.

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\(^1\) On this, see Internal Revenue Service, Publication 926 (2016), Household Employer's Tax Guide.
There will be two hour open-book exam or in the alternative a paper of not more than 35 pages (due at the end of the exam period) on an agreed-upon topic. Class participation will also be taken into account.
Class 1 – Wednesday, September 6

Structure and purposes of FICA, SECA and the 3.8% tax on net investment income
What are the main difference between these taxes?
Why are they important?
How are they coordinated with each other and with the personal income tax?

Materials for Class

Internal Revenue Code Sections 3101 and 3102 (tax on employee’s share of wages), 3111 (tax on employer’s share of wages), 3121 (definitions of wages, employment and other terms), 3501-12 (general provisions relating to employment taxes and collection of income taxes at source), 1401 (tax on self-employment income), 1402 (definitions, including net earnings from self-employment), and 1411 (3.8% tax on net investment income)²

Internal Revenue Code Section 275(a)(1) (no deduction by an employee for FICA or the equivalent Railroad Act taxes), and 164(f) (limited deduction for SECA)

Internal Revenue Code Sections 6672 (Failure to collect and pay over tax…) and 6671(b) (definition of a “responsible” person)

Staff of the Joint Committee on Taxation, Description of the Social Security Tax Base, JCX-36-11 (June 21, 2011)

Internal Revenue Code Sections 32 (the earned income tax credit), and the credits allowed by Sections 45B, 41(h) and 3111(f)


Class 2 – Monday, September 11

Why are FICA, SEC and the 3.8% tax on net investment income separate from the personal income tax?
Income tax issues, such as “tax expenditures” that subsidize private retirement and health care benefits
Brief description of proposals for change (or reform), such as those in the Obama Administration’s annual budgets, in the House Ways and Means Committee draft Tax Reform Act of 2014 and in other proposed legislation that is summarized in the syllabus³

² And here and elsewhere, the related regulations under the cited sections.

³ To be discussed further in class 7.
FICA – Structure; collection; both employed and self-employed; multiple employers and business combinations; common paymasters; definitions (employee, employment and wages); and professional employer organizations or payroll companies

Materials for Class

Summaries in this syllabus of the employment tax provisions of the Administration’s Fiscal 2017 Budget, the House Ways & Means Committee draft of the Tax Reform Act of 2014, and of other proposed legislation

Cencast Service, L.P. v. United States, 729 F. 3rd 1352 (Fed Cir. 2013)\(^4\)

Internal Revenue Code Sections 3504 (acts to be performed by agents), 3511 (certified professional employer organizations), 7422 (civil actions for refund) and 7705 (certified professional employer organizations)

Gerstenbluth v. Credit Suisse Securities (USA) LLC, 728 F.3rd 139 (2nd Cir. 2013)


Mayo Foundation for Medical Education and Research v. United States, 131 S. Ct. 704 (2011)

Atlantic Department Stores, Inc. v. United States, 557 F. 2d 957 (2nd Cir. 1977)

Class 3 – Monday, September 18

FICA - continued
Section 530 and other worker classification issues
“Employees” in other contexts
Personal income tax issues
Partners as employees
Disregarded entities as employers

Materials for Class

Section 530 of the Revenue Act of 1978, as amended, which is codified as a note to Internal Revenue Code Section 3401 and is set out in the syllabus
Internal Revenue Code Sections 3509 (employer liability), 6041 (information returns) and 7436 (proceedings for determination of employment status)

\(^4\) And Section 3512 (motion picture project workers), enacted after Cencast.
Internal Revenue Service Form SS-8 (Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding)
Announcement 2012-45 (Voluntary Classification Settlement Program)
SECC Corporation v. Commr, 142 T.C. 225 (2014)
Rev. Rul. 87-41 (common law employee)
Rev. Rul. 90-93 (statutory employee)
Rev. Rul. 69-184 (partner cannot be an employee)
Regs. §301.7701-2(v)(iv)(B), relating to disregarded entities

Class 4 – Monday, September 25
SECA --
Tax base – net earnings from a trade or business
What is a trade or business
Trusts and estates
Aggregation of trades or businesses
SECA exceptions or exclusions

Materials for Class

Newberry v. Comm’r, 76 T.C. 441 (1981)
Bot v. Comm’r, 353 F.3d 595 (8th Cir. 2003)

Class 5 – Monday, October 2

SECA – continued

Exceptions and exclusions
Investment income
Real estate investors – capital gains and rents
The limited partner exclusion in Section 1402(a)(13)
Traders in commodities and financial instruments
Limited partners
Trusts and estates

Materials for Class

In addition to Internal Revenue Code Section 1402(a)(13), Section 469(h)(2)
Renkemeyer v. Comm’r, 136 T.C. 137 (2011)
Watson v. United States, 668 F. 3rd 1008 (8th Cir. 2012), aff’g 757 F.Supp. 2d 877 (S.D. Iowa 2010)  
Aragona Trust v. Comm’r, 142 T.C. 165 (2014)

Class 6 – Monday, October 9

The 3.8% tax on net investment income

Materials for Class

In addition to Internal Revenue Code Section 1411, Regs. §1.1411-4 through -9; and Section 469

Class 7 – Monday, October 16

Cross-border issues

Proposals for changes to FICA and SECA

Materials for Class

OECD, Taxing Wages 2014

Articles 14 (Income from employment), 17 (Pensions, Social Security, Annuities, etc.) and 18 (Pension Funds) of the US Model Income Tax Treaty (2006)

House Ways and Means Committee draft Tax Reform Act of 2014, Administration’s Fiscal 2015 Budget proposals and other legislative proposals summarized in the syllabus

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5 This is available on Lexis but let me know if you have difficulty locating it and I will send you a copy.
Relevant Internal Revenue Code Sections

Chapter 2 of Subtitle A— SECA
§§1401-3

Chapter 2A of Subtitle A—3.8% Tax on NII
§1411

Chapter 21 of Subtitle C – FICA
§§3101-28

Chapter 22 of Subtitle C – Railroad Retirement Act
§§3201-3241

Chapter 23 of Subtitle C – FUTA
§§3301-11

Chapter 23A of Subtitle C – FUTA for Railroad employees
§§3821-22

Chapter 24 of Subtitle C – Withholding on “wages”
§3401

Chapter 25 of Subtitle C – General rules with respect to Chapter 24
§§3501-11
Rates of tax, etc.

1. **FICA.** Section 3101 (or FICA) imposes tax on the “wages” of an individual, for years after 1990, at the rate of

   a. 6.2% (the old-age, survivors, and disability insurance component) on the taxable wage base (capped at $127,500 for 2017) \(^6\) plus

   b. 1.45%, uncapped, of that base (the hospital insurance component), or in the aggregate at the rate of 7.65%.\(^7\)

   c. For 2013 and later years, the tax on the hospital insurance component is increased by 0.9% in the case of an individual with wages of more than $200,000 ($250,000 on a joint return), bringing the top rate up to 8.55%.

   d. Section 3111 imposes taxes at the same rates, but without the 0.9% increase, on the employer who pays the wages, leading to a combined rate of tax on wages of 16.2% (i.e., 8.55% plus 7.65%).\(^8\)

2. **SECA.** Section 1401 imposes a tax on the self-employment income of an individual equal, for years after 1989, to

   a. 12.4% (the old-age, survivors, and disability insurance component) of such income (capped at $127,200 for 2017), plus

   b. 2.9% uncapped of that base (the hospital insurance component), and

   c. for 2013 and later years, in the case of an individual with self-employment income of $200,000 or more ($250,000 on a joint return), an additional 0.9% (or in the aggregate 3.8% uncapped).

   d. This works out at the top to 16.2% in the aggregate.\(^9\) (Thus, the same rate as FICA.)

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\(^6\) And $118,500 for 2015 and 2016 and $117,000 for 2014).

\(^7\) For 2011 and 2012, the 6.2% rate was reduced to 4.2%.

\(^8\) Disregarding the reduction for 2011 and 2012.

\(^9\) For 2011 and 2012, the 12.4% rate was reduced to 10.4%.
e. The tax is self-assessed but, like FICA, is administered through the income tax system—that is, it ties into the taxpayer’s Form 1040. 10

3. 0.9% increase for 2013 and later years. As noted, for 2013 and subsequent years, an additional tax of 0.9% is imposed on net earnings from self-employment income and on an employee’s wages, in each case if in excess of $200,000 ($250,000 on a joint return), increasing rate of the hospital insurance or Medicare component on that amount to 3.8% and to a top rate to 16.2%. Unlike the other components of SECA and FICA, this is calculated on a joint return basis. The tax imposed on the employee is collected by withholding, without regard to the cap—i.e., the possibility that the individual’s spouse will also have wages and/or self-employment income.

4. 3.8% tax on net investment income. In the case of investment, or “unearned”, income, in order to replicate in part the Medicare component of FICA and SECA, which now is up to 3.8%, a tax of 3.8% is imposed by Section 1411 for 2013 and later years on interest, dividends, capital gain and other “investment income” of an individual or, if less, the excess of adjusted gross income over $200,000 ($250,000 on a joint return);11 or, in the case of an estate or trust, on undistributed net investment income or, if less the excess of adjusted gross income over the dollar amount at which the highest Section 1(e) bracket begins for the year. Administered through the personal income tax—i.e., reported on Form 8960 (Net Investment Income Tax—Individuals, Estates and Trusts).

10 As Business income (Schedule C or C-EZ) or Farm income (Schedule F), which are reported on the Form 1040. The self-employment tax and any unpaid (i.e., un-withheld) FICA taxes are then calculated on the Form 1040, from (1) the Schedule SE (Self-Employment Tax), (2) the Form 8919 (Uncollected Social Security and Medicare Tax on Wages), and (3) Form 4137 (Social Security and Medicare Tax on Unreported Tip Income) and Household employment taxes are added, from Schedule H. The sum, including any FICA that is withheld, is added to the income tax to reach total tax due. Excess social security tax is treated as a payment of tax. The Long Schedule SE has special rules for ministers, etc., for farm profits and payments under the Conservation Reserve Program. For the rest, the Schedule refers to Schedule C and Schedule K-1. Social security wages are a deduction from the capped base, which is then used to calculate the OASDI tax; and to this is then added 2.9% of the uncapped amount.

11 So, borrowing an example in the Regulations, “A, an unmarried United States citizen, has modified adjusted gross income … of $190,000, which includes $50,000 of net investment income. A has a zero tax imposed under section 1411 because the threshold amount for a single individual is $200,000 … If during Year 2, A has modified adjusted gross income of $220,000, which includes $50,000 of net investment income, then the individual has a section 1411 tax of $760 (3.8% multiplied by $20,000, the lesser of $50,000 net investment income or $20,000 excess of modified adjusted gross income over the threshold amount).”
5. **Possible repeal.** Both the 0.9% increase and the 3.8% tax on net investment income may be repealed as part of the repeal/amendment of the Affordable Care Act.
## Historical Social Security Tax Rates [1]

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<td>2008</td>
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<td>2010</td>
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<td>5.625%</td>
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<td>2011</td>
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<td>1.2%</td>
<td>2015</td>
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<td>12.4%</td>
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</table>

Notes:
- Amounts for 1937-74 and for 1975-81 were set by statute; all other amounts were determined under automatic adjustment provisions of the Social Security Act.
- Before 1969, the tax rate on self-employed persons was less than the combined rate on employers and employees.
- For 1951, 1952 and 1953, the upper limits on earnings subject to HI taxes were $125,000, $130,000 and $130,000 respectively. The upper limit was repealed by the Omnibus Budget Reconciliation Act of 1993.
- The tax rate refers to the combined rate for employers and employees.
- [OASDI] refers to the "Old-Age, Survivors, and Disability Insurance" program.
- [HI] refers to Medicare's Hospital Insurance program.
- For 2011 and 2012, the OASDI tax rate on wages for employees and self-employed individuals is reduced from 6.2% to 4.2%. The OASDI tax rate on employers' wages remains at 6.2%.
Table A.3.—Federal Receipts by Source, as a Percentage of Total Revenues, 1967-2016

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<td>22.8</td>
<td>21.9</td>
<td>9.2</td>
<td>2.0</td>
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<td>44.9</td>
<td>18.7</td>
<td>22.2</td>
<td>9.2</td>
<td>2.0</td>
<td>3.0</td>
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<td>19.6</td>
<td>20.9</td>
<td>8.1</td>
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<td>1970</td>
<td>46.9</td>
<td>17.0</td>
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<td>8.1</td>
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[1] Social insurance taxes comprise old-age and survivors insurance, disability insurance, hospital insurance, railroad retirement, railroad social security equivalent account, employment insurance, employee share of Federal employees retirement, and certain non-Federal employees retirement.

[2] Other receipts are primarily composed of (1) customs duties and fees, and (2) deposits of earnings by the Federal Reserve system.


Sources: Office of Management and Budget, Historical Tables, Budget of the U.S. Government, Fiscal Year 2017; Department of the Treasury, Bureau of the Fiscal Service, Final Monthly Treasury Statement of Receipts and Outlays. Fiscal Year 2016 through September 30, 2016; Joint Committee on Taxation staff calculations.
Budgetary Receipts

The Budget released by the Trump Administration in May of 2017 projects that the percentages of receipts from the individual income tax, the corporate income tax and payroll taxes will be 50.35%, 9.5% and 31.4%, respectively, for the five year period, 2018-2022; and will be 51.2%, 9% and 31.2%, respectively, for the 10 year period, 2018-2027. (Payroll taxes do not include FUTA and “other retirement”, whatever that may be). The related Analytical Perspectives projects the percentages to be 48%, 9.4% and 34% for 2017, the year before the Budget proposals take effect, and 53.5%, 8.67% and 33.1% for 2027.
"(a) Termination of certain employment tax liability.

"(1) In general. If--

"(A) for purposes of employment taxes, the taxpayer did not treat an individual as an employee for any period, and

"(B) in the case of periods after December 31, 1978, all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on a basis consistent with the taxpayer's treatment of such individual as not being an employee,

then, for purposes of applying such taxes for such period with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no reasonable basis for not treating such individual as an employee.

"(2) Statutory standards providing one method of satisfying the requirements of paragraph (1). For purposes of paragraph (1), a taxpayer shall in any case be treated as having a reasonable basis for not treating an individual as an employee for a period if the taxpayer's treatment of such individual for such period was in reasonable reliance on any of the following:

"(A) judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;

"(B) a past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual; or

"(C) long-standing recognized practice of a significant segment of the industry in which such individual was engaged.

"(3) Consistency required in the case of prior tax treatment. Paragraph (1) shall not apply with respect to the treatment of any individual for employment tax purposes for any period ending after December 31, 1978, if the taxpayer (or a predecessor) has treated any individual holding a substantially similar position as an employee for purposes of the employment taxes for any period beginning after December 31, 1977.

"(4) Refund or credit of overpayment. If refund or credit of any overpayment of an employment tax resulting from the application of paragraph (1) is not barred on the date of the enactment of this Act by any law or rule of law, the period for filing a claim for refund or credit of such overpayment (to the extent attributable to the application of paragraph (1) shall not expire before the date 1 year after the date of the enactment of this Act.
(b) Prohibition against regulations and rulings on employment status. No regulation or Revenue Ruling shall be published on or after the date of the enactment of this Act and before the effective date of any law hereafter enacted clarifying the employment status of individuals for purposes of the employment taxes by the Department of the Treasury (including the Internal Revenue Service) with respect to the employment status of any individual for purposes of the employment taxes.

(c) Definitions. For purposes of this section--

(1) Employment tax. The term "employment tax" means any tax imposed by subtitle C of the Internal Revenue Code of 1954.

(2) Employment status. The term "employment status" means the status of an individual, under the usual common law rules applicable in determining the employer-employee relationship, as an employee or as an independent contractor (or other individual who is not an employee).

(d) Exception. This section shall not apply in the case of an individual who, pursuant to an arrangement between the taxpayer and another person, provides services for such other person as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work.

(e) Special rules for application of section.

(1) Notice of availability of section. An officer or employee of the Internal Revenue Service shall, before or at the commencement of any audit inquiry relating to the employment status of one or more individuals who perform services for the taxpayer, provide the taxpayer with a written notice of the provisions of this section.

(2) Rules relating to statutory standards. For purposes of subsection (a)(2)--

(A) a taxpayer may not rely on an audit commenced after December 31, 1996, for purposes of subparagraph (B) thereof unless such audit included an examination for employment tax purposes of whether the individual involved (or any individual holding a position substantially similar to the position held by the individual involved) should be treated as an employee of the taxpayer,

(B) in no event shall the significant segment requirement of subparagraph (C) thereof be construed to require a reasonable showing of the practice of more than 25 percent of the industry (determined by not taking into account the taxpayer), and

(C) in applying the long-standing recognized practice requirement of subparagraph (C) thereof--

(i) such requirement shall not be construed as requiring the practice to have continued for more than 10 years, and
"(ii) a practice shall not fail to be treated as long-standing merely because such practice began after 1978.

"(3) Availability of safe harbors. Nothing in this section shall be construed to provide that subsection (a) only applies where the individual involved is otherwise an employee of the taxpayer.

"(4) Burden of proof.

(A) In general. If--

"(i) a taxpayer establishes a prima facie case that it was reasonable not to treat an individual as an employee for purposes of this section, and

"(ii) the taxpayer has fully cooperated with reasonable requests from the Secretary of the Treasury or his delegate,

then the burden of proof with respect to such treatment shall be on the Secretary.

"(B) Exception for other reasonable basis. In the case of any issue involving whether the taxpayer had a reasonable basis not to treat an individual as an employee for purposes of this section, subparagraph (A) shall only apply for purposes of determining whether the taxpayer meets the requirements of subparagraph (A), (B), or (C) of subsection (a)(2).

"(5) Preservation of prior period safe harbor. If--

"(A) an individual would (but for the treatment referred to in subparagraph (B)) be deemed not to be an employee of the taxpayer under subsection (a) for any prior period, and

"(B) such individual is treated by the taxpayer as an employee for employment tax purposes for any subsequent period,

then, for purposes of applying such taxes for such prior period with respect to the taxpayer, the individual shall be deemed not to be an employee.

"(6) Substantially similar position. For purposes of this section, the determination as to whether an individual holds a position substantially similar to a position held by another individual shall include consideration of the relationship between the taxpayer and such individuals.

"(f) Treatment of test room supervisors and proctors who assist in the administration of college entrance and placement exams.

(1) In general. In the case of an individual described in paragraph (2) who is providing services as a test proctor or room supervisor by assisting in the administration of college entrance or placement examinations, this section shall be applied to such services performed after December 31, 2006 (and remuneration paid for such services) without regard to subsection (a)(3) thereof.
(2) **Applicability.** An individual is described in this paragraph if the individual--

"(A) is providing the services described in subsection (a) to an organization described in section 501(c), and exempt from tax under section 501(a), of the Internal Revenue Code of 1986, and

"(B) is not otherwise treated as an employee of such organization for purposes of subtitle C of such Code (relating to employment taxes)."
Totalization Agreement

AGREEMENT ON SOCIAL SECURITY
BETWEEN
THE UNITED STATES OF AMERICA
AND
THE FRENCH REPUBLIC

The Government of the United States of America and the Government of the French Republic, Being desirous of regulating the relationship between their two countries in the field of Social Security, have agreed as follows:

PART I

GENERAL PROVISIONS

Article 1

For purposes of this Agreement:

1. "Territory of a Contracting State" means, as regards the United States, the States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam and American Samoa; and as regards France, the European and Overseas Departments of the French Republic;

2. "National" means, as regards the United States, a national of the United States as defined in section 101, Immigration and Nationality Act of 1952, as amended; and as regards France, a person of French nationality;

3. "Laws" means the laws and regulations specified in Article 2;

4. "Competent Authority" means, as regards the United States, the Secretary of Health and Human Services; and as regards France, the Ministers responsible for implementation of the laws specified in Article 2, paragraph 1.b, each to the extent of his responsibility;

5. "Agency" means, as regards the United States, the Social Security Administration; and as regards France, the institution or agency responsible for applying in whole or in part the laws specified in Article 2, paragraph 1.b;

6. "Period of coverage" means a period of payment of contributions or a period of earnings from employment or self-employment ("activité non salariée"), as defined or recognized as a period of coverage by the laws under which such period has been completed, or any similar period insofar as it is recognized by such laws as equivalent to a period of coverage;

7. "Benefit" means any contributory benefit in cash or in kind provided for in the laws of either Contracting State;

8. "Stateless person" means a person defined as a stateless person in Article 1 of the Convention relating to the Status of Stateless Persons dated September 28, 1954;


10. Any term not defined in this Article shall have the meaning assigned to it in the laws which are being applied.
Article 2  
1. For the purpose of this Agreement, the applicable laws are:
   a. As regards the United States, the laws governing the Federal old-age, survivors, and
disability insurance program: i. Title II of the Social Security Act and regulations pertaining
thereto, except sections 226, 226A and 228 of that title and regulations pertaining to those
sections, and ii. Chapter 2 and Chapter 21 of the Internal Revenue Code of 1986 and regulations
pertaining to those chapters;
   b. As regards France,
      i. laws establishing the administrative organization of social security programs;
      ii. laws establishing the social insurance system for nonagricultural employees
and laws establishing the social insurance system for agricultural employees;
      iii. laws on prevention and compensation of occupational accidents and illnesses;
laws on nonoccupational accident insurance and insurance against occupational accidents and
illnesses for self-employed persons in agricultural occupations;
      iv. laws on family benefits;
      v. laws concerning special social security systems to the extent they relate to the
risks or benefits covered by the laws enumerated in the preceding clauses, but excluding the
special system for civil servants;
      vi. the law on the system for seamen;
      vii. laws concerning sickness and maternity insurance for nonagricultural self-
employed workers and laws concerning sickness and maternity insurance for agricultural self-
employed workers;
      viii. laws concerning old-age allowances and old-age insurance for
nonagricultural self-employed workers, laws concerning old-age and invalidity insurance for
clergymen and members of religious orders, laws concerning old-age and invalidity insurance for
attorneys, and laws concerning old-age insurance for agricultural self-employed workers.
2. Notwithstanding paragraph 1.b(ii) and (vii) of this Article, this Agreement shall not
apply to provisions of French laws which extend to French nationals who work or have worked
outside French territory the right to enroll in voluntary insurance.
3. This Agreement shall also apply to legislation which amends or supplements the laws
specified in paragraph 1; however, it shall apply to future legislation of a Contracting State
which creates new categories of beneficiaries only if the Competent Authority of that
Contracting State does not notify the Competent Authority of the other Contracting State in
writing within three months of the date of the official publication of the new legislation that no
such extension of the Agreement is intended.
4. Unless otherwise provided in this Agreement, laws within the meaning of paragraph 1
shall not include Regulations on Social Security implementing the Treaties establishing the
European Communities or treaties or other international agreements which may be in force
between either Contracting State and a third State, or laws or regulations promulgated for their
specific implementation.

Article 3  
Unless otherwise provided, this Agreement shall apply to
   a. persons who are or have been subject to the laws of either Contracting State and
who are nationals of either Contracting State, refugees or stateless persons and
b. other persons with respect to the rights they derive from the persons mentioned in paragraph (a).

**Article 4**

A national of a Contracting State who resides within the territory of the other Contracting State and to whom the provisions of this Agreement apply shall, together with his dependents, receive equal treatment with the nationals of the other Contracting State in the application of the laws of the other State regarding entitlement to and payment of benefits.

**PART II**

**PROVISIONS ON COVERAGE**

**Article 5**

1. Unless otherwise provided in this Agreement, a person employed within the territory of one of the Contracting States shall, with respect to that employment, be subject to the laws of only that Contracting State, even if the person resides in the territory of the other Contracting State or the place of business of the person's employer is in the territory of the other Contracting State.

2. Unless otherwise provided in this Agreement, a person employed on a vessel which flies the flag of a Contracting State who would otherwise be covered under the laws of both Contracting States shall be subject to the laws of only the State whose flag the vessel flies. For the purpose of this paragraph, a vessel which flies the flag of the United States is an "American vessel" within the meaning of United States laws.

**Article 6**

1. Where an employed person who is covered under the laws of one Contracting State with respect to work performed for an employer in the territory of that Contracting State is sent by that employer to work in the territory of the other Contracting State, the person shall be subject to the laws of only the first Contracting State as if he were employed in its territory, provided that the period of work in the territory of the other Contracting State is not expected to exceed 5 years.

2. Article 5, paragraph 2, shall not apply in the case of a person who is employed in the territorial waters or in a port of a Contracting State on a vessel flying the flag of the other Contracting State, if the person is not ordinarily employed at sea and is not a crew member. In such cases, Article 5, paragraph 1, or Article 6, paragraph 1, shall apply as appropriate.

3. Paragraph 1 shall apply in the case of an employed person who has been sent by his employer from the territory of a Contracting State to the territory of a third state and subsequently sent by that employer from the territory of the third state to the territory of the other Contracting State, only if the employed person is a national of a Contracting State.

4. A person who is employed in a public or private international air transport enterprise of one of the Contracting States as a member of the travelling personnel and who would otherwise be covered under the laws of both Contracting States shall be subject to the laws of only the Contracting State where the enterprise is headquartered.

**Article 7**

1. A person who is self-employed in the territory of one Contracting State shall be subject to the laws of only that Contracting State even if he resides in the territory of the other Contracting State.

2. A person who is normally self-employed in the territory of one Contracting State and who performs self-employment for a temporary period in the territory of the other Contracting State shall be subject to the laws of only the first Contracting State, provided that the period of
self-employment in the territory of the other Contracting State is not expected to exceed 24 months.

3. Except as provided in paragraph 4, a person normally self-employed in the territory of both Contracting States shall be subject to the laws of only the Contracting State in whose territory the person performs his principal activity.

4. A person who is engaged in agricultural self-employment in the territory of one of the Contracting States and who is also employed or self-employed in the territory of the other Contracting State shall be subject, with respect to the agricultural self-employment, only to the laws of the Contracting State in whose territory it is performed.

Article 8

1. This Agreement shall not affect the provisions of the Vienna Convention on Diplomatic Relations of April 18, 1961, or of the Vienna Convention on Consular Relations of April 24, 1963.

2. Nationals of one of the Contracting States who are employed by the Government of that Contracting State in the territory of the other Contracting State but who are not exempt from the laws of the other Contracting State by virtue of the Conventions mentioned in paragraph 1 shall be subject to the laws of only the first Contracting State. For the purposes of this paragraph, employment by the United States Government includes employment by an instrumentality thereof and employment by the French Government means employment in the service of the French Government or an instrumentality ("organisme dépendant") of the French Government performed in the territory of the United States by employees or civil servants or military personnel or persons treated as such.

Article 9

The Competent Authorities of the two Contracting States may agree to grant exceptions to the provisions of this Part in the interest of any person or category of persons, provided that the affected person shall be subject to the laws of one of the Contracting States.

Article 10

Except as provided in Article 6, paragraph 3, the provisions of Articles 5, 6, 7 and 9 shall apply to persons regardless of their nationality who would otherwise be covered under the laws of both Contracting States.

PART III

Provisions on Old-age, Survivors and Invalidity Benefits

Chapter 1

General Provisions

Article 11

1. Except as otherwise provided in this Agreement, any provision of United States laws which restricts, suspends or terminates entitlement to or payment of cash benefits solely because the person resides outside or is absent from the territory of the United States shall not be applicable to persons who reside in the territory of France.

2. Except as otherwise provided in this Agreement, benefits provided under French laws shall not be subject to any restriction on entitlement or any reduction, modification, suspension, termination, or forfeiture solely because the person described in Article 3 resides in the territory of the United States.

Chapter 2

PROVISIONS APPLICABLE TO THE UNITED STATES

Article 12
1. Where a person has completed at least six quarters of coverage under United States laws, but does not have sufficient quarters of coverage to satisfy the requirements for entitlement to benefits under United States laws, the agency of the United States shall take into account, for the purpose of establishing entitlement to benefits under this Article, periods of coverage which are credited under French laws and which do not coincide with periods of coverage already credited under United States laws.

2. In determining eligibility for benefits under paragraph 1 of this Article, the agency of the United States shall credit one quarter of coverage for every calendar quarter credited under French laws, except that no quarter of coverage shall be credited for any calendar quarter already credited as a quarter of coverage under United States laws. The total number of quarters of coverage to be credited for a year shall not exceed four.

3. When entitlement to a benefit under United States laws is established according to the provisions of paragraph 1, the agency of the United States shall first compute a theoretical primary insurance amount in accordance with United States laws (including, as appropriate, the provisions of those laws on indexing of earnings) as if the worker had completed a coverage lifetime as determined in accordance with United States laws at the same earnings level as is credited to the worker during the periods of coverage actually completed under those laws. The agency of the United States shall then compute a pro rata primary insurance amount by applying to the theoretical primary insurance amount the ratio of the duration of the worker's periods of coverage credited under United States laws to the duration of a coverage lifetime. Benefits payable under United States laws on the basis of a pro rata primary insurance amount has been computed shall be paid on the basis of that pro rata primary insurance amount.

4. Entitlement to a benefit from the United States which results from paragraph 1 shall terminate with the acquisition of sufficient periods of coverage under United States laws to establish entitlement to an equal or higher benefit without the need to invoke the provisions of paragraph 1.

5. The provisions of this Article and Article 11, paragraph 1, shall apply to persons without regard to their nationality

Chapter 3

PROVISIONS APPLICABLE TO FRANCE

Article 13

1. Nationals of either of the Contracting States, refugees and stateless persons who have been subject successively or alternately to one or several social insurance systems in each of the Contracting States shall receive benefits under French laws as provided in this Article.

2. Except as provided in paragraph 3, when the individual has sufficient coverage to satisfy the requirements of French laws for entitlement to an old-age, survivor, or invalidity pension without the necessity of referring to the periods of coverage completed under United States laws, the French agency shall determine the amount of the pension according to the provisions of French laws, taking into account only the periods of coverage completed under French laws.

3. (a) Notwithstanding paragraph 2, when an individual who qualifies for an invalidity pension under French laws is also entitled to a disability benefit under United States laws, the French agency shall determine the amount of the invalidity pension it pays according to the provisions of paragraph 4.b(ii) and (iii).
(b) If the amount of the invalidity pension computed exclusively according to French laws without recourse to this Agreement would be greater than the total amount of the benefits payable by the agencies of both Contracting States in accordance with the provisions of this Agreement, the French agency shall pay the benefit amount computed in accordance with the provisions of paragraph 4.b(ii) and (iii) increased by the difference between the amount of the invalidity pension computed exclusively according to French laws and such total amount.

4. When the individual does not have sufficient coverage to satisfy the requirements for a French old-age, survivor or invalidity pension, the benefit which the individual may claim from the French agency shall be awarded according to the following rules:
   a. Totalization of periods of coverage

   The agency of France shall take account of periods of coverage credited under the laws of the United States to the extent that they do not coincide with periods of coverage credited under French laws, both for purposes of determining the right to benefits as well as the maintenance or recovery of this right.

   b. Award of the benefit

   i. Taking account of the totalization of periods as provided in subparagraph a., the French agency shall determine, according to its own laws, if the applicant meets the requirements for entitlement to an old-age, survivor or invalidity pension under its laws.

   ii. If the applicant is eligible for a pension, the French agency shall determine the benefit to which the insured would have been entitled if all the periods of coverage and equivalent periods had been completed exclusively under its own laws. When the amount of the pension is based on the average salary during all or part of the period of coverage, the average salary shall be determined on the basis of the period of coverage completed under French laws.

   iii. The benefit payable to the beneficiary shall be determined by reducing the amount of the benefit referred to in (ii) above to a pro rata amount based on the ratio of (A) the duration of periods of coverage and equivalent periods acquired under French laws to (B) the total periods completed under the laws of the two Contracting States. The total referred to in (B) shall be limited to the number of quarters of coverage required to qualify for a full old-age pension under French laws.

5. If a person no longer has a right to a French invalidity pension because he is not covered under French laws, the French agency shall award an invalidity pension in accordance with the provisions of paragraph 4 (a) and (b) above, provided that the person has completed at least 6 quarters of coverage under United States laws or is eligible for Social Security benefits under United States laws.

Article 14

If the sum of the periods of coverage completed under French laws is less than one year, the French agency shall not be required to award benefits on the basis of the said periods unless a right to benefits is acquired under French laws solely on the basis of these periods. In this case, the benefit shall be awarded only on the basis of these periods.

Article 15

Nationals of either Contracting State shall be entitled to enroll in voluntary insurance provided by French Social Security laws when they reside in French territory, taking into account as appropriate periods of coverage or equivalent periods completed under United States laws.
Article 16
Benefits based on periods of coverage completed under French laws shall be paid to nationals of a third state with which France has a Social Security convention if they reside in the territory of the United States.

Article 17
1. Where French laws award certain benefits only on the condition that the periods of coverage were completed in a profession covered by a special system or in a specified profession or employment, the periods acquired under United States laws shall be taken into account in determining eligibility for these benefits only if they were acquired in the same profession or employment.

2. If, taking account of the periods thus acquired, the individual does not meet the requirements for entitlement to the said benefits, these periods shall be taken into account for the award of benefits under the general system, without taking into account their special nature.

3. Notwithstanding the provisions of Article 11, paragraph 2:
   a. The special allowance and cumulative indemnity provided by the special French laws for mine workers shall be payable only to individuals who work in French mines.
   b. The allowances for dependent children provided by the special French laws for mine workers shall be paid according to the conditions specified therein.
   c. The occupational invalidity pension provided by the special laws applicable to mine workers in France shall be paid to insured individuals who are subject to these special laws at the moment the accident or sickness which led to the invalidity occurred if the individuals resided in France until the date of award of the said pension. The pension shall be discontinued for pensioners who resume work outside of France.

Article 18
The provisions of the present chapter are applicable, by analogy, to the rights of surviving spouses and children.

PART IV
MISCELLANEOUS PROVISIONS

Article 19
1. The Competent Authorities and the agencies of the Contracting States, within the scope of their respective authorities, shall assist each other in implementing this Agreement.

2. The Competent Authorities of the two Contracting States shall:
   a. Conclude an Administrative Arrangement and make such other arrangements as may be necessary for the application of this Agreement;
   b. Communicate to each other information concerning the measures taken for the application of this Agreement; and
   c. Communicate to each other, as soon as possible, information concerning all changes in their respective laws which may affect the application of this Agreement.

3. Liaison agencies for the implementation of this Agreement shall be designated in the Administrative Arrangement.

Article 20
1. The Competent Authorities and agencies of the Contracting States may correspond directly with each other and with any person wherever the person may reside whenever it is necessary for the administration of this Agreement. The correspondence may be in the writer's official language.
2. An application or document may not be rejected because it is in an official language of the other Contracting State.

3. Exemptions from or reductions in taxes or stamp, registration, or enrollment fees provided by the laws of one of the Contracting States for evidence or documents which must be presented in application of the laws of that State shall be extended to the corresponding evidence or documents to be presented to the social security authorities or agencies of the other State in application of this Agreement.

4. Documents and certificates which are presented for purposes of this Agreement shall be exempted from requirements for authentication or legalization by diplomatic or consular authorities.

5. Copies of documents which are certified as true and exact copies by an agency of one Contracting State shall be accepted as true and exact copies by an agency of the other Contracting State, without further certification. The agency of each Contracting State shall be the final judge of the probative value of the evidence submitted to it from whatever source.

Article 21

1. The provisions of this Agreement shall apply only to an application for benefits which is filed on or after the date this Agreement enters into force.

2. A written application for benefits filed with an agency of one Contracting State shall protect the rights of the claimants under the laws of the other Contracting State if the applicant requests that it be considered an application under the laws of the other Contracting State.

3. If an applicant has filed a written application for benefits with the agency of one Contracting State and has not specifically restricted the application to benefits under the laws of that State, the application shall also protect the rights of the claimants under the laws of the other Contracting State if the applicant provides information at the time of filing indicating that the person on whose record benefits are claimed has completed periods of coverage under the laws of the other Contracting State.

Article 22

An application, appeal, or other document which according to the laws of a Contracting State must be submitted to an agency of that Contracting State within a specified period shall be considered to have been submitted on time if it is submitted within the same period to an agency of the other Contracting State. In such case, the agency to which the application, appeal, or document has been submitted shall indicate the date of receipt on the document and transmit it without delay to the liaison agency of the other Contracting State.

Article 23

1. Payments under this Agreement may be made in the currency of the Contracting State making the payment.

2. In case provisions designed to restrict the exchange or exportation of currencies are introduced by either Contracting State, the Governments of both Contracting States shall immediately decide on the measures necessary to insure the transfer of sums owed by either Contracting State under this Agreement.

Article 24

1. Disagreements arising in connection with the application of this Agreement shall, as far as possible, be resolved by the Competent Authorities of the Contracting States.

2. If any such disagreement has not been resolved within a period of six months, either Contracting State may submit the matter to binding arbitration by an arbitral body whose composition and procedure shall be agreed upon by the Contracting States.
Article 25

This Agreement may be amended in the future by supplementary agreements which, from their entry into force, shall be considered an integral part of this Agreement. Such supplementary agreements may be given retroactive effect if they so specify.

Article 26

This Agreement shall not affect provisions of French laws concerning the participation of non-nationals in the organizations necessary for the operation of the Social Security systems.

PART V

TRANSITIONAL AND FINAL PROVISIONS

Article 27

1. This Agreement shall not establish any claim to benefits for any period before its entry into force or to a lump-sum death benefit under United States laws if the person died before its entry into force.

2. Periods of coverage completed before the entry into force of this Agreement shall be taken into account in order to determine the right to benefits under this Agreement, except that neither Contracting State shall be required to take into account periods of coverage occurring prior to the earliest date for which periods of coverage may be credited under its laws.

3. This Agreement shall apply to events which occurred prior to its entry into force insofar as those events are relevant to rights under the laws specified in Article 2.

4. This Agreement shall not result in the reduction of any cash benefit to which entitlement existed prior to its entry into force.

5. (a) Determinations made before the entry into force of this Agreement shall not affect rights arising under it.

(b) Any benefit which was denied or suspended under the domestic law of either Contracting State but which is payable by virtue of this Agreement shall, upon application of the person concerned, be awarded or reinstated upon entry into force of the Agreement, provided that the right to such benefit has not been settled by a lump-sum payment.

(c) Benefit rights which a person acquired prior to the entry into force of this Agreement may be reviewed upon application of the person concerned taking into account the provisions of this Agreement.

6. In applying Article 6, paragraph 1, or Article 7, paragraph 2, in the case of persons who began a period of work in the territory of a Contracting State prior to the effective date of this Agreement, the period of work or self-employment referred to in those two paragraphs shall be considered to begin on that effective date.

Article 28

1. The Governments of both Contracting States shall notify each other in writing of the completion of their respective statutory and constitutional procedures required for the entry into force of this Agreement.

2. This Agreement shall enter into force on the first day of the third month following the date of the last notification.

Article 29

1. This Agreement shall remain in force and effect until the expiration of one calendar year following the year in which written notice of its termination is given by one of the Contracting States to the other Contracting State.
2. If this Agreement is terminated, rights regarding entitlement to or payment of benefits acquired under it shall be retained; the Contracting States shall make arrangements dealing with rights in the process of being acquired.

In witness whereof, the undersigned, being duly authorized thereto by their respective Governments, have signed this Agreement.

Done at Paris on March 2, 1987, in duplicate in the English and French languages, both texts being equally authentic.

ADMINISTRATIVE ARRANGEMENT
CONCERNING THE APPLICATION OF THE AGREEMENT ON SOCIAL SECURITY
BETWEEN THE UNITED STATES OF AMERICA AND THE FRENCH REPUBLIC

Pursuant to the provisions of Article 19, paragraph 2(a), of the Agreement between the United States of America and the French Republic on Social Security, signed March 2, 1987, hereinafter referred to as the "Agreement", the Competent Authorities of the two Contracting States have agreed on the following provisions for application of the Agreement:

Part I
General Provisions

ARTICLE 1
Terms used in this Administrative Arrangement shall have the same meaning as in the Agreement.

ARTICLE 2
1. Pursuant to Article 19, paragraph 3, of the Agreement, the liaison agencies designated by the Competent Authorities of the two Contracting States shall be:
   a. For the United States of America:
      --the Social Security Administration,
   b. For France:
      --the Center for Social Security of Migrant Workers (Centre de la Securite Sociale des Travailleurs Migrants);
      --the National Independent Social Security Fund for Miners (Caisse Autonome Nationale de la Securite Sociale dans les Mines) with respect to coverage and invalidity and old-age benefits and death allowances under the social security system for mine workers.

2. The United States Social Security Administration and the French Competent Authorities shall agree upon joint procedures and forms necessary for the application of the Agreement and this Administrative Arrangement.

Part II
Provisions on Coverage

ARTICLE 3
1. In applying Part II of the Agreement,
   a. where the laws of a Contracting State continue to be applicable in accordance with Article 6, paragraph 1, or Article 7, paragraph 2, of the Agreement, the agency of that Contracting State designated in paragraph 3 shall issue, upon request of the employer or self-employed person, a certificate stating that, for the duration of the mission, the employee or self-employed person remains covered by those laws with respect to the work in question;
b. in all other cases where the laws of a Contracting State are applicable in accordance with Part II of the Agreement, the agency of that Contracting State designated in paragraph 3 shall issue, upon request of the employer or self-employed person, a certificate stating that the employee or self-employed person is subject to the laws of that Contracting State;

c. the certificates referred to in subparagraphs (a) and (b) shall exempt the named worker from the laws on compulsory coverage of the other Contracting State.

2. In the case of a person who has been sent from the United States to France in accordance with Article 6, paragraph 1, or Article 7, paragraph 2, of the Agreement, the United States agency shall only issue a certificate under paragraph 1 of this Article if the employer or self-employed person has certified that the employee in the first case, or the self-employed person in the second case, is covered under a program which insures the person and the family members who accompany him against the cost of health care. If the employee or self-employed person is not covered under such a program, the person concerned shall be subject to French laws and exempt from United States laws in accordance with Article 5 or Article 7, paragraph 1, of the Agreement.

3. The certificates referred to in paragraph 1 shall be issued:

a. In the United States of America by:
   --the Social Security Administration;

b. In France by:
   --the Primary Sickness Insurance Fund (Caisse Primaire d'Assurance Maladie) for persons covered under the general social security system,
   --the agency responsible for administering a particular special social security system for persons covered under that system,
   --the agency designated by the Regional Mutual Benefit Funds (Caisses Mutuelles Régionales) with respect to self-employed persons,
   --the National Independent Social Security Fund for Miners (Caisse Autonome Nationale de Sécurité Sociale dans les Mines) for persons covered under the social security system for mine workers,
   --the Agricultural Social Insurance Mutual Benefit Fund (Caisse de Mutualité Sociale Agricole) for persons covered under the agricultural social security system,
   --the National Establishment for Disabled Seafarers (Etablissement National des Invalides de la Marine) for persons covered under the social security system for seafarers.

4. The agency of a Contracting State which issues the certificates referred to in paragraph 1 shall furnish a copy of these certificates to the liaison agency of the other Contracting State.

ARTICLE 4

1. If an agency of a Contracting State has issued a certificate referred to in Article 3, paragraph 1 (a), of this Administrative Arrangement with respect to a worker for a period of work in the territory of the other Contracting State to which the person was sent in accordance with Article 6, paragraph 1, of the Agreement, and the worker subsequently begins a new period of work in the territory of the other Contracting State, the worker shall not be entitled to a certificate with respect to the new period unless

1. the new period of work begins at least 1 year after the end of the initial period of work or
2. the new period of work is not expected to last beyond 5 years from the date on which the initial period of work began.

2. If an agency of a Contracting State has issued a certificate referred to in Article 3, paragraph 1 (a), of this Administrative Arrangement with respect to a worker for a temporary period of self-employment performed in the territory of the other Contracting State in accordance with Article 7, paragraph 2, of the Agreement, and the worker subsequently begins a new period of self-employment in the territory of the other Contracting State, the worker shall not be entitled to a certificate with respect to the new period unless

1. the new period of self-employment begins at least 1 year after the end of the initial period of self-employment or

2. the new period of self-employment is not expected to last beyond 24 months from the date on which the initial period of self-employment began.

ARTICLE 5

1. For purposes of Article 7, paragraph 3, of the Agreement, a self-employed person shall be considered to perform his principal activity in the territory of the Contracting State in which he maintains a fixed base for more than 183 days during the fiscal year concerned. If the person maintains a fixed base in the territory of both Contracting States or of neither Contracting State for more than 183 days in such year, he shall be considered to perform his principal activity in the territory of the Contracting State in which he is present for the greater number of days in such year. Where difficulties arise, the agencies shall furnish each other with all information necessary to determine the principal activity of the person concerned.

2. If self-employment is covered under the laws of a Contracting State in accordance with Article 7, paragraph 3, of the Agreement, the amount of income from self-employment that is creditable for benefit computation purposes and the amount of contributions that are due under those laws shall be based on the income derived from self-employment performed in the territory of both Contracting States. The contribution rate to be applied in determining the amount of contributions due shall be that which applies under those laws.

ARTICLE 6

To establish eligibility for voluntary or continued optional coverage under the French social security system as provided by Article 15 of the Agreement, the person concerned shall submit to the French agency a record of the periods of coverage or equivalent periods completed under United States laws. This record shall be submitted by the United States agency if the person so requests.

Part III
Provisions on Benefits

ARTICLE 7

1. The agency of a Contracting State with which an application for benefits is first filed in accordance with Article 21 of the Agreement shall inform the appropriate agency of the other Contracting State of this fact without delay, either directly or through the liaison agency, and provide such evidence and other available information as may be necessary to complete action on the claim.

2. The agency of a Contracting State which receives an application that was first filed with an agency of the other Contracting State shall without delay provide the appropriate agency of the other Contracting State, either directly or through the liaison agency, with such evidence and other available information as may be required to complete action on the claim.
3. The agency of the Contracting State with which an application for benefits has been filed shall verify the accuracy of the information pertaining to the applicant and his family members. The types of information to be verified shall be agreed upon by the Competent Authorities or, with their authorization, the liaison agencies.

ARTICLE 8

1. When necessary for the application of Part III of the Agreement, an agency of a Contracting State shall send a record of the periods of coverage completed by a person under the laws of that Contracting State to the liaison agency of the other Contracting State.

2. When claiming benefits in accordance with Article 17 of the Agreement
   a. the claimant shall be responsible for furnishing the French agency all documentary evidence necessary to allow that agency to determine if it can take into account periods certified by the United States agency under paragraph 1;
   b. services performed in the United States shall be considered to be performed underground if they would be so considered in accordance with the special French laws on social security for mine workers if the services had been performed in France.

3. In applying Part III of the Agreement in cases where periods of coverage under the laws of both Contracting States coincide, the agency of each Contracting State shall take into account only the periods of coverage completed under the laws which it applies. For purposes of Article 13, paragraph 4(a), of the Agreement, one quarter of coverage certified by the United States agency shall equal one quarter of coverage credited under French laws.

ARTICLE 9

Benefits which are awarded by an agency of a Contracting State in accordance with the Agreement shall be revalued according to the same provisions as benefits awarded in accordance with the laws of that Contracting State.

ARTICLE 10

1. Benefits payable by an agency of a Contracting State shall be paid directly to the beneficiary in accordance with the laws of that Contracting State.

2. Laws of a Contracting State which provide for reduction, suspension, or termination of benefits to take account of other social security benefits or other income may be applied to beneficiaries even if benefits are being paid by virtue of the laws of the other Contracting State or if the individual receives income in the territory of the other Contracting State.

3. Notwithstanding paragraph 2, pro rata old-age, survivors, or disability benefits payable by the agency of one Contracting State in accordance with Part III of the Agreement shall not be reduced to take account of pro rata benefits of the same type that are paid by an agency of the other Contracting State.

Part IV
Miscellaneous Provisions

ARTICLE 11

In accordance with measures to be agreed upon by the Competent Authorities or, with their authorization, the liaison agencies, the agencies of the two Contracting States shall communicate to each other, upon request and, if necessary, through the liaison agencies, all available information likely to affect a specified individual's benefits paid under the Agreement.

ARTICLE 12
1. Where administrative assistance is furnished under Article 19, paragraph 1, of the Agreement, expenses other than regular personnel and operating costs of the agencies providing the assistance shall be reimbursed by the agency which requested it.

2. Upon request, the agency of either Contracting State shall furnish without cost to the agency of the other Contracting State any medical information and documentation in its possession relevant to the disability of the claimant or beneficiary.

3. Where the agency of a Contracting State requires that a person in the territory of the other Contracting State who is receiving or applying for benefits under the Agreement submit to a medical examination, such examination, if requested by that agency, shall be arranged by the agency of the other Contracting State in accordance with the rules of the agency making the arrangements and at the expense of the agency which requests the examination.

4. Amounts owed under paragraph 1 or 3 shall be reimbursed upon presentation of a statement of expenses.

ARTICLE 13
The liaison agencies of the two Contracting States shall exchange statistics on the number of certificates issued under Article 3 of this Administrative Arrangement and on the payments made to beneficiaries under the Agreement. These statistics shall be furnished annually in a form to be agreed upon by the Competent Authorities or the liaison agencies.

ARTICLE 14
Unless otherwise required by the national statutes of a Contracting State, information about an individual which is transmitted in accordance with the Agreement to that Contracting State by the other Contracting State shall be used exclusively for purposes of implementing the Agreement. Such information received by a Contracting State shall be governed by the national statutes of that Contracting State for the protection of privacy and confidentiality of personal data.

ARTICLE 15
This Administrative Arrangement shall enter into force on the date of entry into force of the Agreement and shall have the same period of validity.

Done at Washington, D.C., on Oct. 21, 1987, in duplicate, in the English and French languages, both texts being equally authentic.
Additional Materials

Additional cases:

1. For an example of cases dealing with employee classification in contexts other than FICA and SECA, see Slayman v. Fedex Ground Package System, Inc., 2014 U.S. Ap. Lexis 16585 (9th Cir. 2014)


4. For other cases involving the issue in Renkemeyer, see Riether v. United States, 919 F. Supp. 2d 1140 (D.N.M. 2012); Howell v. Comm’r, 104 T.C.M. (CCH) 519 (2012); and Castiglione v. Comm’r, 113 T.C.M. (CCH) 1296 (2017)

5. For additional cases on the scope of SECA, see McAllister v. Comm’r., 42 T.C. 948 (1964); Perry v. Comm’r., 67 T.C.M. (CCH) 2966 (1994); and Price v. Comm’r., 65 T.C.M. (CCH) 2968 (1993)

Articles


See also Anne L. Alstott, A New Deal for Old Age: Toward a Progressive Retirement (Harvard University Press 2016), dealing with Social Security issues.


Phyllis Horn Epstein, *Misclassification of Employees and Section 530 Relief*, Tax Notes, March 13, 2017


Kathleen Romig, Center on Budget and Policy Priorities, *Increasing Payroll Taxes Would Strengthen Social Security* (September 27, 2016)


Alan D. Viard, The Other Tax Increase On Savings, Tax Notes, February 20, 2013


James E. Williamson and Francine J. Lipman, The New Earned Income Tax Credit: Too Complex For the Targeted Taxpayers?, 57 Tax Notes 789 (November 9, 1992)


Richard Winchester, Carried Interest for The Common Man, Tax Notes (March 17, 2014)

**History and background**

Martha Derthick, Policymaking for Social Security (The Brookings Institution: 1979)

Martha Derthick, Agency Under Stress (The Brookings Institution: 1990)


**Bar Association comments**

NYSBA Tax Section, Number 921, Report on Recent Developments Regarding Worker Classification With Revised Proposal for Reform (February 24, 1998)

NYSBA Tax Section, Number 1221, Letter Re: Medicare Contribution Tax Definition of Net Investment Income (September 29, 2010)

NYSBA Tax Section, Number 1247, Comments on the Application of Employment Taxes To Partners and the Interaction of the Section 1401 Tax with New Section 1411, (November 14, 2011)

NYSBA Tax Section, Number 1284, Report on the Proposed Regulations under Section 1411 (May 15, 2013)

NYSBA Tax Section, Number 1285, Report on The Proposed Regulations Section 1.1411-10 (May 22, 2013)
NYSBA Tax Section, No. 1326, Material Participation of Trusts and Estates Under Sections 469 and 1411 of the Code (August 17, 2015)

ABA Section of Taxation, Comments Concerning Proposed Treasury Regulations under Section 1411 (April 5, 2013)

ABA Tax Section letter to the Internal Revenue Service, Comments on Material Participation by a Trust or Estate Under Section 469, (January 20, 2015)

Congressional reports, etc.

Joint Committee on Taxation, Tax Expenditures for Health Care (JCX-66-08), July 30, 2008


Staff of the Joint Committee on Taxation, Present Law and Background Relating To The Tax-Related Provisions In The Affordable Care Act, JCX-6-13 (March 4, 2013), pages 23-31

Staff of the Joint Committee on Taxation, Options to Improve Tax Compliance and Reform Tax Expenditures, JCS-02-05 (January 27, 2005), pages 71-105

Paul Burnham, The Taxation of Capital and Labor Through the Self-Employment Tax, Congressional Budget Office (September 2012)

CRS, Increasing the Social Security Payroll Tax Base and Effects on the Tax Burden (January 22, 2009)


The 2014 Annual Report Of the Board of Trustees Of The Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, July 28, 2014

The 2014 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds, July 2014
List in the June 2013 Senate Finance Committee staff release (one of 10) on options for reform, Non-Income Tax Issues and Related Reforms – Employment Taxes, and also, Economic Security, released in May 23, 2013. See the last page of the materials. For the texts, go to http://www.finance.senate.gov/issue/?id=c51408a6-52d1-4c0f-b56f-cffa05e5c987.

Internal Revenue Service, Independent Contractor or Employee: Training Materials, Training 3320102 (10-96) TPDS 84231
Treatises
Bloomberg BNA, Tax Management Portfolios

1. 390-5th, Reasonable Compensation

2. 391-4th, Employment Status – Employee v. Independent Contractor

3. 392-6th, Withholding, Social Security and Unemployment Taxes on Compensation

4. 6830-1st, International Aspects of U.S. Social Security and Unemployment Tax
Employment tax provisions in the House Ways and Means Committee discussion draft of the Tax Reform Act of 2014\textsuperscript{13}

The employment, or payroll, tax provisions included in the Ways and Means Committee discussion draft of the Tax Reform Act of 2014 are all scored by the Joint Committee on Taxation as raising tax revenues except for the change in the worker classification rules\textsuperscript{14} They are as follows:

1. **Reduction in SECA tax base.** The draft would correct the reduction in the SECA tax base (in Section 1402(a)(12)) that is intended to achieve parity between SECA and FICA by limiting the reduction to one half of the OASDI component of the tax on the “capped” amount – i.e., to 7.1064\% of the first $117,000 (for 2014).

2. **SECA tax on shareholders of S Corporations and partners in a partnership.** The draft would make significant changes in the overall structure of the payroll taxes by
   a. treating an S corporation shareholder’s pro rata share of the S corporation’s income (more specifically, the shareholder’s pro rata share of the non-separately computed income of the corporation from a trade or business) as net earnings from self-employment;
   b. repealing the limited partner exclusion in Section 1402(a)(13) from net earnings from self-employment; but
   c. reducing by 30\% net earnings from self-employment (which, in the case of a shareholder of an S corporation, would include wages subject to FICA), which is intended to approximate the historic return on invested capital; or
   d. reducing by 100\% net earnings from self-employment if the partner of S corporation shareholder (which for this purpose includes the individual’s spouse and any lineal descendants of either) did not “materially participate” (as determined under the passive activity loss rules in Section 469(h)) in the activities of the S corporation or partnership (or any entity in which that entity has an interest).\textsuperscript{15}

\textsuperscript{13} The draft was released in February 2014 and the ultimate bill as H.R. 1 in December of 2014.

\textsuperscript{14} Which would reduce tax revenues by $2.5 billion over 10 years. See February 2, 2013 letter from the Joint Committee on Taxation to Chairman Camp.

\textsuperscript{15} As set out in the Section-by-Section Summary, “Under current law, self-employment taxes are not applied consistently to owners of different types of business entities….The disparate application of SECA leads to confusion, poor compliance, and significant opportunities for use of the rules, all of which result in similarly situated business owners being treated in substantially different ways. The provision [in the draft] creates a straightforward rule that treats all owners of pass-through businesses equally.”
3. **Safe harbor for worker classification.** The draft would “provide much-needed certainty” by establishing a safe harbor under which a service provider (which may be an individual or an entity in which the individuals providing the services own interests) would be classified as an independent contractor, and not an employee, if the services are performed in the ordinary course of a trade or business of the recipient, are performed pursuant to a written contract, and specified criteria are met. The criteria, which are intended to be objective, vary, depending on whether the service provider is in the business of selling goods or services or not. Additionally, the service provider must either have a principal place of business, not primarily provide the service in the recipient’s place of business, pay fair market value rent for the use of the service recipient’s place of business or provide the service primarily using equipment that the service provider supplies. The IRS would generally be precluded from retroactively reclassifying the independent contractor if there was a good faith effort to qualify for the safe harbor. The compensation paid by the service recipient is treated and reported as wages for income tax purposes, but the withholding is at the rate of 5% of the first $10,000.

4. **Additional. FICA changes.** The draft would also
   a. repeal the FICA exemptions in Section 3121(b)(1) and (19) for foreign workers (including agricultural workers and the exemptions for students, researchers and cultural exchange participants) temporarily admitted to the U.S. under specified visas;
   b. limit the FICA exemption in Sections 3121(b)(2) and (10) for students to cases where the earnings are less than $1,200 a year, which is the amount required for a quarter of coverage; and
   c. apply FICA to any payment made by an employer by reason of involuntary termination of employment (including supplemental unemployment benefit or

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16 From the Section-by-Section Summary.

17 In which case compensation must be primarily on a commission basis and directly related to sales of goods and services, not hours worked.

18 If not, the criteria require the individual (1) to incur significant unreimbursed expenses, (2) to agree to perform the service for a particular amount of time to achieve a specific result, or to complete a specific task, (3) be primarily compensated on a basis that is not tied to hours of work and (4) either have a significant investment in assets or training, not be required to perform services exclusively for the service recipient, or to not have performed services for the service recipient as an employee within the 1 year period ending on the date that the contract for services is entered into.

19 Described in the release that accompanied the draft as “Clos[ing] the loophole that provides a tax incentive to hire ..foreign workers instead of putting American workers first.”
“SUB” payments), notwithstanding any contrary IRS rulings, and thus in effect, at least prospectively, decide Quality Stores in favor of the IRS.  

5. **Professional employer organizations.** The draft would specify that professional employer organizations (or “employee leasing companies”) which are “certified” by the IRS are the “employers” of any work-site employee performing services for a customer in respect of wages that the organization remits to the employee, thus clarifying the responsibilities of the employer organization and the work-site employer. (Such an organization, or the customer if the contract is terminated, would be treated as a “successor” employer.)

**Changes to SECA**

The 30% reduction in the SECA base is intended to approximate the historic return on invested capital and thus to eliminate income from capital from the SECA base (or, put differently, limit it to income from labor). This is based on the conclusion that the portion of the GDP attributable to labor has generally remained constant over the last several decades at 70%. The treatment for purposes of the deduction of proprietorships, *i.e.*, cases where a business is carried on directly and not through a partnership or S corporation, will be dealt with by regulations.

The changes to SECA would not affect the existing exclusions from the SECA base for certain interest, dividends, gains and rental income – these would continue to be excluded from net earnings from self-employment.

While there are no changes as such to the 3.8% tax on net investment income, changes to the base of SECA (as well as other changes proposed by the draft) may affect the amount subject to that tax. Reported by staff members that the Republican majority of the Committee would have repealed the 3.8% tax altogether but concluded that repeal would conflict with their goal of reducing the top personal income tax rate while keeping the present distribution of the tax burden.

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20 And likely require a different result in cases which have held payments made to induce the retirement of tenured faculty members are not wages. *See North Dakota State University v. United States*, 255 F. 3rd 599 (8th Cir. 2001).

21 *See* the Section-by-Section Summary that accompanied the Ways and Means Committee discussion draft.
Employment tax proposals in the Obama Administration’s Fiscal Year 2015 Revenue Proposals
(March 2014)

1. SECA would apply to all net earnings derived by an S corporation or partnership (whether general or a limited partnership or a limited liability company) if the entity was engaged in a professional services business and the individual shareholder or partner materially participated in the business. Wages would be disregarded. The exceptions for dividends, rents, capital gains and retired partners would remain.
   a. Material participation would generally be determined under Section 469, without the limited partner exception, and thus be present if the individual was involved on a regular, continuous and substantial basis – usually the case of 500 or more hours a year.
   b. A professional service business would be an entity substantially all of whose activities involved the performance of services in the field of health, law, engineering, architecture, accounting, actuarial science, performing arts, consulting (similar to those referred to in Section 448(d)(2)(A), and also athletics, investment advice or management, brokerage services and lobbying.
2. Non-employees. Contractors and other non-employee service providers, if receiving $600 or more in a year, would be required to provide a Form W-9 with its TIN. Failing that, there would be withholding at a flat rate on gross payments.
3. Employee leasing organizations. Set forth standards for making employee leasing, or professional employer, organizations jointly liable for Federal employment taxes, including FICA.
4. Worker classification. Repeal the moratorium on regulations and other guidance in Section 530 of the Revenue Act of 1978 and allow the IRS to require prospective reclassification of workers who are currently misclassified, but with a continuation of the reduced penalties; and allow the IRS to issue generally applicable guidance on the proper classification of workers under common law standards.

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22 Treasury briefing took the view that capital was not an important income producing factor in professional service businesses.
Employment tax proposals in the Obama Administration’s Fiscal Year 2017 Revenue

Proposals

(February 2016)

The Administration’s 2017 budget proposals would

1. Apply the 3.8% tax on net investment income to all trade or business income not subject to SECA, thus picking up income arguably excluded by the limited partner exclusion in Section 1402(a)(13) and S corporation inclusions (i.e., amounts not treated as wages), as well as gains from sales of business property; and

2. Apply SECA to income derived as a shareholder of an S corporation or a partner in a partnership in the same way if the entity was engaged in a professional service business – full inclusion if the shareholder or partner materially participates, inclusion of reasonable compensation if the owner does not materially participate. Reasonable compensation would include guaranteed payments for services. Material participation would be defined as regular, continuous and substantial participation, ordinarily picking up an individual who works in the business for at least 500 hours a year. A professional service business would be a partnership, S corporation or other entity substantially all of the activities of which involve the performance of services in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts and consulting, as well as athletics, investment advice or management, brokerage services, and lobbying.

3. Repeal the income tax credit allowed to an employer by Section 45 for the employer’s share of FICA paid in respect of tips.

The first two items are estimated by the Joint Committee to raise $235.869 billion over 10 years, $103.200 billion over five years, and $13.734 billion in the first year; the third, is estimated to raise $547 million in the first year, $4.44 billion over five years and $10.544 over ten years.

American Jobs and Closing Tax Loopholes Act of 2010, as passed by the House of Representatives

SEC. 413. EMPLOYMENT TAX TREATMENT OF PROFESSIONAL SERVICE BUSINESSES.

(a) In General- Section 1402 is amended by adding at the end the following new subsection:

`(m) Special Rules for Professional Service Businesses-

`(1) SHAREHOLDERS PROVIDING SERVICES TO DISQUALIFIED S CORPORATIONS-

`(A) IN GENERAL- In the case of any disqualified S corporation, each shareholder of such disqualified S corporation who provides substantial services with respect to the professional service business referred to in subparagraph (C) shall take into account such shareholder's pro rata share of all items of income or loss described in section 1366 which are attributable to such business in determining the shareholder's net earnings from self-employment.

`(B) TREATMENT OF FAMILY MEMBERS- Except as otherwise provided by the Secretary, the shareholder's pro rata share of items referred to in subparagraph (A) shall be increased by the pro rata share of such items of each member of such shareholder's family (within the meaning of section 318(a)(1)) who does not provide substantial services with respect to such professional service business.

`(C) DISQUALIFIED S CORPORATION- For purposes of this subsection, the term 'disqualified S corporation' means--

`(i) any S corporation which is a partner in a partnership which is engaged in a professional service business if substantially all of the activities of such S corporation are performed in connection with such partnership, and

`(ii) any other S corporation which is engaged in a professional service business if the principal asset of such business is the reputation and skill of 3 or fewer employees.23

23 The Senate Finance Committee description of its mark-up said that “To make [this] alternative more administrable and more targeted, [its] amendment changes the language so that the policy applies only if 80 percent or more of the professional service income of the corporation is attributable to the services of 3 or fewer owners of the corporation.”
(2) PARTNERS- In the case of any partnership which is engaged in a professional service business, subsection (a)(13) shall not apply to any partner who provides substantial services with respect to such professional service business.

(3) PROFESSIONAL SERVICE BUSINESS- For purposes of this subsection, the term 'professional service business' means any trade or business if substantially all of the activities of such trade or business involve providing services in the fields of health, law, lobbying, engineering, architecture, accounting, actuarial science, performing arts, consulting, athletics, investment advice or management, or brokerage services.

(4) REGULATIONS- The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection, including regulations which prevent the avoidance of the purposes of this subsection through tiered entities or otherwise.

(5) CROSS REFERENCE- For employment tax treatment of wages paid to shareholders of S corporations, see subtitle C.'.

(b) Conforming Amendment- Section 211 of the Social Security Act is amended by adding at the end the following new subsection:

(l) Special Rules for Professional Service Businesses-

(1) SHAREHOLDERS PROVIDING SERVICES TO DISQUALIFIED S CORPORATIONS-

(A) IN GENERAL- In the case of any disqualified S corporation, each shareholder of such disqualified S corporation who provides substantial services with respect to the professional service business referred to in subparagraph (C) shall take into account such shareholder's pro rata share of all items of income or loss described in section 1366 of the Internal Revenue Code of 1986 which are attributable to such business in determining the shareholder's net earnings from self-employment.

(B) TREATMENT OF FAMILY MEMBERS- Except as otherwise provided by the Secretary of the Treasury, the shareholder's pro rata share of items referred to in subparagraph (A) shall be increased by the pro rata share of such items of each member of such shareholder's family (within the meaning of section 318(a)(1) of the Internal Revenue Code of 1986) who does not provide substantial services with respect to such professional service business.

(C) DISQUALIFIED S CORPORATION- For purposes of this subsection, the term 'disqualified S corporation' means--

(i) any S corporation which is a partner in a partnership which is engaged in a professional service business if substantially all of the activities of such S corporation are performed in connection with such partnership, and


`(ii) any other S corporation which is engaged in a professional service business if the principal asset of such business is the reputation and skill of 3 or fewer employees.

`(2) PARTNERS- In the case of any partnership which is engaged in a professional service business, subsection (a)(12) shall not apply to any partner who provides substantial services with respect to such professional service business.

`(3) PROFESSIONAL SERVICE BUSINESS- For purposes of this subsection, the term ‘professional service business' means any trade or business if substantially all of the activities of such trade or business involve providing services in the fields of health, law, lobbying, engineering, architecture, accounting, actuarial science, performing arts, consulting, athletics, investment advice or management, or brokerage services.'.

(c) EFFECTIVE DATE- The amendments made by this section shall apply to taxable years beginning after December 31, 2010.