

Chapter 600 – Employment

Subchapter 01 – Employment

60001.601 Employee Defined

Whether an individual is an "employee" under the common law rules or Federal statutory definition is determined in accordance with the provisions of the Social Security Act and the applicable regulations. Under the Social Security Act, the term "employee" includes:

- An officer of a State or political subdivision. (Section 218(b)(3))
- Any individual who, under the common law rules applicable in determining an employer-employee relationship, has the status of an employee. (Section 210(j)(2))

For purposes of coverage under Section 218 Agreements and the mandatory coverage provisions, the individual performing services must be an employee of the State or local government entity.

State law provisions are used to determine whether an individual is an officer of a State or political subdivision and, therefore, an employee. Review the State statutes to determine whether they establish enough control for the individual to be classified as an employee. Statutes may state that a specific position is that of a public official, in which case there is likely to be a right to control sufficient to make the individual an employee. (A notary public and a juror perform the functions of a public office but are not public officers.)

60001.605 Common-Law Rules

An individual who performs services for a State or local government is an employee if the individual is an employee under the common law rules. The common law rule for determining whether a worker is an employee is whether the government entity has the right to direct and control the worker as to the manner and means of the worker's job performance. In other words, the entity has the right to tell the worker not only what shall be done but how it shall be done.

If an individual is subject to the control or direction of another merely as to the result to be accomplished and not as to the means and methods for accomplishing the result, the individual is an independent contractor. The difference between an employee and an independent contractor lies in the degree of control.

60001.610 Employee vs. Independent Contractor

In determining whether an individual is an employee or an independent contractor under the common law rule, all evidence of control and independence must be considered. The facts fall into three main categories:

- does the entity have the right to direct and control how the worker performs the specific task for which the worker is hired;
- does the entity have the right to direct and control the business and financial aspects of the worker's activities; and
- the relationship of the parties. A written contract is a very important piece of evidence showing the type of relationship the parties intended to create. A written agreement describing the worker as an independent contractor is evidence of the parties' intent. The substance of the relationship, not the label, governs the worker's status. The facts and circumstances under which a worker performs services are determinative. The substance of the relationship, not the label, governs the worker's status

If a State has a question concerning whether an individual is an employee, the State should direct its inquiry either to SSA or to IRS, which has authority to determine whether an individual is an employee for FICA tax purposes.

60001.615 Section 530 of the 1978 Revenue Act

Section 530 of the Revenue Act of 1978 provides, under certain circumstances, employers relief from Federal employment tax obligations when IRS determines the employer misclassified employees as independent contractors.

The Section 530 provision does not apply to State and local government employers covered under Section 218 Agreements. However, State and local government employers whose workers are subject to the mandatory Social Security and Medicare tax provisions are eligible for Section 530 treatment.

Refer to IRS questions concerning the Section 530 provision.

60001.620 Elected Officials

Individuals elected to serve in State or political subdivision positions are generally employees of the entity in which they are elected. In some situations, the elected official's duties for that entity require the elected official to perform certain duties for other entities within the jurisdiction of the entity in which he or she was elected. For coverage purposes, the elected

official is the employee of the entity in which he or she was elected with respect to his or her official duties.

60001.621 Election workers

Election workers are workers hired by the state or local government who earn a set fee for each day of work. In order to be considered employees, election workers are subject to a degree of direction and control.

A. Definitions relating to election work

An **election worker** is someone hired by the state or local government to monitor, preside over, officiate, or assist in public elections. An election worker is only employed during election periods, earns a set fee for each day of work, and may be called to duty at a polling station or at a counting center.

Postal voting or Vote-by-Mail describes the method of voting in an election whereby paper ballots are distributed to voters and/or returned to the government by mail, instead of ballots being cast in person at a polling station or electronically via an electronic voting system.

Absentee voting is the process by which a person is permitted to vote by mail because of absence from the usual voting district, illness, or the like.

Early voting differs from absentee voting in that voters may visit an election official's office or, other satellite voting locations, and cast a vote in person without offering an explanation for not being able to vote on Election Day.

B. Duties of an election worker

The duties of an election worker may include one or more of the following:

- Assist the Supervising Judge and share responsibility for the operation of the polling station;
- Greet voters, assist at the registration book and/or card encoder machine, accompany each voter to a voting machine, verify voter receipt information, and collect voter cards;
- Assist the Supervising Judge in opening and closing the polling station;
- Open envelopes, sort and prepare postal votes or vote-by-mail ballots for counting;
- Count postal votes or vote-by-mail and/or absentee ballots if necessary;
- Operate vote tally machines, and
- Seal and store postal votes or vote-by-mail ballots.

C. Extending coverage to election workers

Election workers who count paper postal or vote-by-mail ballots at counting centers or at any other facility are due the same coverage or exclusion provisions (SL 3001.357) deemed for election workers who assist with balloting at the actual polling stations (**Section 218 (c) (8) of the Social Security Act**).

60001.625 Fee-Based Public Officials

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

Reference: *Social Security Ruling 92-4p* (SSA adopted the IRS definition of a “fee.”)

A. POSITION COMPENSATED SOLELY BY FEES

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

B. POSITION COMPENSATED BY SALARY AND FEES

Generally, a position compensated by a salary and fees is considered a fee-basis position if the fees are the principal source of compensation, unless a State law provides that a position for which any salary is paid is not a fee-basis position. A State may exclude positions compensated by both salary and fees from Social Security and Medicare coverage under the State’s Section 218 Agreement. If the exclusion is taken, none of the compensation received, including the salary, is covered wages under the Section 218 Agreement. However, the salary payment, while excluded under the Agreement, is subject to mandatory Social Security if the official is not a member of a public retirement system.

60001.630 Justices of the Peace

A justice of the peace is ordinarily a public officer and, therefore, an employee of the political entity for which he or she performs services. A justice of the peace is often an elected official.

Reference: *Social Security Ruling 73-58c*

60001.635 Police Officers and Firefighters

Police officer and firefighter positions are defined under State statutes and court decisions. The terms do not include services in positions that, although connected with police and firefighting functions, are not actually police officer and firefighter positions.

NOTE: Police officers and firefighters are not considered emergency workers under the mandatory exclusion from Social Security and Medicare coverage. This exclusion applies only to services of an employee who was hired because of an unforeseen emergency to do work in connection with that emergency on a temporary basis (e.g., an individual hired to battle a major forest fire or to provide emergency assistance in other similar disasters such as volcano eruption, severe ice storm, earthquake and flood).

60001.640 Public Officers

An officer of a State or political subdivision is an employee by statutory definition. Generally, the statutory authority establishing the position describes the occupant of a position as a public officer if, in fact, that is his/her status. Indicative of such status are provisions that the individual has tenure in his/her position and that he/she takes an oath of office. Generally, a public officer exercises some part of the sovereign power of the State or political subdivision.

A mayor, member of a legislature, county commissioner, State or local judge, justice of the peace, country or city attorney, marshal, sheriff, constable, or a registrar of deeds is a public official. Other examples are tax collectors, tax assessors, road commissioners, members of boards and commissions, such as school boards, utility districts, zoning boards, and boards of health.

A notary public and a juror perform the functions of a public office but are not public officers and are not employees.

Reference: Social Security Ruling 72-36

60001.642 Court Reporters

According to the U.S. Department of Labor / Bureau of Labor Statistics, approximately 60% of court reporters work for State and local governments, 10% are self employed, while most of the remaining court reporters are salaried employees working for court reporting agencies or firms. The National Court Reporters Association (NCRA), along with other leading industry participants, classifies court reporters as two different types, "official" and "independent or freelance." Official court reporters are employed by judges and the courts. Independent court reporters are commonly self employed or work for an independent reporting firm.

The distinction between official and independent court reporters is not always obvious. For example, the court reporter in a state court might be referred to as “official,” even though he/she is actually an independent reporter. This incorrect association is often a result of a lack of understanding regarding the types of court reporters. Also, the term “official” has become synonymous with any duty performed in a court of law rather than exclusively a title for full time government employed court reporters. Furthermore, due to an increasing number of firms representing court reporters, it is becoming more common to have courts contract with independent reporters to serve on an “as needed” basis. The independent court reporter is not an employee of the court, but provides court reporting services to the court. Similarly, a reporter who works as an official court reporter in a government court can also act independently. All work done outside of the court not related to their official government position is considered independent employment. Independent employment is not subject to the provisions of respective 218 agreements in which coverage is extended to official court reporters in any given state or instrumentality.

Official government court reporters in public courts are government employees with respect to services performed by them which are required by statute. The same holds true for local or county court reporters working in municipal courts. Those services performed by official government court reporters outside of the statute, such as furnishing additional transcripts, in which a fee is paid directly to the court reporter (see SL 60001.625 for public officials paid by fees) will be remunerated by wages, or payments which become self employment income, separate from their wage payments by the government entity or court. Self employed independent court reporters working outside of a court or those who contract their services to a government court are compensated with payments which become self employment income. Court reporters represented by court reporting agencies are employees of the agency not the state or instrumentality for which they perform services. Official court reporters can perform independent work; however, independent or freelance court reporters, while they may be assuming the role of an official court reporter, are not government employees.

In all instances, SSA and State Social Security administrators should first consult their respective section 218 agreements for mention of the service of court reporters. Any individual who is not an officer of the State or instrumentality of government as defined in Section 218(b)(3) should be evaluated on the basis of whether or not an employer / employee relationship exists. Refer to RS 02100.000 for additional information on employee /employer relationships.

60001.645 Sheltered Workshops

A. WHAT A SHELTERED WORKSHOP IS

A State or non-profit organization established to carry out a program of rehabilitation for handicapped individuals, and/or to provide these individuals with remunerative employment or other occupational rehabilitating activity.

B. HOW A SHELTERED WORKSHOP OPERATES

The State or non-profit organization may contract with private business to operate the workshop, but usually provides individual supervision for the handicapped worker. A program of rehabilitation is established for each individual, and typically consists of (1) a diagnostic and evaluation period; (2) a personal adjustment training period; and (3) a vocational training period. During this rehabilitation training, the individuals are usually paid at reduced pay rates. While the individual is completing this regimen, the services of these individuals are generally not performed as an employee and the remuneration is not wages for employment.

After completing the rehabilitation program, the individual leaves the workshop environment and enters regular employment, if able to perform an available job. Individuals who are unable to obtain regular employment because of the severity of their impairments or unavailability of jobs, are retained in the workshop indefinitely or until placed in regular employment. The individuals performing services are paid at a fraction of or up to minimum wage, depending on their capacity to perform the services. The services of these individuals generally are performed as employees.

Reference: *Social Security Ruling 69-60*

60001.650 Tax Assessors and Tax Collectors

If under State law these positions are public officers, these individuals are employees. Generally, elected tax collectors and elected tax assessors are employees of the political subdivisions in which they are elected. The services performed by tax assessors or tax collectors who are elected to a position, and, in addition, are appointed under a separate legal authority to assess or collect taxes for other political subdivisions, are treated separately for coverage purposes. Tax assessors and tax collectors who perform employment services in nonelective positions may be employed by more than one political entity. In questionable cases, apply the common law rule, i.e., the right to control when the tax assessor or tax collector performs services, where and how he or she performs services.

60001.655 Volunteer Firefighters

When a firefighter receives compensation, that compensation is wages and is subject to FICA taxes, unless an exclusion applies. It does not matter whether the workers are called “volunteers.” Any worker who receives compensation for services performed subject to the will and control of an employer is a common-law employee. If the worker is a common law employee, the amounts paid, whether in cash or some other form, are subject to withholding. Volunteer firefighters are generally considered employees of the fire departments or fire districts for which they perform their services.

Firefighters who are on call and work regularly but intermittently do not qualify for the emergency exclusion under Section 218(c) (6) of the Act, even if their work involves situations that may be considered emergencies. This exclusion applies only to services of an employee who was hired because of an unforeseen emergency to do work in connection with that emergency on a temporary basis (e.g., an individual hired to battle a major forest fire or to provide emergency assistance in other similar disasters such as volcano eruption, severe ice storm, earthquake and flood).

While volunteer firefighters may not receive wages, they may receive remuneration intended to reimburse them for expenses. Expense reimbursements (whether cash, in-kind benefits, or tax exemptions) paid to firefighters must be made under an accountable plan. According to Internal Revenue Code section 62(c), an accountable plan must:

- require firefighters to substantiate actual business expenses,
- allow no reimbursements for unsubstantiated expenses, and
- require that any amounts received that exceed substantiated expenses be returned with a reasonable period.

Any amounts paid for reimbursement that do not meet these conditions are considered made under a nonaccountable plan and are treated as wages. Therefore, a per diem amount that does not reimburse actual, documented expenses is subject to Social Security and Medicare. It does not matter whether the amount is paid as reimbursements, a per diem, or under a point system.

60001.660 Identity of the Employer

The common-law rules apply in determining the identity of an employer for purposes of determining whether services for that employer are covered. The employer is the entity that has the final authority to direct and control the individual in the performance of his or her work, or which reserves the right to do so. This includes the power to hire, fire, supervise and control the

individual. The source of the payment for employment is not a controlling factor in deciding the identity of the employer.

Situations may arise where the employee works for more than one entity, e.g., a tax collector who collects for two or more political subdivisions, and the identity of the employer is not clear.

If there is a provision in a statute or ordinance, expressed or implied, which authorizes employment of the individual, and he or she is hired (or elected) under this authority, the individual is an employee of the State or political subdivision to which the provision applies. If there is no such authority, the employer is the entity that has the right to control the worker in the performance of the work, i.e., the common-law employer.

60001.665 Cooperative Federal-State Government Employment

If an individual performs services in connection with an activity carried on cooperatively by the Federal Government and any State or local government entity, it must be determined whether the individual is an employee of the Federal government or of the State or political subdivision. Beginning November 10, 1988, under section 205(p) (1) of the Social Security Act, SSA determines whether the individual is an employee of the Federal government or of the State or political subdivision. Before November 10, 1988, SSA accepted a determination by the heads of other Federal agencies as to whether such individuals were Federal employees. Such determinations are for Social Security coverage purposes and not for purposes of taxation.

If it is determined the individual is not an employee of the Federal government, it must be determined whether the individual's services are covered under the State's Section 218 Agreement or under the mandatory Social Security coverage provisions. If there is a question concerning the identity of employer, the issue and all pertinent information should be submitted to the Social Security Administration.

60001.670 Cooperative State-Local Government Employment

An individual may perform services for an organization in connection with an activity carried on cooperatively by the State and one or more political subdivisions or by two or more political subdivisions.

- If the organization is a separate political subdivision, the coverage of the employee is dependent upon whether the employees of the political subdivision are covered under a Section 218 Agreement or the mandatory Social Security and Medicare coverage provisions.

- If the organization is not a separate political subdivision, it must be determined which political subdivision is the employer of the individuals performing services, i.e., which entity actually hires, fires, and controls the performance of services. If one entity is the employer, the coverage of the employees is dependent upon whether the employees of the political subdivision are covered under a Section 218 Agreement or the mandatory Social Security and Medicare coverage provisions.
- If the organization is not a separate political subdivision, it may be an entity created by a joint venture of two or more political subdivisions in which none of those political subdivisions has been designated as the employer. Generally, in such situations, all the participating political subdivisions are considered joint employers. The coverage of services performed by an employee under the State's Section 218 Agreement is then dependent upon the extent to which each of the joint employers has provided coverage for its employees under the Agreement. Each employer which has covered its positions under a Section 218 Agreement is liable for reporting its pro rata share of the employee's wages. Each employer must report up to the taxable maximum.

60001.675 Intergovernmental Personnel Act of 1970

Effective January 5, 1971, the Intergovernmental Personnel Act (IPA) of 1970, Public Law 91-648, permits the temporary assignment of personnel back and forth between Federal agencies, State and local governments, Indian tribes or tribal organizations, institutions of higher education and other eligible organizations. Assignments are for specific work beneficial to both the State, local government, Indian tribe, or other eligible organizations and the Federal agency concerned. An assignment agreement may not exceed 2 years but can be extended for 2 additional years without loss of employee rights and benefits.

An employee assigned under the IPA continues the retirement coverage he or she had prior to the intergovernmental transfer. State and local government employees covered under a Section 218 Agreement immediately before the detail or appointment to the Federal government position continue to be covered under that agreement.

A State or local government employee appointed to a position in a Federal agency is carried by the State or local government on leave without pay status and is paid by the Federal agency. The employee is not covered for Social Security by virtue of the Federal service, however, and wages paid are not reported by the Federal agency. If a State or local government employee is appointed to a Federal agency and there is a problem in reporting the wages paid, the State or local government should contact the Federal agency

and the employee to make arrangements to ensure correct reporting procedures are implemented. If the State or local government is given sufficient wage information and is reimbursed the total Social Security taxes due, then the State or local government can include those wages paid in its reports, if the employee's services for the State or local government were covered under a Section 218 Agreement or the mandatory Social Security coverage provisions.

A Federal employee detailed or appointed to a State position is not covered under the State's Section 218 Agreement even though the employee serves in a position covered by the agreement. The employee continues the Federal coverage he or she had immediately prior to the transfer, i.e., Federal retirement system or Social Security coverage as a Federal employee.

60001.680 Predecessor-Successor Situations

When two or more governmental entities join to create a new entity, or one governmental entity takes over one or more other entities, or when a village or township government decides to incorporate itself as a city, it must be determined how the outcome of each of these situations affects the Social Security coverage obtained for the employees of the predecessor entities as well as the Social Security coverage status of those employees working for the resulting successor entity.

Different terms have been used interchangeably to describe what occurs in most predecessor-successor situations – merger, consolidation, acquisition, annexation, etc. Social Security uses the following standardized terminology to describe the different types of situations that occur:

- Consolidation
- Annexation
- Hybrid Consolidation
- Miscellaneous Transition

A. What is a Consolidation?

Two or more entities come together to create a new entity. The constituent entities are legally dissolved and cease to exist when the new entity comes into being.

A significant aspect of a consolidation is that the successor entity exhibits **both a change in form and a change in substance** from its predecessor entities.

1. Change in Form

The organization or structure, of the successor entity is different from that of the predecessor entities. The organization of the governmental and operational processes and the structure of the departments within the successor entity differ from that of the predecessor entities.

2. Change in Substance

A primary example of change in substance is where the dissolution of the predecessor entities results in their termination and the subsequent creation of a new “juristic entity.” The successor entity assumes the management and control once held by the predecessor entities. An indication of a change in substance is a transfer of property, assets and liabilities from the predecessor entities to the successor entity. Other examples would be a change in legal status or the change in powers and functions between those of the predecessor entities and the successor entity.

Example: The Village of Lime and the Town of Orange dissolve and, upon their dissolution, consolidate to become the City of Citrusville. As an incorporated city, Citrusville has a different governmental structure than that of Lime or Orange and gains additional powers under State laws which were not available to its predecessor entities.

B. What is an Annexation?

An entity absorbs or annexes one or more entities. The entities being annexed are legally dissolved and cease to exist, but the entity doing the annexing continues to exist and maintains its overall identity and structure, although a name change might occur.

Example: The Tea School District and the Sweet School District were separate political subdivisions. Each had obtained Social Security coverage separately for their respective employees via coverage modifications to the State’s Section 218 Agreement. Due to a decline in its population and tax base, the Sweet School District no longer could afford to operate its school system. As the result of negotiations between the school boards of both school districts, it was agreed that the Tea School District would annex the Sweet School District, including all the Sweet School District’s property and assets, and make it part of the Tea School District.

As a result of this annexation, the Sweet School District dissolved and filed a notice of dissolution with the Social Security Administration to terminate its Section 218 coverage modification and ceased to exist. The Tea School

District underwent no change to its organizational structure or substance from the annexation and absorbed the Sweet School District employees into its existing system. The former Sweet School District employees became Tea School District employees. The Social Security coverage of former Sweet School District employees became dependent upon the Social Security coverage situation in the Tea School District.

C. What is a Hybrid Consolidation?

This is a variation on the consolidation process and has occurred in some City and County Consolidated Government situations. In a true consolidation situation both the City and County dissolve to create the new Consolidated Government. In the hybrid consolidation:

- one of the two predecessor entities dissolves and turns all its powers and functions over to the successor Consolidated Government;
- the second predecessor entity turns over most, but not all, of its powers and functions to the Consolidated Government.

The Consolidated Government is established as a separate political subdivision. Because the second predecessor entity retains some of its powers and functions, it does not dissolve and maintains its Section 218 Agreement to cover its remaining employees. As with a true consolidation, the successor entity of a hybrid consolidation exhibits both a change in form and a change in substance from its predecessor entities.

Example: The City of Kalmar was the county seat of Delaney County. Both Kalmar and Delaney County were separate political subdivisions, and each had obtained Social Security coverage separately for their respective government employees via coverage modifications to the State's Section 218 Agreement.

In 1980, in an effort to cut costs and eliminate redundant services, the City of Kalmar and Delaney County considered consolidating their governments. Following a favorable referendum of both city and county voters, the City of Kalmar and Delaney County agreed to a consolidation of their governments effective January 1, 1982, to form the new political subdivision of the Consolidated Government of Kalmar and Delaney County. As part of the agreement, the City of Kalmar totally dissolved, terminated its Section 218 coverage modification, and transferred all its powers, functions and employees to the Consolidated Government effective January 1, 1982. Delaney County Government, on the other hand, turned over most of its powers, functions and employees to the Consolidated Government, but did retain the County Sheriff's Department, including the County Jail and County Court, and the County Clerk's Office. Delaney County Government

did not dissolve or terminate its Section 218 coverage modification and still exists as an entity separate from the Consolidated Government.

The Consolidated Government of Kalmar and Delaney County was a new political subdivision and was the new employer of all the former city and county government employees who were transferred to it. The Social Security coverage they had under their former employers was no longer effective.

D. What are Miscellaneous Transitions?

There are situations where a governmental entity may undergo a significant structural or organizational change that does not fall under the categories of consolidation, annexation or hybrid consolidation. Yet, the change may be such that the entity's Social Security coverage is affected.

Examples:

Due to population growth, a Village or Township decides or is required by State law to incorporate itself as a city. As an incorporated city, the entity will have additional powers.

An institution of higher learning goes from being its own [political subdivision](#) to an [instrumentality](#) of the State University system.

60001.681 How Social Security Coverage is Affected in Various Predecessor-Successor Situations

Proper handling of predecessor-successor situations is affected by the State Social Security Administrator's timely reporting to the Social Security Administration when the situations occur.

A. Consolidation

With the legal dissolution of the consolidating entities (along with notices of dissolution to remove them from the State's Section 218 Agreement, see SL 40001.485) and the creation of a new entity, the employee positions of the new entity are new positions, and procedures for implementing new coverage must be undertaken if the entity wants Social Security coverage. The former coverage modifications are no longer applicable, and new modifications are needed to provide Social Security coverage for:

- **Absolute Coverage Group** (positions not covered by a retirement system) – If modifications for the absolute coverage groups are not submitted, then the mandatory Social Security provisions apply to those non-retirement system positions.
- **Deemed Retirement System** (Social Security coverage provided to the retirement system on an entity-by-entity basis) – For those positions under a deemed retirement system, the consolidated entity must first hold a coverage referendum in order to provide Social Security coverage.
- **Single Retirement System** – If the consolidated entity has positions in a retirement system that obtained Social Security coverage as a single retirement system via a single statewide referendum for members of the system in all political subdivisions having positions under that system, those single retirement system positions would retain their Social Security coverage. A referendum would not be necessary. An identification modification (SL 40001.490, Exhibit 6) must be provided to inform the Social Security Administration that the new entity’s positions are to be included under the retirement system’s existing Section 218 coverage modification.

Note: When dealing with any of these consolidation, hybrid consolidation or miscellaneous transition situations, it is extremely important to discern whether the retirement system involved obtained Social Security coverage as a single statewide retirement system or on an entity-by-entity deemed retirement system basis.

B. Annexation

The employees of the entity or entities being annexed become the employees of the entity which continues in existence. In this case, the Social Security coverage status of the annexed employees depends on the Social Security coverage status of the entity which continues in existence.

If School District A annexes School District B, the former School District B employees would now be considered School District A employees and would be subject to whatever Social Security coverage that is already in effect for existing School District A employees.

With the legal dissolution of the entity or entities being annexed, the State must submit notice(s) of dissolution to remove them from the State’s Section 218 Agreements; but no new Section 218 coverage modification is necessary for the entity that continues to exist. If the annexation results in a name change for the continuing entity, a notice should be submitted to the Social Security Regional Office concerning the name change (SL 40001.475).

C. Hybrid Consolidation

The positions of the predecessor entities that were folded into the newly created entity are treated in the same way that absolute coverage group, deemed retirement system group, and single retirement system group positions are treated in consolidation situations.

The State must submit notice(s) of dissolution to the Social Security Administration to delete from the State's Section 218 Agreement the legally dissolved predecessor entity or entities that completely ceased to exist due to the hybrid consolidation.

The coverage modifications for those entities that dissolved are no longer applicable for the absolute coverage and deemed retirement system group positions that were folded into the newly created successor governmental entity. Social Security coverage is obtained for those employees by the following:

1. Absolute Coverage Group

A new coverage modification is needed to provide Social Security coverage for the absolute coverage group, or else, the mandatory Social Security provisions would apply. **Note:** If the positions that are covered for mandatory Social Security later come under a retirement system, mandatory Social Security coverage would then cease.

2. Deemed Retirement System Group

In order to provide Social Security coverage for positions under a deemed retirement system, the successor entity must first hold a coverage referendum for the deemed retirement system group. Whether Social Security coverage could then be extended to the retirement system group would be dependent upon the type of referendum held and the outcome of the voting.

3. Single Retirement System

If the new entity has positions under a retirement system that obtained Social Security coverage for its members as a single retirement system, a coverage referendum is not necessary; an identification modification must be submitted to the Social Security Regional Office informing the Social Security Administration that the new entity is to be included in the retirement system's coverage modification.

The employee positions remaining under the predecessor entity that did not totally fold into the newly created entity maintain their coverage under the predecessor entity's established modifications.

D. Miscellaneous Transition

A Village incorporates itself as a City. Whether the Village's Social Security coverage carries over to the City appears to turn on the legal status of the new entity vis-à-vis the former. The answer depends on the laws of the State.

If, according to State law, the result of the change is merely a **change in the form (SL 60001.680A)** but not a **change in the substance (SL 60001.680A)** of the entity or vice versa – just a change in substance but not a change in form, the same positions that were previously covered under the entity's Section 218 coverage modification would continue to exist; and the procedures (including referendum) to effect new coverage would not be necessary. Only a name change notification would be required for Social Security Administration record purposes.

However, if according to State law, the result of the change is a change in both the form and the substance of the entity, then the positions involved would be for a new employer; and procedures for implementing new coverage (including a referendum for the retirement system coverage group) would have to be undertaken.

60001.682 Determining the Status of a Predecessor-Successor Situation and How Social Security Coverage is Affected

A. Documentation Which May Be Used in Determining the Status of a Predecessor-Successor Situation

1. Copies of the ordinances, resolutions, or other enactments (e.g. notice of dissolution) of each predecessor entity which bear upon the terms and conditions for accomplishing the consolidation, annexation, or transition.
2. Copies of the charter and bylaws or other enactments of the successor entity which deal with the relationship between it and the merged entities regarding the assumption of obligations incurred by the predecessor entities, with special reference to any materials governing the retirement

- rights of the employees of each predecessor entity and the retirement rights of the successor entity employees.
3. Copies of the ordinances or resolutions by which each predecessor entity established its retirement system(s).
 4. Copies of the successor entity's ordinances establishing its retirement system(s).

It may be helpful to view how the determination process was applied in the following situation.

B. Example – The City of Cloverdale Retirement System

The Village of Cloverdale employees were members of the Village of Cloverdale Retirement System. Employee positions covered under the retirement system were also covered for Social Security. The Village of Cloverdale was subsequently consolidated with the Township of Thornton (both entities dissolved) to create the City of Cloverdale. Upon its creation, the employees of the City of Cloverdale were covered by the City of Cloverdale Retirement System. There was some concern whether the City of Cloverdale Retirement System was a new retirement system or merely a continuation of the former Village of Cloverdale Retirement System.

The Social Security Administration's policy is that if the village retirement system was abolished and the city system was an entirely new retirement system, then Social Security coverage could only be effectuated by a coverage referendum. If, on the other hand, the city retirement system was, in reality, a modification and continuation of the village retirement system and not a new system, then no new referendum would be necessary to provide the employees of the city with Social Security coverage even if the consolidation resulted in new positions being added to the village retirement system.

To arrive at a decision, the documentation listed in SL 60001.682A was requested and reviewed. As a result, it was determined that the City of Cloverdale Retirement System was not a continuation of the former Village of Cloverdale Retirement System. Thus, the City of Cloverdale would have to hold a referendum in order to cover the retirement system positions under Social Security.

C. Obtaining a State Attorney General's Opinion

Some situations may not neatly fit into one of the four predecessor-successor categories, and the legal status of the resultant entity may not be clear from all the documentation obtained. The Social Security Administration views the

question of whether a political subdivision has been dissolved and a new one created as a question of State law. Bearing this in mind, it may be necessary to obtain the State Attorney General's opinion on the legal status of the entities involved in a predecessor-successor situation.

Although the State Attorney General's opinion will be given due weight, the Social Security Administration is permitted, but not required, to defer to the opinion of a State Attorney General in making its final determination in these matters.

If the State Attorney General is unable or unwilling to render an opinion on the legal status of the entities involved in a predecessor-successor situation, the issue should be referred to the Social Security Regional Office General Counsel for resolution.

D. Predecessor-Successor Examples

1. Consolidation

Example 1:

The City of Maplesville School System covered non-retirement system positions for Social Security via Modification No. 27 and covered its State Teacher Retirement System (STRS) positions for Social Security via Modification No. 427. STRS obtains Social Security coverage on an entity-by-entity deemed retirement system basis.

The Oak County School System covered both its STRS employees and its non-retirement system positions for Social Security via Modification No. 231.

Some years later, an act was approved by a local referendum providing for the consolidation of the two school systems into a "single county-wide system" to be called the "Deciduous School System." The act also stated that the new school system shall "constitute a political subdivision of the State" and that each of the former school systems "shall cease to be a political subdivision of the State." The State Attorney General issued an opinion affirming the consolidation of the Maplesville and Oak County School Systems. The Social Security Administration concurred with the State Attorney General's opinion. Notices of Dissolution were filed for The City of Maplesville and Oak County School Systems.

Effective January 1, 1992, the Deciduous School System became operational. The non-retirement system positions in the former school systems continue to be non-retirement system positions in the new school system. Membership in STRS for employee positions in the two former school systems was carried over to the same positions in the new school system.

How is the Social Security coverage for the non-retirement system positions affected by the consolidation?

Because the Maplesville and Oak County School Systems ceased to exist and were dissolved, their Section 218 coverage modifications for non-retirement system positions would no longer be in effect. The non-retirement system positions of the new entity, the Deciduous School System, would either be covered for Social Security under the mandatory Social Security provisions, or else Social Security coverage could be extended to them as an absolute coverage group by a modification to the State's Section 218 Agreement.

How is the Social Security coverage for the STRS positions affected by the consolidation?

Because the Maplesville and Oak County School Systems ceased to exist and were dissolved, their Section 218 coverage modifications for STRS positions would no longer be in effect. If a political subdivision is dissolved and replaced by a new political subdivision, the deemed retirement system for the dissolved entity does not continue with respect to the newly created entity. Since Social Security coverage for the STRS positions in the Maplesville and Oak County School Systems was extended on a deemed retirement system (entity-by-entity) basis, then Social Security coverage for the STRS positions of the new entity – the Deciduous School System – can only be effectuated based on the results of a coverage referendum.

Example 2:

The Township of Cedar Grove covered non-retirement system positions for Social Security via Modification No. 27. Cedar Grove's retirement system positions were under the Public Employee Retirement System (PERS). Social Security coverage had been extended to PERS system-wide as a single retirement system under Modification 163 following a favorable majority vote referendum.

The Village of Rosedale had no positions under a retirement system, but covered all its employees for Social Security as an absolute coverage group via Modification 112.

Following the passage of ordinances and resolutions in both Cedar Grove and Rosedale, the two entities dissolved on January 1, 1995 and consolidated to become the City of Cedardale. The Cedardale Charter stated that all assets and territory which belonged to the predecessor entities “shall be a body corporate with the official name and title of “City of Cedardale.” The powers granted to the city are broader than those granted to either the village or the township.

With the establishment of the City of Cedardale, all employee positions were placed under PERS.

How is the Social Security coverage of the City of Cedardale’s employees affected by the consolidation?

Because Cedar Grove and Rosedale ceased to exist and were dissolved, their Section 218 coverage modifications would no longer be in effect and notices of dissolution would have to be submitted to Social Security. However, upon its establishment, the City of Cedardale covered all its employee positions under PERS, and since PERS had obtained Social Security coverage as a single retirement system (system-wide), all entities joining PERS are covered automatically for Social Security, and a coverage referendum is not necessary for the City of Cedardale. An identification modification (SL 40001.490, Exhibit 6) is all that is necessary.

In effect, all former employees of the two predecessor entities now working for the City of Cedardale would retain their Social Security coverage.

2. Annexation

The Village of Broadmoor obtained Social Security coverage for its non-retirement system employee positions via Modification 68. The remainder of the village employee positions was under the Broadmoor Unified Retirement Plan and not covered for Social Security.

The City of Fayette covers all its employee positions under the Public Employees Retirement Fund (PERF). Entities covered by PERF can obtain Social Security on a deemed retirement system (entity-by-entity) basis via

coverage referendums. The City of Fayette has not held a coverage referendum, and, thus, its employee positions are not covered for Social Security.

Following the passage of ordinances and resolutions by the governments of Broadmoor and Fayette, the Village of Broadmoor dissolved on January 1, 2002, and its assets and territory were formally annexed by the City of Fayette. A notice of Broadmoor's dissolution was submitted to the Social Security Administration. All former Broadmoor employee positions were carried over by Fayette and placed under PERF coverage.

How was the Social Security coverage of the former Broadmoor non-retirement system employees affected by the annexation?

Since the Village of Broadmoor dissolved and ceased to exist, its Section 218 coverage modification for the non-retirement system positions would no longer be in effect. Generally, when one entity ceases to exist and the positions and functions are moved to another entity, employees of the dissolved entity become employees of the entity that continues in existence. Their coverage status depends on the conditions of coverage for the entity which continues to exist. In this case, the Social Security coverage of Broadmoor's non-retirement system employees would end effective with the date of annexation by the City of Fayette when they become employees of the City of Fayette and are covered under PERF. If the City of Fayette wished to obtain Social Security coverage for its employees, a coverage referendum and modification would be necessary.

3. Hybrid Consolidation – The Metropolitan Government of Nashville and Davidson County (Tennessee)

The City of Nashville first covered its employees for Social Security under Modification 4 to the State's Section 218 Agreement effective January 1, 1952. Davidson County first covered its employees for Social Security under Modification 30 effective April 1, 1955.

The governments of the City of Nashville and of Davidson County agreed to consolidate effective April 1, 1963, but this would not be a true consolidation. As of April 1, 1963, the City of Nashville dissolved, and its Section 218 coverage modification terminated. With its dissolution, the City of Nashville turned over all its governmental powers, functions and workforce to a new entity to be called the Metropolitan Government of Nashville and Davidson County (Metro Government). Although the Davidson County Government

turned over most of its governmental powers, functions and workforce to the Metro Government, it did retain some of its powers, functions and workforce and did not dissolve or terminate its Section 218 coverage modification. Although a mere shell of its former self, the Davidson County Government continues to exist as an entity separate from the Metro Government.

A hybrid consolidation created the Metro Government effective April 1, 1963. Social Security coverage was extended to its employees effective April 1, 1963 via Modification 194 to the State's Section 218 Agreement.

4. Miscellaneous Transition

Social Security coverage was extended effective January 1, 1958 via Modification 76 to The Village of Rockatuck's non-retirement system positions as well as those positions covered by the Municipal Employees' Retirement System (MERS), except police officers and firefighters. MERS was a deemed retirement system (Social Security coverage on an entity by entity basis). Effective February 13, 1970, the Village of Rockatuck was legally dissolved, and on the same date, the City of Rockatuck was incorporated. As part of the transition, all City of Rockatuck positions were placed under MERS.

Despite the dissolution of the Village of Rockatuck, the Social Security Administration questioned whether the result of the change from Village to Incorporated City was merely a change in form, but not in substance, of the juristic entity. If the transition from Village to Incorporated City were merely a change in form, then the Administration's stance would be that the same employee positions continued to exist and that a new referendum to extend Social Security coverage to them would not be necessary. If, on the other hand, the old juristic entity was actually terminated and a new one created, the positions involved would be new positions, and a coverage referendum of the City employees in positions covered by MERS would have to be held before Social Security coverage could be extended to them.

The Social Security Administration advised that the opinion of the State Attorney General should be obtained concerning the effect of the dissolution of the Village of Rockatuck and the incorporation (on the same date) of the City of Rockatuck.

The State Attorney General opined that the dissolution of the Village and simultaneous incorporation of the City was just a change in form, and, thus, the Social Security coverage of the MERS positions would carry over from the Village of Rockatuck to the City of Rockatuck. The Social Security

Administration accepted the State Attorney General's opinion. As a result, a coverage referendum of the City of Rockatuck's MERS employees was not necessary. All the City of Rockatuck's MERS positions, except police and firefighters, were covered for Social Security from the date of incorporation.

60001.683 Application of the Continuing Employment Exception to Mandatory Medicare Coverage in Predecessor-Successor Situations

A. The Continuing Employment Exception

Most State and local government employees hired or rehired beginning April 1, 1986 are mandatorily covered for Medicare. When Congress extended mandatory Medicare coverage to State and local government employees, it recognized that mandatory Medicare coverage for all State and local government employees could impose a significant financial burden on the various State and local governmental entities. To prevent this from happening, Congress provided a continuing employment exception to mandatory Medicare coverage for those employees in "current employment which continues" 26 U.S.C. 3121(u)(2)(C) (1988).

Section 3121(u)(2)(c) of the Internal Revenue Code (IRC) contains the continuing employment exception for services performed by State and local government employees hired before April 1, 1986. Those employees hired before April 1, 1986 are excluded from mandatory Medicare coverage provided that they were

- Performing regular and substantial services for pay before April 1, 1986
- Bona fide employees before April 1, 1986
- Hired for purposes other than avoiding Medicare taxes
- And have not either on April 1, 1986 or later terminated the employment relationship with the employer.

The status of a former government entity's pre-April 1, 1986 hires when that entity joins in a consolidation (or hybrid consolidation) or is taken over in an annexation or goes through a miscellaneous transition is determined by whether there was a continuous employment relationship. We reference two important cases for guidance.

B. Examples

1. Board of Education of Muhlenberg County, Kentucky vs. United States of America, 920F.2d 370 (6th Cir. 1990)

Effective July 1, 1986, three rural western Kentucky school districts – Muhlenberg County School District, Central City Independent School District, and the Greenville Independent School District – consolidated into one post-consolidation district called the Muhlenberg County School District, which, although keeping the name and employer identification number of the old Muhlenberg County school system, considered itself a new entity.

The newly consolidated Muhlenberg County School District assumed all the assets and liabilities of the three pre-consolidation school districts, including contractual obligations. Each of the pre-consolidation school boards was given representation on the post-consolidation school board, and the teachers of the three pre-consolidation school districts had no interruption of employment, no termination, no transfer and retained their continuing contract status. For these reasons, the post-consolidation Muhlenberg County School District did not consider the employees of the pre-consolidation school districts as being new hires to be covered under the mandatory Medicare provisions.

The U.S. Government, on the other hand, viewed the old Muhlenberg County school system as continuing to exist after the consolidation but considered the Greenville and Central City school systems to have been dissolved and held that the former Greenville and Central City employees were new hires of the Muhlenberg County School district as of July 1, 1986, and must be covered for mandatory Medicare and pay the requisite taxes.

In its December 3, 1990 decision, the U.S. Court of Appeals for the Sixth Circuit held that the language of the continuing employment exception did not expressly address the results of a consolidation. After reviewing the legislative history of mandatory Medicare coverage and the continuing employment exception, the Court sided with the Muhlenberg County School District and concluded that it was not Congress' intention "to treat a merger or consolidation as creating a new employer" for purposes of IRC Section 3121(u)(2)(C) because such treatment would create the same, sudden financial burden on state and local governments that the exception was drafted to mitigate, and would deter consolidation of local government entities for purposes of enhancing efficiency.

Accordingly, the court held that the consolidated school system was not a new employer for its post-consolidation employees, who in substance worked continuously for the same employer under a different name.

2. **Regan vs. United States, 421 F. Supp. 2d 319 (D Mass. 2006)**

Although the *Muhlenberg* case dealt specifically with a consolidation situation, the *Regan* case viewed *Muhlenberg* as being instructive when considering the status of the employees of a governmental entity annexed by another such entity.

The Commonwealth of Massachusetts passed various statutes between 1996 and 2000 which abolished the county governments in seven counties. The county government employees were transferred to State employment with no impairment of employment rights, without interruption of service, without impairment of seniority, retirement or other rights of employees, and without reduction in compensation or salary grade. Additionally, the Commonwealth paid all the liabilities and assumed the leases and contracts of the abolished counties.

In its [March 14, 2006 decision](#), the United States District Court for the District of Massachusetts acknowledged that IRC Section 3121 did not provide a clear answer as to whether the State would be considered a new employer and the previously excepted county employees treated as newly hired when the State abolished a county government and brought employment relationships under its control.

From its review of the legislative history of mandatory Medicare and the continuing employment exception as well as other sources, such as the *Muhlenberg* case, the court ultimately determined it was not the intent of Congress to treat an annexation or consolidation as creating a new employer for the purposes of the mandatory Medicare provisions because such treatment would create a sudden financial burden on State and local governments that would be inconsistent with the policy decision Congress made when it created the continuing employment exception. Accordingly, the court ruled in favor of the Commonwealth's position that its actions to annex the seven county governments did not render the county employees newly hired nor could the Commonwealth/State be considered a new employer for the purposes of the continuing employment exception. The court concluded that the annexation did not interrupt the continuity of employment for the continuing employment exception.

C. The Continuing Employment Exception Status in Predecessor-Successor Situations

By establishing the continuing employment exception to mandatory Medicare, Congress was attempting to provide a gradual process of including employees in the Medicare system and avoid a sudden financial burden for governmental employers, which could, in turn, deter the joining of local government entities for purposes of enhancing efficiency.

1. Consolidations and Hybrid Consolidations

Employees of a governmental entity hired prior to April 1, 1986, who were exempt from mandatory Medicare coverage due to the continuing employment exception, continue to be exempt if the governmental entity is subsequently involved in a consolidation or hybrid consolidation situation.

2. Annexations

The continuing employment exception to mandatory Medicare applies to the pre-April 1, 1986 hired employees of a governmental entity which is being annexed, even if it is a local governmental entity that is being annexed by the State government.

3. Miscellaneous Transitions

Due to the nature of a Miscellaneous Transition – the change in form and substance of an existing governmental entity – there is no interruption or termination of the employment relationship, and the continuity of employment is not interrupted. The pre-April 1, 1986, hired employees would continue to be exempt from the mandatory Medicare coverage provisions.