

**DESCRIPTION OF H.R. 6124,
THE “TRIBAL SOCIAL SECURITY FAIRNESS ACT OF 2018”**

Scheduled for Markup
by the
HOUSE COMMITTEE ON WAYS AND MEANS
on June 21, 2018

Prepared by the Staff
of the
JOINT COMMITTEE ON TAXATION



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INTRODUCTION

The House Committee on Ways and Means has scheduled a committee markup of H.R. 6124, the “Tribal Social Security Fairness Act of 2018,” on June 21, 2018. The bill allows Indian tribes to enter into agreements with the Commissioner of Social Security to obtain Social Security and Medicare coverage for services performed by tribal council members. This document,¹ prepared by the staff of the Joint Committee on Taxation, provides a description of the bill.

¹ This document may be cited as follows: Joint Committee on Taxation, *Description of H.R. 6124, the “Tribal Social Security Fairness Act of 2018”* (JCX-35-18), June 20, 2018. This document can also be found on the Joint Committee on Taxation website at www.jct.gov. All section references herein are to the Internal Revenue Code of 1986, as amended (herein “Code”), unless otherwise stated.

A. Voluntary Agreements for Coverage of Services by American Indian Tribal Council Members

Present Law

Federal Insurance Contributions Act (“FICA”)

Federal Insurance Contributions Act (“FICA”) taxes on employers and employees finance the Old-Age, Survivors, and Disability Insurance (“OASDI”) and Medicare (“HI”) programs.² The OASDI tax rate is 6.2 percent on both the employee and employer (for a total rate of 12.4 percent) and applies to employee wages up to the OASDI wage base (\$128,400 for calendar year 2018). The HI tax rate is 1.45 percent on both the employee and the employer (for a total rate of 2.9 percent) and applies to all wages.³

FICA taxes (and coverage under the OASDI and Medicare programs) generally are mandatory, that is, employers and employees generally cannot choose whether FICA taxes apply. However, as discussed below, in the case of State and local government employees covered by a State or local government retirement system, a State may enter into an agreement with the Social Security Administration to cover one or more groups of such employees under the OASDI and Medicare programs. In that case, services of such employees constitute employment for FICA purposes and their wages are subject to FICA.⁴

FICA taxes apply to wages, defined as remuneration for employment, which in turn is defined as service performed by an employee.⁵ Remuneration for service performed by an individual who is not an employee does not constitute wages for FICA purposes and is not subject to FICA. Guidance issued by the Internal Revenue Service holds that services performed by members of Indian tribal councils in their capacities as such do not constitute employment for FICA purposes.⁶ As a result, amounts paid to members of tribal councils for services as council members are not wages subject to FICA.

² Sections 3101-3128 of the Internal Revenue Code of 1986, as amended (the “Code”). Statutory references herein are to the Code unless otherwise indicated. The employee portion of the taxes is collected through withholding by the employer.

³ The employee portion of the HI tax (not the employer portion) is increased by an additional tax of 0.9 percent on wages received in excess of a threshold amount. The threshold amount is \$250,000 in the case of a joint return, \$125,000 in the case of a married individual filing a separate return, and \$200,000 in any other case.

⁴ Sec. 3121(b)(7)(E). In addition, under section 3121(b)(7)(F), State and local government employees who are not covered by a retirement system are generally subject to FICA. Also, generally State and local government employees are subject to the Medicare tax unless an exception applies (for example, section 3121(u)(2)(C) provides a continuing employment exception with various requirements, including employment prior to April 1, 1986).

⁵ Sec. 3121(a) and (b). Employee is defined in section 3121(d).

⁶ Rev. Rul. 59-354, 1959-2 C.B. 24. In 2006, the Social Security Administration (“SSA”) updated its program instructions to clarify that earnings of Indian tribal council members do not count toward Social Security benefits. However, the program instructions include a note stating that earnings posted for members of Indian tribal

Social Security and Medicare Benefits

The OASDI program under the Social Security Act provides for the payment of benefits (“Social Security benefits”) to individuals based on wages earned as an employee and credited to the employee’s earnings record.⁷ Eligibility for Medicare coverage under the Social Security Act generally is based on eligibility for Social Security benefits and, thus, on wages credited to an employee’s earnings record.⁸ Similar definitions of wages and employment apply for these purposes as for FICA purposes.⁹ Thus, remuneration for service performed by an individual who is not an employee does not constitute wages for purposes of earning credits for OASDI or Medicare benefits.

Coverage under the OASDI and Medicare programs generally is mandatory. However, coverage generally does not apply in the case of State and local government employees covered by a State or local government retirement system. In that case, if a referendum process and certain criteria are met, then at the request of a State, the Commissioner of Social Security will enter into an agreement with the State with respect to one or more coverage groups of such employees under the OASDI and Medicare programs.¹⁰ Generally, such an agreement encompasses all positions within such a coverage group and once covered, the employer may not revoke such coverage and employees filling such covered positions may not decline coverage.

Description of Proposal

The proposal amends the Social Security Act to provide that, at the request of an Indian tribe, the Commissioner of Social Security will enter into an agreement with the Indian tribe to cover services performed by individuals as members of the Indian tribe’s tribal council under the OASDI and Medicare programs. Accordingly, service of a member of a tribal council under such an agreement constitutes employment. For purposes of the proposal, the term “tribal council” means the governing body of a Federally recognized Indian tribe. In addition, the term “member” means, with respect to a tribal council, (1) an individual who is serving as a member of the tribal council, or (2) the head of the tribal council.

An agreement with an Indian tribe under the proposal applies to all members of the tribal council and must include all services performed by individuals in their capacity as members of the tribal council. An agreement will be effective with respect to services performed after an

councils for tax years prior to 2006 should remain on earnings records and be used in applicable benefit computations. SSA POMS: RS 01901.700.

⁷ OASDI benefits are provided by Title II of the Social Security Act (42 U.S.C. secs. 401ff.).

⁸ Sec. 226 of the Social Security Act (42 U.S.C. sec. 426).

⁹ Secs. 209 and 210 of the Social Security Act (42 U.S.C. secs. 409 and 410).

¹⁰ Generally, the State or local government may only extend coverage following a referendum process in which a vote occurs that satisfies various conditions, and if the governor of the State, or an official of the State designated for this purpose, certifies to the Commissioner of Social Security that such conditions have been met. Sec. 218 of the Social Security Act (42 U.S.C. sec. 418).

effective date specified in the agreement, provided that the date may not be earlier than the first day of the next calendar month in which the agreement is executed by both parties. At the request of the Indian tribe at the time of the agreement, the agreement may apply with respect to services performed before the effective date for which there were timely paid in good faith (and not subsequently refunded) to the Secretary of the Treasury amounts equivalent to the sum of the employee and employer OASDI and Medicare taxes which would have been imposed by the Code had such services constituted employment for purposes of the Code. No agreement under the proposal may require payment to be made after the effective date of any taxes with respect to services performed before the effective date. No agreement under the proposal may be terminated on or after the effective date of the agreement.

The proposal also amends the FICA rules to provide that a tribal council member covered by an agreement under the proposal is an employee for FICA purposes. Therefore, services of a tribal council member covered by an agreement constitute employment for FICA purposes, and wages of the tribal council member are subject to FICA.¹¹

Effective Date

The proposal is effective on the date of enactment.

¹¹ Nothing in the proposal is to be construed to affect the application of any Federal income tax withholding requirements.

B. Estimated Revenue Effect of the Proposal

| Fiscal Years | | | | | | | | | | | | | |
|-----------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|----------------|----------------|
| [Millions of Dollars] | | | | | | | | | | | | | |
| <u>Item</u> | <u>2018</u> | <u>2019</u> | <u>2020</u> | <u>2021</u> | <u>2022</u> | <u>2023</u> | <u>2024</u> | <u>2025</u> | <u>2026</u> | <u>2027</u> | <u>2028</u> | <u>2018-23</u> | <u>2018-28</u> |
| H.R. 6124 [1]... | --- | [2] | 1 | 1 | 1 | 1 | 1 | 2 | 2 | 2 | 2 | 4 | 13 |

NOTE: Details do not add to totals due to rounding.

[1] Estimate contains the following budget effects:

| | <u>2018</u> | <u>2019</u> | <u>2020</u> | <u>2021</u> | <u>2022</u> | <u>2023</u> | <u>2024</u> | <u>2025</u> | <u>2026</u> | <u>2027</u> | <u>2028</u> | <u>2018-23</u> | <u>2018-28</u> |
|---------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|----------------|----------------|
| On-budget... | [2] | [2] | [2] | [2] | [2] | [2] | [2] | [2] | [2] | [2] | [2] | 1 | 3 |
| Off-budget... | [2] | [2] | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 3 | 10 |

[2] Gain of less than \$500,000.