U.S. Railroad Retirement Board
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Legal Opinion L-2001-18
November 14, 2001

TO : Philip H. Arnold
Chief of Records Analysis and Systems
Through: Ronald Russo
Director of Policy and Systems

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Last Pre-Retirement Employment Determination In-home care – California

This is in reference to your memorandum of September 4, 2001, wherein you ask whether providing in-home care services for a disabled individual constitutes last pre-retirement employment (LPE).

Section 2(f)(6) of the Railroad Retirement Act (RRA) (45 U.S.C. § 231a(f)(6)) provides for a reduction to the tier II component and the supplemental annuity if an employee performs compensated service for the person by whom such individual was employed before the date on which his annuity began to accrue. Such work restrictions are commonly referred to as LPE work deductions. Self-employment is not LPE, as it is work performed in an individual's own business, trade or profession as an independent contractor, rather than as an employee. 20 CFR 216.23(c).

Your memorandum indicates that an employee annuitant receives compensation from the California Department of Social Services for providing 5 hours of daily in-home care to his paralyzed son. The annuitant has been performing this work activity since before he became entitled to an annuity.[1] In accordance with applicable law, the work performed by the annuitant is LPE unless the work activity falls within the self-employment exception.

Attached to your inquiry was a copy of a "Statement of Earnings and Deductions," a form that accompanies each payment to the annuitant from the California Department of Social Services. The annuitant is listed as the "provider" and his son is shown as the "recipient." The statement shows a withholding for FIT (presumably federal income tax), SIT (presumably state income tax) and UNION-SEIU (presumably dues for the Service Employees International Union). The information shown on the statement reflects an average hourly rate of $6.73 and you have projected an annual income of approximately $14,400.00 for the annuitant. There is no FICA deduction.

The above statement form and your memorandum refer to the program at issue as the "IHSS Program." A check of California's website reveals that the acronym IHSS is used to identify a Medicaid program known as the In-Home Supportive Services Program (Cal. Welf. & Inst. Code, § 12300 et seq. (West 2001)). The purpose of the program is to provide supportive services to aged, blind, or disabled persons, who are unable to perform the services themselves, and who cannot safely remain in their homes unless these services are provided. (Welf. & Inst. Code, § 12300(a)). The program is an alternative to out-of-home care and is administered by the counties, under the supervision of the state in compliance with federal law.

Counties are authorized to implement the program in three different ways: 1) by using their own civil service or merit system employees to provide the services, 2) by contracting out to private and public agencies for the services and 3) by having the aid recipient hire and supervise the worker. (See §§ 12302, 12302.2). I infer from your inquiry that the third method was utilized in this case, as your memo indicates that the annuitant was selected by his son to serve as his provider. Even if the first or second method were employed, it is my opinion that the work performed as a provider for the IHSS program is not outside the scope of LPE.

1 At the time your inquiry was submitted, the employee had not yet been awarded an annuity. RRB records indicate the employee has since been awarded an annuity with a beginning date of September 1, 2001.

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The first and second methods noted above implicitly, if not explicitly, require an employer-employee relationship. In the first instance, the provider is an employee of the county, and in the second instance the provider is an employee of the contracting agency. Consequently, the LPE self-employment exception does not apply where either the first or second methods are employed to obtain the services of a provider. Where the third method is utilized, California's regulations define "employer" as the recipient of IHSS. (Reg. 30-701(2)). This definition is consistent with information found on California's website, which includes the following statement:

> If you are approved for IHSS, you must hire someone (your individual provider) to perform the authorized services. You are considered your provider's employer and, therefore, it is your responsibility to hire, train, supervise, and fire this individual.

Courts have addressed the status of IHSS providers as "employees" on three occasions, with differing results. In Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1468-1470 (9th Cir. 1983), the Ninth Circuit ruled IHSS workers were the "employees" of the state and counties for purposes of the minimum wage provisions of the Fair Labor Standards Act. In In-Home Supportive Services v. Worker's Comp. Appeals Bd., 152 Cal.App.3d 720, 725-741 (1984), the California Court of Appeal ruled that IHSS workers were the "employees" of the state for purposes of workers' compensation coverage. However, in Service Employees International Union (SEIU), Local 434 v. County of Los Angeles, 225 Cal.App.3d 761 (1990), the California Court of Appeal ruled that IHSS workers were not the "employees" of the county for purposes of compelling the county to negotiate with the SEIU as a representative of IHSS providers. Subsequently, the SEIU successfully lobbied the state legislature so that each county must establish an employer of record for IHSS providers on or before January 1, 2003. Welf & Inst. Code § 12302.25(a). However, the code continues to provide as follows:

> Recipients of in-home supportive services shall retain the right to choose the individuals that provide their care and to recruit, select, train, reject, or change any provider under the contract mode or to hire, fire, train, and supervise any provider under any other mode of service. Id.

Board regulations provide that whether an individual performing services is an employee depends upon the degree to which the recipient of services controls the individual's work. 20 C.F.R. § 216.23(c). In the case at hand, the recipient determines the manner in which the provider's tasks are performed, as well as how such services are performed. A recipient may discharge a provider at any time without notice to the county. Likewise, a provider has the right to terminate his or her services without incurring liability for work to be performed. It is my opinion that such control on the part of the recipient establishes an employee-employer relationship between the provider and recipient. Therefore, the earnings the father receives through the IHSS program are subject to the LPE work restrictions.

Your memorandum requests a determination of not merely whether the services provided by the annuitant constitute LPE, but whether, generally, the provision of in-home care services through similar programs constitute LPE. As indicated in Legal Opinion L-89-138, such programs vary from state to state and therefore, no general answer to the question is possible. You also request specifics as to the types of information which should be obtained in developing a case for an LPE determination. When developing similar cases for submission to the Office of General Counsel, information regarding the degree to which the recipient of the services controls the provider of the services should be obtained. Though not an exhaustive list, section 216.23(c) of the Board's regulations identifies some of the factors to be considered when evaluating the degree of control.

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[2] This conclusion appears to be consistent with the Social Security Administration's treatment of IHSS providers as stated in an opinion of California's Attorney General. 68 Op. Atty. Gen. Cal. 194, July 23, 1985.