

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	<b>CLASSIFICATION</b> UI - Tax
	<b>CORRESPONDENCE SYMBOL</b> OUI/DUIO
	<b>DATE</b> March 19, 2010

**ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 18-10**

**TO:** STATE WORKFORCE AGENCIES

**FROM:** JANE OATES /s/  
Assistant Secretary

**SUBJECT:** Application of the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act) to the Provisions of the Federal Unemployment Tax Act (FUTA)

1. Purpose. To provide information regarding the provisions of the HEART Act as they affect Federal employment taxes.
2. References. The Heroes Earnings Assistance and Relief Act of 2008, Public Law No. 110-245, enacted June 17, 2008; the Internal Revenue Code (IRC) Section 3121(z) (26 United States Code (U.S.C.) 3121(z)); IRC Section 3306(c) (26 U.S.C. 3306(c)); IRC Section 3306(j)(3) (26 U.S.C. 3306(j)(3)) and the Social Security Act (SSA) Section 210 (42 U.S.C. 410(e)).
3. Background. The HEART Act amended certain sections of the IRC and the SSA to provide tax benefits and incentives for military personnel. Among these changes, Section 302 of the HEART Act specified that certain foreign subsidiaries of U.S. companies under a contract with the U.S. government are treated as U.S. employers for purposes of Social Security and Medicare employment taxes. The HEART Act changed the employment tax provisions for the Federal Insurance Contributions Act (FICA) by amending IRC Section 3121(z) and the definition of the term “American Employer” at subsection (e) of Section 210 of the SSA (42 U.S.C. 410(e)). These changes provide for wages of U.S. citizens working outside the U.S. for foreign companies to be covered wages, if the foreign companies are controlled by a U.S. company under contract with the U.S. government, or any instrumentality of the U.S. government. The HEART Act changed the definition of the term “control” applicable to this provision to “more than 50 percent,” from “at least 80 percent.”
4. Guidance Concerning FUTA Coverage for Services Performed Outside of the United States. The HEART Act did not amend FUTA. Section 3306(c)(B), FUTA, exempts certain foreign employment from the Federal unemployment tax. It states that, for services performed outside the U.S., “employment” means “any service, whatever the nature, performed after 1971 outside the United States ... by a citizen of the United States as an employee of an American employer.” Thus, services are not taxable under FUTA when they are performed by a U.S. citizen outside the U.S. for a foreign company, even if the company is controlled by a U.S. company under contract with the U.S. government.

<b>RESCISSIONS</b> None	<b>EXPIRATION DATE</b> Continuing
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5. FUTA - FICA Differences. Since the HEART Act amended Federal law to cover these particular services for FICA, but did not amend FUTA, differences now exist between FICA and FUTA for coverage of these services.
6. Taxation Rules. The following table describes the proper taxation rules for FICA and FUTA that apply to services performed outside the U.S.

Table: How to Treat Services Performed Outside the U.S. for FICA and FUTA.

Citizen of U.S.?	Services Performed Outside the U.S.?	Services Performed for a Foreign Employer?	Foreign Subsidiary Controlled by U.S. Employer Under Contract With U.S. Government?	Taxation Rules	
				FICA	FUTA
No	Yes	N/A	N/A	Not Covered	Not Covered
Yes	Yes	Yes	No	Not Covered	Not Covered
Yes	Yes	Yes	Yes	Covered	Not Covered
Yes	Yes	No – Services Performed for U.S. Employer	N/A	Covered	Covered

7. Action Requested. Administrators are requested to distribute this directive to appropriate staff.
8. Inquires. Direct inquires to the appropriate Regional Office.