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employer. For provisions relating to the time of such payment, see § 31.3121(a)–2.

§ 31.3111–4 Liability for employer tax.

The employer is liable for the employer tax with respect to the wages paid to his employees for employment performed for him.

§ 31.3111–5 Manner and time of payment of employer tax.

The employer tax is payable to the district director in the manner and at the time prescribed in Subpart G of the regulations in this part.

§ 31.3112–1 Instrumentalities of the United States specifically exempted from the employer tax.

Section 3112 makes ineffectual as to the employer tax imposed by section 3111 those provisions of law which grant to an instrumentality of the United States an exemption from taxation, unless such provisions grant a specific exemption from the tax imposed by section 3111 by an express reference to such section or the corresponding section of prior law (section 1410 of the Internal Revenue Code of 1939). Thus, the general exemptions from Federal taxation granted by various statutes to certain instrumentalities of the United States without specific reference to the tax imposed by section 3111 or by section 1410 of the 1939 Code are rendered inoperative insofar as such exemptions relate to the tax imposed by section 3111. For provisions relating to the exception from employment of services performed in the employ of an instrumentality of the United States specifically exempted from the employer tax, see § 31.3121(b)(5)–1. For provisions relating to services performed for an instrumentality exempt on December 31, 1950, from the employer tax, see paragraph (c) of § 31.3121 (b) (6)–1.

GENERAL PROVISIONS

§ 31.3121(a)–1 Wages.

(a)(1) Whether remuneration paid after 1954 for employment performed after 1936 constitutes wages is determined under section 3121(a). This section and §§ 31.3121(a)(1)–1 to 31.3121(a)(15)–1, inclusive (relating to the statutory exclusions from wages), apply with respect only to remuneration paid after 1954 for employment performed after 1936. Whether remuneration paid after 1936 and before 1940 for employment performed after 1936 constitutes wages shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 401 (Regulations 91). Whether remuneration paid after 1939 and before 1951 for employment performed after 1936 constitutes wages shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 402 (Regulations 106). Whether remuneration paid after 1950 and before 1955 for employment performed after 1936 constitutes wages shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 408 (Regulations 128).

(2) The term *compensation* as used in section 3231(e) of the Internal Revenue Code has the same meaning as the term *wages* as used in this section, determined without regard to section 3121(b)(9), except as specifically limited by the Railroad Retirement Tax Act (chapter 22 of the Internal Revenue Code) or regulation. The Commissioner may provide any additional guidance that may be necessary or appropriate in applying the definitions of sections 3121(a) and 3231(e).

(b) The term ''wages'' means all remuneration for employment unless specifically excepted under section 3121(a) (see §§ 31.3121(a)(1)–1 to 31.3121(a)(15)–1, inclusive) or paragraph (j) of this section.

(c) The name by which the remuneration for employment is designated is immaterial. Thus, salaries, fees, bonuses, and commissions on sales or on insurance premiums, are wages if paid as compensation for employment.

(d) Generally the basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework, or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually. See, however, § 31.3121(a)(8)–1 which relates to the treatment of cash remuneration computed on a time basis for agricultural labor.

(e) Generally the medium in which the remuneration is paid is also immaterial. It may be paid in cash or in something other than cash, as for example, goods, lodging, food, or clothing. Remuneration paid in items other than cash shall be computed on the basis of the fair value of such items at the time of payment. See, however, §§ 31.3121 (a)(7)–1, 31.3121(a)(8)–1, 31.3121(a)(10)–1, and 31.3121(a)(12)–1, relating to the treatment of remuneration paid in any medium other than cash for services not in the course of the employer's trade or business and for domestic service in a private home of the employer, for agricultural labor, for services performed by certain homeworkers, and as tips, respectively.

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called ''courtesy'' discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term ''facilities or privileges'', however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

(g) Amounts of so-called ''vacation allowances'' paid to an employee constitute wages. Thus, the salary of an employee on vacation, paid notwithstanding his absence from work, constitutes wages.

(h) Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment. For amounts that are received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990, see § 31.3121(a)–3.

(i) Remuneration for employment, unless such remuneration is specifically excepted under section 3121(a) or paragraph (j) of this section, constitutes wages even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them.

Example. A is employed by B during the month of January 1955 in employment and is entitled to receive remuneration of $100 for the services performed for B, the employer, during the month. A leaves the employ of B at the close of business on January 31, 1955. On February 15, 1955 (when A is no longer an employee of B), B pays A the remuneration of $100 which was earned for the services performed in January. The $100 is wages and the taxes are payable with respect thereto.

(j) In addition to the exclusions specified in §§ 31.3121(a)(1)–1 to 31.3121(a)(15)–1, inclusive, the following types of payments are excluded from wages:

(1) Remuneration for services which do not constitute employment under section 3121(b) and which are not deemed to be employment under section 3121(c) (see § 31.3121(c)–1).

(2) Remuneration for services which are deemed not to be employment under section 3121(c) (see § 31.3121(c)–1).

(3) Tips or gratuities paid, prior to January 1, 1966, directly to an employee by a customer of an employer, and not accounted for by the employee to the employer. For provisions relating to the treatment of tips received by an employee after December 31, 1965, as wages, see §§ 31.3121(a)(12) and 31.3121(q).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7001, 34 FR 999, Jan. 23, 1969; T.D. 7374, 40 FR 30948, July 24, 1975; T.D. 8276, 54 FR 51027, Dec. 12, 1989; T.D. 8324, 55 FR 51696, Dec. 17, 1990; T.D. 8582, 59 FR 66189, Dec. 23, 1994]

§ 31.3121(a)–1T Question and answer relating to the definition of wages in section 3121(a) (Temporary).

The following question and answer relates to the definition of wages in section 3121(a) of the Internal Revenue Code of 1954, as amended by section

531(d)(1)(A) of the Tax Reform Act of 1984 (98 Stat. 885):

Q–1: Are fringe benefits included in the definition of ''wages'' under section 3121(a)?

A–1: Yes, unless specifically excluded from the definition of ''wages'' pursuant to section 3121(a)(1) through (20). For example, a fringe benefit provided to or on behalf of an employee is excluded from the definition of ''wages'' if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 117 or 132.

[T.D. 8004, 50 FR 755, Jan. 7, 1985]

§ 31.3121(a)–2 Wages; when paid and received.

(a) In general, wages are received by an employee at the time that they are paid by the employer to the employee. Wages are paid by an employer at the time that they are actually or constructively paid unless under paragraph (c) of this section they are deemed to be subsequently paid. For provisions relating to the time when tips received by an employee are deemed paid to the employee, see § 31.3121(q)–1.

(b) Wages are constructively paid when they are credited to the account of or set apart for an employee so that they may be drawn upon by him at any time although not then actually reduced to possession. To constitute payment in such a case the wages must be credited to or set apart for the employee without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that they may be drawn upon at any time, and their payment brought within his own control and disposition. For provisions relating to the treatment of deductions from remuneration as payments of remuneration, see § 31.3123–1.

(c) (1) The first $50 of cash remuneration paid, either actually or constructively, by an employer to an employee in a calendar quarter for—

(i) Service to which § 31.3121(a)(7)–1 is applicable (service not in the course of the employer's trade or business and domestic service in a private home of the employer); or

(ii) Service to which § 31.3121(a)(10)–1 is applicable (service performed by certain home workers),

shall be deemed to be paid by the employer to the employee at the first moment of time in such calendar quarter that the sum of such cash payments made within such quarter is at least $50.

(2)(i) The first $100 of cash remuneration paid, either actually or constructively, by an employer to an employee in the calendar year 1955 or 1956 for agricultural labor to which § 31.3121 (a)(8)–1 is applicable shall be deemed to be paid by the employer to the employee at the first moment of time in such calendar year that the sum of such cash payments made within such year is at least $100.

(ii) Cash remuneration paid, either actually or constructively, by an employer to an employee in a calendar year after 1956 for agricultural labor to which § 31.3121(a)(8)–1 is applicable, and before either of the events described in *(a)* or *(b)* of this subdivision has occurred, shall be deemed to be paid upon the occurrence of the earlier of such events, as follows:

(a) The first moment of time in such calendar year that the sum of the payments of such remuneration is at least $150, or

(b) The twentieth day in such calendar year on which the employee has performed such agricultural labor for the employer for cash remuneration computed on a time basis.

(3) If an employer pays cash remuneration to an employee for two or more of the types of service referred to in this paragraph, the provisions of this paragraph are to be applied separately to the amount of remuneration attributable to each type of service.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8306, July 2, 1964; T.D. 7001, 34 FR 999, Jan. 23, 1969]

§ 31.3121(a)–3 Reimbursement and other expense allowance amounts.

(a) *When excluded from wages.* If a reimbursement or other expense allowance arrangement meets the requirements of section 62(c) of the Code and

§1.62–2 and the expenses are substantiated within a reasonable period of time, payments made under the arrangement that do not exceed the substantiated expenses are treated as paid under an accountable plan and are not wages. In addition, if both wages and the reimbursement or other expense allowance are combined in a single payment, the reimbursement or other expense allowance must be identified either by making a separate payment or by specifically identifying the amount of the reimbursement or other expense allowance.

(b) *When included in wages*—(1) *Accountable plans*—(i) *General rule.* Except as provided in paragraph (b)(1)(ii) of this section, if a reimbursement or other expense allowance arrangement satisfies the requirements of section 62(c) and §1.62–2, but the expenses are not substantiated within a reasonable period of time or amounts in excess of the substantiated expenses are not returned within a reasonable period of time, the amount paid under the arrangement in excess of the substantiated expenses is treated as paid under a nonaccountable plan, is included in wages, and is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the reasonable period.

(ii) *Per diem or mileage allowances.* If a reimbursement or other expense allowance arrangement providing a per diem or mileage allowance satisfies the requirements of section 62(c) and §1.62–2, but the allowance is paid at a rate for each day or mile of travel that exceeds the amount of the employee's expenses deemed substantiated for a day or mile of travel, the excess portion is treated as paid under a nonaccountable plan and is included in wages. In the case of a per diem or mileage allowance paid as a reimbursement, the excess portion is subject to withholding and payment of employment taxes when paid. In the case of a per diem or mileage allowance paid as an advance, the excess portion is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the expenses with respect to which the advance was paid (i.e., the days or miles of travel) are substantiated. The Commissioner may, in his discretion, prescribe special rules in pronouncements of general applicability regarding the timing of withholding and payment of employment taxes on per diem and mileage allowances.

(2) *Nonaccountable plans.* If a reimbursement or other expense allowance arrangement does not satisfy the requirements of section 62(c) and §1.62–2 (e.g., the arrangement does not require expenses to be substantiated or require amounts in excess of the substantiated expenses to be returned), all amounts paid under the arrangement are treated as paid under a nonaccountable plan, are included in wages, and are subject to withholding and payment of employment taxes when paid.

(c) *Effective dates.* This section generally applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990. Paragraph (b)(1)(ii) of this section applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after January 1, 1991, with respect to expenses paid or incurred on or after January 1, 1991.

[T.D. 8324, 55 FR 51696, Dec. 17, 1990]

§31.3121(a)(1)–1 Annual wage limitation.

(a) *In general.* (1) The term ''wages'' does not include that part of the remuneration paid by an employer to an employee within any calendar year—

(i) After 1954 and before 1959 which exceeds the first $4,200 of remuneration,

(ii) After 1958 and before 1966 which exceeds the first $4,800 of remuneration,

(iii) After 1965 and before 1968 which exceeds the first $6,600 of remuneration,

(iv) After 1967 and before 1972 which exceeds the first $7,800 of remuneration,

(v) After 1971 and before 1973 which exceeds the first $9,000 of remuneration,

(vi) After 1972 and before 1974 which exceeds the first $10,800 of remuneration,

(vii) After 1973 and before 1975 which exceeds the first $13,200 of remuneration, or

(viii) After 1974 which exceeds the amount equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) which is effective for such calendar year

(exclusive of remuneration excepted from wages in accordance with paragraph (j) of §31.3121(a)–1 or §§31.3121(a)(2)–1 to 31.3121(a)(15)–1, inclusive) paid within the calendar year by an employer to the employee for employment performed for him at any time after 1936. For provisions relating to the treatment of tips for purposes of the annual wage limitation see §31.3121(q)–1.

(2) The annual wage limitation applies only if the remuneration received during any 1 calendar year by an employee from the same employer for employment performed after 1936 exceeds the amount of such limitation. The limitation in such case relates to the amount of remuneration received during any 1 calendar year for employment after 1936 and not to the amount of remuneration for employment performed in any 1 calendar year.

Example. Employee A, in 1967 receives $7,000 from employer B in part payment of $8,000 due him from employment performed in 1967. In 1968 A receives from employer B the balance of $1,000 due him for employment performed in 1967, and thereafter in 1968 also receives $7,000 for employment performed in 1968 for employer B. The first $6,600 of the $7,000 received during 1967 is subject to the taxes in 1967. The remaining $400 received in 1967 is not included as wages and is not subject to the taxes. The balance of $1,000 received in 1968 for employment during 1967 is subject to the taxes during 1968 as is also the first $6,800 of the $7,000 thereafter received in 1968 ($1,000 plus $6,800 totaling $7,800, which is the annual wage limitation applicable to remuneration received in 1968 by an employee from any one employer). The remaining $200 received in 1968 is not included as wages and is not subject to the taxes.

(3) If during a calendar year the employee receives remuneration from more than one employer, the annual wage limitation does not apply to the aggregate remuneration received from all of such employers, but instead applies to the remuneration received during such calendar year from each employer with respect to employment after 1936. In such case the first remuneration received in any calendar year after 1974 up to the amount equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) (the first $13,200 received in 1974, the first $10,800 received in 1973, the first $9,000 received in 1972, the first $7,800 received in any calendar year after 1967 and before 1972, the first $6,600 received in any calendar year after 1965 and before 1968, the first $4,800 received in any calendar year after 1958 and before 1966, or the first $4,200 received in any calendar year after 1954 and before 1959) from each employer constitutes wages and is subject to the taxes, even though, under section 6413(c), the employee may be entitled to a special credit or refund of a portion of the employee tax deducted from his wages received during the calendar year. In this connection and in connection with the two examples immediately following, see §31.6413(c)–1, relating to special credits or refunds of employee tax. In connection with the annual wage limitation in the case of remuneration paid for services performed in the employ of the United States or a wholly owned instrumentality thereof, see §31.3122. In connection with the annual wage limitation in the case of remuneration paid for services performed in the employ of the Government of Guam, the Government of American Samoa, the District of Columbia, a political subdivision of the Government of Guam, or the Government of American Samoa, or any instrumentality of any of the foregoing which is wholly owned thereby, see §31.3125. In connection with the application of the annual wage limitation, see also paragraph (b) of this section, relating to the circumstances under which wages paid by a predecessor employer are deemed to be paid by his successor. In connection with the annual wage limitation in the case of remuneration paid after December 31, 1978, from two or more related corporations that compensate an employee through a common paymaster, see §31.3121(s)–1.

Example 1. During 1968 employee C receives from employer D a salary of $1,300 a month

for employment performed for D during the first 7 months of 1968, or total remuneration of $9,100. At the end of the 6th month C has received $7,800 from employer D, and only that part of his total remuneration from D constitutes wages subject to the taxes. The $1,300 received by employee C from employer D in the 7th month is not included as wages and is not subject to the taxes. At the end of the 7th month C leaves the employ of D and enters the employ of E. C receives remuneration of $1,560 a month from employer E in each of the remaining 5 months of 1968, or total remuneration of $7,800 from employer E. The entire $7,800 received by C from employer E constitutes wages and is subject to the taxes. Thus, the first $7,800 received from employer D and the entire $7,800 received from employer E constitute wages.

Example 2. During the calendar year 1968 F is simultaneously an officer (an employee) of the X Corporation, the Y Corporation, and the Z Corporation and during such year receives a salary of $7,800 from each corporation. Each $7,800 received by F from each of the Corporations X, Y, and Z (whether or not such corporations are related) constitutes wages and is subject to the taxes.

(b) *Wages paid by predecessor attributed to successor.* (1) If an employer (hereinafter referred to as a successor) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and if immediately after the acquisition the successor employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for purposes of the application of the annual wage limitation set forth in paragraph (a) of this section, any remuneration (exclusive of remuneration excepted from wages in accordance with paragraph (j) of §31.3121(a)–1 or §§31.3121(a)(2)–1 to 31.3121(a)(15)–1, inclusive) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by the predecessor during such calendar year and prior to the acquisition shall be considered as having been paid by the successor.

(2) The wages paid, or considered as having been paid, by a predecessor to an employee shall, for purposes of the annual wage limitation, be treated as having been paid to such employee by a successor if:

(i) The successor during a calendar year acquired substantially all the property used in a trade or business, or used in a separate unit of a trade or business, of the predecessor;

(ii) Such employee was employed in the trade or business of the predecessor immediately prior to the acquisition and is employed by the successor in his trade or business immediately after the acquisition; and

(iii) Such wages were paid during the calendar year in which the acquisition occurred and prior to such acquisition.

(3) The method of acquisition by an employer of the property of another employer is immaterial. The acquisition may occur as a consequence of the incorporation of a business by a sole proprietor or a partnership, the continuance without interruption of the business of a previously existing partnership by a new partnership or by a sole proprietor, or a purchase or any other transaction whereby substantially all the property used in a trade or business, or used in a separate unit of a trade or business, of one employer is acquired by another employer.

(4) Substantially all the property used in a separate unit of a trade or business may consist of substantially all the property used in the performance of an essential operation of the trade or business, or it may consist of substantially all the property used in a relatively self-sustaining entity which forms a part of the trade or business.

Example 1. The M Corporation which is engaged in the manufacture of automobiles, including the manufacture of automobile engines, discontinues the manufacture of the engines and transfers all the property used in such manufacturing operation to the N Company. The N Company is considered to have acquired a separate unit of the trade or business of the M Corporation, namely, its engine manufacturing unit.

Example 2. The R Corporation which is engaged in the operation of a chain of grocery stores transfers one of such stores to the S Company. The S Company is considered to have acquired a separate unit of the trade or business of the R Corporation.

(5) A successor may receive credit for wages paid to an employee by a predecessor only if immediately prior to the acquisition the employee was employed

by the predecessor in his trade or business which was acquired by the successor and if immediately after the acquisition such employee is employed by the successor in his trade or business (whether or not in the same trade or business in which the acquired property is used). If the acquisition involves only a separate unit of a trade or business of the predecessor, the employee need not have been employed by the predecessor in that unit provided he was employed in the trade or business of which the acquired unit was a part.

Example. The Y Corporation in 1968 acquires by purchase all the property of the X Company and immediately after the acquisition employs in its trade or business employee A, who, immediately prior to the acquisition, was employed by the X Company. The X Company has in 1968 (the calendar year in which the acquisition occurs) and prior to the acquisition paid $5,000 of wages to A. The Y Corporation in 1968 pays to A remuneration of $5,000 with respect to employment. Only $2,800 of the remuneration paid by the Y Corporation is considered to be wages. For purposes of the $7,800 limitation, the Y Corporation is credited with the $5,000 paid to A by the X Company. If in the same calendar year, the Z Company acquires the property by purchase from the Y Corporation and A immediately after the acquistion is employed by the Z Company in its trade or business, no part of the remuneration paid to A by the Z Company in the year of the acquisition will be considered to be wages. The Z Company will be credited with the remuneration paid to A by the Y Corporation and also with the wages paid to A by the X Company (considered for purposes of the application of the $7,800 limitation as having also been paid by the Y Corporation).

(6) Where a corporation described in section 501(c)(3) which is exempt from income tax under section 501(a) has in effect a certificate filed pursuant to section 3121(k), or pursuant to section 1426(1) of the Internal Revenue Code of 1939, waiving its exemption from the taxes imposed by the Act, the activity in which such corporation is engaged is considered to be its trade or business for the purpose of determining whether the transferred property was used in the trade or business of the predecessor and for the purpose of determining whether the employment by the predecessor and the successor of an individual whose services were retained by the successor constitute employment in a trade or business. Thus, if a charitable or religious organization, subject to the taxes by virtue of its certificate, acquires all the property of another such organization likewise subject to the taxes and retains the services of employees of the predecessor, wages paid to such employees by the predecessor in the year of the acquisition (and prior to such acquisition) will be attributed to the successor for purposes of the annual wage limitation.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8307, July 2, 1964; T.D. 6983, 33 FR 18015, Dec. 4, 1968; T.D. 7374, 40 FR 30948, July 24, 1975; T.D. 7660, 44 FR 75139, Dec. 19, 1979]

§ 31.3121(a)(2)–1 Payments under employers' plans on account of retirement, sickness or accident disability, medical or hospitalization expenses, or death.

(a) The term ''wages'' does not include the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of—

(1) An employee's retirement,

(2) Sickness or accident disability of an employee or any of his dependents,

(3) Medical or hospitalization expenses in connection with sickness or accident disability of an employee or any of his dependents, or

(4) Death of an employee or any of his dependents.

(b) The plan or system established by an employer need not provide for payments on account of all of the specified items, but such plan or system may provide for any one or more of such items. Payments for any one or more of such items under a plan or system established by an employer solely for the dependents of his employees are not within this exclusion from wages.

(c) Dependents of an employee include the employee's husband or wife,

children, and any other members of the employee's immediate family.

(d) It is immaterial for purposes of this exclusion whether the amount or possibility of such benefit payments is taken into consideration in fixing the amount of an employee's remuneration or whether such payments are required, expressly or impliedly, by the contract of service.

§ 31.3121(a)(3)–1 Retirement payments.

The term ''wages'' does not include any payment made by an employer to an employee (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) on account of the employee's retirement. Thus, payments made to an employee on account of his retirement are excluded from wages under this exception even though not made under a plan or system.

§ 31.3121(a)(4)–1 Payments on account of sickness or accident disability, or medical or hospitalization expenses.

The term ''wages'' does not include any payment made by an employer to, or on behalf of, an employee on account of the employee's sickness or accident disability or the medical or hospitalization expenses in connection with the employee's sickness or accident disability, if such payment is made after the expiration of 6 calendar months following the last calendar month in which such employee worked for such employer. Such payments are excluded from wages under this exception even though not made under a plan or system. If the employee does not actually perform services for the employer during the requisite period, the existence of the employer- employee relationship during that period is immaterial.

§ 31.3121(a)(5)–1 Payments from or to certain tax-exempt trusts, or under or to certain annuity plans or bond purchase plans.

(a) *Payments from or to certain tax- exempt trusts.* The term ''wages'' does not include any payment made—

(1) By an employer, on behalf of an employee or his beneficiary, into a trust, or

(2) To, or on behalf of, an employee or his beneficiary from a trust.

If at the time of such payment the trust is exempt from tax under section 501(a) as an organization described in section 401(a). A payment made to an employee of such a trust for services rendered as an employee of the trust and not as a beneficiary thereof is not within this exclusion from wages.

(b) *Payments under or to certain annuity plans.* (1) The term ''wages'' does not include any payment made after December 31, 1962—

(i) By an employer, on behalf of an employee or his beneficiary, into an annuity plan, or

(ii) To, or on behalf of, an employee or his beneficiary under an annuity plan, if at the time of such payment the annuity plan is a plan described in section 403(a).

(2) The term ''wages'' does not include any payment made before January 1, 1963—

(i) By an employer, on behalf of an employee or his beneficiary, into an annuity plan, or

(ii) To, or on behalf of, an employee or his beneficiary under an annuity plan,

if at the time of such payment the annuity plan meets the requirements of section 401(a)(3), (4), (5), and (6).

(c) *Payments under or to certain bond purchase plans.* The term ''wages'' does not include any payment made after December 31, 1962—

(1) By an employer, on behalf of an employee or his beneficiary, into a bond purchase plan, or

(2) To, or on behalf of, an employee or his beneficiary under a bond purchase plan,

if at the time of such payment the plan is a qualified bond purchase plan described in section 405(a).

[T.D. 6876, 31 FR 2596, Feb. 10, 1966]

§ 31.3121(a)(6)–1 Payment by an employer of employee tax under section 3101 or employee contributions under a State law.

The term ''wages'' does not include any payment by an employer (without deduction from the remuneration of, or other reimbursement from, the employee) of either (a) the employee tax

imposed by section 3101 or the corresponding section of prior law, or (b) any payment required from an employee under a State unemployment compensation law.

§ 31.3121(a)(7)–1 Payments for services not in the course of employer's trade or business or for domestic service.

(a) *Meaning of terms*—(1) *Services not in the course of employer's trade or business.* The term ''services not in the course of the employer's trade or business'' includes services that do not promote or advance the trade or business of the employer. Such term does not include services performed for a corporation. As used in this section, the term does not include service not in the course of the employer's trade or business performed on a farm operated for profit or domestic service in a private home of the employer. See paragraph (f) of §31.3121(g)–1 for provisions relating to services not in the course of the employer's trade or business performed on a farm operated for profit.

(2) *Domestic service in a private home of the employer.* Services of a household nature performed by an employee in or about a private home of the person by whom he is employed constitute domestic service in a private home of the employer. A private home is a fixed place of abode of an individual or family. A separate and distinct dwelling unit maintained by an individual in an apartment house, hotel, or other similar establishment may constitute a private home. If a dwelling house is used primarily as a boarding or lodging house for the purpose of supplying board or lodging to the public as a business enterprise, it is not a private home. In general, services of a household nature in or about a private home include services performed by cooks, waiters, butlers, housekeepers, governesses, maids, valets, baby sitters, janitors, laundresses, furnacemen, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. The term ''domestic service in a private home of the employer'' does not include the services enumerated above unless such services are performed in or about a private home of the employer. Services not of a household nature, such as services performed as a private secretary, tutor, or librarian, even though performed in the employer's home, are not included within the term ''domestic service in a private home of the employer''. As used in this section, the term does not include domestic service in a private home of the employer performed on a farm operated for profit or service not in the course of the employer's trade or business. See paragraph (f) §31.3121(g)–1 for provisions relating to domestic service in a private home of the employer performed on a farm operated for profit.

(b) *Payments other than in cash.* The term ''wages'' does not include remuneration paid in any medium other than cash (1) for service not in the course of the employer's trade or business, or (2) for domestic service in a private home of the employer. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any medium other than cash, such as lodging, food, clothing, car tokens, transportation passes or tickets, or other goods or commodities, for service not in the course of the employer's trade or business or for domestic service in a private home of the employer does not constitute wages.

(c) *Cash payments.* (1) The term ''wages'' does not include cash remuneration paid by an employer in any calendar quarter after 1954 to an employee for—

(i) Domestic service in a private home of the employer, or

(ii) Service not in the course of the employer's trade or business,

unless the cash remuneration paid in such quarter by the employer to the employee for such service is $50 or more.

(2) The test relating to cash remuneration of $50 or more is based on the remuneration paid in a calendar quarter rather than on the remuneration earned during a calendar quarter. It is immaterial whether the remuneration was earned before 1955 or after 1954.

Example. In the calendar quarter ending March 31, 1955, employer X pays employee A cash remuneration of $50 for service not in the course of X's trade or business. Such remuneration constitutes wages subject to the

taxes even though $10 thereof represents payment for such service performed by A for X in December 1954.

In determining whether $50 or more has been paid either for domestic service in a private home of the employer or for service not in the course of the employer's trade or business, only cash remuneration for such service shall be taken into account. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as lodging, food, clothing, car tokens, transportation passes or tickets, or other goods or commodities, is disregarded in determining whether the cash-remuneration test is met. If an employee receives cash remuneration from an employer in a calendar quarter for both types of services the $50 cash-remuneration test is to be applied separately to each type of service. If an employee receives cash remuneration from more than one employer in a calendar quarter for domestic service in a private home of the employer or for service not in the course of the employer's trade or business, the $50 cash-remuneration test is to be applied separately to the remuneration received from each employer. See §31.3102–1, relating to deduction of employee tax or amounts equivalent to the tax from cash payments for the services described in this section; §31.3121(a)–2, relating to time of payment of wages for such services; and §31.3121(i)–1, relating to computations to the nearest dollar of any payment of cash remuneration for domestic service in a private home of the employer.

§31.3121(a)(8)–1 Payments for agricultural labor.

(a) *Scope of this section.* For purposes of the regulations in this section, the term ''agricultural labor'' means only such agricultural labor (see §31.3121(g)–1) as constitutes employment or is deemed to constitute employment by reason of the rules relating to included and excluded services contained in section 3121(c) (see §31.3121(c)–1) or the corresponding section of prior law.

(b) *Payments other than in cash.* The term ''wages'' does not include remuneration paid in any medium other than cash for agricultural labor. For meaning of the term ''cash remuneration'', see paragraph (f) of the regulations in this section.

(c) *Cash payments.* (1) The term ''wages'' does not include cash remuneration paid by an employer in the calendar year 1955 or 1956 to an employee for agricultural labor unless the cash remuneration paid in such year by the employer to the employee for such labor is $100 or more.

(2)(i) The term ''wages'' does not include cash remuneration paid by an employer in any calendar year after 1956 to an employee for agricultural labor unless the cash remuneration paid in such year by the employer to the employee for such labor is $150 or more, or unless the employee performs agricultural labor for the employer on 20 days or more during such year for cash remuneration computed on a time basis.

(ii) The application of the provisions of this subparagraph may be illustrated by the following example:

Example. On 18 days in 1957 A performs agricultural labor for X for cash remuneration of $8 per day, and X pays A $144 in such year. A performs no further service for X. Neither the $150-cash-remuneration test nor the 20-day test is met. Accordingly, the remuneration paid by X to A is not subject to the taxes. If in 1957 A had performed agricultural labor for X on 20 days for cash remuneration of $7.20 per day, the $144 paid by X to A would have been subject to the taxes because the 20-day test would have been met. Or if A had performed the 18 days of agricultural labor for cash remuneration of $8.50 per day and had been paid in full therefor in 1957, his cash remuneration of $153 would have been subject to the taxes because the $150-cash-remuneration test would have been met.

(d) *Application of cash-remuneration test.* (1) If an employee receives cash remuneration from an employer both for services which constitute agricultural labor and for services which do not constitute agricultural labor, only the amount of such remuneration which is attributable to agricultural labor shall be included in determining whether cash remuneration of $150 or more ($100 or more in 1955 or 1956) has been paid in the calendar year by the employer to the employee for agricultural labor.

Example. Employer X operates a store and also is engaged in farming operations. Employee A, who regularly performs services for

X in connection with the operation of the store, works on X's farm when additional help is required for the farm activities. In the calendar year 1957, X pays A $140 in cash computed on a time basis for agricultural labor performed on 19 different days in such year, and $2,260 for services performed in connection with the operation of the store. Since the cash remuneration paid by X to A in the calendar year 1957 for agricultural labor is less than $150, the cash-remuneration test is not met. Since A performed agricultural labor for X on less than 20 days in 1957, the 20-day test set forth in section 3121(a)(8) is not met. The $140 paid by X to A in 1957 for agricultural labor does not constitute wages and is not subject to the taxes.

(2) The test relating to cash remuneration of $150 or more ($100 or more in 1955 or 1956) is based on the cash remuneration paid in a calendar year rather than on the remuneration earned during a calendar year. It is immaterial if such cash remuneration is paid in a calendar year other than the year in which the agricultural labor is performed.

Example. Employer X pays cash remuneration of $150 in the calendar year 1957 to employee A for agricultural labor. Such remuneration constitutes wages even though $10 of such amount represents payment for agricultural labor performed by A for X in December 1956.

(3) In determining whether $150 or more ($100 or more in 1955 or 1956) has been paid to an employee for agricultural labor, only cash remuneration for such labor shall be taken into account. If an employee receives cash remuneration in any one calendar year from more than one employer for agricultural labor, the cash-remuneration test is to be applied with respect to the remuneration received by the employee from each employer in such calendar year for such labor.

(e) *Application of 20-day test.* (1) Only agricultural labor for which cash remuneration is computed on a time basis is taken into account in determining whether an employee performs such labor for such remuneration on 20 days or more during a calendar year after 1956. For purposes of the 20-day test, the amount of such remuneration is immaterial, and it is immaterial if, in addition to cash remuneration computed on a time basis, the remuneration for such labor also includes remuneration other than cash or remuneration which is not computed on a time basis. If cash remuneration paid to an employee after 1956 for agricultural labor is computed on a time basis, such cash remuneration does not constitute ''wages'' unless it is paid in a calendar year in which either the 20-day test or the $150-cash-remuneration test is met.

Example. Employer X employs A to construct fences on a farm owned by X. The work constitutes agricultural labor and is performed on 50 days in November and December 1957. A is not employed by X at any other time. A's remuneration consists of meals and lodging, $5 cash per day, and additional cash measured by the amount of fence constructed. X pays A $140 cash in December 1957 and $160 cash in January 1958, in full payment for the work. Inasmuch as A has performed agricultural labor for X on 50 days in 1957, for remuneration computed on a time basis, the 20-day test is met for 1957 and the $140 cash paid in 1957 is subject to the taxes. It is immaterial that the $150-cash-remuneration test is not met for 1957. Inasmuch as X has paid A $160 cash remuneration in 1958 for agricultural labor, the $150-cash-remuneration test is met for 1958 and the $160 cash paid in 1958 is subject to the taxes. It is immaterial that the 20-day test is not met for 1958. If the remuneration paid by X to A in January 1958 had been in an amount less than $150, neither the $150-cash-remuneration test nor the 20-day test would have been met for the calendar year 1958, and the remuneration paid by X to A in such year would not have been subject to the taxes.

(2) For the purpose of determining whether an employee performs agricultural labor for an employer on 20 days or more during any calendar year after 1956, for cash remuneration computed on a time basis, there shall be counted as one day—

(i) Any day or portion thereof on which the employee actually performs such labor for cash remuneration computed one time basis; and

(ii) Any day or portion thereof on which the employee does not perform agricultural labor but with respect to which cash remuneration is paid or payable to the employee for such labor, such as a day on which the employee is sick or on vacation.

An employee who on a particular day reports for work and, at the direction of his employer, holds himself in readiness to perform agricultural labor shall

be considered to be engaged in the actual performance of such labor on that day. For purposes of the regulations in this section, a day is a period of 24 hours commencing at midnight and ending at midnight.

Example. During the period of 20 days beginning April 11, 1957 and ending April 30, 1957, employee A was employed by employer X to perform agricultural labor on X's farm. The agreement provided that A would be furnished room and board at the farm and would be paid cash wages of $150 per month. On one day during the 20-day period A was sick and unable to work, and on another day X directed A to refrain from work because of weather conditions. At the termination of A's employment X paid A cash wages of $100 for the full 20-day period. The 20-day test had been met and the $100 cash wages were subject to the taxes.

(3) If in any one calendar year an employee performs agricultural labor for more than one employer, the 20-day test is to be applied with respect to the agricultural labor performed by the employee in such year for each employer.

(f) *Meaning of ''cash remuneration.''* Cash remuneration includes checks and other monetary media of exchange. Cash remuneration does not include payments made in any other medium, such as lodging, food, clothing, car tokens, transportation passes or tickets, farm products, or other goods or commodities.

(g) *Cross references.* (1) For provisions relating to deductions of employee tax or amounts equivalent to the tax from cash payments for agricultural labor, see § 31.3102–1.

(2) For provisions relating to the time of payment of wages for agricultural labor, see § 31.3121(a)–2.

(3) For provisions relating to records to be kept with respect to agricultural labor, see paragraph (b) of § 31.6001–2.

[T.D. 6744, 29 FR 8308, July 2, 1964]

§ 31.3121(a)(9)–1 Payments to employees for nonwork periods.

(a) The term ''wages'' does not include any payment (other than vacation or sick pay) made by an employer to an employee for a period throughout which the employment relationship exists between the employer and the employee, but in which the employee does not work (other than being subject to call for the performance of work) for the employer, if such payment is made after the calendar month in which—

(1) The employee attains age 65, if the employee is a man to whom the payment is made before January 1975, or if the employee is a woman to whom the payment is made before November 1956, or

(2) The employee attains age 62, if the employee is a man to whom the payment is made after December 1974, or if the employee is a woman to whom the payment is made after October 1956.

(b) Vacation or sick pay is not within this exclusion from wages. If the employee does any work for the employer in the period for which the payment is made, no remuneration paid by such employer to such employee with respect to such period is within this exclusion from wages.

Example. Mrs. A, an employee of X, attained the age of 62 on September 15, 1956, and discontinued the performance of regular work for X on September 30, 1956. Their employment relationship continued for several years until Mrs. A's death, and X paid Mrs. A $50 per month as consideration for Mrs. A's agreement to work when asked by X. The payment for each month was made on the first day of each succeeding month. After September 30, 1956, the only work performed by Mrs. A for X was performed on one day in October 1956. The payment made by X to Mrs. A on November 1 (for October 1956) is not excluded from wages under this exception, but the payments made thereafter are excluded from wages. The payment on November 1 was not excluded because Mrs. A worked for X on one day in October 1956. (Inasmuch as Mrs. A had attained age 62 in September 1956, the November 1 payment would have been excluded if Mrs. A had not performed any work for X in October 1956.)

[T.D. 6744, 29 FR 8309, July 2, 1964, as amended by T.D. 7373, 40 FR 30957, July 24, 1975; 40 FR 32831, Aug. 5, 1975]

§ 31.3121(a)(10)–1 Payments to certain home workers.

(a) The term ''wages'' does not include remuneration paid by an employer in any calendar quarter to an employee—

(1) For services performed after 1954 as a home worker who is an employee by reason of the provisions of section 3121(d)(3)(C) (see paragraph (d) of § 31.3121(d)–1), or

(2) For services performed after 1950 and before 1955 as a home worker who is an employee by reason of the provisions of section 1426(d)(3)(C) of the Internal Revenue Code of 1939. unless the cash remuneration paid in such quarter by the employer to the employee for such services is $50 or more. The test relating to cash remuneration of $50 or more is based on remuneration paid in a calendar quarter rather than on remuneration earned during a calendar quarter. If $50 or more of cash remuneration is paid in a particular calendar quarter, it is immaterial whether the $50 is in payment for services performed during the quarter of payment or during any other quarter.

(b) The application of paragraph (a) of this section may be illustrated by the following examples:

Example 1. A, a home worker, performs services for X, a manufacturer, in 1954 and 1955. In the performance of the home work A is an employee both in 1954 (by reason of section 1426(d)(3)(C) of the 1939 Code) and in 1955 (by reason of section 3121(d)(3)(C)). In March 1955, A returns to X articles made by A at home from materials received by A from X in 1954. X pays A cash remuneration of $50 for such work when the finished articles are delivered. The $50 includes $10 which represents remuneration for home work performed by A in 1954. The entire $50 is subject to the taxes.

Example 2. Assume that the same transactions occur, but that A is not subject in 1954 to licensing requirements under the laws of the State in which the home work is performed. A, therefore, does not perform home work in 1954 as an employee of X by reason of section 1426(d)(3)(C) of the 1939 Code, and the $10 paid in 1955 for such work is not remuneration for employment. The remaining $40 for the home work performed in 1955 is remuneration for employment, but is excluded from wages by application of the $50 cash-remuneration test.

(c) In the event an employee receives remuneration in any one calendar quarter from more than one employer for services performed as a home worker of the character described in paragraph (a) of this section, the regulations in this section are to be applied with respect to the remuneration received by the employee from each employer in such calendar quarter for such services. This exclusion from wages has no application to remuneration paid for services performed as a home worker who is an employee under either section 3121(d)(2)(see paragraph (c) of § 31.3121(d)–1) or section 1426(d)(2) of the 1939 Code, relating to common law employees.

(d) Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as clothing, car tokens, transportation passes or tickets, or other goods or commodities, is disregarded in determining whether the $50 cash-remuneration test is met. If the cash remuneration paid in any calendar quarter by an employer to an employee for services performed as a home worker of the character described in paragraph (a) of this section is $50 or more, then no remuneration, whether in cash or in any medium other than cash, paid by the employer to the employee in such calendar quarter for such services is excluded from wages under this exception.

(e) For provisions relating to whether a home worker is an employee under section 1426(d)(3)(C) of the 1939 Code, see § 408.204 of Regulations 128; 26 CFR (1939) Part 408. See also § 31.3102–1, relating to deduction of employee tax or amounts equivalent to the tax from cash payments for services performed as a home worker of the character described in paragraph (a) of this section, and § 31.3121(a)–2, relating to the time of payment of wages for such services.

§ 31.3121(a)(11)–1 Moving expenses.

(a) The term ''wages'' does not include remuneration paid on or after November 1, 1964, to or on behalf of an employee, either as an advance or a reimbursement, specifically for moving expenses incurred or expected to be incurred, if (and to the extent that) at the time of payment it is reasonable to believe that a corresponding deduction is or will be allowable to the employee under section 217. The reasonable belief contemplated by the statute may be based upon any evidence reasonably sufficient to induce such belief, even though such evidence may be insufficient upon closer examination by the district director or the courts finally to establish that a deduction is allowable under section 217. The reasonable belief shall be based upon the application of section 217 and the regulations thereunder in Part 1 of this chapter

(Income Tax Regulations). When used in this section, the term ''moving expenses'' has the same meaning as when used in section 217 and the regulations thereunder.

(b) Except as otherwise provided in paragraph (a) of this section, or in a numbered paragraph of section 3121(a), amounts paid to or on behalf of an employee for moving expenses are wages for purposes of section 3121(a).

[T.D. 7375, 40 FR 42350, Sept. 12, 1975]

§ 31.3121(a)(12)–1 Tips.

The term ''wages'' does not include remuneration received by an employee after December 1965 in the form of tips if—

(a) The tips are paid in any medium other than cash, or

(b) The cash tips received by an employee in any calendar month in the course of his employment by an employer are less than $20.

If the cash tips received by an employee in a calendar month after December 1965 in the course of his employment by an employer amount to $20 or more, none of the cash tips received by the employee in such calendar month are excluded from the term ''wages'' under this section. The cash tips to which this section applies include checks and other monetary media of exchange. Tips received by an employee in any medium other than cash, such as passes, tickets, or other goods or commodities do not constitute wages. If an employee in any calendar month performs services for two or more employers and receives tips in the course of his employment by each employer, the $20 test is to be applied separately with respect to the cash tips received by the employee in respect of his services for each employer and not to the total cash tips received by the employee during the month. As to the time tips are deemed paid, see § 31.3121(q)–1. For provisions relating to the treatment of tips received by an employee prior to 1966, see paragraph (j)(3) of § 31.3121 (a)–1.

[T.D. 7001, 34 FR 999, Jan. 23, 1969]

§ 31.3121(a)(13)–1 Payments under certain employers' plans after retirement, disability, or death.

(a) *In general.* The term ''wages'' does not include the amount of any payment or series of payments made after January 2, 1968, by an employer to, or on behalf of, an employee or any of his dependents under a plan established by the employer which makes provisions for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), which is paid or commences to be paid upon or within a reasonable time after the termination of an employee's employment relationship because of the employee's—

(1) Death,

(2) Retirement for disability, or

(3) Retirement after attaining an age specified in the plan established by the employer or in a pension plan of the employer at the age at which a person in the employee's circumstances is eligible for retirement.

A payment or series of payments made under the circumstances described in the preceding sentence is excluded from ''wages'' even if made pursuant to an incentive compensation plan which also provides for the making of other types of payments. However, any payment or series of payments which would have been paid if the employee's relationship had not been terminated is not excluded from ''wages'' under this section and section 3121(a)(13). For example, lump-sum payments for unused vacation time or a final paycheck received after retirement are payments which the employee would have received whether or not he retired and therefore are not excluded from ''wages'' under this section. Further, if any payment is made upon or after termination of employment for any reason other than those set out in subparagraphs (1), (2), and (3) of this paragraph such payment is not excludable from ''wages'' by this section. For example, if a pension plan provides for retirement upon disability, completion of 30 years of service, or attainment of age 65, and if an employee who is not disabled retires at age 61 after 30 years

of service, none of the retirement payments made to the employee under the pension plan (including any made after he is 65) is excludable from ''wages'' under this section. However, if the pension plan had conditioned retirement after 30 years of service upon attainment of age 60, all of the retirement payments would have been excludable.

(b) *Plan.* The plan or system established by an employer need not provide for payments because of termination of employment for all the reasons set out in paragraphs (a)(1), (2), and (3) of this section, but such plan or system may provide for payments because of termination for any one or more of such reasons. Payments because of termination of employment for any one or more of such reasons under a plan or system established by an employer solely for the dependents of his employees are not within this exclusion from wages.

(c) *Dependents.* Dependents of an employee include the employee's husband or wife, children, and any other members of the employee's immediate family.

(d) *Benefit payment.* It is immaterial for purposes of this exclusion whether the amount or possibility of benefit payments is paid on account of services rendered or taken into consideration in fixing the amount of an employee's remuneration or whether such payments are required, expressly or impliedly, by the contract of service.

(e) *Example.* The application of this section may be illustrated by the following example:

Example. A, an employee, receives a salary of $1,500 a month, payable on the 5th day of the month following the month for which the salary is earned. A's employer has established an incentive compensation plan for a class of his employees, including A, providing for the payment of deferred compensation on termination of employment, including termination upon an employee's death, retirement at age 65 (the retirement age specified in the plan), or retirement for disability. On March 1, 1973, A attains the age of 65 and retires. On March 5, 1973, A receives $5,500 from his employer of which $1,500 represents A's salary for services he performed in February 1973, and $4,000 represents incentive compensation paid under the employer's plan. The amount of $4,000 is excluded from ''wages'' under this section. The amount of $1,500 is not excluded from ''wages'' under this section.

[T.D. 7374, 40 FR 30949, July 24, 1975]

§ 31.3121(a)(14)–1 Payments by employer to survivor or estate of former employee.

The term ''wages'' does not include any payment by an employer to a survivor or the estate of a former employee made after 1972 and after the calendar year in which such employee died.

[T.D. 7374, 40 FR 30950, July 24, 1975, as amended by T.D. 7373, 40 FR 30957, July 24, 1975]

§ 31.3121(a)(15)–1 Payments by employer to disabled former employee.

The term ''wages'' does not include any payment made after 1972 by an employer to an employee, if at the time such payment is made such employee is entitled to disability insurance benefits under section 223(a) of the Social Security Act and such entitlement commenced prior to the calendar year in which such payment is made, and if such employee did not perform any service for such employer during the period for which such payment is made.

[T.D. 7374, 40 FR 30950, July 24, 1975, as amended by T.D. 7373, 40 FR 30957, July 24, 1975]

§ 31.3121(a)(18)–1 Payments or benefits under a qualified educational assistance program.

The term ''wages'' does not include any payment made, or benefit furnished, to or for the benefit of an employee in a taxable year beginning after December 31, 1978, if at the time of such payment or furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

[T.D. 7898, 48 FR 31019, July 6, 1983]

§ 31.3121(b)–1 Employment; services to which the regulations in this subpart apply.

(a) The provisions of the regulations in this subpart relating to the term ''employment'' apply with respect to services performed after 1954. Certain provisions also apply with respect to services performed before 1955 for which the remuneration is paid after

1954 (see paragraph (b) of §31.3121(b)–2. For provisions relating generally to services performed before 1955, see paragraph (a) of §31.3121 (b)–2. For provisions relating to the circumstances under which services which do not constitute employment are nevertheless deemed to be employment, and relating to the circumstances under which services which constitute employment are nevertheless deemed not to be employment, see §31.3121 (c)–1. For provisions relating to who are employees and who are employers see §§31.3121 (d)–1 and 31.3121 (d)–2, respectively.

(b) The taxes apply with respect to remuneration paid after 1954 for services performed before 1955, as well as for services performed after 1954, to the extent that the remuneration and services constitute wages and employment. See §§31.3121(a)–1 to 31.3121(a)(13)–1 relating to wages.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6983, 33 FR 18015, Dec. 4, 1968]

§31.3121(b)–2 Employment; services performed before 1955.

(a) *General rule.* (1) Subject to the provisions of paragraph (b) of this section:

(i) Services performed after 1936 and before 1955 which were employment under the applicable law in effect before 1955 constitute employment under section 3121(b).

(ii) Services performed after 1936 and before 1955 which were not employment under the applicable law in effect before 1955 do not constitute employment under section 3121(b).

(2) Except as provided in paragraph (b) of this section, determination of whether services performed before 1955 constitute employment shall be made in accordance with the applicable provisions of law in effect before 1955 and of the regulations thereunder. The regulations applicable in determining whether service performed after 1936 and before 1955 constitute employment are as follows:

(i) Services performed after 1936 and before 1940—26 CFR (1939) Part 401 (Regulations 91).

(ii) Services performed after 1939 and before 1951—26 CFR (1939) Part 402 (Regulations 106).

(iii) Services performed after 1950 and before 1955—26 CFR (1939) Part 408 (Regulations 128).

(b) *Certain services performed before 1955 the remuneration for which is paid after 1954.* (1) Services of the following character performed before 1955, for which remuneration is paid after 1954, constitute employment under section 3121(b):

(i) Agricultural labor, as defined in section 3121(g) (see §31.3121(g)–1), other than services of the character described in section 3121(b)(1) (relating to services performed in connection with the production or harvesting of certain oleoresinous products and services performed by certain foreign agricultural workers), which, at the time performed, constituted employment under section 1426(b) of the 1939 Code, or would have constituted employment except for the provisions of section 1426(b)(1) of such Code, as in effect at the time the services were performed.

(ii) Services not in the course of the employers' trade or business (see paragraph (a)(1) of §31.3121(a)(7)–1) which, at the time performed, constituted employment under section 1426(b) of the 1939 Code, or would have constituted employment except for the provisions of section 1426(b)(3) of such Code, as in effect at the time the services were performed.

(2) Services of the character described in paragraphs (a) and (b) of §31.3121(b)(1)–1, which were performed by certain foreign agricultural workers before 1955 and the remuneration for which is paid after 1954, do not constitute employment under section 3121(b), irrespective of whether they constituted employment under section 1426(b) of the 1939 Code, as in effect at the time the services were performed.

(3) This paragraph has no application to services performed before 1955 and the remuneration for which was paid before 1955.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8309, July 2, 1964]

§ 31.3121(b)–3 Employment; services performed after 1954.

(a) *In general.* Whether services performed after 1954 constitute employment is determined in accordance with the provisions of section 3121(b).

(b) *Services performed within the United States.* Services performed after 1954 within the United States (see § 31.3121(e)–1) by an employee for his employer, unless specifically excepted by section 3121(b), constitute employment. With respect to services performed within the United States, the place where the contract of service is entered into is immaterial. The citizenship or residence of the employee or of the employer also is immaterial except to the extent provided in any specific exception from employment. Thus, the employee and the employer may be citizens and residents of a foreign country and the contract of service may be entered into in a foreign country, and yet, if the employee under such contract performs services within the United States, there may be to that extent employment.

(c) *Services performed outside the United States*—(1) *In general.* Except as provided in paragraphs (c)(2) and (3) of this section, services performed outside the United States (see § 31.3121(e)–1) do not constitute employment.

(2) *On or in connection with an American vessel or American aircraft.* (i) Services performed after 1954 by an employee for an employer ''on or in connection with'' an American vessel or American aircraft outside the United States (see § 31.3121(e)–1) constitute employment if:

(a) The employee is also employed ''on and in connection with'' such vessel or aircraft when outside the United States; and

(b) The services are performed under a contract of service, between the employee and the employer, which is entered into within the United States, or during the performance of the contract under which the services are performed and while the employee is employed on the vessel or aircraft it touches at a port within the United States; and

(c) The services are not excepted under section 3121(b).

(ii) An employee performs services on and in connection with the vessel or aircraft if he performs services on such vessel or aircraft which are also in connection with the vessel or aircraft. Services performed on the vessel by employees as officers or members of the crew, or as employees of concessionaires, of the vessel, for example, are performed under such circumstances, since such services are also connected with the vessel. Similarly, services performed on the aircraft by employees as officers or members of the crew of the aircraft are performed on and in connection with such aircraft. Services may be performed on the vessel or aircraft, however, which have no connection with it, as in the case of services performed by an employee while on the vessel or aircraft merely as a passenger in the general sense. For example, the services of a buyer in the employ of a department store while he is a passenger on a vessel are not in connection with the vessel.

(iii) If services are performed by an employee ''on and in connection with'' an American vessel or American aircraft when outside the United States and the conditions listed in paragraph (c)(2)(i) *(b)* and *(c)* of this section are met, then the services of that employee performed on or in connection with the vessel or aircraft constitute employment. The expression ''on or in connection with'' refers not only to services performed on the vessel or aircraft but also to services connected with the vessel or aircraft which are not actually performed on it (for example, shore services performed as officers or members of the crew, or as employees of concessionaires, of the vessel).

(iv) Services performed by a member of the crew or other employee whose contract of service is not entered into within the United States, and during the performance of which and while the employee is employed on the vessel or aircraft it does not touch at a port within the United States, do not constitute employment under this subparagraph, notwithstanding services performed by other members of the crew or other employees on or in connection with the vessel or aircraft may constitute employment.

(v) A vessel includes every description of watercraft, or other contrivance, used as a means of transportation on water. An aircraft includes every description of craft, or other contrivance, used as a means of transportation through the air. In the case of an aircraft, the term ''port'' means an airport. An airport means an area on land or water used regularly by aircraft for receiving or discharging passengers or cargo. For definitions of ''American vessel'' and ''American aircraft'', see §31.3121(f)–1.

(vi) With respect to services performed outside the United States on or in connection with an American vessel or American aircraft, the citizenship or residence of the employee is immaterial, and the citizenship or residence of the employer is material only in case it has a bearing in determining whether a vessel is an American vessel.

(3) *By a citizen of the United States as an employee for an American employer.* Services performed after 1954 outside the United States by a citizen of the United States as an employee for an American employer constitute employment provided the services are not specifically excepted under section 3121(b). For definitions of ''citizen of the United States'' and ''American employer'', see §§31.3121(e)–1 and 3121 (h)–1, respectively.

(4) *By a citizen of the United States as an employee for a foreign subsidiary corporation.* For provisions relating to the extension of the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act to certain services not constituting employment which are performed outside the United States by citizens of the United States in the employ of a foreign subsidiary of a domestic corporation, see section 3121(1) and Part 36 of this chapter (Regulations Relating to Contract Coverage of Employees of Foreign Subsidiaries).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8309, July 2, 1964]

§31.3121(b)–4 Employment; excepted services in general.

(a) Services performed by an employee for an employer do not constitute employment for purposes of the taxes if they are specifically excepted from employment under any of the numbered paragraphs of section 3121(b). Services so excepted do not constitute employment for purposes of the taxes even though they are performed within the United States, or are performed outside the United States on or in connection with an American vessel or American aircraft, or are performed outside the United States by a citizen of the United States for an American employer. If not otherwise provided in the regulations relating to the numbered paragraphs of section 3121(b), such regulations apply to services performed after 1954.

(b) The exception attaches to the services performed by the employee and not to the employee as an individual; that is, the exception applies only to the services in an excepted class rendered by the employee.

Example. A is an individual who is employed part time by B to perform services which are specifically excepted from employment under one of the numbered paragraphs of section 312(b). A is also employed by C part time to perform services which constitute employment. While no tax liability is incurred with respect to A's remuneration for services performed in the employ of B (the services being excepted from employment), the exception does not embrace the services performed by A in the employ of C (which constitute employment) and the taxes attached with respect to the wages (see §31.3121(a)–1) for such services.

(c) For provisions relating to the circumstances under which services which are excepted are nevertheless deemed to be employment, and relating to the circumstances under which services which are not excepted are nevertheless deemed not to be employment, see §31.3121(c)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8310, July 2, 1964]

§31.3121(b)(1)–1 Certain services performed by foreign agricultural workers, or performed before 1959 in connection with oleoresinous products.

(a) *Services of workers from Mexico.* Services performed before 1965 by foreign agricultural workers from the Republic of Mexico under contracts entered into in accordance with title V of

the Agricultural Act of 1949, as amended, are excepted from employment. Contracts entered into pursuant to the provisions of such title V may provide for the performance only of services which constitute ''agricultural employment''. The term ''agricultural employment'' includes certain services which do not constitute ''agricultural labor'' as that term is defined in section 3121(g) (see § 31.3121(g)–1. For purposes of title V of the Agricultural Act of 1949, as amended, the term ''agricultural employment'' includes services or activities included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938, as amended, or section 3121(g) of the Internal Revenue Code. Under section 507 of the Agricultural Act of 1949, as amended, and as in effect before October 3, 1961, the term ''agricultural employment'' included also horticultural employment, cotton ginning, compressing and storing, crushing of oil seeds, and the packing, canning, freezing, drying, or other processing of perishable or seasonable agricultural products.

(b) *Services of workers from British West Indies.* Services performed by a foreign agricultural worker lawfully admitted to the United States from the Bahamas, Jamaica, or the other British West Indies, on a temporary basis to perform form agricultural labor are excepted from employment.

(c) *Services performed after 1956 by foreign workers.* Services performed after 1956 by a foreign agricultural worker lawfully admitted to the United States from any foreign country or possession thereof, including the Republic of Mexico, on a temporary basis to perform agricultural labor are excepted from employment.

(d) *Services performed before 1959 in connection with the production or harvesting of certain oleoresinous products.* Services performed before 1959 in connection with the production or harvesting of crude gum (oleoresin) from a living tree or the processing of such crude gum into gum spirits of turpentine and gum rosin, provided the processing is carried on by the original producer of the crude gum, are expected from employment. However, the services to which this paragraph relates constitute agricultural labor as defined in section 3121(g) (see paragraph (d) of § 31.3121(g)–1). Thus, any cash remuneration paid for such services, to the extent that the services are deemed to constitute employment by reason of the rules relating to included and excluded services continued in section 3121(c) (see § 31.3121(c)–1), is taken into account in applying the test prescribed in section 3121(a)(8)(B) for determining whether cash remuneration paid for agricultural labor constitutes wages (see paragraph (c) of § 31.3121(a)(8)–1).

(e) *Cross-reference.* See paragraph (b) of § 31.3121(b)–2 for provisions relating to the status of services of the character to which paragraphs (a) and (b) of this section apply which were performed before 1955 and the remuneration for which is paid after 1954.

[T.D. 6744, 29 FR 8310, July 2, 1964]

§ 31.3121(b)(2)–1 Domestic service performed by students for certain college organizations.

(a) Services of a household nature performed in or about the club rooms or house of a local college club, or in or about the club rooms or house of a local chapter of a college fraternity or sorority, by a student who is enrolled and regularly attending classes at a school, college, or university are excepted from employment. For purposes of this exception, the statutory tests are the type of services performed by the employee, the character of the place where the services are performed, and the status of the employee as a student enrolled and regularly attending classes at a school, college, or university.

(b) In general, services of a household nature in or about the club rooms or house of a local college club or local chapter of a college fraternity or sorority include services rendered by cooks, waiters, butlers, maids, janitors, laundresses, furnacemen, handymen, gardeners, housekeepers, and housemothers.

(c) A local college club or local chapter of a college fraternity or sorority does not include an alumni club or chapter. If the club rooms or house of a local college club or local chapter of a college fraternity or sorority is used primarily for the purpose of supplying board or lodging to students or the

public as a business enterprise, the services performed therein are not within the exception.

(d) The term ''school, college, or university'' within the meaning of this exception is to be taken in its commonly or generally accepted sense.

(e) Services of a household nature are not within the exception if performed in or about rooming or lodging houses, boarding houses, clubs (except local college clubs) hotels, hospitals, eleemosynary institutions, or commercial offices or establishments.

(f) For provisions relating to domestic service in a private home of the employer, see §31.3121(a)(7)–1.

§31.3121(b)(3)–1 Family employment.

(a) Certain services are excepted from employment because of the existence of a family relationship between the employee and the individual employing him. The exceptions are as follows:

(1) Services performed by an individual in the employ of his or her spouse;

(2) (i) Services performed before 1961 by a father or mother in the employ of his or her son or daughter;

(ii) Services not in the course of the employer's trade or business, or domestic service in a private home of the employer, performed after 1960 but prior to 1968 by a father or mother in the employ of his or her son or daughter;

(iii) Services not in the course of the employer's trade or business, or domestic service in a private home of the employer, performed after 1967 by a father or mother in the employ of his or her son or daughter unless *(a)* the employer has a child (including an adopted child or stepchild) living in his or her home who is under age 18 or who has a mental or physical condition which requires the personal care and supervision of an adult for at least 4 continuous weeks in the calendar quarter in which the services are rendered; and *(b)* the employer is during the calendar quarter in which the services are rendered:

(1) A widow or widower;

(2) A divorced person who has not remarried; or

(3) A married person who has a spouse living in the home who has a mental or physical condition which results in such spouse's being incapable of caring for such child for at least 4 continuous weeks in the calendar quarter in which the services are rendered; and

(3) Services performed by a son or daughter under the age of 21 in the employ of his or her father or mother.

(b) Under paragraph (a) (1) and (2) (i) of this section, the exception is conditioned solely upon the family relationship between the employee and the individual employing him. Under paragraph (a)(2) (ii) and (iii) of this section, in addition to the family relationship, there is a further requirement that the services performed after 1960 and before 1968 for purposes of paragraph (a)(2)(ii) and after 1967 for purposes of paragraph (a)(2)(iii) shall be services not in the course of the employer's trade or business or shall be domestic service in a private home of the employer. The terms ''services not in the course of the employer's trade or business'' and ''domestic service in a private home of the employer'' have the same meaning as when used in §31.3121(a) (7)–1, except that it is immaterial under paragraphs (a)(2) (ii) and (iii) of this section whether or not such services are performed on a farm operated for profit. The mere fact that a mental or physical disability, whether temporary or permanent, renders a child or spouse incapable of self-support does not necessarily mean that the child requires the personal care and supervision of an adult or that the spouse is incapable of caring for a child within the meaning of paragraph (a)(2)(iii) of this section. A written statement by a doctor of the existence of the mental or physical condition of the child or spouse which states that the child requires the personal care and supervision of an adult or that the spouse is incapable of caring for a child and which sets forth the period of time during which the condition has existed and is likely to exist will usually be sufficient evidence to establish the existence and duration of the condition at the time of the statement. Under paragraph (a)(3) of this section, in addition to the family relationship, there is a further requirement that the son or daughter shall be under

the age of 21, and the exception continues only during the time that the son or daughter is under the age of 21.

(c) Services performed in the employ of a corporation are not within the exception. Services performed in the employ of a partnership are not within the exception unless the requisite family relationship exists between the employee and each of the partners comprising the partnership.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8311, July 2, 1964; T.D. 7374, 40 FR 30950, July 24, 1975]

§ 31.3121(b)(4)–1 Services performed on or in connection with a non-American vessel or aircraft.

(a) Services performed within the United States by an employee for an employer ''on or in connection with'' a vessel not an American vessel, or ''on or in connection with'' an aircraft not an American aircraft, are excepted from employment if—

(1) The employee is employed by such employer ''on and in connection with'' such vessel or aircraft when outside the United States, and

(2) (i) The employee is not a citizen of the United States, or (ii) the employer is not an American employer.

(b) An employee performs services on and in connection with the vessel or aircraft if he performs services on the vessel or aircraft when outside the United States which are also in connection with the vessel or aircraft. Services performed on the vessel outside the United States by employees as officers or members of the crew, or by employees of concessionaires, of the vessel, for example, are performed under such circumstances, since such services are also connected with the vessel. Similarly, services performed on the aircraft outside the United States by employees as officers or members of the crew of the aircraft are performed on and in connection with such aircraft. Services may be performed on the vessel or aircraft, however, which have no connection with it, as in the case of services performed by an employee while on the vessel or aircraft merely as a passenger in the general sense. For example, the services of a buyer in the employ of a department store while he is a passenger on a vessel are not in connection with the vessel.

(c) The expression ''on or in connection with'' refers not only to services performed on the vessel or aircraft but also to services connected with the vessel or aircraft which are not actually performed on it (for example, shore services performed as officers or members of the crew, or as employees of concessionaires, of the vessel).

(d) Services performed within the United States on or in connection with a non-American vessel or aircraft for an employer by an employee who is not a citizen of the United States are excepted from employment, irrespective of whether the employer is or is not an American employer, provided the employee also is employed by such employer on and in connection with the vessel or aircraft when outside the United States. Services performed within the United States on or in connection with a non-American vessel or aircraft by an employee for an employer who is not an American employer also are excepted from employment, irrespective of whether the employee is or is not a citizen of the United States, provided the employee also is employed by such employer on and in connection with the vessel or aircraft when outside the United States. Services performed within the United States on or in connection with a non-American vessel or aircraft for an American employer by an employee who is a citizen of the United States are not excepted from employment under section 3121(b)(4), irrespective of whether the employee is employed by such employer on and in connection with the vessel or aircraft when outside the United States. Further, section 3121(b)(4) does not except from employment services performed within the United States for an employer, whether or not an American employer, on or in connection with a non-American vessel or aircraft by an employee, whether or not a citizen of the United States, who is not also employed by such employer on and in connection with the vessel or aircraft when outside the United States.

(e) Services performed outside the United States on or in connection with a vessel not an American vessel, or on

or in connection with an aircraft not an American aircraft, by a citizen of the United States as an employee for an American employer are not excepted from employment under section 3121(b)(4), irrespective of whether the employee is employed on and in connection with such vessel or aircraft when outside the United States. Services performed outside the United States on or in connection with a vessel not an American vessel or on or in connection with an aircraft not an American aircraft, either by an employee who is not a citizen of the United States or for an employer who is not an American employer, do not, in any event, constitute employment. See paragraph (c) of §31.3121(b)–3, relating to services performed outside the United States which constitute employment.

(f) See paragraph (c)(2)(v) of §31.3121(b)–3 for definitions of ''vessel'' and ''aircraft'', §31.3121(f)–1, for definitions of ''American vessel'' and ''American aircraft'', §31.3121(e)–1, for definition of ''citizen of the United States'', and §31.3121(h)–1, for definition of ''American employer''.

§31.3121(b)(5)–1 Services in employ of an instrumentality of the United States specifically exempted from the employer tax.

Services performed in the employ of an instrumentality of the United States are excepted from employment if such instrumentality is exempt from the employer tax imposed by section 3111 by virtue of any other provision of law which specifically refers to such section 3111 or the corresponding section of prior law (section 1410 of the Internal Revenue Code of 1939) in granting exemption from the employer tax. This exception does not operate to exclude from employment services performed in the employ of an instrumentality of the United States unless the Congress has granted to such instrumentality a specific exemption from the tax imposed by section 3111 or the corresponding section of prior law. For provisions which make general exemptions from Federal taxation ineffectual as to the employer tax imposed by section 3111, see §31.3112–1. For other exceptions from employment applicable with respect to services performed in the employ of an instrumentality of the United States, see §31.3121(b)(6)–1.

§31.3121(b)(6)–1 Services in employ of United States or instrumentality thereof.

(a) *In general.* This section relates to services performed in the employ of the United States Government or in the employ of an instrumentality of the United States. Particular services which are not excepted from employment under one rule set forth in this section may nevertheless be excepted under another rule set forth in this section or under §31.3121(b)(5)–1, relating to services in the employ of an instrumentality of the United States specifically exempted from the employer tax. Moreover, services performed in the employ of the United States or of any instrumentality thereof which are not excepted from employment under paragraph (5) or (6) of section 3121(b) may nevertheless be excepted under some other paragraph of such section. For provisions relating generally to the application of the taxes in the case of services performed in the employ of the United States or a wholly owned instrumentality thereof, see 3122. For provisions relating to the computation of remuneration for service performed by an individual as a member of a uniformed service or for service performed by an individual as a volunteer or volunteer leader within the meaning of the Peace Corps Act, see §31.3121(i)–2 and §31.3121(i)–3, respectively.

(b) *Services covered under a retirement system established by a law of the United States.* Services performed in the employ of the United States or in the employ of any instrumentality thereof are excepted from employment under section 3121(b)(6)(A) if such services are covered under a law enacted by the Congress of the United States which specifically provides for the establishment of a retirement system for employees of the United States or of such instrumentality. Determinations as to whether services are covered by a retirement system of the requisite character are to be made as of the time such services are performed. Services of an employee who has an option to

have his services covered under a retirement system are not covered under such retirement system unless and until he exercises such option. The test is whether particular services performed by an employee are covered by a retirement system of the requisite character rather than whether the position in which such services are performed is covered by such retirement system.

(c) *Services performed for an instrumentality not subject to employer tax on December 31, 1950, and covered under a retirement system established by such instrumentality.* (1) Subject to the provisions of subparagraph (4) of this paragraph, services performed in the employ of an instrumentality of the United States are excepted from employment under section 3121(b)(6)(B) if—

(i) The particular instrumentality was not subject on December 31, 1950, to the employer tax imposed by section 1410 of the Internal Revenue Code of 1939, and

(ii) The services are covered by a retirement system established by such instrumentality.

(2) If the particular instrumentality was not in existence on December 31, 1950, but is created thereafter under a law which was in effect on December 31, 1950, services performed in the employ of such instrumentality are excepted from employment (unless otherwise provided in paragraph (c)(4) of this section) if—

(i) The instrumentality had it been in existence on December 31, 1950, would not have been subject on that date to the employer tax imposed by section 1410 of the Internal Revenue Code of 1939, and

(ii) The services are covered by a retirement system established by such instrumentality.

It is immaterial, for purposes of this exception, whether the exemption from the employer tax on December 31, 1950, resulted, or would have resulted, from a tax exemption as such in effect on December 31, 1950, or from the provisions of section 1426(b) (6) of the Internal Revenue Code of 1939 in effect on that date, relating to the exception from employment of services performed in the employ of certain instrumentalities of the United States.

(3) Determinations as to whether services performed in the employ of an instrumentality referred to in paragraph (c)(1) or (2) of this section are covered by a retirement system established by such instrumentality are to be made as of the time such services are performed. Services of an employee who has an option to have his services covered under a retirement system established by the instrumentality are not covered under such retirement system unless and until he exercises such option. The test is whether particular services performed by an employee are covered by a retirement system established by the instrumentality rather than whether the position in which such services are performed is covered by such retirement system.

(4) The exception from employment provided in section 3121(b)(6)(B) has no application with respect to any of the following classes of services:

(i) Services performed in the employ of a corporation which is wholly owned by the United States;

(ii) Services performed in the employ of a production credit association, a Federal Reserve Bank, or a Federal Credit Union; services performed before December 31, 1959, in the employ of a national farm loan association; services performed after December 30, 1959, in the employ of a Federal land bank association; services performed after December 31, 1959, in the employ of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives; services performed after December 31, 1972, in the employ of a Federal home loan bank; and services performed after December 31, 1966, and before January 1, 1973, in the employ of a Federal home loan bank, in the case of individuals who are in such employ on the latter date, provided that an amount equal to the taxes imposed by sections 3101 and 3111 with respect to all such services performed by all such individuals are paid under the provisions of section 3122 by July 1, 1973;

(iii) Services performed in the employ of a State, county, or community committee under the Commodity Stabilization Service;

(iv) Services performed by a civilian employee, not compensated from funds appropriated by the Congress, in the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Exchanges, Marine Corps Exchanges, or other activities, conducted by an instrumentality of the United States subject to the jurisdiction of the Secretary of Defense, at installations of the Department of Defense for the comfort, pleasure, contentment, and mental and physical improvement of personnel of such Department; or

(v) Services performed by a civilian employee, not compensated from funds appropriated by the Congress, in the Coast Guard Exchanges or other activities, conducted by an instrumentality of the United States subject to the jurisdiction of the Secretary of the Treasury, at installations of the Coast Guard for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Coast Guard.

(d) *Special classes of services.* The following classes of services performed either in the employ of the United States or in the employ of any instrumentality thereof are excepted from employment under section 3121(b)(6)(C):

(1) Services performed as the President or Vice President of the United States or a Member, Delegate, or Resident Commissioner, of or to the Congress of the United States;

(2) Services performed in the legislative branch of the United States Government;

(3) Services performed in a penal institution of the United States by an inmate thereof;

(4) (i) Except as provided in paragraph (d)(4)(ii) of this section, services performed by student nurses, medical or dental interns, residents in training, student dietitians, student physical therapists, or student occupational therapists, assigned or attached to a hospital, clinic, or medical or dental laboratory operated by any department, agency, or instrumentality of the U.S. Government, or by certain other student employees described in section 5351(2) of title 5, United States Code.

(ii) The provisions of paragraph (d)(4)(i) of this section have no application to services performed after 1965 by medical or dental interns or by medical or dental residents in training.

(5) Services performed by an individual as an employee serving on a temporary basis in case of fire, storm, earthquake, flood, or other similar emergency; and

(6) (i) Except as provided in paragraph (d)(6)(ii) of this section, services performed by an individual to whom subchapter III of chapter 83 of title 5, United States Code (civil service retirement) does not apply because he is, with respect to such services, subject to another retirement system, established either by a law of the United States or by the agency or instrumentality of the United States for which such services are performed.

(ii) The provisions of paragraph (d)(6)(i) of this section have no application to service performed by an individual to whom subchapter III of chapter 83 of title 5, United States Code (civil service retirement) does not apply because such individual is subject to the retirement system of the Tennessee Valley Authority, if such service is subject to the plan approved by the Secretary of Health and Human Services on December 28, 1956, pursuant to section 104 (i)(2) of the Social Security Amendments of 1956 (70 Stat. 827). See section 201(m)(4) of such amendments for provisions relating to the timeliness of payment of tax with respect to remuneration paid before 1957 for such services, and barring the imposition of interest on the amount of any such tax due for any period before December 28, 1956.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8311, July 2, 1964; T.D. 6983, 33 FR 18016, Dec. 4, 1968; T.D. 7373, 40 FR 30957, July 24, 1975]

§31.3121(b)(7)–1 Services in employ of States or their political subdivisions or instrumentalities.

(a) *In general.* Except as provided in other paragraphs of this section, services performed in the employ of any State, any political subdivision of a State, or any instrumentality of one or more States or political subdivisions thereof which is wholly owned by one

or more States or political subdivisions are excepted from employment. For the definition of the term ''State'', as used in this section, see § 31.3121(e)–1.

(b) *Covered transportation service.* The exception from employment under section 3121(b)(7) does not apply to covered transportation service as defined in section 3121(j). See that section and 31.3121(j)–1.

(c) *Government of American Samoa.* The exception from employment under section 3121(b)(7) does not apply to services performed after 1960 in the employ of the Government of American Samoa, any political subdivision thereof, or any instrumentality of such Government or political subdivision, or combination thereof, which is wholly owned thereby, performed by an officer or employee thereof (including a member of the legislature of such Government or political subdivision).

(d) *District of Columbia.* The exception from employment under section 3121(b)(7) does not apply to services performed after September 30, 1965, in the employ of the District of Columbia or any instrumentality which is wholly owned thereby, if such service is not covered by a retirement system established by a law of the United States. Notwithstanding the preceding sentence the following classes of services performed either in the employ of the District of Columbia or in the employ of any instrumentality which is wholly owned thereby are excepted from employment:

(1) Services performed in a hospital or penal institution by a patient or inmate thereof.

(2) Services performed by student nurses, student dietitians, student physical therapists, or student occupational therapists assigned or attached to a hospital, clinic, or medical or dental laboratory operated by the District of Columbia or by any wholly owned instrumentality thereof, or by certain other student employees described in section 5351(2) of title 5, United States Code. This subparagraph does not apply to services performed by medical or dental interns or by medical or dental residents in training described in such section 5351(2).

(3) Services performed by an individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency.

(4) Services performed by a member of a board, committee, or council of the District of Columbia, paid on a per diem, meeting, or other fee basis.

(e) *Government of Guam.* The exception from employment under section 3121(b)(7) does not apply to services performed after 1972 in the employ of the Government of Guam or any instrumentality which is wholly owned thereby, by an employee properly classified as a temporary or intermittent employee, if such service is not covered by a retirement system established by a law of Guam. The preceding sentence shall not apply to the services performed by an elected official or a member of the legislature or in a hospital or penal institution by a patient or inmate thereof. For purposes of this paragraph—

(1) Any person whose services as an officer or employee of such Government or instrumentality is not covered by a retirement system established by a law of the United States shall not, with respect to such service, be regarded as an employee of the United States or any agency or instrumentality thereof, and

(2) The remuneration for service described in subparagraph (1) (including fees paid to a public official) shall be deemed to have been paid by such Government or instrumentality.

[T.D. 6744, 29 FR 8312, July 2, 1964, as amended by T.D. 6983, 33 FR 18016, Dec. 4, 1968; T.D. 7373, 40 FR 30958, July 24, 1975]

§ 31.3121(b)(7)–2 Service by employees who are not members of a public retirement system.

(a) *Table of contents.* This paragraph contains a listing of the major headings of this § 31.3121(b)(7)–2.

§ 31.3121(b)(7)–2 Service by employees who are not members of a public retirement system.

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(2) Requirement that system provide minimum level of benefits.
(f) Transition rules.
(1) Application of qualified participant rules during 1991.
(2) Additional transition rules for plans in existence on November 5, 1990.

(b) *Introduction.* Under section 3121(b)(7)(F), wages of an employee of a State or local government are generally subject to tax under FICA after July 1, 1991, unless the employee is a member of a retirement system maintained by the State or local government entity. This section 31.3121(b)(7)–2 provides rules for determining whether an employee is a ''member of a retirement system''. These rules generally treat an employee as a member of a retirement system if he or she participates in a system that provides retirement benefits, and has an accrued benefit or receives an allocation under the system that is comparable to the benefits he or she would have or receive under Social Security. In the case of part-time, seasonal and temporary employees, this minimum retirement benefit is required to be nonforfeitable.

(c) *General rule*—(1) *Inclusion in employment of service by employees who are not members of a retirement system.* Except in the case of service described in sections 3121(b)(7)(F) (i) through (v), the exception from employment under section 3121(b)(7) does not apply to service in the employ of a State or any political subdivision thereof, or of any instrumentality of one or more of the foregoing that is wholly owned thereby, after July 1, 1991, unless the employee is a member of a retirement system of such State, political subdivision or instrumentality at the time the service is performed. An employee is not a member of a retirement system at the time service is performed unless at that time he or she is a qualified participant (as defined in paragraph (d) of this section) in a retirement system that meets the requirements of paragraph (e) of this section with respect to that employee.

(2) *Treatment of individuals employed in more than one position.* Under section 3121(b)(7)(F), whether an employee is a member of a retirement system is determined on an entity-by-entity rather than a position-by-position basis. Thus, if an employee is a member of a retirement system with respect to service he or she performs in one position in the employ of a State, political subdivision or instrumentality thereof, the employee is generally treated as a member of a retirement system with respect to all service performed for the same State, political subdivision or instrumentality in any other positions. A State is a separate entity from its political subdivisions, and an instrumentality is a separate entity from the State or political subdivision by which it is owned for purposes of this rule. See paragraph (e)(2) of this section, however, for rules relating to service and compensation required to be taken into account in determining whether an employee is a member of a retirement system for purposes of this section. This rule is illustrated by the following examples:

Example 1. An individual is employed full-time by a county and is a qualified participant (as defined in paragraph (d) of this section) in its retirement plan with regard to such employment. In addition to this full-time employment, the individual is employed part-time in another position with the same county. The part-time position is not covered by the county retirement plan, however, and neither the service nor the compensation in the part-time position is considered in determining the employee's retirement benefit under the county retirement plan. Nevertheless, if the retirement plan meets the requirements of paragraph (e) of this section with respect to the individual, the exclusion from employment under section 3121(b)(7) applies to both the employee's full-time and part-time service with the county.

Example 2. An individual is employed full-time by a State and is a member of its retirement plan. The individual is also employed part-time by a city located in the State, but does not participate in the city's retirement plan. The services of the individual for the city are not excluded from employment under section 3121(b)(7), because

the determination of whether services constitute employment for such purposes is made separately with respect to each political subdivision for which services are performed.

(d) *Definition of qualified participant*—(1) *General rule*—(i) *Defined benefit retirement systems.* Whether an employee is a qualified participant in a defined benefit retirement system is determined as services are performed. An employee is a qualified participant in a defined benefit retirement system (within the meaning of paragraph (e)(1) of this section) with respect to services performed on a given day if, on that day, he or she is or ever has been an actual participant in the retirement system and, on that day, he or she actually has a total accrued benefit under the retirement system that meets the minimum retirement benefit requirement of paragraph (e)(2) of this section. An employee may not be treated as an actual participant or as actually having an accrued benefit for this purpose to the extent that such participation or benefit is subject to any conditions (other than vesting), such as a requirement that the employee attain a minimum age, perform a minimum period of service, make an election in order to participate, or be present at the end of the plan year in order to be credited with an accrual, that have not been satisfied. The rules of this paragraph (d)(1)(i) are illustrated by the following examples:

Example 1. A State maintains a defined benefit plan that is a retirement system within the meaning of paragraph (e)(1) of this section. Under the terms of the plan, employees in positions covered by the plan must complete 6 months of service before becoming participants. The exception from employment in section 3121(b)(7) does not apply to services of an employee during the employee's 6 months of service prior to his or her initial entry into the plan. The same result occurs even if, upon the satisfaction of this service requirement, the employee is given credit under the plan for all service with the employer (i.e., if service is credited for the 6-month waiting period). This is true even if the employee makes a required contribution in order to gain the retroactive credit. The same result also occurs if the employee can elect to participate in the plan before the end of the 6-month waiting period, but does not elect to do so.

Example 2. A political subdivision maintains a defined benefit plan that is a retirement system within the meaning of paragraph (e)(1) of this section. Under the terms of the plan, service during a plan year is not credited for accrual purposes unless a participant has at least 1,000 hours of service during the year. Benefits that accrue only upon satisfaction of this 1,000-hour requirement may not be taken into account in determining whether an employee is a qualified participant in the plan before the 1,000-hour requirement is satisfied.

(ii) *Defined contribution retirement systems.* Whether an employee is a qualified participant in a defined contribution retirement system is determined as services are performed. An employee is a qualified participant in a defined contribution or other individual account retirement system (within the meaning of paragraph (e)(1) of this section) with respect to services performed on a given day if, on that day, he or she has satisfied all conditions (other than vesting) for receiving an allocation to his or her account (exclusive of earnings) that meets the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to compensation during any period ending on that day and beginning on or after the beginning of the plan year of the retirement system. This is the case regardless of whether the allocations were made or accrued before the effective date of section 3121(b)(7)(F). This rule is illustrated by the following examples:

Example 1. A State-owned hospital maintains a nonelective defined contribution plan that is a retirement system within the meaning of paragraph (e)(1) of this section. Under the terms of the plan, employees must be employed on the last day of a plan year in order to receive any allocation for the year. Employees may not be treated as qualified participants in the plan before the last day of the year.

Example 2. Assume the same facts as in *Example 1* except that, under the terms of the plan, an employee who terminates service before the end of a plan year receives a pro rata portion of the allocation he or she would have received at the end of the year, e.g., based on compensation earned since the beginning of the plan year. If the pro rata allocation available on a given day would meet the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to compensation from the beginning of the plan year through that day (or some

later day), employees are treated as qualified participants in the plan on that day.

Example 3. A political subdivision maintalns an elective defined contribution plan that is a retirement system within the meaning of paragraph (e)(1) of this section. The plan has a calendar year plan year and two open seasons—in December and June—when employees can change their contribution elections. In December, an employee elects not to contribute to the plan. In June, the employee elects (beginning July 1) to contribute a uniform percentage of compensation for each pay period to the plan for the remainder of the plan year. The employee is not a qualified participant in the plan during the period January–June, because no allocations are made to the employee's account with respect to compensation during that time, and it is not certain at that time that any allocations will be made. If the level of contributions during the period July–December meets the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to compensation during that period, however, the employee is treated as a qualified participant during that period.

Example 4. Assume the same facts as in *Example 3*, except that the plan allows participants to cancel their elections in cases of economic hardship. In October, the employee suffers an economic hardship and cancels the election (effective November 1). If the contributions during the period July–October are high enough to meet the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to compensation during that period, the employee is treated as a qualified participant during that period. In addition, if the contributions during the period July–October are high enough to meet the requirements for the entire period July–December, the employee is treated as a qualified participant in the plan throughout the period July–December, even though no allocations are made to the employee's account in the last two months of the year. There is no requirement that the period used to determine whether an employee is a qualified participant on a given day remain the same from day to day, as long as the period begins on or after the beginning of the plan year and ends on the date the determination is being made.

(2) *Special rule for part-time, seasonal and temporary employees*—(i) *In general.* A part-time, seasonal or temporary employee is generally not a qualified participant on a given day unless any benefit relied upon to meet the requirements of paragraph (d)(1) of this section is 100-percent nonforfeitable on that day. This requirement may be applied solely to the portion of an employee's benefit under the retirement system attributable to compensation and service while an employee is a part-time, seasonal or temporary employee, provided that such service is taken into account with respect to the remaining portion of the benefit for vesting purposes. Rules similar to the rules in section 411(a)(11) are applicable in determining whether a benefit is nonforfeitable. Thus, a benefit does not fail to be nonforfeitable solely because it can be immediately distributed upon separation of service without the consent of the employee, provided that the present value of the benefit does not exceed the cash-out limit in effect under §1.411(a)–11T(c)(3)(ii) of this chapter.

(ii) *Treatment of employees entitled to certain distributions upon death or separation from service.* A part-time, seasonal or temporary employee's benefit under a retirement system is considered nonforfeitable within the meaning of paragraph (d)(2)(i) of this section on a given day if on that day the employee is unconditionally entitled under the retirement system to a single-sum distribution on account of death or separation from service of an amount that is at least equal to 7.5 percent of the participant's compensation (within the meaning of paragraph (e)(2)(iii)(B) of this section) for all periods of credited service taken into account in determining whether the employee's benefit under the retirement system meets the minimum retirement benefit requirement of paragraph (e)(2) of this section. An employee will be considered to be unconditionally entitled to a single-sum distribution notwithstanding the fact that the distribution may be forfeitable (in whole or in part) upon a finding of such employee's criminal misconduct. The participant must be entitled to interest on the distributable amount through the date of distribution, at a rate meeting the requirements of paragraph (e)(2)(iii)(C) of this section, as part of the single sum. See paragraph (f)(2)(i)(C) for a transition rule relating to this nonforfeitable benefit safe harbor. The rule of this paragraph (d)(2)(ii) is illustrated by the following example:

Example. An employee is required to contribute 7.5 percent of his or her compensation to a State's defined benefit plan each year. The contribution is ''picked up'' by the employer in accordance with section 414(h). Under the plan, these amounts plus interest accrued since the date each amount was contributed are refundable to the employee in all cases upon the employee's death or separation from service with the employer. If the interest rate meets the requirements of paragraph (e)(2)(iii)(C) of this section, then the employee's benefits under the plan are considered nonforfeitable and thus meet the requirement of paragraph (d)(2)(i) of this section. Of course, the benefit under the plan must still meet the minimum retirement benefit requirement for defined benefit plans of paragraph (e)(2)(ii) of this section.

(iii) *Definitions of part-time, seasonal and temporary employee*—(A) *Definition of part-time employee.* For purposes of this section, a part-time employee is any employee who normally works 20 hours or less per week. A teacher employed by a post-secondary educational institution (e.g., a community or junior college, post-secondary vocational school, college, university or graduate school) is not considered a part-time employee for purposes of this section if he or she normally has classroom hours of one-half or more of the number of classroom hours designated by the educational institution as constituting full-time employment, provided that such designation is reasonable under all the facts and circumstances. In addition, elected officials and election workers (otherwise described in section 3121(b)(7)(F)(iv) but paid in excess of $100 annually) are not considered part-time, seasonal or temporary employees for purposes of this section. The rules of this paragraph (d)(2)(iii) are illustrated by the following example:

Example. A community college treats a teacher as a full-time employee if the teacher is assigned to work 15 classroom hours per week. A new teacher is assigned to work 8 classroom hours per week. Because the assigned classroom hours of the teacher are at least one-half of the school's definition of full-time teacher, the teacher is not a part-time employee.

(B) *Definition of seasonal employee.* For purposes of this section, a seasonal employee is any employee who normally works on a full-time basis less than 5 months in a year. Thus, for example, individuals who are hired by a political subdivision during the tax return season in order to process incoming returns and work full-time over a 3-month period are seasonal employees.

(C) *Definition of temporary employee.* For purposes of this section, a temporary employee is any employee performing services under a contractual arrangement with the employer of 2 years or less duration. Possible contract extensions may be considered in determining the duration of a contractual arrangement, but only if, under the facts and circumstances, there is a significant likelihood that the employee's contract will be extended. Future contract extensions are considered significantly likely to occur for purposes of this rule if on average 80 percent of similarly situated employees (i.e., those in the same or a similar job classification with expiring employment contracts) have had bona fide offers to renew their contracts in the immediately preceding 2 academic or calendar years. In addition, future contract extensions are considered significantly likely to occur if the employee with respect to whom the determination is being made has a history of contract extensions with respect to his or her current position. An employee is not considered a temporary employee for purposes of this rule solely because he or she is included in a unit of employees covered by a collective bargaining agreement of 2 years or less duration.

(D) *Treatment of employees participating in certain systems.* Whether an employee is a part-time, seasonal or temporary employee with respect to allocations or benefits under a retirement system is generally determined based on service in the position in which the allocations or benefits were earned, and does not take into account service in other positions with the same or different States, political subdivisions or instrumentalities thereof. All of an employee's service in other positions with the same or different States, political subdivisions or instrumentalities thereof may be taken into account for purposes of determining whether an employee is a part-time, seasonal or temporary employee with respect to benefits under the retirement system, however, *Provided that:*

The employee's service in the other positions is or was covered by the retirement system; all service aggregated for purposes of determining whether an employee is a part-time, seasonal or temporary employee (and related compensation) is aggregated under the system for all purposes in determining benefits (including vesting); and the employee is treated at least as favorably as a full-time employee under the retirement system for benefit accrual purposes. The rule of this paragraph (d)(2)(iii)(D) is illustrated by the following example:

Example. Assume that an employee works 15 hours per week for a county and 10 hours per week for a municipality, and that both of these political subdivisions contribute to the same state-wide public employee retirement system. Assume further that the employee's service in both positions is aggregated under the system for all purposes in determining benefits (including vesting). If the employee is covered under the retirement system with respect to both positions and is treated for benefit accrual purposes at least as favorably as full-time employees under the retirement system, then the employee is not considered a part-time employee of either the county or the municipality for purposes of the nonforfeitable benefit requirement of paragraph (d)(2)(i) of this section.

(3) *Alternative lookback rule*—(i) *In general.* An employee may be treated as a qualified participant in a retirement system throughout a calendar year if he or she was a qualified participant in such system (within the meaning of paragraphs (d) (1) and (2) of this section) at the end of the plan year of the system ending in the previous calendar year. This rule is illustrated by the following examples:

Example 1. A political subdivision maintains a plan that is a retirement system within the meaning of paragraph (e)(1) of this section. An employee is a qualified participant within the meaning of paragraph (d)(1) of this section in the plan on the last day of the plan year ending on May 31, 1995. If the alternative lookback rule is used to determine FICA liability, no such liability exists with respect to the employee or employer for calendar year 1996 by reason of section 3121(b)(7)(F). The same result would apply if the determination is being made with respect to calendar year 1992 and the lookback year was the plan year ending May 31, 1991, even though that plan year ended before the effective date of section 3121(b)(7)(F).

Example 2. A political subdivision maintains an elective defined contribution plan described in section 457(b) of the Code. An employee is eligible to participate in the plan but does not elect to contribute for a plan year. Under the general rule of paragraph (d)(1) of this section, the employee is not a qualified participant in the plan during the plan year because contributions sufficient to meet the minimum retirement benefit requirement of paragraph (e)(2) of this section are not being made. However, if an employee's status as a qualified participant is being determined under the alternative lookback rule, then the employee is a qualified participant for the calendar year in which the determination is being made if he of she was a qualified participant as of the end of the plan year that ended in the previous calendar year.

(ii) *Application in first year of participation.* If the alternative lookback rule is used, an employee who participates in the retirement system may be treated as a qualified participant on any given day during his or her first plan year of participation in a retirement system (within the meaning of paragraph (e)(1) of this section) if and only if it is reasonable on such day to believe that the employee will be a qualified participant (within the meaning of paragraphs (d)(1) and (2) of this section) on the last day of such plan year. In the case of a defined contribution retirement system, the determination of whether the employee is actually (or is expected to be) a qualified participant at the end of the plan year must take into account all compensation since the commencement of participation. See paragraph (d)(3)(iv) of this section. If this reasonable belief is correct, and the employee is a qualified participant on the last day of his or her first plan year of participation, then the exception from employment in section 3121(b)(7) will apply without regard to section 3121(b)(7)(F) to services of the employee for the balance of the calendar year in which the plan year ends. For purposes of this paragraph (d)(3)(ii), it is not reasonable to assume the establishment of a new plan until such establishment actually occurs. In addition, the rule in this paragraph (d)(3)(ii) may not be used to treat an employee as a qualified participant until the employee actually becomes a participant in the retirement system. In the case of a retirement system that

does not permit a new employee to participate until the first day of the first month beginning after the employee's commencement of service, or some earlier date, a new employee who is not a part-time, seasonal or temporary employee may be treated as a qualified participant until such date. This 1-month rule of administrative convenience applies without regard to whether the employer has a reasonable belief that the employee will be a qualified participant. The rules of this paragraph (d)(3)(ii) are illustrated by the following examples:

Example 1. A political subdivision maintains a plan that is a retirement system within the meaning of paragraph (e)(1) of this section and uses the alternative lookback rule of this paragraph (d)(3). Under the terms of the plan, service during a plan year is not credited for accrual purposes unless a participant has at least 1,000 hours of service during the year. Assume that an employee becomes a participant. If it is reasonable to believe that the employee will be credited with 1,000 hours of service by the last day of his or her first year of participation and thereby become a qualified participant by reason of accruing a benefit that meets the minimum retirement benefit requirement of paragraph (e)(2) of this section, the services of the employee are not subject to FICA tax from the date of initial participation until the end of that plan year. If the employee is a qualified participant on the last day of his or her first plan year of participation, then the exception from employment for purposes of FICA will apply to services of the employee for the balance of the calendar year in which the plan year ended.

Example 2. Assume the same facts as *Example 1,* except that the employee is a newly hired employee and the plan provides that an employee may not participate until the first day of his or her first full month of employment. Under the 1-month rule of convenience, the employee may be treated as a qualified participant until the first date on which he or she could participate in the plan.

(iii) *Application in last year of participation.* If the alternative lookback rule is used, an employee may be treated as a qualified participant on any given day during his or her last year of participation in a retirement system (within the meaning of paragraph (e)(1) of this section) if and only if it is reasonable to believe on such day that the employee, will be a qualified participant (within the meaning of paragraphs (d)(1) and (2) of this section) on his or her last day of participation. For purposes of this paragraph (d)(3)(iii), an employee's last year of participation means the plan year that the employer reasonably ascertains is the final year of such employee's participation (e.g., where the employee has a scheduled retirement date or where the employer intends to terminate the plan).

(iv) *Special rule for defined contribution retirement systems.* An employee may not be treated as a qualified participant in a defined contribution retirement system under this paragraph (d)(3) if compensation for less than a full plan year or other 12-month period is regularly taken into account in determining allocations to the employee's account for the plan year unless, under all of the facts and circumstances, such arrangement is not a device to avoid the imposition of FICA taxes. For example, an arrangement under which compensation taken into account is limited to the contribution base described in section 3121(x)(1) is not considered a device to avoid FICA taxes by reason of such limitation. See paragraph (e)(2)(iii)(B) of this section for a rule permitting the use of such limitation. This rule is illustrated by the following example:

Example. A political subdivision maintains a defined contribution plan that covers all of its full-time employees and is a retirement system within the meaning of paragraph (e)(1) of this section. Under the plan, a portion of each participant's compensation in the final month of every plan year is allocated to the participant's account. Employees covered under the plan generally may not be treated as qualified participants under the alternative lookback rule for any portion of the calendar year following the year in which such allocation is made.

(v) *Consistency requirement.* Beginning with calendar year 1992, if the alternative lookback rule is used to determine whether an employee is a qualified participant, it must be used consistently from year to year and with respect to all employees of the State, political subdivision or instrumentality thereof making the determination. If a retirement system is sponsored by more than one State, political subdivision or instrumentality, this consistency requirement applies separately to each plan sponsor.

(4) *Treatment of former participants*—(i) *In general.* In general, the rules of this paragraph (d) apply equally to former participants who continue to perform service for the same State, political subdivision or instrumentality thereof or who return after a break in service. Thus, for example, a former employee of a political subdivision with a deferred benefit under a defined benefit retirement system maintained by the political subdivision who is re-employed by the political subdivision but does not resume participation in the retirement system, may continue to be a qualified participant in the system after becoming reemployed if his or her total accrued benefit under the system meets the minimum retirement benefit requirement of paragraph (e)(2) of this section (taking into account all periods of service (including current service) required to be taken into account under that paragraph). See also paragraph (e)(2)(v) of this section for situations in which benefits under a retirement system may be taken into account even though they relate to service for another employer.

(ii) *Treatment of re-hired annuitants.* An employee who is a former participant in a retirement system maintained by a State, political subdivision or instrumentality thereof, who has previously retired from service with the State, political subdivision or instrumentality, and who is either in pay status (i.e., is currently receiving retirement benefits) under the retirement system or has reached nomal retirement age under the retirement system, is deemed to be a qualified participant in the retirement system without regard to whether he or she continues to accrue a benefit or whether the distribution of benefits under the retirement system has been suspended pending cessation of services. This rule also applies in the case of an employee who has retired from service with another State, political subdivision or instrumentality thereof that maintains the same retirement system as the current employer, provided the employee is a former participant in the system by reason of the employee's former employment. Thus, for example, if a teacher retires from service with a school district that participates in a state-wide teachers' retirement system, begins to receive benefits from the system, and later becomes a substitute teacher in another school district that participates in the same state-wide system, the employee is treated as a re-hired annuitant under this paragraph (d)(4)(ii).

(e) *Definition of retirement system*—(1) *Requirement that system provide retirement-type benefits.* For purposes of section 3121(b)(7)(F), a retirement system includes any pension, annuity, retirement or similar fund or system within the meaning of section 218 of the Social Security Act that is maintained by a State, political subdivision or instrumentality thereof to provide retirement benefits to its employees who are participants. Whether a plan is maintained to provide retirement benefits with respect to an employee is determined under the facts and circumstances of each case. For example, a plan providing only retiree health insurance or other deferred welfare benefits is not considered a retirement system for this purpose. The legal form of the system is generally not relevant. Thus, for example, a retirement system may include a plan described in section 401(a), an annuity plan or contract under section 403 or a plan described in section 457(b) or (f) of the Internal Revenue Code. In addition, the Social Security system is not a retirement system for purposes of section 3121(b)(7)(F) and this section. These rules are illustrated by the following examples:

Example 1. Under an employment arrangement, a portion of an employee's compensation is regularly deferred for 5 years. Because a plan that defers the receipt of compensation for a short span of time rather than until retirement is not a plan that provides retirement benefits, this arrangement is not a retirement system for purposes of section 3121(b)(7)(F).

Example 2. An individual holds two positions with the same political subdivision. The wages earned in one position are subject to FICA tax pursuant to an agreement (under section 218 of the Social Security Act) between the Secretary of Health and Human Services and the State in which the political subdivision is located. Because the Social Security system is not a retirement system for purposes of section 3121(b)(7)(F), the exception from employment in section 3121(b)(7) does not apply to service in the

other position unless the employee is otherwise a member of a retirement system of such political subdivision.

(2) *Requirement that system provide minimum level of benefits*—(i) *In general.* A pension, annuity, retirement or similar fund or system is not a retirement system with respect to an employee unless it provides a retirement benefit to the employee that is comparable to the benefit provided under the Old-Age portion of the Old-Age, Survivor and Disability Insurance program of Social Security. Whether a retirement system meets this requirement is generally determined on an individual-by-individual basis. Thus, for example, a pension plan that is not a retirement system with respect to an employee may nevertheless be a retirement system with respect to other employees covered by the system.

(ii) *Defined benefit retirement systems.* A defined benefit retirement system maintained by a State, political subdivision or instrumentality thereof meets the requirements of this paragraph (e)(2) with respect to an employee on a given day if and only if, on that day, the employee has an accrued benefit under the system that entitles the employee to an annual benefit commencing on or before his or her Social Security retirement age that is at least equal to the annual Primary Insurance Amount the employee would have under Social Security. For this purpose, the Primary Insurance Amount an individual would have under Social Security is determined as it would be under the Social Security Act if the employee had been covered under Social Security for all periods of service with the State, political subdivision or instrumentality, had never performed service for any other employer, and had been fully insured within the meaning of section 214(a) of the Social Security Act, except that all periods of service with the State, political subdivision or instrumentality must be taken into account (i.e., without reduction for low-earning years).

(iii) *Defined contribution retirement systems*—(A) *In general.* A defined contribution retirement system maintained by a State, political subdivision or instrumentality thereof meets the requirements of paragraph (e)(2)(i) of this section with respect to an employee if and only if allocations to the employee's account (not including earnings) for a period are at least 7.5 percent of the employee's compensation for service for the State, political subdivision or instrumentality during the period. Matching contributions by the employer may be taken into account for this purpose.

(B) *Definition of compensation.* The definition of compensation used in determining whether a defined contribution retirement system meets the minimum retirement benefit requirement must generally be no less inclusive than the definition of the employee's base pay as designated by the employer or the retirement system, provided such designation is reasonable under all the facts and circumstances. Thus, for example, a defined contribution retirement system will not fail to meet this requirement merely because it disregards for all purposes one or more of the following: overtime pay, bonuses, or single-sum amounts received on account of death or separation from service under a bona fide vacation, compensatory time or sick pay plan, or under severance pay plans. Furthermore, any compensation remaining after such amounts are disregarded that is in excess of the contribution base described in section 3121(x)(1) at the beginning of the plan year may also be disregarded. The rules of this paragraph are illustrated by the following example:

Example. A political subdivision maintains an elective defined contribution plan that is a retirement system within the meaning of paragraph (e)(1) of this section. The plan has a calendar year plan year. In 1995, an employee contributes to the plan at a rate of 7.5 percent of base pay. Assume that the employee will reach the maximum contribution base described in section 3121(x)(1) in October of 1995. The employee is a qualified participant in the plan for all of the 1995 plan year without regard to whether the employee ceases to participate at any time after reaching the maximum contribution base.

(C) *Reasonable interest rate requirement.* A defined contribution retirement system does not satisfy this paragraph (e)(2) with respect to an employee unless the employee's account is credited with earnings at a rate that is reasonable under all the facts and circumstances, or employees' accounts

are held in a separate trust that is subject to general fiduciary standards and are credited with actual earnings on the trust fund. Whether the interest rate with which an employee's account is credited is reasonable is determined after reducing the rate to adjust for the payment of any administrative expenses. The rule of this paragraph (e)(2)(iii)(C) is illustrated by the following example:

Example. A political subdivision maintains a defined contribution plan described in section 457(b). Under the plan, the accounts of participants are credited annually on the basis of a variable interest rate formula determined as of the beginning of the plan year. The formula requires an interest rate (after adjustment for administrative expense payments) equal to 100 percent of the Applicable Federal Rate for long-term debt instruments. This interest rate constitutes a reasonable rate of interest.

(iv) *Treatment of emloyees employed in more than one position with the same entity.* All service and compensation of an employee with respect to his or her employment with a State, political subdivision or instrumentality thereof must generally be considered in determining whether a benefit meets the requirement of this paragraph (e)(2). However, for individuals employed simultaneously in multiple positions with the same entity, this determination may (but is not required to) be made solely by reference to the service and compensation related to a single position of the employee with the State, political subdivision or instrumentality thereof making the determination, provided that the position is not a part-time, seasonal or temporary position.

(v) *Treatment of employees participating in certain systems.* In general, only compensation from and service for the State, political subdivision or instrumentality thereof that employs the employee (and the allocations or benefits related to such compensation or service) on a given day are considered in determining whether the employee's benefit under the retirement system on that day meets the requirements of this paragraph (e)(2), even if the employee has other allocations or benefits under the same retirement system from service with another State, political subdivision or instrumentality thereof. However, an employee's total allocations or benefits under a retirement system maintained by multiple States, political subdivisions or instrumentalities thereof (including the current employer) may be taken into account if:

(A) The compensation and service on which the additional allocations or benefits are based are also taken into account in determining whether the employee's allocations or benefits satisfy the minimum retirement benefit requirement;

(B) The retirement system takes all service and compensation of the employee in all positions covered by the system into account for all benefit determination purposes; and

(C) If the employee is a part-time, seasonal or temporary employee, he or she is treated under the plan for benefit accrual purposes in as favorable a manner as a full-time employee participating in the system.

(vi) *Additional testing methods.* Additional testing methods may be designated by the Commissioner in revenue procedures, revenue rulings, notices or other documents of general applicability.

(f) *Transition rules*—(1) *Application of qualified participant rules during 1991*—(i) *In general.* An employee may be treated as a qualified participant in a retirement system (within the meaning of paragraph (e)(1) of this section) on a given day during the period July 1 through December 31, 1991, if it is reasonable on that day to believe that he or she will be a qualified participant under the general rule in paragraphs (d) (1) and (2) of this section by January 1, 1992 (taking into account only service and compensation on or after such date). For purposes of this paragraph (f)(1)(i), given the facts and circumstances of a particular case, it may be reasonable to assume that the terms of a plan will be changed or that a new retirement system will be established by the end of calendar year 1991, as long as affirmative steps have been taken to accomplish this result.

(ii) *Extension of reliance period if legislative action required.* If a plan amendment or other action is necessary in order to treat an employee as a member of a retirement system for purposes

of this section, such amendment or other action may only be taken by a legislative body that does not convene during the period July 1, 1991, through December 31, 1991, and the other requirements of paragraph (f)(1)(i) of this section are met, the end of the reasonable reliance period (including the rule that service and compensation prior to that date may be disregarded) provided under paragraph (f)(1)(i) of this section is extended from December 31, 1991, to the date that is the last day of the first legislative session commencing after December 31, 1991. These rules are illustrated by the following examples:

Example 1. A State maintains a defined benefit plan that meets the requirements of paragraph (e) of this section. The plan does not cover a particular class of full-time employees as of July 1, 1991. However, in light of the enactment of section 3121(b)(7)(F), State officials administering the plan for the State intend to request that the legislature amend the State statute to include that class of employees in the existing plan and otherwise to modify the terms of the plan to meet the requirements of section 3121(b)(7)(F) and this section. The State legislature meets from January through March each year, and legislative action is required to expand coverage under the plan. State officials administering the plan have publicized the proposed amendment providing for the addition of these employees to the plan. Under the transition rule for 1991, if it is reasonable to believe that the legislature will pass this bill in the 1992 session, service by the employees who will be covered under the plan by reason of the amendment is not treated as employment by reason of section 3121(b)(7)(F) during the period prior to April 1, 1992. This is true regardless of whether the plan provides retroactive coverage for the period July 1, 1991 through March 31, 1992.

Example 2. Assume the same facts as in *Example 1,* except that legislative action is not required in order to expand coverage under the plan, and that publication of the proposed change to the plan occurs in 1991. Assume further that coverage is expanded under the plan to include the new class of full-time employees as of April 1, 1992. Despite this action, in this situation the service by those employees during the period January 1, 1992 through March 31, 1992 is not excluded from ''employment'' under section 3121(b)(7)(F), and wages for that period are generally subject to FICA taxes even if the plan provides retroactive coverage for any portion of the period July 1, 1991 to March 31, 1992.

(2) *Additional transition rules for plans in existence on November 5, 1990*—(i) *Application of minimum retirement benefit requirement to defined benefit retirement systems in plan years beginning before 1993*—(A) *In general.* A defined benefit retirement system maintained by a State, political subdivision or instrumentality thereof on November 5, 1990, is not subject to the minimum retirement benefit requirement of paragraph (e)(2) of this section for any plan year beginning before January 1, 1993, with respect to individuals who were actually covered under the system on November 5, 1990. Such a retirement system is also not subject to the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to an employee who becomes a participant after November 5, 1990, if he or she is employed in a position that was covered under the retirement system on November 5, 1990, without regard to whether such coverage was mandatory or elective. A retirement system is not described in this paragraph (f)(2)(i)(A) if there has been a material decrease in the level of retirement benefits under the retirement system pursuant to an amendment adopted subsequent to November 5, 1990. Whether such a material decrease in benefits has occurred is determined under the facts and circumstances of each case. A decrease in benefits is not material to the extent that it does not decrease the benefit payable at normal retirement age. These rules are illustrated by the following examples:

Example 1. The retirement formula under a retirement plan that was in existence on November 5, 1990, is amended to use career average compensation instead of a high 3-year average, without any increase in the benefit formula. This amendment constitutes a material decrease in the level of benefit under the retirement plan. Therefore, the retirement plan is subject to the minimum retirement benefit requirement for the plan year for which the amendment is effective and for all succeeding plan years.

Example 2. A defined benefit retirement plan that was in existence on November 5, 1990, is subsequently amended to include part-time employees. Previously, this class of employees was not covered under the plan either on a mandatory or on an elective basis. The plan is subject to the minimum retirement benefit requirement with respect to the part-time employees because this

class of employees was previously excluded from coverage under the retirement plan. Of course, the nonforfeitable benefit rule applies to the benefit relied upon to meet the minimum retirement benefit requirement with respect to any part-time, seasonal or temporary employee covered during this period.

(B) *Treatment in plan years beginning after 1992 of benefits accrued during previous plan years.* The general rule that a defined benefit retirement system meets the minimum retirement benefit requirement on the basis of total benefits and service accrued to date is modified for plans in existence on November 5, 1990. If a defined benefit retirement system in existence on November 5, 1990, does not meet the minimum retirement benefit requirement solely because the benefits accrued for an employee (with respect to whom the system is entitled to relief under paragraph (f)(2)(i)(A) of this section) as of the last day of the last plan year beginning before January 1, 1993, do not meet the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to service and compensation before that time, then the retirement system will be deemed to comply with the requirements of paragraph (e)(2) of this section if the future service accruals would comply with the requirement of paragraph (e)(2) of this section. If retirement benefits under a retirement system in existence on November 5, 1990 are materially decreased within the meaning of paragraph (f)(2)(i)(A) of this section, then the date the decrease is effective is substituted for January 1, 1993 for purposes of this paragraph. The rule of this paragraph (f)(2)(i)(B) is illustrated by the following example:

Example. A defined benefit plan maintained by a State was in existence on November 5, 1990. It provides a retirement benefit on the last day of the 1992 plan year that is insufficient to meet the requirements of paragraph (e)(2) of this section based on employees' total service and compensation with the State at that time. The plan will nevertheless meet the requirements of paragraph (e)(2) of this section if it is amended to provide benefits sufficient to meet the requirements of paragraph (e)(2) of this section based on employees' service and compensation in plan years beginning after December 31, 1992.

(C) *Treatment of part-time, seasonal or temporary employees.* A defined benefit retirement system is not exempt from the minimum retirement benefit requirement with respect to a part-time, seasonal or temporary employee during the transition period provided in paragraph (f)(2)(i)(A) of this section unless any retirement benefit provided to the employee is 100-percent nonforfeitable within the meaning of paragraph (d)(2) of this section. In determining whether the benefit is nonforfeitable, the special rule in paragraph (d)(2)(ii) of this section is modified in two respects during the transition period: first, the percentage of compensation required to be available for distribution is reduced from 7.5 percent to 6 percent; and second, the period of service with respect to which compensation must be determined is modified to include all periods of participation by the employee in the system since July 1, 1991.

(ii) *Application of minimum retirement benefit requirement to defined contribution retirement systems in plan years beginning before 1993.* A defined contribution retirement system maintained by a State, political subdivision or instrumentality thereof on November 5, 1990, meets the minimum retirement benefit requirement of paragraph (e) (2) of this section with respect to an employee for any plan year beginning before January 1, 1993, if mandatory allocations to the employee's account (not including earnings) for a period are at least 6 percent (rather than 7.5 percent) of the employee's compensation for service to the State, political subdivision or instrumentality during the period, and the plan otherwise meets the requirements of paragraph (e)(2)(iii) of this section. This transition rule is only available with respect to an employee who is actually covered under the system on November 5, 1990, and to an employee who becomes a participant after November 5, 1990, if he or she is employed in a position that was covered under the retirement system on November 5, 1990, without regard to whether such coverage was mandatory or elective. In addition, this transition rule is not available with respect to a part-time, seasonal or temporary employee unless the mandatory allocation required under this paragraph (f)(2)(ii)

is 100-percent nonforfeitable within the meaning of paragraph (d)(2) of this section. A retirement system is not described in this paragraph (f)(2)(ii) if there has been a material decrease in the level of retirement benefits under the retirement system pursuant to an amendment adopted subsequent to November 5, 1990. Whether such a material decrease in benefits has occurred is determined under all the facts and circumstances.

(iii) *Application of qualified participant rules.* A participant with respect to whom relief is granted under paragraph (f)(2)(i)(A) of this section may be treated as a qualified participant in the defined benefit retirement system on a given day if, on that day, he or she is actually a participant in the retirement system, and, on that day, it is reasonable to believe that the participant will actually accrue a benefit before the end of the plan year of such retirement system in which the determination is made. A participant is not treated as accruing a benefit for purposes of this rule if his or her accrued benefits increase solely as a result of an increase in compensation. However, an employee is treated as a qualified participant for a plan year if the employee meets all of the applicable conditions for accruing the maximum current benefit for such year but fails to accrue a benefit solely because of a uniformly applicable benefit limit under the plan. In addition, an employee may be treated as a qualified participant in the system on a given day if the employee is a re-hired annuitant within the meaning of paragraph (d)(4)(ii) of this section. This rule is illustrated by the following example:

Example. A political subdivision maintains a defined benefit plan that is a retirement system within the meaning of paragraph (e)(1) of this section but does not meet the requirements of paragraph (e)(2) of this section. If the plan is not subject to the minimum retirement benefit requirement, an employee who is a participant in the retirement plan as of the end of a plan year beginning before January 1, 1993, and may reasonably be expected to accrue a benefit under the plan by the end of such plan year may be treated as a qualified participant in the plan throughout the plan year regardless of the actual amount of the accrual.

[T.D. 8354, 56 FR 29570, June 28, 1991; 56 FR 40246, Aug. 14, 1991, as amended by T.D. 8794, 63 FR 70338, Dec. 21, 1998]

§ 31.3121(b)(8)–1 Services performed by a minister of a church or a member of a religious order.

(a) *In general.* Services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, or by a member of a religious order in the exercise of his duties required by such order, are excluded from employment, except that services performed by a member of such an order in the exercise of such duties (whether performed for the order or for another employer) are included in employment if an election of coverage under section 3121(r) and §31.3121(r)–1 is in effect with respect to such order or with respect to the autonomous subdivision thereof to which such member belongs. For provisions relating to the election available to certain ministers and members of religious orders with respect to the extension of the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act to certain services performed by them, see Part 1 of this chapter (Income Tax Regulations).

(b) *Service by a minister in the exercise of his ministry.* Except as provided in paragraph (c)(3) of this section, service performed by a minister in the exercise of his ministry includes the ministration of sacerdotal functions and the conduct of religious worship, and the control, conduct, and maintenance of religious organizations (including the religious boards, societies, and other integral agencies of such organizations), under the authority of a religious body constituting a church or church denomination. The following rules are applicable in determining whether services performed by a minister are performed in the exercise of his ministry:

(1) Whether service performed by a minister constitutes the conduct of religious worship or the ministration of

sacerdotal functions depends on the tenets and practices of the particular religious body constituting his church or church denomination.

(2) Service performed by a minister in the control, conduct, and maintenance of a religious organization relates to directing, managing, or promoting the activities of such organization. Any religious organization is deemed to be under the authority of a religious body constituting a church or church denomination if it is organized and dedicated to carrying out the tenets and principles of a faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith. The term ''religious organization'' has the same meaning and application as is given to the term for income tax purposes.

(3) (i) If a minister is performing service in the conduct of religious worship or the ministration of sacerdotal functions, such service is in the exercise of his ministry whether or not it is performed for a religious organization.

(ii) The rule in paragraph (b)(3)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged to perform service as chaplain at N University. M devotes his entire time to performing his duties as chaplain which include the conduct of religious worship, offering spiritual counsel to the university students, and teaching a class in religion. M is performing service in the exercise of his ministry.

(4) (i) If a minister is performing service for an organization which is operated as an integral agency, of a religious organization under the authority of a religious body constituting a church or church denomination, all service performed by the minister in the conduct of religious worship, in the ministration of sacerdotal functions, or in the control conduct, and maintenance of such organization (see paragraph (b)(2) of this section) is in the exercise of his ministry.

(ii) The rule in paragraph (b)(4)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged by the N Religious Board to serve as director of one of its departments. He performs no other service. The N Religious Board is an integral agency of O, a religious organization operating under the authority of a religious body constituting a church denomination. M is performing service in the exercise of his ministry.

(5) (i) If a minister, pursuant to an assignment or designation by a religious body constituting his church, performs service for an organization which is neither a religious organization nor operated as an integral agency of a religious organization, all service performed by him, even though such service may not involve the conduct of religious worship or the ministration of sacerdotal functions, is in the exercise of his ministry.

(ii) The rule in paragraph (b)(5)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is assigned by X, the religious body constituting his church, to perform advisory service to Y Company in connection with the publication of a book dealing with the history of M's church denomination. Y is neither a religious organization nor operated as an integral agency of a religious organization. M performs no other service for X or Y. M is performing service in the exercise of his ministry.

(c) *Service by a minister not in the exercise of his ministry.* (1) Section 3121(b)(8)(A) does not except from employment service performed by a duly ordained, commissioned, or licensed minister of a church which is not in the exercise of his ministry.

(2) (i) If a minister is performing service for an organization which is neither a religious organization nor operated as an integral agency of a religious organization and the service is not performed pursuant to an assignment or designation by his ecclesiastical superiors, then only the service performed by him in the conduct of religious worship or the ministration of sacerdotal functions is in the exercise of his ministry. See, however, paragraph (c)(3) of this section.

(ii) The rule in paragraph (c)(2)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged by N University to teach history and mathematics. He performs no other service for N although from time to time he performs marriages and conducts funerals for relatives and friends. N University is neither

a religious organization nor operated as an integral agency of a religious organization. M is not performing the service for N pursuant to an assignment or designation by his ecclesiastical superiors. The service performed by M for N University is not in the exercise of his ministry. However, service performed by M in performing marriages and conducting funerals is in the exercise of his ministry.

(3) Service performed by a duly ordained, commissioned, or licensed minister of a church as an employee of the United States, or a State, Territory, or possession of the United States, or the District of Columbia, or a foreign government, or a political subdivision of any of the foregoing, is not considered to be in the exercise of his ministry for purposes of the taxes, even though such service may involve the ministration of sacerdotal function or the conduct of religious worship. Thus, for example, service performed by an individual as a chaplain in the Armed Forces of the United States is considered to be performed by a commissioned officer in his capacity as such, and not by a minister in the exercise of his ministry. Similarly, service performed by an employee of a State as a chaplain in a State prison is considered to be performed by a civil servant of the State and not by a minister in the exercise of his ministry.

(d) *Service in the exercise of duties required by a religious order.* Service performed by a member of a religious order in the exercise of duties required by such order includes all duties required of the member by the order. The nature or extent of such service is immaterial so long as it is a service which he is directed or required to perform by his ecclesiastical superiors.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7280, 38 FR 18369, July 10, 1973]

§ 31.3121(b)(8)–2 Services in employ of religious, charitable, educational, or certain other organizations exempt from income tax.

(a) Services performed by an employee in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a) are excepted from employment. However, this exception does not apply to services with respect to which a certificate, filed pursuant to section 3121 (k) or (r), or section 1426(l) of the Internal Revenue Code of 1939, is in effect. For provisions relating to the services with respect to which such a certificate is in effect, see §§ 31.3121(k)–1 and 31.3121(r)–1.

(b) For provisions relating to exemption from income tax of an organization described in section 501(c)(3), see Part 1 of this chapter (Income Tax Regulations). For provisions relating to waiver by an organization of its exemption from the taxes imposed by sections 3101 and 3111, see § 31.3121(k)–1. See also § 31.3121(b)(8)–1, relating to services performed by a minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; § 31.3121(b)(10)–1, relating to services for remuneration of less than $50 for calendar quarter in the employ of certain organizations exempt from income tax; § 31.3121(b)(10)–2, relating to services performed in the employ of a school, college, or university by certain students; and § 31.3121(b)(13)–1, relating to services performed by certain student nurses and hospital interns.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7280, 38 FR 18369, July 10, 1973]

§ 31.3121(b)(9)–1 Railroad industry; services performed by an employee or an employee representative as defined in section 3231.

Services performed by an individual as an ''employee'' or as an ''employee representative'', as those terms are defined in section 3231, are excepted from employment. For definitions of employee and employee representatives, see §§ 31.3231(b)–1 and 31.3231(c)–1.

§ 31.3121(b)(10)–1 Services for remuneration of less than $50 for calendar quarter in the employ of certain organizations exempt from income tax.

(a) Services performed by an employee in a calendar quarter in the employ of an organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521 are excepted from employment if the remuneration for the services is less than

$50. The test relating to remuneration of $50 is based on the remuneration earned during a calendar quarter rather than on the remuneration paid in a calendar quarter. The exception applies separately with respect to each organization for which the employee renders services in a calendar quarter. The type of services performed by the employee and the place where the services are performed are immaterial; the statutory tests are the character of the organization in the employ of which the services are performed and the amount of the remuneration for services performed by the employee in the calendar quarter. For provisions relating to exemption from income tax under section 501(a) or 521, see Part 1 of this chapter (Income Tax Regulations).

Example 1. X is a local lodge of a fraternal organization and is exempt from income tax under section 501(a) as an organization of the character described in section 501(c)(8). X has two paid employees, A, who serves exclusively as recording secretary for the lodge, and B, who performs services for the lodge as janitor of its clubhouse. For services performed during the first calendar quarter of 1955 (that is, January 1, 1955, through March 31, 1955, both dates inclusive) A earns a total of $30. For services performed by certain student quarter B earns $180. Since the remuneration for the services performed by A during such quarter is less than $50, all of such services are expected, and the taxes do not attach with respect to any of the remuneration for such services. Since the remuneration for the services performed by B during such quarter, however, is not less than $50, none of such services are excepted, and the taxes attached with respect to all of the remuneration for such services (that is, $180) as and when paid.

Example 2. The facts are the same as in example 1, above, except that on April 1, 1955, A's salary is increased and, for services performed during the calendar quarter beginning on that date (that is, April 1, 1955, through June 30, 1955, both dates inclusive), A earns a total of $60. Although all of the services performed by A during the first quarter were excepted, none of A's services performed during the second quarter are excepted since the remuneration for such services is not less than $50. The taxes attach with respect to all of the remuneration for services performed during the second quarter (that is, $60) as and when paid.

Example 3. The facts are the same as in example 1, above, except that A earns $120 for services performed during the year 1955, and such amount is paid to him in a lump sum at the end of the year. The services performed by A in any calendar quarter during the year are excepted if the portion of the $120 attributable to services performed in that quarter is less than $50. If, however, the portion of the $120 attributable to services performed in any calendar quarter during the year is not less than $50, the services during that quarter are not excepted, and the taxes attach with respect to that portion of the remuneration attributable to his services in that quarter.

(b) See § 31.3121(b)(8)–2, relating to services performed in the employ of religious, charitable, educational, and certain other organizations exempt from income tax; § 31.3121(b)(8)–1, relating to services performed by a minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; § 31.3121(b)(10)–2, relating to services performed by certain students in the employ of a school, college, or university or of a nonprofit organization auxiliary to a school, college, or university; and § 31.3121(b)(13)–1, relating to services performed by certain student nurses and hospital interns.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7373, 40 FR 30958, July 24, 1975]

§ 31.3121(b)(10)–2 Services performed by certain students in the employ of a school, college, or university, or of a nonprofit organization auxiliary to a school, college, or university.

(a) (1) Services performed in the employ of a school, college, or university (whether or not such organization is exempt from income tax) are excepted from employment, if the services are performed by a student who is enrolled and is regularly attending classes at such school, college, or university.

(2) Services performed after 1972 in the employ of an organization which is—

(i) Described in section 509(a)(3) and § 1.509(a)–4;

(ii) Organized, and at all times thereafter operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university; and

(iii) Operated, supervised, or controlled by or in connection with such school, college, or university;

are excepted from employment, if the services are performed by a student who is enrolled and is regularly attending classes at such school, college, or university. The preceding sentence shall not apply to services performed in the employ of a school, college, or university of a State or a political subdivision thereof by a student referred to in section 218(c)(5) of the Social Security Act (42 U.S.C. 418(c)(5)) if such services are covered under the agreement between the Secretary of Health, Education, and Welfare and such State entered into pursuant to section 218 of such Act. For the definitions of ''operated, supervised, or controlled by'', ''supervised or controlled in connection with'', and ''operated in connection with'', see paragraphs (g), (h), and (i), respectively, of § 1.509(a)–4.

(b) For purposes of this exception, the amount of remuneration for services performed by the employee in the calendar quarter, the type of services performed by the employee, and the place where the services are performed are immaterial. The statutory tests are (1) the character of the organization in the employ of which the services are performed as a school, college, or university, or as an organization described in paragraph (a)(2) of this section, and (2) the status of the employee as a student enrolled and regularly attending classes at the school, college, or university by which he is employed or with which his employer is affiliated.

(c) The status of the employee as a student performing the services shall be determined on the basis of the relationship of such employee with the organization for which the services are performed. An employee who performs services in the employ of a school, college, or university, as an incident to and for the purpose of pursuing a course of study at such school, college, or university has the status of a student in the performance of such services. An employee who performs services in the employ of an organization described in paragraph (a)(2) of this section, as an incident to and for the purpose of pursuing a course of study at a school, college, or university with which such organization is affiliated, has the status of a student in the performance of such services.

(d) The term ''school, college, or university'' within the meaning of this exception is to be taken in its commonly or generally accepted sense.

(e) For provisions relating to domestic service performed by a student in a local college club, or local chapter of a college fraternity or sorority, see § 31.3121(b)(2)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7373, 40 FR 30958, July 24, 1975]

§ 31.3121(b)(11)–1 Services in the employ of a foreign government.

(a) Services performed by an employee in the employ of a foreign government are excepted from employment. The exception includes not only services performed by ambassadors, ministers, and other diplomatic officers and employees but also services performed as a consular or other officer or employee of a foreign government, or as a nondiplomatic representative thereof.

(b) For purposes of this exception, the citizenship or residence of the employee is immaterial. It is also immaterial whether the foreign government grants an equivalent exemption with respect to similar services performed in the foreign country by citizens of the United States.

§ 31.3121(b)(12)–1 Services in employ of wholly owned instrumentality of foreign government.

(a) Services performed by an employee in the employ of certain instrumentalities of a foreign government are excepted from employment. The exception includes all services performed in the employ of an instrumentality of the government of a foreign country, if—

(1) The instrumentality is wholly owned by the foreign government;

(2) The services are of a character similar to those performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(3) The Secretary of State certifies to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality and employees thereof exemption is claimed, grants an equivalent exemption with respect

to services performed in the foreign country by employees of the United States Government and of instrumentalities thereof.

(b) For purposes of this exception, the citizenship or residence of the employee is immaterial.

§ 31.3121(b)(13)–1 Services of student nurse or hospital intern.

(a) Services performed as a student nurse in the employ of a hospital or a nurses' training school are excepted from employment, if the student nurse is enrolled and regularly attending classes in a nurses' training school and such nurses' training school is chartered or approved pursuant to State law.

(b) Services performed before 1966 as an intern (as distinguished from a resident doctor), in the employ of a hospital are excepted from employment, if the intern has completed a 4 years' course in a medical school chartered or approved pursuant to State law.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6983, 33 FR 18017, Dec. 4, 1968]

§ 31.3121(b)(14)–1 Services in delivery or distribution of newspapers, shopping news, or magazines.

(a) *Services of individuals under age 18.* Services performed by an employee under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution (as, for example, by a regional distributor) to any point for subsequent delivery or distribution, are excepted from employment. Thus, the services performed by an employee under the age of 18 in making house-to-house delivery or sale of newspapers or shopping news, including handbills and other similar types of advertising material, are excepted from employment. The services are excepted irrespective of the form or method of compensation. Incidental services by the employees who makes the house-to-house delivery, such as services in assembling newspapers, are considered to be within the exception. The exception continues only during the time that the employee is under the age of 18.

(b) *Services of individuals of any age.* Services performed by an employee in, and at the time of, the sale of newspapers or magazines to ultimate consumers under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, are excepted from employment. The services are excepted whether or not the employee is guaranteed a minimum amount of compensation for such services, or is entitled to be credited with the unsold newspapers or magazines turned back. Moreover, the services are excepted without regard to the age of the employee. Services performed other than at the time of sale to the ultimate consumer are not within the exception. Thus, the services of a regional distributor which are antecedent to but not immediately part of the sale to the ultimate consumer are not within the exception. However, incidental services by the employee who makes the sale to the ultimate consumer, such as services in assembling newspapers or in taking newspapers or magazines to the place of sale, are considered to be within the exception.

§ 31.3121(b)(15)–1 Services in employ of international organization.

(a) Subject to the provisions of section 1 of the International Organizations Immunities Act (22 U.S.C. 288), services performed in the employ of an international organization as defined in section 7701(a)(18) are excepted from employment.

(b) (1) Section 7701(a)(18) provides as follows:

SEC. 7701. *Definitions.* (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(18) *International organization.* The term ''international organization'' means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288–288f).

(2) Section 1 of the International Organizations Immunities Act provides as follows:

SEC. 1 [*International Organizations Immunities Act.*] For the purposes of this title [International Organizations Immunities Act], the term ''international organization'' means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities herein provided. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this title (including the amendments made by this title) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The president shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities herein provided or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this title.

§ 31.3121(b)(16)–1 Services performed under share-farming arrangement.

(a) The term ''employment'' does not include services performed by an individual under an arrangement with the owner or tenant of land pursuant to which—

(1) Such individual undertakes to produce agricultural or horticultural commodities (including livestock, bees, poultry, and fur-bearing animals and wildlife) on such land,

(2) The agricultural or horticultural commodities produced by such individual, or the proceeds therefrom, are to be divided between such individual and such owner or tenant, and

(3) The amount of such individual's share depends on the amount of the agricultural or horticultural commodities produced.

For purposes of this exception, the arrangement pursuant to which the individual's services are performed must meet the specified statutory conditions.

(b) If the arrangement between the parties provides that the individual who undertakes to produce a crop or livestock is to be compensated at a specified rate of pay or is to receive a fixed sum of money or a stipulated quantity of the commodities to be produced, without regard to the amount actually produced, as distinguished from a proportionate share of the crop or livestock, or the proceeds therefrom, the services performed by such individual in the production of such crop or livestock is not within the exception.

(c) For provisions relating to the status, under the Self-Employment Contributions Act of 1954, of the services which are excepted from ''employment'' under this section, see the regulations under section 1402(a) in Part 1 of this chapter (Income Tax Regulations).

[T.D. 6744, 29 FR 8313, July 2, 1964]

§ 31.3121(b)(17)–1 Services in employ of Communist organization.

The term ''employment'' does not include services performed in the employ of any organization in any calendar quarter beginning after June 30, 1956, and during any part of which such organization is registered, or there is in effect a final order of the Subversive Activities Control Board requiring such organization to register, under the Internal Security Act of 1950 (50 U.S.C. 781 et seq.), as amended, as a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization.

[T.D. 6744, 29 FR 8313, July 2, 1964]

§ 31.3121(b)(18)–1 Services performed by a resident of the Republic of the Philippines while temporarily in Guam.

(a) Services performed after 1960 by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101) are excepted from employment.

(b) Section 101(a)(15)(H) of the Immigration and Nationality Act provides as follows:

SEC. 101. *Definitions.* [Immigration and Nationality Act (66 Stat. 166)]

(a) As used in this chapter—

* * * * *

(15) The term ''immigrant'' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * * *

(H) An alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring merit and ability; or (ii) who is coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as an industrial trainee;

[T.D. 6744, 29 FR 8313, July 2, 1964]

§ 31.3121(b)(19)–1 Services of certain nonresident aliens.

(a) (1) Services performed after 1961 by a nonresident alien individual who is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, are excepted from employment if the services are performed to carry out a purpose for which the individual was admitted. For purposes of this section an alien individual who is temporarily present in the United States as a nonimmigrant under such subparagraph (F) or (J) is deemed to be a nonresident alien individual. The preceding sentence does not apply to the extent it is inconsistent with section 7701(b) and the regulations under that section. A nonresident alien individual who is temporarily present in the United States as a nonimmigrant under such subparagraph (J) includes an alien individual admitted to the United States as an ''exchange visitor'' under section 201 of the United States Information and Educational Exchange Act of 1948 (22 U.S.C. 1446).

(2) If services are performed by a nonresident alien individual's alien spouse or minor child, who is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act, as amended, the services are not deemed for purposes of this section to be performed to carry out a purpose for which such individual was admitted. The services of such spouse or child are excepted from employment under this section only if the spouse or child was admitted for a purpose specified in such subparagraph (F) or (J) and if the services are performed to carry out such purpose.

(b) Section 101 of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, provides in part as follows:

SEC. 101. *Definitions.* [Immigration and Nationality Act (68 Stat. 166)]

(a) As used in this chapter—* * *

(15) The term ''immigrant'' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * * *

(F) (i) An alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him;

* * * * *

(J) An alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training, and the alien spouse and minor children of any such

alien if accompanying him or following to join him.

* * * * *

[Sec. 101, Immigration and Nationality Act, as amended by sec. 101, Act of June 27, 1952, 66 Stat. 166; sec. 109, Act of Sept. 21, 1961, 75 Stat. 534]

[T.D. 6744, 29 FR 8313, July 2, 1964, as amended by T.D. 8411, 57 FR 15241, Apr. 27, 1992]

§ 31.3121(b)(20)–1 Service performed on a boat engaged in catching fish.

(a) *In general.* (1) Service performed on or after December 31, 1954, by an individual on a boat engaged in catching fish or other forms of aquatic animal life (hereinafter ''fish'') are excepted from employment if—

(i) The individual receives a share of the boat's (or boats' for a fishing operation involving more than one boat) catch of fish or a share of the proceeds from the sale of the catch,

(ii) The amount of the individual's share depends solely on the amount of the boat's (or boats' for a fishing operation involving more than one boat) catch of fish.

(iii) The individual does not receive and is not entitled to receive, any cash remuneration, other than remuneration that is described in sub-division (1) of this subparagraph, and

(iv) The crew of the boat (or of each boat from which the individual receives a share of the catch) normally is made up of fewer than 10 individuals.

(2) The requirement of paragraph (a)(1)(ii) is not satisfied if there exists an agreement with the boat's (or boats') owner or operator by which the individual's remuneration is determined partially or fully by a factor not dependent on the size of the catch. For example, if a boat is operated under a remuneration arrangement, *e.g.,* a collective agreement which specifies that crew members, in addition to receiving a share of the catch, are entitled to an hourly wage for repairing nets, regardless of whether this wage is actually paid, then all the crew members covered by the arrangement are entitled to receive cash remuneration other than a share of the catch and their services are not excepted from employment by section 3121(b)(20).

(3) The operating crew of a boat includes all persons on the boat (including the captain) who receive any form of remuneration in exchange for services rendered while on a boat engaged in catching fish. See § 1.6050A–1 for reporting requirements for the operator of a boat engaged in catching fish with respect to individuals performing services described in this section.

(4) During the same return period, service performed by a crew member may be excepted from employment by section 3121(b)(20) and this section for one voyage and not so excepted on a subsequent voyage on the same or on a different boat.

(5) During the same voyage, service performed by one crew member may be excepted from employment by section 3121(b)(20) and this section but service performed by another crew member may not be so excepted.

(b) *Special rule.* Services performed after December 31, 1954, and before October 4, 1976, on a boat by an individual engaged in catching fish are not excepted from employment for any voyage (for purposes of section 3121(b) and the corresponding regulations), even though the individual satisfies the requirements of paragraphs (a)(1)(i) through (iv) of this section, if the owner or operator of the boat engaged in catching fish treated the individual as an employee. For purposes of this subparagraph, the individual was treated as an employee if—

(1) Form 941 was voluntarily filed by the boat operator or owner, regardless of whether the tax imposed by chapter 21 was withheld. For purposes of this subdivision, the filing of Form 941 is not voluntary if the filing was the result of action taken by the Service pursuant to section 6651(a) (relating to addition to the tax for failure to file tax return or to pay tax);

(2) The boat owner or operator withheld from the individual's share the tax imposed by chapter 21, regardless of whether the tax was paid over to the Service; or

(3) The boat owner or operator made full or partial payment of the tax imposed by chapter 21, unless the payment was made pursuant to section 7422(a) (relating to no civil actions for refund prior to filing claim for refund).

However, for purposes of this paragraph crew members whose services, but for paragraphs (a)(1)(i) through (iii), would have been excepted from employment by section 3121(b)(20) are not required to pay self-employment tax on income earned in performing those services. See §1.1402(c)–3(g). Moreover, in such cases the employer is not entitled to a refund of the employer's share of any tax imposed by chapter 21 that was paid.

[T.D. 7716, 45 FR 57123, Aug. 27, 1980]

§31.3121(c)–1 Included and excluded services.

(a) If a portion of the services performed by an employee for an employer during a pay period constitutes employment, and the remainder does not constitute employment, all the services performed by the employee for the employer during the period shall for purposes of the taxes be treated alike, that is, either all as included or all as excluded. The time during which the employee performs services which under section 3121(b) constitute employment, and the time during which he performs services which under such section do not constitute employment, within the pay period, determine whether all the services during the pay period shall be deemed to be included or excluded.

(b) If one-half or more of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then all the services of that employee for that person in that pay period shall be deemed to be employment.

(c) If less than one-half of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then none of the services of that employee for that person in that pay period shall be deemed to be employment.

(d) The application of the provisions of paragraphs (a), (b), and (c) of this section may be illustrated by the following example:

Example. The AB Club, which is a local college club within the meaning of section 3121(b)(2), employs D, a student who is enrolled and is regularly attending classes at a university, to perform domestic service for the club and to keep the club's books. The domestic services performed by D for the AB Club do not constitute employment, and his services as the club's bookkeeper constitute employment. D receives a payment at the end of each month for all services which he performs for the club. During a particular month D spends 60 hours in performing domestic service for the club and 40 hours as the club's bookkeeper. None of D's services during the month are deemed to be employment, since less than one-half of his services during the month constitutes employment. During another month D spends 35 hours in the performance of domestic services and 60 hours in keeping the club's books. All of D's services during the month are deemed to be employment, since one-half or more of his services during the month constitutes employment.

(e) For purposes of this section, a ''pay period'' is the period (of not more than 31 consecutive calendar days) for which a payment of remuneration is ordinarily made to the employee by the employer. Thus, if the periods for which payments of remuneration are made to the employee by the employer are of uniform duration, each such period constitutes a ''pay period''. If, however, the periods occasionally vary in duration, the ''pay period'' is the period for which a payment of remuneration is ordinarily made to the employee by the employer, even though that period does not coincide with the actual period for which a particular payment of remuneration is made. For example, if an employer ordinarily pays a particular employee for each calendar week at the end of the week, but the employee receives a payment in the middle of the week for the portion of the week already elapsed and receives the remainder at the end of the week, the ''pay period'' is still the calendar week; or if, instead, that employee is sent on a trip by such employer and receives at the end of the third week a single remuneration payment for three weeks' services, the ''pay period'' is still the calendar week.

(f) If there is only one period (and such period does not exceed 31 consecutive calendar days) for which a payment of remuneration is made to the employee by the employer, such period is deemed to be a ''pay period'' for purposes of this section.

(g) The rules set forth in this section do not apply (1) with respect to any services performed by the employee for the employer if the periods for which such employer makes payments of remuneration to the employee vary to the extent that there is no period ''for which a payment of remuneration is ordinarily made to the employee'', or (2) with respect to any services performed by the employee for the employer if the period for which a payment of remuneration is ordinarily made to the employee by such employer exceeds 31 consecutive calendar days, or (3) with respect to any service performed by the employee for the employer during a pay period if any of such service is excepted by section 3121(b)(9) (see § 31.3121(b)(9)–1).

(h) If during any period for which a person makes a payment of remuneration to an employee only a portion of the employee's services constitutes employment, but the rules prescribed in this section are not applicable, the taxes attach with respect to such services as constitute employment as defined in section 3121(b).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8313, July 2, 1964]

§ 31.3121(d)–1 Who are employees.

(a) *In general.* (1) Whether an individual is an employee with respect to services performed after 1954 is determined in accordance with section 3121(d) and (o) and section 3506. This section of the regulations applies with respect only to services performed after 1954. Whether an individual is an employee with respect to services performed after 1936 and before 1940 shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 401 (Regulations 91). Whether an individual is an employee with respect to services performed after 1939 and before 1951 shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 402 (Regulations 106). Whether an individual is an employee with respect to services performed after 1950 and before 1955 shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 408 (Regulations 128).

(2) Section 3121(d) contains three separate and independent tests for determining who are employees. Paragraphs (b), (c), and (d) of this section relate to the respective tests. Paragraph (b) relates to the test for determining whether an officer of a corporation is an employee of the corporation. Paragraph (c) relates to the test for determining whether an individual is an employee under the usual common law rules. Paragraph (d) relates to the test for determining which individuals in certain occupational groups who are not employees under the usual common law rules are included as employees. If an individual is an employee under any one of the tests, he is to be considered an employee for purposes of the regulations in this subpart whether or not he is an employee under any of the other tests.

(3) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(4) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees.

(5) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment (see § 31.3121(b)–3).

(b) *Corporate officers.* Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for

whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) *Special classes of employees.* (1) In addition to individuals who are employees under paragraph (b) or (c) of this section, other individuals are employees if they perform services for remuneration under certain prescribed circumstances in the following occupational groups:

(i) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services for his principal;

(ii) As a full-time life insurance salesman;

(iii) As a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or

(iv) As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

(2) In order for an individual to be an employee under this paragraph, the individual must perform services in an occupation falling within one of the enumerated groups. If the individual does not perform services in one of the designated occupational groups, he is not an employee under this paragraph. An individual who is not an employee under this paragraph may nevertheless be an employee under paragraph (b) or (c) of this section. The language used to designate the respective occupational groups relates to fields of endeavor in which particular designations are not necessarily in universal use with respect to the same service. The designations are addressed to the actual services without regard to any technical or colloquial labels which may be attached to such services. Thus, a determination whether services fall within one of the designated occupational groups depends upon the facts of the particular situation.

(3) The factual situations set forth below are illustrative of some of the individuals falling within each of the above enumerated occupational groups. The illustrative factual situations are as follows:

(i) *Agent-driver or commission-driver.* This occupational group includes agent-drivers or commission-drivers who are engaged in distributing meat or meat products, vegetables or vegetable products, fruit or fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services for their principals. An agent-driver or commission-driver includes an individual who operates his own truck or the truck of the person for whom he performs services, serves customers designated by such person as well as those solicited on his own, and whose compensation is a commission on his sales or the difference between the price he charges his customers and the price he pays to such person for the product or service.

(ii) *Full-time life insurance salesman.* An individual whose entire or principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one life insurance company is a full-time life insurance salesman. Such a salesman ordinarily uses the office space provided by the company or its general agent, and stenographic assistance, telephone facilities, forms, rate books, and advertising materials are usually made available to him without cost. An individual who is engaged in the general insurance business under a contract or contracts of service which do not contemplate that the individual's principal business activity will be the solicitation of life insurance or annuity contracts, or both, for one company, or any individual who devotes only part time to the solicitation of life insurance contracts, including annuity contracts, and is principally engaged in other endeavors, is not a full-time life insurance salesman.

(iii) *Home workers.* This occupational group includes a worker who performs services off the premises of the person for whom the services are performed, according to specifications furnished by such person, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him. For provisions relating to the determination of wages in the case of a home worker to whom this subdivision is applicable, see § 31.3121(a)(10)–1.

(iv) *Traveling or city salesman. (a)* This occupational group includes a city or traveling salesman who is engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person or persons) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations. An agent-driver or commission-driver is not within this occupational group. City or traveling salesmen who sell to retailers or to the others specified, operate off the premises of their principals, and are generally compensated on a commission basis, are within this occupational group. Such salesmen are generally not controlled as to the details of their services or the means by which they cover their territories, but in the ordinary case they are expected to call on regular customers with a fair degree of regularity.

(*b*) In order for a city or traveling salesman to be included within this occupational group, his entire or principal business activity must be devoted to the solicitation of orders for one principal. Thus, the multiple-line salesman generally is not within this occupational group. However, if the salesman solicits orders primarily for one principal, he is not excluded from this occupational group solely because of side-line sales activities on behalf of one or more other persons. In such a case, the salesman is within this occupational group only with respect to the services performed for the person for whom he primarily solicits orders and not with respect to the services performed for such other persons. The following examples illustrate the application of the foregoing provisions:

Example 1. Salesman A's principal business activity is the solicitation of orders from retail pharmacies on behalf of the X Wholesale Drug Company. A also occasionally solicits orders for drugs on behalf of the Y and Z Companies. A is within this occupational group with respect to his services for the X Company but not with respect to his services for either the Y Company or the Z Company.

Example 2. Salesman B's principal business activity is the solicitation of orders from retail hardware stores on behalf of the R Tool

Company and the S Cooking Utensil Company. B regularly solicits orders on behalf of both companies. B is not within this occupational group with respect to the services performed for either the R Company or the S Company.

Example 3. Salesman C's principal business activity is the house-to-house solicitation of orders on behalf of the T Brush Company. C occasionally solicits such orders from retail stores and restaurants. C is not within this occupational group.

(4)(i) The fact that an individual falls within one of the enumerated occupational groups, however, does not make such individual an employee under this paragraph unless *(a)* the contract of service contemplates that substantially all the services to which the contract relates in the particular designated occupation are to be performed personally by such individual, *(b)* such individual has no substantial investment in the facilities used in connection with the performance of such services (other than in facilities for transportation) and *(c)* such services are part of a continuing relationship with the person for whom the services are performed and are not in the nature of a single transaction.

(ii) The term ''contract of service'', as used in this paragraph, means an arrangement, formal or informal, under which the particular services are performed. The requirement that the contract of service shall contemplate that substantially all the services to which the contract relates in the particular designated occupation are to be performed personally by the individual means that it is not contemplated that any material part of the services to which the contract relates in such occupation will be delegated to any other person by the individual who undertakes under the contract to perform such services.

(iii) The facilities to which reference is made in this paragraph include equipment and premises available for the work or enterprise as distinguished from education, training, and experience, but do not include such tools, instruments, equipment, or clothing, as are commonly or frequently provided by employees. An investment in an automobile by an individual which is used primarily for his own transportation in connection with the performance of services for another person has no significance under this paragraph, since such investment is comparable to outlays for transportation by an individual performing similar services who does not own an automobile. Moreover, the investment in facilities for the transportation of the goods or commodities to which the services relate is to be excluded in determining the investment in a particular case. If an individual has a substantial investment in facilities of the requisite character, he is not an employee within the meaning of this paragraph, since a substantial investment of the requisite character standing alone is sufficient to exclude the individual from the employee concept under this paragraph.

(iv) If the services are not performed as part of a continuing relationship with the person for whom the services are performed, but are in the nature of a single transaction, the individual performing such services is not an employee of such person within the meaning of this paragraph. The fact that the services are not performed on consecutive workdays does not indicate that the services are not performed as part of a continuing relationship.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8314, July 2, 1964; T.D. 7691, 45 24129, Apr. 9, 1980]

§31.3121(d)–2 Who are employers.

(a) Every person is an employer if he employs one or more employees. Neither the number of employees employed nor the period during which any such employee is employed is material for the purpose of determining whether the person for whom the services are performed is an employer.

(b) An employer may be an individual, a corporation, a partnership, a trust, an estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group, or entity. A trust or estate, rather than the fiduciary acting for on behalf of the trust or estate, is generally the employer.

(c) Although a person may be an employer under this section, services performed in his employ may be of such a

nature, or performed under such circumstances, as not to constitute employment (see § 31.3121(b)–3).

§ 31.3121(e)–1 State, United States, and citizen.

(a) When used in the regulations in this subpart, the term ''State'' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Territories of Alaska and Hawaii before their admission as States, and (when used with respect to services performed after 1960) Guam and American Samoa.

(b) When used in the regulations in this subpart, the term ''United States'', when used in a geographical sense, means the several states (including the Territories of Alaska and Hawaii before their admission as States), the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands. When used in the regulations in this subpart with respect to services performed after 1960, the term ''United States'' also includes Guam and American Samoa when the term is used in a geographical sense. The term ''citizen of the United States'' includes a citizen of the Commonwealth of Puerto Rico or the Virgin Islands, and, effective January 1, 1961, a citizen of Guam or American Samoa.

[T.D. 6744, 29 FR 8314, July 2, 1964]

§ 31.3121(f)–1 American vessel and aircraft.

(a) The term ''American vessel'' means any vessel which is documented (that is, registered, enrolled, or licensed) or numbered in conformity with the laws of the United States. It also includes any vessel which is neither documented nor numbered under the laws of the United States, nor documented under the laws of any foreign country, if the crew of such vessel is employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State. (For provisions relating to the terms ''State'' and ''citizen'', see § 31.3121 (e)–1.)

(b) The term ''American aircraft'' means any aircraft registered under the laws of the United States.

(c) For provisions relating to services performed outside the United States on or in connection with an American vessel or American aircraft, see paragraph (c)(2) of § 31.3121(b)–3.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8314, July 2, 1964]

§ 31.3121(g)–1 Agricultural labor.

(a) *In general.* (1) The term ''agricultural labor'' as defined in section 3121(g) includes services of the character described in paragraph (b), (c), (d), (e), and (f) of this section. In general, however, the term does not include services performed in connection with forestry, lumbering, or landscaping.

(2) The term ''farm'' as used in the regulations in this subpart includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, orchards, and such greenhouses and other similar structures as are used primarily for the raising of agricultural or horticultural commodities. Greenhouses and other similar structures used primarily for other purposes (for example, display, storage, and fabrication of wreaths, corsages, and bouquets) do not constitute ''farms''.

(3) For provisions relating to the exception from employment provided with respect to services performed by certain foreign agricultural workers and to services performed before 1959 in connection with the production or harvesting of certain oleoresinous products, see § 31.3121(b)(1)–1. For provisions relating to the exclusion from wages of remuneration paid in any medium other than cash for agricultural labor and to the test for determining whether cash remuneration paid for agricultural labor constitutes wages, see § 31.3121(a)(8)–1.

(b) *Services described in section 3121(g)(1).* (1) Services performed on a farm by an employee of any person in connection with any of the following activities constitute agricultural labor:

(i) The cultivation of the soil;

(ii) The raising, shearing, feeding, caring for, training, or management of livestock, bees, poultry, fur-bearing animals, or wildlife; or

(iii) The raising or harvesting of any other agricultural or horticultural commodity.

(2) Services performed in connection with the production or harvesting of maple sap, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry constitute agricultural labor only if such services are performed on a farm. Thus, services performed in connection with the operation of a hatchery, if not operated as part of a poultry or other farm, do not constitute agricultural labor.

(c) *Services described in section 3121(g)(2).* (1) The following services performed by an employee in the employ of the owner or tenant or other operator of one or more farms constitute agricultural labor, provided the major part of such services is performed on a farm:

(i) Services performed in connection with the operation, management, conservation, improvement, or maintenance of any of such farms or its tools or equipment; or

(ii) Services performed in salvaging timber, or clearing land of brush and other debris, left by a hurricane.

(2) The services described in paragraph (c)(1)(i) of this section may include, for example, services performed by carpenters, painters, mechanics, farm supervisors, irrigation engineers, bookkeepers, and other skilled or semiskilled workers, which contribute in any way to the conduct of the farm or farms, as such, operated by the person employing them, as distinguished from any other enterprise in which such person may be engaged.

(3) Since the services described in this paragraph must be performed in the employ of the owner or tenant or other operator of the farm, the term ''agricultural labor'' does not include services performed by employees of a commercial painting concern, for example, which contracts with a farmer to renovate his farm properties.

(d) *Services described in section 3121(g)(3).* Services performed by an employee in the employ of any person in connection with any of the following operations constitute agricultural labor without regard to the place where such services are performed:

(1) The ginning of cotton;

(2) The operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying or storing water for farming purposes; or

(3) The production or harvesting of crude gum (oleoresin) from a living tree or the processing of such crude gum into gum spirits of turpentine and gum rosin, provided such processing is carried on by the original producer of such crude gum.

(e) *Services described in section 3121(g)(4).* (1) Services performed by an employee in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of any agricultural or horticultural commodity constitute agricultural labor if:

(i) Such services are performed by the employee in the employ of an operator of a farm or in the employ of a group of operators of farms (other than a cooperative organization);

(ii) Such services are performed with respect to the commodity in its unmanufactured state; and

(iii) Such operator produced more than one-half of the commodity with respect to which such services are performed during the pay period, or such group of operators produced all of the commodity with respect to which such services are performed during the pay period.

(2) The term ''operator of a farm'' as used in this paragraph means an owner, tenant, or other person, in possession of a farm and engaged in the operation of such farm.

(3) The services described in this paragraph do not constitute agricultural labor if performed in the employ of a cooperative organization. The term ''organization'' includes corporations, joint-stock companies, and associations which are treated as corporations pursuant to section 7701(a)(3) of the Internal Revenue Code. For purposes of this paragraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which the services involved are performed.

(4) Processing services which change the commodity from its raw or natural state do not constitute agricultural labor. For example the extraction of juices from fruits or vegetables is a processing operation which changes the character of the fruits or vegetables from their raw or natural state and, therefore, does not constitute agricultural labor. Likewise, services performed in the processing of maple sap into maple sirup or maple sugar do not constitute agricultural labor. On the other hand, services rendered in the cutting and drying of fruits or vegetables are processing operations which do not change the character of the fruits or vegetables and, therefore, constitute agricultural labor, if the other requisite conditions are met. Services performed with respect to a commodity after its character has been changed from its raw or natural state by a processing operation do not constitute agricultural labor.

(5) The term ''commodity'' refers to a single agricultural or horticultural product, for example, all apples are to be treated as a single commodity, while apples and peaches are to be treated as two separate commodities. The services with respect to each such commodity are to be considered separately in determining whether the condition set forth in paragraph (e)(1)(iii) of this section has been satisfied. The portion of the commodity produced by an operator or group of operators with respect to which the services described in this paragraph are performed by a particular employee shall be determined on the basis of the pay period in which such services were performed by such employee.

(6) The services described in this paragraph do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for distribution for consumption. Moreover, since the services described in this paragraph must be rendered in the actual handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of the commodity, such services do not, for example, include services performed as stenographers, bookkeepers, clerks, and other office employees, even though such services may be in connection with such activities. However, to the extent that the services of such individuals are performed in the employ of the owner or tenant or other operator of a farm and are rendered in major part on a farm, they may be within the provisions of paragraph (c) of this section.

(f) *Services described in section 3121(g)(5).* (1) Service not in the course of the employer's trade or business (see paragraph (a)(1) of §31.3121(a)(7)–1) or domestic service in a private home of the employer (see paragraph (a)(2) of §31.3121(a)(7)–1) constitutes agricultural labor if such service is performed on a farm operated for profit. The determination whether remuneration for any such service performed on a farm operated for profit constitutes wages is to be made under §31.3121(a)(8)–1 rather than under §31.3121(a)(7)–1. For provisions relating to the exception from employment provided with respect to any such service performed after 1960 by a father or mother in the employ of his or her son or daughter, see §31.3121(b)(3)–1.

(2) Generally, a farm is not operated for profit if it is occupied by the employer primarily for residential purposes, or is used primarily for the pleasure of the employer or his family such as for the entertainment of guests or as a hobby of the employer or his family.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8315, July 2, 1964]

§31.3121(h)–1 American employer.

(a) The term ''American employer'' means an employer which is (1) the United States or any instrumentality thereof, (2) an individual who is a resident of the United States, (3) a partnership, if two-thirds or more of the partners are residents of the United States, (4) a trust, if all of the trustees are residents of the United States, or (5) a corporation organized under the laws of the United States or of any State. For provisions relating to the terms ''State'' and ''United States'', see §31.3121(e)–1.

(b) For provisions relating to services performed outside the United States by a citizen of the United States as an employee for an American employer, see paragraph (c)(3) of §31.3121(b)–3 and paragraph (e) of §31.3121(b)(4)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8315, July 2, 1964]

§31.3121(i)–1 Computation to nearest dollar of cash remuneration for domestic service.

An employer may, for purposes of the act, elect to compute to the nearest dollar any payment of cash remuneration for domestic service described in section 3121(a)(7)(B) (see §31.3121(a)(7)–1) which is more or less than a whole-dollar amount. For the purpose of the computation to the nearest dollar, the payment of a fractional part of a dollar shall be disregarded unless it amounts to one-half dollar or more, in which case it shall be increased to one dollar. For example, any amount actually paid between $4.50 and $5.49, inclusive, may be treated as $5 for purposes of the taxes imposed by the act. If an employer elects this method of computation with respect to any payment of cash remuneration made in a calendar quarter for domestic service in his private home, he must use the same method in computing each payment of cash remuneration of more or less than a whole-dollar amount made to each of his employees in such calendar quarter for domestic service in his private home. Moreover, if an employer elects this method of computation with respect to payments of the prescribed character made in any calendar quarter, the amount of each payment of cash remuneration so computed to the nearest dollar shall, in lieu of the amount actually paid, be deemed to constitute the amount of cash remuneration for purposes of the act. Thus, the amount of cash payments so computed to the nearest dollar shall be used for purposes of determining whether such payments constitute wages; for purposes of applying the employee and employer tax rates to the wage payments; for purposes of any required record keeping; and for purposes of reporting and paying the employee tax and employer tax with respect to such wage payments.

§31.3121(i)–2 Computation of remuneration for service performed by an individual as a member of a uniformed service.

In the case of an individual performing service after December 31, 1956, as a member of a uniformed service (see section 31.3121(n)), to which the provisions of section 3121(m)(1) (see §31.3121(m)) are applicable, the term ''wages'' shall, subject to the provisions of section 3121(a)(1) (see §31.3121(a)–1), include as the individual's remuneration for such service only his basic pay as described in section 102(10) of the Servicemen's and Veterans' Survivor Benefits Act (38 U.S.C. 401(1), 403; 72 Stat. 1126).

[T.D. 6744, 29 FR 8315, July 2, 1964]

§31.3121(i)–3 Computation of remuneration for service performed by an individual as a volunteer or volunteer leader within the meaning of the Peace Corps Act.

In the case of an individual performing service in his capacity as a volunteer or volunteer leader within the meaning of the Peace Corps Act (see section 31.3121(p)), the term ''wages'' shall, subject to the provisions of section 3121(a)(1) (see §31.3121(a)–1), include as such individual's remuneration for such service only amounts paid pursuant to section 5(c) or section 6(1) of the Peace Corps Act (22 U.S.C. 2501; 75 Stat. 612).

[T.D. 6744, 29 FR 8315, July 2, 1964]

§31.3121(i)–4 Computation of remuneration for service performed by certain members of religious orders.

In any case where an individual is a member of a religious order (as defined in section 3121(r)(2) and paragraph (b) of §31.3121(r)–1) performing service in the exercise of duties required by such order, and an election of coverage under section 3121(r) and §31.3121(r)–1 is in effect with respect to such order or the autonomous subdivision thereof to which such member belongs, the term ''wages'' shall, subject to the provisions of section 3121(a)(1) (relating to

definition of wages), include as such individual's remuneration for such service the fair market value of any board, lodging, clothing, and other perquisites furnished to such member by such order or subdivision or by any other person or organization pursuant to an agreement (whether written or oral) with such order or subdivision. Such other perquisites shall include any cash either paid by such order or subdivision or paid by another employer and not required by such order or subdivision to be remitted to it. For purposes of this section, perquisites shall be considered to be furnished over the period during which the member receives the benefit of them. (See example 4 of this section.) In no case shall the amount included as such individual's remuneration under this paragraph be less than $100 a month. All relevant facts and elements of value shall be considered in every case. Where the fair market value of any board, lodging, clothing, and other perquisites furnished to all members of an electing religious order or autonomous subdivision (or to all in a group of members) does not vary significantly, such order or subdivision may treat all of its members (or all in such group of members) as having a uniform wage. The provisions of this section may be illustrated by the following examples of the treatment of particular perquisites:

Example 1. M is a religious order which requires its members to take a vow of poverty and which has made an election under section 3121(r). Under section 3121(i)(4), M must include in the wages of its members the fair market value of the clothing it provides for its members. M and several other religious orders using essentially the same type of religious habit purchase clothing for their members from either of two suppliers in arms-length transactions. The fair market value of such clothing (*i.e.,* the price at which such items would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell) is determined by reference to the actual sales price of these suppliers to the religious orders.

Example 2. N is a religious order which requires its members to take a vow of poverty and which has made an election under section 3121(r). N operates a seminary adjacent to a university. Students at the university obtain lodging and board on campus from the university for its fair market value of $2,000 for the school year. Such lodging and board is essentially the same as that provided by N at its seminary to N's members subject to a vow of poverty. Accordingly, the amount to be included in the ''wages'' of such members with respect to lodging and board for the same period of time is $2,000.

Example 3. O is a religious order which requires its members to take a vow of poverty and to observe silence, and which has made an election under section 3121(r). O operates a monastery in a remote rural area. Under section 3121(i)(4), O must include in the wages of its members assigned to this monastery the fair market value of the board and lodging furnished to them. In making a determination of the fair market value of such board and lodging, the remoteness of the monastery, as well as the smallness of the rooms and the simplicity of their furnishings, affect this determination. However, the facts that the facility is used by a religious order as a monastery and that the order's members maintain silence do not affect the fair market value of such items.

Example 4. P is a religious order which requires its members to take a vow of poverty and which has made an election under section 3121(r). Several of P's members are attending a university on a full-time basis. The fair market value of the board and lodging of each of such members at the university is $1,000 per semester. P pays the university $1,000 at the beginning of each semester for the board and lodging of each of such members. In addition, P gives each such member a $400 cash advance to cover his miscellaneous expenses during the semester. Under section 3121(i)(4), P must prorate the fair market value of such members' board and lodging, as well as the miscellaneous items, over the semester and include such value in the determination of ''wages''.

Example 5. Q is a religious order which is a corporation organized under the laws of Wisconsin, which requires its members to take a vow of poverty, and which has made an election under section 3121(r). Q has convents in rural South America and in suburbs and central city areas of the United States. Characteristically, in the United States its suburban convents provide somewhat larger and newer rooms for its members than do its convents in city areas. Moreover, its suburban convents have more extensive grounds and somewhat more elaborate facilities than do its older convents in city areas. However, both types of convents limit resident members to a single, plainly furnished room and provide them meals which are comparable. Q's members in South America live in extremely primitive dwellings and otherwise have extremely modest perquisites. Under section 3121(i)(4), Q may report a uniform wage for its members who live in suburban convents and city convents in the United

States, as the board, lodging, and perquisites furnished these members do not vary significantly from one convent to the other. Q may report another uniform wage (but not less than $100 per month apiece) for its members who are citizens of the United States and who reside in South America based on the fair market value of the perquisites furnished these individuals, as the fair market value of the perquisites furnished these individuals varies significantly from that of those furnished its members who live in its domestic convents but does not vary significantly among members in South America whose wages are subject to tax.

[T.D. 7280, 38 FR 18369, July 10, 1973]

§ 31.3121(j)–1 Covered transportation service.

(a) *Transportation systems acquired in whole or in part after 1936 and before 1951*—(1) *In general.* Except as provided in subparagraph (2) of this paragraph, all service performed in the employ of a State or political subdivision thereof in connection with its operation of a public transportation system constitutes covered transportation service if any part of the transportation system was acquired from private ownership after 1936 and before 1951. For purposes of this subparagraph, it is immaterial whether any part of the transportation system was acquired before 1937 or after 1950, whether the employee was hired before, during, or after 1950, or whether the employee had been employed by the employer from whom the State or political subdivision acquired its transportation system or any part thereof.

(2) *General retirement system protected by State constitution.* Except as provided in paragraph (a)(3) of this section, service performed in the employ of a State or political subdivision in connection with its operation of a public transportation system acquired in whole or in part from private ownership after 1936 and before 1951 does not constitute covered transportation service, if substantially all service in connection with the operation of the transportation system was, on December 31, 1950, covered under a general retirement system providing benefits which are protected from diminution or impairment under the State constitution by reason of an express provision, dealing specifically with retirement systems established by the State or political subdivisions of the State, which forbids such diminution or impairment.

(3) *Additions to certain transportation systems by acquisition after 1950.* This subparagraph is applicable only in case of an acquisition after 1950 from private ownership of an addition to an existing public transportation system which was acquired in whole or in part by a State or political subdivision thereof from private ownership after 1936 and before 1951 and then only in case service for such existing transportation system did not constitute covered transportation service by reason of the provisions of subparagraph (2) of this paragraph. Service in connection with the operation of such transportation system (including any additions acquired after 1950) constitutes covered transportation service commencing with the first day of the third calendar quarter following the calendar quarter in which the addition to the existing transportation system was acquired, if such service is performed by an employee who became an employee of the State or political subdivision in connection with and at the time of its acquisition from private ownership of such addition and who before the acquisition of such addition rendered service in employment in connection with the operation of the addition so acquired by such State or political subdivision. However, service performed by such employee in connection with the operation of the transportation system does not constitute covered transportation service if, on the first day of the third calendar quarter following the calendar quarter in which the addition was acquired, such service is covered by a general retirement system which does not, with respect to such employee, contain special provisions applicable only to employees who became employees of the State or political subdivision in connection with and at the time of its acquisition of such addition.

(b) *Transportation systems in operation on December 31, 1950, no part of which was acquired after 1936 and before 1951*—(1) *In general.* Except as provided in paragraph (b)(2) of this section, no service performed in the employ of a State or a political subdivision thereof in connection with its operation of a

public transportation system constitutes covered transportation service if no part of such transportation system operated by the State or political subdivision on December 31, 1950, was acquired from private ownership after 1936 and before 1951.

(2) *Additions acquired after 1950.* This subparagraph is applicable only in case of an acquisition after 1950 from private ownership of an addition to an existing public transportation system which was operated by a State or political subdivision on December 31, 1950, but no part of which was acquired from private ownership after 1936 and before 1951. Service in connection with the operation of such transportation system (including any additions acquired after 1950) constitutes covered transportation service commencing with the first day of the third calendar quarter following the calendar quarter in which the addition to the existing transportation system was acquired, if such service is performed by an employee who became an employee of the State or political subdivision in connection with and at the time of its acquisition from private ownership of such addition and who before the acquisition of such addition rendered service in employment in connection with the operation of the addition so acquired by such State or political subdivision. However, service performed by such employee in connection with the operation of the transportation system does not constitute covered transportation service if, on the first day of the third calendar quarter following the calendar quarter in which the addition was acquired, such service is covered by a general retirement system which does not, with respect to such employee, contain special provisions applicable only to employees who became employees of the State or political subdivision in connection with and at the time of its acquisition of such addition.

(c) *Transportation systems acquired after 1950.* All service performed in the employ of a State or political subdivision thereof in connection with its operation of a public transportation system constitutes covered transportation service if the transportation system was not operated by the State or political subdivision before 1951 and, at the time of its first acquisition after 1950 from private ownership of any part of its transportation system, the State or political subdivision did not have a general retirement system covering substantially all service performed in connection with the operation of the transportation system.

(d) *Definitions.* For purposes of this section:

(1) The term ''general retirement system'' means any pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof for employees of the State, political subdivision, or both; but such term does not include such a fund or system which covers only service performed in positions connected with the operation of its public transportation system.

(2) A transportation system or a part thereof is considered to have been acquired by a State or political subdivision from private ownership if prior to the acquisition service performed by the employees in connection with the operation of the system or an acquired part thereof constituted employment under the act or under subchapter A of chapter 9 of the Internal Revenue Code of 1939 or was covered by an agreement entered into pursuant to section 218 of the Social Security Act (42 U.S.C. 418), and some of such employees became employees of the State or political subdivision in connection with and at the time of such acquisition.

(3) The term ''political subdivision'' includes an instrumentality of a State, of one or more political subdivisions of a State, or of a State and one or more of its political subdivisions.

(4) The term ''employment'' includes service covered by an agreement entered into pursuant to section 218 of the Social Security Act.

§ 31.3121(k)–1 Waiver of exemption from taxes.

(a) *Who may file a waiver certificate*—(1) *In general.* If services performed in the employ of an organization are excepted from employment under section 3121(b)(8)(B), the organization may file a waiver certificate on Form SS–15, together with a list on Form SS–15a, certifying that it desires to have the Federal old-age, survivors, and disability

insurance system established by title II of the Social Security Act extended to services performed by its employees. (For provisions relating to the exception under section 3121(b)(8)(B), see that section and §31.3121(b)(8)–2.) A certificate in effect under section 1426(1) of the Internal Revenue Code of 1939 on December 31, 1954, remains in effect under, and is subject to the provisions of, section 3121(k). If the period covered by a certificate filed under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939, is terminated by an organization, a certificate may not thereafter be filed by the organization under section 3121(k). For regulations relating to certificates filed under section 1426(l) of the Internal Revenue Code of 1939, see 26 CFR (1939) 408.216 (Regulations 128).

(2) *Organizations having two separate groups of employees.* If an organization is eligible to file a certificate under section 3121(k), and the organization employs both individuals who are in positions covered by a pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof and individuals who are not in such positions, the organization shall divide its employees into two separate groups for purposes of any certificate filed after August 28, 1958. One group shall consist of all employees who are in positions covered by such a fund or system and (i) are members of such fund or system, or (ii) are not members of such fund or system but are eligible to become members thereof. The other group shall consist of all remaining employees. An organization which has so divided its employees into two groups may file a certificate after August 28, 1958, with respect to the employees in either group, or may file a separate certificate after such date with respect to employees in each group.

(3) *Certificates filed before September 14, 1960.* A certificate filed before September 14, 1960, is void unless at least two-thirds of the employees, determined on the basis of the facts which existed as of the date the certificate was filed, concurred in the filing of the certificate, and the organization certified to such concurrence in the certificate. All individuals who were employees of the organization within the meaning of section 3121(d) (see §31.3121(d)–1) shall be included in determining whether two-thirds of the employees of the organization concurred in the filing of the certificate; except that there shall not be included (i) those employees who at the time of the filing of the certificate were performing for the organization services only of the character specified in paragraphs (8)(A), (10)(B), and (13) of section 3121(b) (see §§31.3121(b)(8)–1, 31.3121(b)(10)–2, and 31.3121(b)(13)–1, respectively), (ii) those alien employees who at the time of the filing of the certificate were performing services for such organization under an arrangement which provided for the performance only of services outside the United States not on or in connection with an American vessel or American aircraft, and (iii) in connection with certificates filed after August 28, 1958, those employees who at the time of the filing of the certificate were in a group to which such certificate was not applicable because of the provisions of section 3121(k)(1)(E). (See paragraph (a)(2) of this section.) As used in this subparagraph, the term ''alien employee'' does not include an employee who was a citizen of the Commonwealth of Puerto Rico or a citizen of the Virgin Islands, and the term ''United States'' includes Puerto Rico and the Virgin Islands.

(b) *Execution and amendment of certificate*—(1) *Use of prescribed forms.* An organization filing a certificate pursuant to section 3121(k) shall use Form SS–15, in accordance with the regulations and instructions applicable thereto. The certificate may be filed only if it is accompanied by a list on Form SS–15a, containing the signature, address, and social security account number, if any, of each employee, if any, who concurs in the filing of the certificate. (For provisions relating to account numbers, see §31.6011(b)–2.) If no employee concurs in a certificate filed after September 13, 1960, that fact should be stated on the Form SS–15a. (For provisions relating to the concurrence of employees in certificates filed before September 14, 1960, see paragraph (a)(3) of this section.)

(2) *Amendment of list on Form SS–15a*—(i) *Certificate filed after August 28, 1958.* The list on Form SS–15a accompanying a certificate filed after August 28, 1958, under section 3121(k), may be amended at any time before the expiration of the twenty-fourth month following the calendar quarter in which the certificate is filed, by filing a supplemental list or lists on Form SS–15a Supplement, containing the signature, address, and social security account number, if any, of each additional employee who concurs in the filing of the certificate.

(ii) *Certificate filed before August 29, 1958.* The list on Form SS–15a which accompanied a certificate filed before August 29, 1958, under section 3121(k) or under section 1426(l) of the Internal Revenue Code of 1939, may be amended by filing a supplemental list or lists on Form SS–15a Supplement at any time after August 31, 1954, and before the expiration of the twenty-fourth month following the first calendar quarter for which the certificate was in effect, or before January 1, 1959, whichever is the later.

(3) *Where to file certificate or amendment.* The certificate on Form SS–15 and accompanying list on Form SS–15a of an organization which is required to make a return on Form 941 pursuant to §31.6011(a)–1 or §31.6011(a)–4 shall be filed with the internal revenue officer designated in the instructions applicable to Form SS–15 and Form SS–15a. The Form SS–15 and Form SS–15a of any other organization shall be filed in accordance with the provisions of §31.6091–1 which are otherwise applicable to returns. Each Form SS–15a Supplement shall be filed with the internal revenue officer with whom the related Forms SS–15 and SS–15a were filed.

(c) *Effect of waiver*—(1) *In general.* The exception from employment under section 3121(b)(8)(B) does not apply to services with respect to which a certificate, filed pursuant to section 3121(k), or section 1426(l) of the Internal Revenue Code of 1939, is in effect. (See §§31.3121(b)(8) and 31.3121(b)(8)–2). If an organization has divided its employees into two groups, as set forth in paragraph (a)(2) of this section, a certificate filed with respect to either group shall have no effect with respect to services performed by an employee as a member of the other group; and the provisions of this subparagraph shall apply as if each group were separately employed by a different organization. A certificate is not terminated if the organization loses its exemption under section 501(a) as an organization of the character described in section 501(c)(3), but continues effective with respect to any subsequent periods during which the organization is so exempt. The certificate of an organization may be in effect without being applicable to services performed by every employee of the organization. Subparagraph (2) of this paragraph relates to the beginning of the period for which a certificate is in effect. Subparagraph (3) of this paragraph relates to the services with respect to which a certificate is in effect. Even though a certificate is in effect with respect to the services of an employee, such services may be excepted from employment under some provision of section 3121(b) other than paragraph (8)(B) thereof. For example, service performed in any calendar quarter in the employ of an organization described in section 501(c)(3) and exempt from income tax under section 501(a) is excepted from employment under section 3121(b)(10)(A) if the remuneration for such service is less than $50, regardless of whether the organization files a certificate.

(2) *Beginning of effective period of waiver*—(i) *Certificate filed after July 30, 1965.* A certificate filed after July 30, 1965, by an organization pursuant to section 3121(k) shall be in effect for the period beginning with one of the following dates, which shall be designated by the organization on the certificate:

(a) The first day of the calendar quarter in which the certificate is filed,

(b) The first day of the calendar quarter immediately following the quarter in which the certificate is filed, or

(c) The first day of any calendar quarter preceding the calendar quarter in which the certificate is filed, except that such date may not be earlier than the first day of the 20th calendar quarter preceding the quarter in which such certificate is filed. Thus, a certificate filed in December 1965 may be made effective, pursuant to this paragraph (c)(2)(i)*(c)*, for the period beginning

with the first day of the calendar quarter beginning October 1, 1960, or the first day of any other calendar quarter beginning after October 1, 1960, and before October 1, 1965.

(ii) *Certificate filed after August 28, 1958, and before July 31, 1965.* A certificate filed after August 28, 1958, and before July 31, 1965, by an organization pursuant to section 3121(k) shall be in effect for the period beginning with one of the following dates, which shall be designated by the organization on the certificate:

(a) The first day of the calendar quarter in which the certificate is filed,

(b) The first day of the calendar quarter immediately following the quarter in which the certificate is filed, or

(c) The first day of any calendar quarter preceding the calendar quarter in which the certificate is filed, except that, in the case of a certificate filed before 1960, such date may not be earlier than January 1, 1956, and in the case of a certificate filed after 1959 (but before July 31, 1965), such date may not be earlier than the first day of the fourth calendar quarter preceding the quarter in which the certificate is filed. Thus, a certificate filed in December 1959 may be made effective for the calendar quarter beginning January 1, 1956; but a certificate filed in January 1960 may not be made effective for a calendar quarter beginning before January 1, 1959.

(iii) *Certificate filed after 1956 and before August 29, 1958.* A certificate filed by an organization after 1956 and before August 29, 1958 pursuant to section 3121(k), became effective for the period beginning with one of the following dates, as designated by the organization on the certificate:

(a) The first day of the calendar quarter in which the certificate was filed, or

(b) The first day of the calendar quarter immediately following the quarter in which the certificate was filed.

(iv) *Certificate filed before 1957.* A certificate filed before 1957 pursuant to section 3121(k) became effective for the period beginning with the first day following the close of the calendar quarter in which the certificate was filed. In no case, however, shall a certificate filed under the provisions of section 3121(k) be in effect with respect to services performed before January 1, 1955. (For regulations relating to waiver certificates filed under section 1426(l) of the Internal Revenue Code of 1939, see 26 CFR (1939) 408.216 (Regulations 128).)

(3) *Services to which certificate applies*—(i) *In general.* If an organization's certificate is in effect (see paragraph (c)(2) of this section), the certificate becomes effective with respect to services performed in its employ by each individual *(a)* who enters the employ of the organization after the calendar quarter in which the certificate is filed, as set forth in paragraph (c)(3)(ii) of this section, or *(b)* whose signature appears on the list on Form SS–15a, as set forth in paragraph (c)(3)(iii) of this section, or *(c)* whose signature appears on a Form SS–15a Supplement, as set forth in paragraph (c)(3)(iv) or (v) of this section. The first date on which such a certificate becomes effective with respect to an employee's services shall be the earliest date applicable under this subparagraph. An organization's certificate is not effective with respect to the services of an employee who is in its employ in the calendar quarter in which the certificate is filed and who does not sign Form SS–15a or Form SS–15a Supplement, so long as his employment relationship with the organization, at the close of the calendar quarter in which the certificate is filed and thereafter, continues without interruption.

(ii) *Employee hired after quarter in which certificate is filed.* If an individual enters the employ of an organization on or after the first day following the close of the calendar quarter in which the organization files a certificate pursuant to section 3121(k), the certificate shall be in effect with respect to services performed by the individual in the employ of the organization on and after the day he enters the employ of the organization. A former employee of the organization who is rehired on or after the first day following the close of the calendar quarter in which such a certificate is filed shall be considered to have entered the employ of the organization after such calendar quarter, regardless of whether such individual concurred in the filing of the certificate.

(iii) *Employee who signs Form SS–15a.* A certificate on Form SS–15 filed by an organization pursuant to section 3121(k) shall be in effect with respect to services performed by an individual in the employ of the organization on and after the first day for which the certificate is in effect, if such individual's signature appears on the list on Form SS–15a which accompanies such certificate.

(iv) *Employee who signs Form SS–15a Supplement to concur in certificate filed after August 28, 1958.* If the list on Form SS–15a accompanying a certificate filed after August 28, 1958, by an organization pursuant to section 3121(k) is amended in accordance with paragraph (b)(2)(i) of this section by the filing of a supplemental list on Form SS–15a Supplement, the certificate shall be in effect with respect to the services of each individual whose signature appears on the supplemental list, performed in the employ of the organization—

(a) On and after the first day for which the certificate is in effect, if the supplemental list is filed on or before the last day of the month following the calendar quarter in which the certificate is filed, or

(b) On and after the first day of the calendar quarter in which the supplemental list is filed, if such list is filed after the close of the first month following the calendar quarter in which the certificate is filed.

(v) *Employee who signed Form SS–15a Supplement to concur in certificate filed before August 29, 1958.* If the list on Form SS–15a which accompanied a certificate filed before August 29, 1958, by an organization pursuant to section 3121(k), or pursuant to section 1426(l) of the Internal Revenue Code of 1939, was amended in accordance with paragraph (b)(2)(ii) of this section by the filing of a supplemental list on Form SS–15a Supplement, the certificate shall be in effect with respect to the services of each individual whose signature appears on the supplemental list, performed in the employ of the organization—

(a) On and after the first day for which the certificate is in effect, if the supplemental list was filed on or before the last day of the month following the first calendar quarter for which the certificate was in effect, or

(b) On and after the first day following the close of the calendar quarter in which the supplemental list was filed, but not before January 1, 1955, if such list was filed after the close of the first month following the first calendar quarter for which the certificate is in effect.

(4) *Administrative provisions applicable when certificate has retroactive effect.* For purposes of computing interest and for purposes of section 6651 (relating to addition to tax for failure to file tax return), in any case in which a certificate filed pursuant to section 3121(k)(1) is effective pursuant to section 3121(k)(1)(B)(iii) (as originally enacted and as amended by section 316(a) of the Social Security Amendments of 1965) for one or more calendar quarters prior to the quarter in which the certificate is filed, the due date for the return and payment of the tax for such prior calendar quarters resulting from the filing of such certificate shall be the last day of the calendar month following the calendar quarter in which the certificate is filed. The statutory period for the assessment of the tax for such prior calendar quarters shall not expire before the expiration of 3 years from such due date. A waiver certificate (as described in section 3121(k)(1) and this section) furnished to the Internal Revenue Service after February 12, 1976, shall not be considered filed with the Internal Revenue Service unless interest paid to the organization (or credited to its account) in connection with a claim for credit or refund of taxes, which claim was based upon the exemption from taxes the organization is waiving by such certificate, is repaid. The interest so paid must be repaid only to the extent such interest relates to any taxes for which the organization or its employees would be liable by reason of the waiver certificate. Furthermore, when a waiver certificate has been filed prior to the payment of a refund of taxes based upon the exemption from taxes the organization in waiving, no credit or refund in respect of the taxes for which the exemption has been waived shall be allowed. If repayment of the interest is made as required by this subparagraph, on or before the last

day of the calendar month following the calendar quarter in which the certificate is furnished to the Internal Revenue Service, such certificate shall be considered to have been filed on the date it was originally furnished. If repayment occurs after that day, such certificate shall be considered to have been filed on the date of the repayment. References in this subparagraph to a waiver certificate refer also to any supplement to such a certificate.

(d) *Termination of waiver by organization.* (1) The period for which a certificate filed pursuant to section 3121(k), or pursuant to section 1426(l) of the Internal Revenue Code of 1939, is in effect may be terminated by the organization upon giving to the district director with whom the organization is filing returns 2 years' advance notice in writing of its desire to terminate the effect of the certificate at the end of a specified calendar quarter, but only if, at the time of the receipt of such notice by the district director, the certificate has been in effect for a period of not less than 8 years. The notice of termination shall be signed by the president or other principal officer of the organization. Such notice shall be dated and shall show (i) the title of the officer signing the notice, (ii) the name, address, and identification number of the organization, (iii) the district director with whom the certificate was filed, (iv) the date on which the certificate became effective, and (v) the date on which the certificate is to be terminated. No particular form is prescribed for the notice of termination.

(2) In computing the effective period which must precede the date of receipt of the notice of termination, there shall be disregarded any period or periods as to which the organization was not exempt from income tax under section 501(a) as an organization of the character described in section 501(c)(3) or under section 101(6) of the Internal Revenue Code of 1939.

(3) The notice of termination may be revoked by the organization by giving, prior to the close of the calendar quarter specified in the notice of termination, a written notice of such revocation. The notice of revocation shall be filed with the district director with whom the notice of termination was filed. The notice of revocation shall be signed by the president or other principal officer of the organization. Such notice shall be dated and shall show (i) the title of the officer signing the notice, (ii) the name, address, and identification number of the organization, and (iii) the date of the notice of termination to be revoked. No particular form is prescribed for the notice of revocation.

(e) *Termination of waiver by Commissioner.* (1) The period for which a certificate filed pursuant to section 3121(k), or pursuant to section 1426(l) of the Internal Revenue Code of 1939, is in effect may be terminated by the Commissioner, with the prior concurrence of the Secretary of Health, Education, and Welfare, upon a finding by the Commissioner that the organization has failed to comply substantially with the requirements applicable with respect to the taxes imposed by the act (or the corresponding provisions of prior law) or is no longer able to comply therewith. The Commissioner shall give the organization not less than 60 days' advance notice in writing that the period covered by the certificate will terminate at the end of the calendar quarter specified in the notice of termination.

(2) The notice of termination may be revoked by the Commissioner, with the prior concurrence of the Secretary of Health, Education, and Welfare, by giving written notice of revocation to the organization before the close of the calendar quarter specified in the notice of termination.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6983, 33 FR 18018, Dec. 4, 1968; T.D. 7012, 34 FR 7693, May 15, 1969; T.D. 7476, 42 FR 17874, Apr. 4, 1977]

§31.3121(k)–2 Waivers of exemption; original effective date changed retroactively.

(a) *Certificates filed after 1955 and before August 29, 1958.* (1) An organization which filed a certificate under section 3121(k) after 1955 and before August 29, 1958, may file a request on Form SS–15b at any time before 1960 to have such certificate made effective, with respect to the services of individuals who concurred in the filing of such certificate (initially, or by signing a supplemental

list on Form SS–15a Supplement which was filed before Aug. 29, 1958) and whose signatures also appeared on such request on Form SS–15b, for the period beginning with the first day of any calendar quarter after 1955 which preceded the first calendar quarter for which the certificate originally was effective.

(2) For purposes of computing interest and for purposes of section 6651 (relating to addition to tax for failure to file tax return), the due date for the return and payment of the tax for any calendar quarter resulting from the filing of a request referred to in paragraph (a)(1) of this section shall be the last day of the calendar month following the calendar quarter in which the request is filed. The statutory period for the assessment of such tax shall not expire before the expiration of 3 years from such due date.

(b) *Certificate filed before 1966.* (1) An organization which filed a certificate on Form SS–15 under section 3121(k)(1)(A) before January 1, 1966, may amend such certificate during 1965 or 1966 to make the certificate effective beginning with the first day of a calendar quarter preceding the date designated by the organization on the certificate (see paragraph (c)(2) of § 31.3121(k)–1). The amendment of the certificate shall be made by filing a Certificate For Retroactive Coverage on Form SS–15b. A certificate on Form SS–15 may be amended to be effective for the period beginning with the first day of any calendar quarter which precedes the calendar quarter for which the certificate was originally effective, except that such a certificate may not be made effective, through an amendment, for any calendar quarter which begins earlier than the 20th calendar quarter preceding the calendar quarter in which the organization files a Certificate For Retroactive Coverage on Form SS–15b. Thus, if a Certificate For Retroactive Coverage is filed in May 1966 in respect of a certificate on Form SS–15 filed in 1965, the certificate on Form SS–15 may not be made effective for a calendar quarter preceding the quarter beginning April 1, 1961. A certificate on Form SS–15 which is amended by a Certificate For Retroactive Coverage on Form SS–15b will be effective for the period preceding the first calendar quarter for which the certificate originally was effective only with respect to the services of individuals who concurred in the filing of the certificate (initially, or by signing a supplemental list on Form SS–15a Supplement which was filed prior to the date on which the Certificate For Retroactive Coverage was filed) and whose signatures also appear on the Certificate For Retroactive Coverage on Form SS–15b. A Certificate For Retroactive Coverage shall be filed with the district director with whom the related Form SS–15 was filed.

(2) For purposes of computing interest and for purposes of section 6651 (relating to addition to tax for failure to file tax return), the due date for the return and payment of the tax for any calendar quarter resulting from the filing of an amendment referred to in paragraph (b)(1) of this section shall be the last day of the calendar month following the calendar quarter in which the amendment is filed. The statutory period for the assessment of such tax shall not expire before the expiration of 3 years from such due date.

[T.D. 6983, 33 FR 18018, Dec. 4, 1968]

§ 31.3121(k)–3 Request for coverage of individual employed by exempt organization before August 1, 1956.

(a) *Application of this section.* This section is applicable to requests made after July 31, 1956, and before September 14, 1960, under section 403 of the Social Security Amendments of 1954, as amended, except that nothing in this section shall render invalid any act performed pursuant to, and in accordance with, Revenue Ruling 57–11, Cumulative Bulletin 1957–1, page 344, or Revenue Ruling 58–514, Cumulative Bulletin 1958–2, page 733. (For regulations relating to requests made before August 1, 1956, under section 403 of the Social Security Amendments of 1954, see 26 CFR (1939) 408.216(c) and (d) (Regulations 128).)

(b) *Organization which did not have waiver certificate in effect*—(1) *Coverage requested by employee before August 27, 1958.* Pursuant to section 403(a) of the Social Security Amendments of 1954, as amended by section 401 of the Social Security Amendments of 1956, any individual who, as an employee, performed

services after December 31, 1950, and before August 1, 1956, for an organization described in section 501(c)(3) which was exempt from income tax under section 501(a), or which was exempt from income tax under section 101(6) of the Internal Revenue Code of 1939, but which failed to file, before August 1, 1956, a valid waiver certificate under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939, may request after July 31, 1956, and before August 27, 1958, that such part of the remuneration received by him for services performed in the employ of the organization after 1950 and before 1957 with respect to which employee and employer taxes were paid be deemed to constitute remuneration for employment, if:

(i) Any of the services performed by the individual after December 31, 1950, and before January 1, 1957, would have constituted employment if such a certificate on Form SS–15 filed by the organization had been in effect for the period during which the services were performed and the individual's signature had appeared on the accompanying list on Form SS–15a;

(ii) The employee and employer taxes were paid with respect to any part of the remuneration received by the individual from the organization for such services;

(iii) A part of such taxes was paid before August 1, 1956;

(iv) Such taxes as were paid before August 1, 1956, were paid by the organization in good faith and upon the assumption that it had filed a valid certificate under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939; and

(v) No refund (or credit) of such taxes had been obtained by either the employee or the employer, exclusive of any refund (or credit) which would have been allowable if the services performed by the individual had constituted employment.

(2) *Coverage requested by employee after August 26, 1958, and before September 14, 1960.* Requests may be made after August 26, 1958, and before September 14, 1960, pursuant to section 403(a) of the Social Security Amendments of 1954, as amended by section 401 of the Social Security Amendments of 1956, by the Act of August 27, 1958 (Pub. L. 85–785, 72 Stat. 938), and by section 105(b)(6) of the Social Security Amendments of 1960. Any individual who, as an employee, performed services after December 31, 1950, and before August 1, 1956, for an organization described in section 501(c)(3) which was exempt from income tax under section 501(a), or which was exempt from income tax under section 101(6) of the Internal Revenue Code of 1939, but which did not have in effect during the entire period in which the individual was so employed a valid waiver certificate under section 3121(k), or under section 1326(l) of the Internal Revenue Code of 1939, may request after August 26, 1958, and before September 14, 1960, that such part of the remuneration received by him for services performed in the employ of the organization after 1950 and before 1957 with respect to which employee and employer taxes were paid be deemed to constitute remuneration for employment, if:

(i) Any of the services performed by the individual after December 31, 1950, and before January 1, 1957, would have constituted employment if such a certificate on Form SS–15 filed by the organization had been in effect for the period during which the services were performed and the individual's signature had appeared on the accompanying list on Form SS–15a;

(ii) The employee and employer taxes were paid with respect to any part of the remuneration received by the individual from the organization for such services performed during the period in which the organization did not have a valid waiver certificate in effect;

(iii) A part of such taxes was paid before August 1, 1956;

(iv) Such taxes as were paid before August 1, 1956, were paid by the organization in good faith, and either without knowledge that a waiver certificate was necessary or upon the assumption that it had filed a valid certificate under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939; and

(v) No refund (or credit) of such taxes has been obtained by either the employee or the employer, exclusive of any refund (or credit) which would be allowable if the services performed by

the individual had constituted employment.

(3) *Execution and filing of request.* (i) Except where the alternative procedure set forth in paragraph (b)(3)(ii) of this section is followed, the request of an individual under section 403(a) of the Social Security Amendments of 1954, as amended, is required to be made and filed as provided in this subdivision. The request shall be made in writing, be signed and dated by the individual, and include:

(a) The name and address of the organization for which the services were performed;

(b) The name, address, and social security account number of the individual;

(c) A statement that the individual has not obtained refund or credit (other than a refund or credit which would have been allowable if the services had constituted employment) from the district director of any part of the employee tax paid with respect to remuneration received by him from the organization for services performed after 1950 and before 1957; and

(d) A request that all remuneration received by him from the organization for such services with respect to which employee and employer taxes had been paid shall be deemed to constitute remuneration for employment to the extent authorized by section 403(a) of the Social Security Amendments of 1954, as amended.

The request of an individual shall be accompanied by a statement of the organization incorporating the substance of each of the five conditions listed in paragraph (b)(1) or (2), whichever is appropriate, of this section. The statement of the organization shall show also that the individual performed services for the organization after December 31, 1950, and before August 1, 1956; that the organization was an organization described in section 501(c)(3) which was exempt from income tax under section 501(a) or was exempt from income tax under section 101(6) of the Internal Revenue Code of 1939, and the district director with whom returns on Form 941 were filed. The organization's statement shall be signed by the president or other principal officer of the organization who shall certify that the statement is correct to the best of his knowledge and belief. If the statement of the organization is not submitted with the individual's request, the individual shall include in his request an explanation of his inability to submit the statement. Other information may be required, but should be submitted only upon receipt of a specific request therefore. No particular form is prescribed for the request of the individual or the statement of the organization required to be submitted with the request. The individual's request should be filed with the district director with whom the organization files returns on Form 941. If the individual is deceased or mentally incompetent and the request is made by the legal representative of the individual or other person authorized to act on his behalf, the request shall be accompanied by evidence showing such person's authority to make the request.

(ii) An organization which has or had in its employ individuals with respect to whom section 403(a) of the Social Security Amendments of 1954, as amended, is applicable may, if it so desires, prepare a form or forms for use by any such individual or individuals in making requests under such section. Any such form shall provide space for the signature of the individual or individuals and contain such information as required to be included in a request (see paragraph (b)(3)(i) of this section). Any such form used by more than one individual, and any such form used by one individual which is signed and returned to the organization, shall be submitted by the organization, together with its statement (as required in paragraph (b)(3)(i) of this section), to the district director with whom the organization files its returns on Form 941. An individual is not required to use a form prepared by the organization but may, at his election, file his request in accordance with the provisions of paragraph (b)(3)(i) of this section.

(4) *Optional tax payments by organization.* An organization which prior to August 1, 1956, reported and paid employee and employer taxes with respect to any portion of the remuneration paid to an individual, who is eligible to file a request under section 403(a) of

the Social Security Amendments of 1954, as amended, for services performed by him after 1950 and before 1957, may report and pay such taxes before September 14, 1960, with respect to any remaining portion of such remuneration which would have constituted wages if a certificate had been in effect with respect to such services. Such taxes may be reported as an adjustment without interest in the manner prescribed in Subpart G of the regulations in this part.

(5) *Effect of request.* If a request is made and filed under the conditions stated in this paragraph with respect to one or more individuals, remuneration for services performed by each such individual after 1950 and before 1957, with respect to which the employee and employer taxes are paid on or before the date on which the request was filed with the district director, will be deemed to constitute remuneration for employment to the extent that such services would have constituted employment as defined in section 3121(b), or in section 1426(b) of the Internal Revenue Code of 1939, if a certificate had been in effect with respect to such services. However, the provisions of section 3121(a) and §§31.3121(a)–1 to 31.3121(a)(10)–1, inclusive, of the regulations in this part or the provisions of section 1426(a) of the Internal Revenue Code of 1939 and the regulations in 26 CFR (1939) 408.226 and 408.227 (Regulations 128), as the case may be, are applicable in determining the extent to which such remuneration for employment constitutes wages for purposes of the employee and employer taxes.

(c) *Individual who failed to sign list of concurring employees*—(1) *In general.* Pursuant to section 403(b) of the Social Security Amendments of 1954, as amended, any individual who, as an employee, performed services after December 31, 1950, and before August 1, 1956, for an organization which filed a valid certificate under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939, but who failed to sign the list of employees concurring in the filing of such certificate, may request on or before January 1, 1959, that the remuneration received by him for such services be deemed to constitute remuneration for employment, if:

(i) Any of the services performed by the individual after December 31, 1950, and before August 1, 1956, would have constituted employment if the signature of such individual had appeared on the list of employees who concurred in the filing of the certificate;

(ii) The employee and employer taxes were paid before August 1, 1956, with respect to any part of the remuneration received by the individual from the organization for such services; and

(iii) No refund (or credit) of such taxes has been obtained either by the employee or the employer, exclusive of any refund (or credit) which would be allowable if the services performed by the individual had constituted employment.

(2) *Execution and filing of request.* (i) Except where the alternative procedure set forth in subdivision (ii) of this subparagraph is followed, the request of an individual under section 403(b) of the Social Security Amendments of 1954, as amended, shall be made and filed as provided in this subdivision. The request shall be filed on or before January 1, 1959, be made in writing, be signed and dated by the individual, and include:

(a) The name and address of the organization for which the services were performed;

(b) The name, address, and social security account number of the individual;

(c) A statement that the individual has not obtained a refund or credit (other than a refund or credit which would be allowable if the services had constituted employment) from the district director of any part of the employee tax paid before August 1, 1956, with respect to remuneration received by him from the organization;

(d) A request that all remuneration received by the individual from the organization for services performed after 1950 and before August 1, 1956, with respect to which employee and employer taxes were paid before August 1, 1956, shall be deemed to constitute remuneration for employment to the extent authorized by section 403(b) of the Social Security Amendments of 1954, as amended; and

(e) A statement that the individual understands that, upon the filing of

such request with the district director, *(1)* he will be deemed to have concurred in the certificate which was previously filed by the organization, and *(2)* the employee and employer taxes will be applicable to all wages received, and to be received, by him for services performed for the organization on or after the effective date of such certificate to the extent that such taxes would have been applicable if he had signed the list on Form SS–15a submitted with the certificate.

The request of an individual shall be accompanied by a statement of the organization incorporating the substance of each of the three conditions listed in paragraph (c)(1) of this section. The statement of the organization should also show that the individual performed services for the organization after December 31, 1950, and before August 1, 1956; that the organization filed a valid certificate under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939; and the district director with whom returns on Form 941 are filed. Such statement shall be signed by the president or other principal officer of the organization who shall certify that the statement is correct to the best of his knowledge and belief. If the statement of the organization is not submitted with the individual's request, the individual shall include in his request an explanation of his inability to submit such statement. Other information may be required, but should be submitted only upon receipt of a specific request therefor. No particular form is prescribed for the request of the individual or the statement of the organization required to be submitted with the request. The individual's request should be filed with the district director with whom the organization files returns on Form 941. If the individual is deceased or mentally incompetent and the request is made by the legal representative of the individual or other person authorized to act on his behalf, the request shall be accompanied by evidence showing such persons' authority to make the request.

(ii) An organization which has or had in its employ individuals with respect to whom section 403(b) of the Social Security Amendments of 1954, as amended, is applicable, may, if it so desires, prepare a form or forms for use by any such individual or individuals in making requests under such section. Any such form shall provide space for the signature of the individual or individuals and contain such information as is required by paragraph (c)(1)(i) of this section to be included in a request. Any such form used by more than one individual, and any such form used by one individual, and any such form used by one individual which is signed and returned to the organization, shall be submitted by the organization, together with its statement (as required in paragraph (c)(1)(i) of this section), to the district director with whom the organization files returns on Form 941. An individual is not required to use a form prepared by the organization but may, at his election, file his request in accordance with the provisions of subdivisions (i) of this subparagraph.

(3) *Effect of request.* An individual who makes and files a request under the conditions stated in this paragraph with respect to services performed as an employee of an organization described in section 501(c)(3) which was exempt from income tax under section 501(a), or which was exempt from income tax under section 101(6) of the Internal Revenue Code of 1939, will be deemed to have signed the list accompanying the certificate filed by the organization under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939. Accordingly, all services performed by the individual for the organization on and after the effective date of the certificate will constitute employment to the same extent as if he had, in fact, signed the list. The employee tax and employer tax are applicable with respect to any remuneration paid to the employee by the organization which constitutes wages. If less than the correct amount of such taxes has been paid, the additional amount due should be reported as an adjustment without interest within the time specified in subpart G of the regulations in this part.

[T.D. 6744, 29 FR 8318, July 2, 1964]

§ 31.3121(k)–4 Constructive filing of waivers of exemption from social security taxes by certain tax-exempt organizations.

(a) *Constructive filing of waiver certificate where no refund or credit has been allowed.* (1) This paragraph applies (except as provided in subparagraph (3) of this paragraph) to an organization if all of the following four conditions are met.

(i) The organization is one described in section 501(c)(3) of the Internal Revenue Code of 1954, which is exempt from income tax under section 501(a) of the Code.

(ii) The organization did not file a valid waiver certificate under section 3121(k)(1) of the Internal Revenue Code of 1954 (or the corresponding provision of prior law) as of the later of October 19, 1976, or the earliest date on which it satisfies paragraph (a)(1)(iii) of this section.

(iii) The taxes imposed by sections 3101 and 3111 of the Code were paid with respect to remuneration paid by the organization to its employees, as though such certificate had been filed, during any period that includes all or part of at least three consecutive calendar quarters and that did not terminate before the end of the third calendar quarter of 1973.

(iv) The Internal Revenue Service did not allow (or erroneously allowed) a refund or credit of any part of the taxes paid as described in subdivision (iii) of this subparagraph with respect to remuneration for services performed on or after April 1, 1973. For purposes of the previous sentence, a refund or credit which would have been allowed, even if a valid waiver certificate filed under section 3121(k)(1) had been in effect, shall be disregarded. A refund or credit will be regarded as having been erroneously allowed if it was credited by the Internal Revenue Service to the taxpayer account of the organization or any of its employees on or after September 9, 1976, even though it was properly made under the law in effect when made.

(2) (i) An organization to which this paragraph applies shall be deemed to have filed a valid waiver certificate under section 3121(k)(1) (or the corresponding provision of prior law) for purposes of section 210(a)(8)(B) of the Social Security Act and section 3121(b)(8)(B). The waiver certificate shall be deemed to have been filed on the first day of the period described in paragraph (a)(1)(iii) of this section and shall be effective on the first day of the calendar quarter in which such period began. However, such waiver is effective only with respect to remuneration for services performed after 1950.

(ii) The waiver certificate shall be deemed to have been accompanied by a list containing the signature, address, and social security number (if any) of each employee with respect to whom the taxes imposed by sections 3101 and 3111 were paid as described in paragraph (a)(1)(iii) of this section. Each such employee shall be deemed to have concurred in the filing of the certificate for purposes of section 210(a)(8)(B) of the Social Security Act and section 3121(b)(8)(B). A statement containing the name, address, and employer identification number of the organization, and the name, last known address, and social security number (if any) of each employee described in the preceding sentence shall be filed by the organization at the request of the Internal Revenue Service.

(iii) The services of all employees entering or reentering the employ of an organization on or after the first day following the close of the calendar quarter in which the organization is deemed to have filed the waiver certificate, performed on or after the day of such entry or reentry, shall be covered by the certificate.

(3) This paragraph (a) shall not apply to an organization if—

(i) Prior to the end of the period referred to in paragraph (a)(1)(iii) (and, in addition, in the case of an organization organized on or before October 9, 1969, prior to October 19, 1976), the organization had applied for a ruling or determination letter acknowledging it to be exempt from income tax under section 501(c)(3);

(ii) The organization subsequently received such ruling or determination letter;

(iii) The organization did not pay any taxes under sections 3101 and 3111 with respect to any employee for any calendar quarter ending after the twelfth

month following the date of mailing of the ruling or determination letter; and

(iv) The organization did not pay any taxes under sections 3101 and 3111 with respect to any calendar quarter beginning after the later of December 31, 1975, or the date on which the ruling or determination letter was issued.

(4) In the case of an organization which is deemed under this paragraph to have filed a valid waiver certificate under section 3121(k)(1), if the period with respect to which the taxes imposed by sections 3101 and 3111 were paid by the organization (as described in paragraph (a)(1)(iii) of this section) terminated prior to October 1, 1976, taxes under sections 3101 and 3111 with respect to remuneration paid by the organization after the termination of such period and prior to July 1, 1977, which remained unpaid on December 20, 1977 (or which were paid after October 19, 1976, but prior to December 20, 1977), shall not be due or payable (or, if paid, shall be refunded). Similarly, an organization that received a refund or credit of the taxes described in paragraph (a)(1)(iii) of this section after September 8, 1976, shall not be liable for the taxes imposed by sections 3101 and 3111 with respect to remuneration paid by it prior to July 1, 1977, for which the organization received the refund or credit. The waiver certificate, which an organization described in this subparagraph is deemed to have filed, shall not apply to any service with respect to the remuneration for which the taxes imposed by sections 3101 and 3111 are not due or payable (or are refunded) by reason of this subparagraph.

(5) In the case of an organization which is deemed under this paragraph to have filed a valid waiver certificate under section 3121(k)(1), if the taxes imposed by sections 3101 and 3111 were not paid during the period referred to in paragraph (a)(1)(iii) of this section (whether the period has terminated or not) with respect to remuneration paid by the organization to individuals who became its employees after the close of the calendar quarter in which such period began, taxes under sections 3101 and 3111 with respect to remuneration paid prior to July 1, 1977, to such employees, which remain unpaid on December 20, 1977 (or which were paid after October 19, 1976, but prior to December 20, 1977), shall not be due or payable (or, if paid, shall be refunded). The waiver certificate, which an organization described in this subparagraph is deemed to have filed, shall not apply to any service with respect to remuneration for which the taxes imposed by sections 3101 and 3111 are not due or payable (or are refunded) by reason of this subparagraph.

(6) This subparagraph allows certain employees to obtain social security coverage for service not covered by a deemed-filed waiver certificate by reason of section 3121(k)(4)(C) and paragraph (a)(4) or (5) of this section. To qualify under this subparagraph, all of the following conditions must be met.

(i) An individual performed service as an employee of an organization which is deemed under this paragraph to have filed a waiver certificate under section 3121(k)(1), on or after the first day of the period described in paragraph (a)(1)(iii) of this section and before July 1, 1977.

(ii) The service performed by the individual does not constitute employment (as defined in section 210 (a) of the Social Security Act and section 3121(b) of the Code) because the waiver certificate which the organization is deemed to have filed is inapplicable to such service by reason of section 3121(k)(4)(C), but would constitute employment (as so defined) in the absence of section 3121(k)(4)(C).

(iii) The individual files a request on or before April 15, 1980, in the manner and form, and with such official, as may be prescribed by regulations under title II of the Social Security Act.

(iv) That request is accompanied by full payment of the taxes, which would have been paid under section 3101 with respect to the remuneration for the service described in paragraph (a)(6)(ii) of this section but for the application of section 3121(k)(4)(C) (or by satisfactory evidence that appropriate arrangements have been made for the payment of such taxes in installments as provided in section 3121(k)(8) and paragraph (d) of this section).

If these conditions are satisfied, the remuneration paid for the service described in paragraph (a)(6)(i) of this section shall be deemed to constitute

remuneration for employment. In any case where remuneration paid by an organization to an individual is deemed under this subparagraph to constitute remuneration for employment, such organization shall be liable (notwithstanding any other provision of the Code or regulations) for payment of the taxes it would have been required to pay under section 3111 with respect to such remuneration but for the application of section 3121(k)(4)(C). The due date for the return and payment by the organization of the taxes described in the preceding sentence shall be the last day of the calendar month following the calendar quarter in which the organization is notified in writing of the employee's request. However, see paragraph (d) of this section which permits the payment of these taxes in installments.

(b) *Constructive filing of waiver certificate where refund or credit has been allowed and new certificate is not filed.* (1) This paragraph applies to an organization which meets two conditions. First, it must be an organization to which paragraph (a) of this section would apply but for its failure to satisfy the requirement of paragraph (a)(1)(iv) of this section because a refund or credit of taxes was allowed before September 9, 1976. Second, it must not have filed an actual valid waiver certificate under section 3121(k)(1) in accordance with the requirements of paragraph (c) of this section.

(2) An organization to which this paragraph applies shall be deemed, for purposes of section 210(a)(8)(B) of the Social Security Act and section 3121(b)(8)(B), to have filed a valid waiver certificate under section 3121(k)(1) on April 1, 1978. Such certificate shall be effective for the period beginning on the first day of the first calendar quarter with respect to which the refund or credit referred to in paragraph (b)(1) of this section was allowed (or, if later, on July 1, 1973).

(3) If an organization is deemed under this paragraph to have filed a waiver certificate on April 1, 1978, the provisions of paragraph (a)(2)(ii) and (iii) of this section (relating to employees covered by a deemed-filed waiver certificate) shall apply. Such certificate shall supersede any certificate which may have been actually filed by such organization prior to that date.

(4) Where an organization is deemed under this paragraph to have filed a waiver certificate on April 1, 1978, the due date for the return and payment of the taxes imposed by sections 3101 and 3111 for wages paid prior to April 1, 1978, with respect to services constituting employment by reason of such certificate shall be August 1, 1978. However, see paragraph (d) of this section which permits the payment of these taxes in installments. Such taxes (along with the amount of any interest paid in connection with the refund or credit described in paragraph (b)(1) of this section) shall be a liability of such organization, payable from its own funds. No portion of such taxes (or interest) shall be deducted from the wages of (or otherwise collected from) the individuals who performed such services, and those individuals shall have no liability for the payment thereof.

(5) This subparagraph allows certain employees of organizations covered under this paragraph to obtain social security coverage for periods prior to those covered by a deemed-filed waiver certificate. To qualify under this subparagraph, all of the following conditions must be met.

(i) An individual performed service, as an employee of an organization deemed under this paragraph to have filed a waiver certificate under section 3121(k)(1), at any time prior to the period for which such certificate is effective.

(ii) The taxes imposed by sections 3101 and 3111 were paid with respect to remuneration paid for such service, but such service (or any part thereof) does not constitute employment (as defined in section 210(a) of the Social Security Act and section 3121(b)) because the applicable taxes so paid were refunded or credited (otherwise than through a refund or credit which would have been allowed if a valid waiver certificate filed under section 3121(k)(1) had been in effect) prior to September 9, 1976.

(iii) Any portion of such service (with respect to which taxes were paid and refunded or credited as described in paragraph (b)(5)(ii) of this section) would constitute employment (as so

defined) if the organization had actually filed under section 3121(k)(1) a valid waiver certificate effective as provided in paragraph (c)(2) of this section (with such individual's signature appearing on the accompanying list).

If this subparagraph applies, the remuneration paid for the portion of such service described in paragraph (b)(5)(iii) of this section shall be deemed to constitute remuneration for employment (as defined in section 210(a) of the Social Security Act and section 3121(b)), where such individual filed a request on or before April 15, 1980 (in the manner and form, and with such official, as may be prescribed by regulations under title II of the Social Security Act), accompanied by full repayment of the taxes which were paid under section 3101 with respect to such remuneration and were refunded or credited (or by satisfactory evidence that arrangements have been made for the payment of such taxes in installments as provided in section 3121(k)(8) and paragraph (d) of this section). In any case where remuneration paid by an organization to an individual is deemed under this subparagraph to constitute remuneration for employment such organization shall be liable (notwithstanding any other provision of the Code or regulations) for repayment of any taxes which it paid under section 3111 with respect to such remuneration and which were refunded or credited to it. Any interest received by the organization or its employees in connection with a refund or credit with respect to such taxes shall be remitted with the repayment of taxes pursuant to this subparagraph.

(c) *Actual filing of waiver certificate by April 1, 1978, where refund or credit has been allowed.* (1) An organization may file an actual waiver certificate in accordance with paragraphs (c)(2) and (3) of this section if it is an organization to which paragraph (a) of this section would apply but for its failure to meet the condition set forth in paragraph (a)(1)(iv) of this section.

(2) An organization described in paragraph (c)(1) of this section was permitted to file an actual waiver certificate on or before April 1, 1978. This certificate must be effective for the period beginning on or before the first day of the first calendar quarter with respect to which a refund or credit described in paragraph (b)(1) of this section was allowed (or, if later, with the first day of the earliest calendar quarter for which such certificate may be in effect under section 3121(k)(1)(B)(iii)). Such waiver certificate must have been accompanied by a list described in section 3121(k)(1)(A), containing the signature, address, and social security number of each concurring employee (if any).

(3) Such a waiver certificate shall be valid only if the organization complied with the following notification requirements and, on or before April 30, 1978, filed (with the service center of the Internal Revenue Service with which the waiver certificate was filed) a certification that it had complied with these notification requirements. However, these requirements shall be conclusively presumed to have been met with respect to any employees who concurred in the filing of the waiver certificate.

(i) Written notification of the option to obtain social security coverage for the retroactive period covered by the waiver certificate is required to have been given to all current and former employees of the organization with respect to whose remuneration taxes imposed by sections 3101 and 3111 were paid for any part of the period covered by the waiver certificate. For purposes of the preceding sentence, in the case of a former employee a mailing of notification to his or her last known address shall constitute delivery to the former employee. This notification must have been given at least 30 days prior to the date by which the employee was required to inform the organization whether he or she elects the retroactive social security coverage.

(ii) The notification required by this subparagraph must have stated the earliest date for which the waiver certificate is effective and the date by which the employee must have informed the organization of a decision to elect the retroactive coverage. In addition, the notification must have advised the employee how to obtain information as to the quarters of social security coverage to be obtained and any taxes or interest for which the employee would be liable if the election

was made. The organization must have provided this information to any interested employee at least 14 days prior to the last day on which such employee was to have informed the organization of any election.

(iii) If the notification resulted in any employee electing the retroactive coverage whose signature did not appear on the list of concurring employees which accompanied a previously filed waiver certificate, the certification that was supplied on or before April 30, 1978, must have been accompanied by a special amendment to that list. Any employee whose name appears on this special amended list shall be treated as if his or her name appeared on the list of concurring employees filed with the waiver certificate. The preceding sentence shall only apply with respect to amended lists of concurring employees filed to comply with the requirements of this subparagraph.

(4) Any interest received in connection with a refund or credit described in paragraph (b)(1) of this section must have been repaid on or before April 30, 1978, with respect to each employee who concurs in the filing of a waiver certificate pursuant to this paragraph. Notwithstanding the provisions of paragraph (c)(4) of §31.3121(k)–1, if such interest was repaid on or before April 30, 1978, the waiver certificate shall be considered to have been filed on the date it was originally furnished to the Internal Revenue Service.

(d) *Installment payment of taxes for retroactive coverage.* This paragraph applies if—

(1) An organization is deemed under paragraph (a) of this section to have filed a valid waiver certificate, but the applicable period described in paragraph (a)(1)(iii) has terminated and all or part of the taxes imposed by sections 3101 and 3111, with respect to remuneration paid by such organization to its employees after the close of such period, remains payable notwithstanding section 3121(k)(4)(C) and paragraph (a)(4) of this section; or

(2) An organization described in paragraph (c) files a valid waiver certificate by March 31, 1978, or, not having filed the certificate by that date, is seemed to have filed the certificate on April 1, 1978, under paragraph (b); or

(3) An individual files a request under paragraph (a)(6) or (b)(5) to have service treated as constituting remuneration for employment (as defined in section 210(a) of the Social Security Act and section 3121(b)).

If this paragraph applies, the taxes due under sections 3101 and 3111 (together with any additions to tax or interest other than interest described in paragraph (c)(4)) with respect to service constituting employment by reason of the waiver certificate for any period prior to the first day of the calendar quarter in which the certificate is filed or deemed filed, or with respect to service constituting employment by reason of an employee request, may be paid in installments over an appropriate period of time, as determined by the district director. In determining the appropriate period of time, the district director shall exercise forbearance and, to the extent possible, grant the organization an installment agreement that will allow it sufficient funds to carry out its basic mission. If any installment is not paid on or before the date fixed for its payment, the total unpaid amount shall become payable immediately and shall be paid upon notice and demand.

(e) *Application of certain provisions to cases of constructive filing.* (1) Except as provided in paragraphs (e)(2) and (3) of this section, all of the provisions of section 3121(k) (other than subparagraphs (B), (F), and (H) of section 3121(k)(1)) and the regulations thereunder (including the provisions requiring the payment of taxes under sections 3101 and 3111 with respect to the services involved), shall apply with respect to any certificate which is deemed to have been filed under paragraph (a) or (b) of this section, in the same way they would apply if the certificate had been actually filed on that day under section 3121(k)(1).

(2) The provisions of section 3121(k)(1)(E) shall not apply unless the taxes described in paragraph (a)(1)(iii) of this section were paid by the organization as though a separate certificate had been filed with respect to one or both of the groups to which such provisions relate.

(3) The action of the organization in obtaining the refund or credit described in paragraph (b)(1) of this section shall not be considered a termination of such organization's coverage period for purposes of section 3121(k)(3).

(4) Any organization which is deemed to have filed a waiver certificate under paragraph (a) or (b) of this section shall be considered for purposes of section 3102(b) to have been required to deduct the taxes imposed by section 3101 with respect to the services involved.

[T.D. 7647, 44 FR 59524, Oct. 16, 1979]

§ 31.3121(l)–1 Agreements entered into by domestic corporations with respect to foreign subsidiaries.

For provisions relating to the extension of the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act to certain services performed outside the United States by citizens of the United States in the employ of a foreign subsidiary of a domestic corporation, see the Regulations Relating to Contract Coverage of Employees of Foreign Subsidiaries (part 36 of this chapter).

§ 31.3121(o)–1 Crew leader.

The term ''crew leader'' means an individual who furnishes individuals to perform agricultural labor for another person, if such individual pays (either on his own behalf or on behalf of such person) the individuals so furnished by him for the agricultural labor performed by them and if such individual has not entered into a written agreement with such person whereby such individual has been designated as an employee of such person. For purposes of this chapter a crew leader is deemed to be the employer of the individuals furnished by him to perform agricultural labor, after 1956, for another person, and the crew leader is deemed not to be an employee of such other person with respect to the performance of services by him after 1956 in furnishing such individuals or as a member of the crew. An individual is not a crew leader within the meaning of section 3121(o) and of this section if he does not pay the agricultural workers furnished by him to perform agricultural labor for another person, or if there is an agreement between such individual and the person for whom the agricultural labor is performed whereby such individual is designated as an employee of such person. Whether or not such individual is an employee will be determined under the usual common-law rules (see paragraph (c) of § 31.3121(d)–1).

[T.D. 6744, 29 FR 8320, July 2, 1964]

§ 31.3121(q)–1 Tips included for employee taxes.

(a) *In general.* Except as otherwise provided in paragraph (b) of this section, tips received after 1965 by an employee in the course of his employment shall be considered remuneration for employment. (For definition of the term ''employee'' see 3121(d) and § 31.3121(d)–1.) Tips reported by an employee to his employer in a written statement furnished to the employer pursuant to section 6053(a) (see § 31.6053–1) shall be deemed to be paid to the employee at the time the written statement is furnished to the employer. Tips received by an employee which are not reported to his employer in a written statement furnished pursuant to section 6053(a) shall be deemed to be paid to the employee at the time the tips are actually received by the employee. For provisions relating to the collection of employee tax in respect of tips from the employee, see § 31.3102–3.

(b) *Tips not included for employer taxes.* Tips received after 1965 by an employee in the course of his employment do not constitute remuneration for employment for purposes of computing wages subject to the taxes imposed by subsections (a) and (b) of section 3111.

(c) *Tips received by an employee in course of his employment.* Tips are considered to be received by an employee in the course of his employment for an employer regardless of whether the tips are received by the employee from a person other than his employer or are paid to the employee by the employer. However, only those tips which are received by an employee on his own behalf (as distinguished from tips received on behalf of another employee) shall be considered as remuneration paid to the employee. Thus, where employees practice tip splitting (for example, where waiters pay a portion of

the tips received by them to the busboys), each employee who receives a portion of a tip left by a customer of the employer is considered to have received tips in the course of his employment.

(d) *Computation of annual wage limitation.* In connection with the application of the annual wage limitation (see §31.3121(a)(1)–1), tips reported by an employee to his employer in a written statement furnished to the employer pursuant to section 6053(a) shall be taken into account for purposes of the tax imposed by section 3101. However, since tips received by an employee in the course of his employment do not constitute remuneration for employment for purposes of the tax imposed by section 3111, they are disregarded for purposes of the annual wage limitation in respect of such tax. Accordingly, separate computations for purposes of the annual wage limitation may be required in respect of an employee who receives tips. The provisions of this paragraph may be illustrated by the following example:

Example. During 1966, A is employed as a waiter by X restaurant and is paid wages by X restaurant at the rate of $100 a week. At the end of October 1966, A has been paid weekly wages in the amount of $4,300 and has reported tips in the amount of $2,200. On November 6, 1966, A is paid an additional week's wages in the amount of $100 and on November 9, 1966, A furnishes X restaurant a report of tips actually received by him during October. The annual wage limitation of $6,600 (weekly wages of $4,400 ($4,300 plus $100) and tips of $2,200) had been reached for purposes of the tax imposed by section 3101 prior to November 9 and, accordingly, no portion of the tips included in the report furnished on that date constitutes wages. However, since tips do not constitute remuneration for employment for purposes of the tax imposed by section 3111, the weekly wages paid to A during the remainder of 1966 will be subject to the tax imposed by section 3111.

[T.D. 7001, 34 FR 1000, Jan. 23, 1969]

§31.3121(r)–1 Election of coverage by religious orders.

(a) *In general.* A religious order whose members are required to take a vow of poverty, or any autonomous subdivision of such an order, may elect to have the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act extended to services performed by its members in the exercise of duties required by such order or subdivision. See section 3121(i)(4) and §31.3121(i)–4 for provisions relating to the computation of the amount of remuneration of such members. For purposes of this section, a subdivision of a religious order is autonomous if it directs and governs its members, if it is responsible for its members' care and maintenance, if it is responsible for the members' support and maintenance in retirement, and if the members live under the authority of a religious superior who is elected by them or appointed by higher authority.

(b) *Definition of member*—(1) *In general.* For purposes of section 3121(r) and this section, a member of a religious order means any individual who is subject to a vow of poverty as a member of such order, who performs tasks usually required (and to the extent usually required) of an active member of such order, and who is not considered retired because of old age or total disability.

(2) *Retirement because of old age*—(i) *In general.* For purposes of section 3121(r)(2) and this paragraph, an individual is considered retired because of old age if (A) in view of all the services performed by the individual and the surrounding circumstances it is reasonable to consider him to be retired, and (B) his retirement occurred by reason of old age. Even though an individual performs some services in the exercise of duties required by the religious order, the first test (the retirement test) is met where it is reasonable to consider the individual to be retired.

(ii) *Factors to be considered.* In determining whether it is reasonable to consider an individual to be retired, consideration is first to be given to all of the following factors:

(A) *Nature of services.* Consideration is given to the nature of the services performed by the individual in the exercise of duties required by his religious order. The more highly skilled and valuable such services are, the more likely the individual rendering such services is not reasonably considered retired. Also, whether such services are

of a type performed principally by retired members of the individual's religious order may be significant.

(B) *Amount of time.* Consideration is also given to the amount of time the individual devotes to the performance of services in the exercise of duties required by his religious order. This time includes all the time spent by him in any activity in connection with services that might appropriately be performed in the exercise of duties required of active members by the order. Normally, an individual who, solely by reason of his advanced age, performs services of less than 45 hours per month shall be considered retired. In no event shall an individual who, solely by reason of his advanced age, performs services of less than 15 hours per month not be considered retired.

(C) *Comparison of services rendered before and after retirement.* In addition, consideration is given to the nature and extent of the services rendered by the individual before he ''retired,'' as compared with the services performed thereafter. A large reduction in the importance or amount of services performed by the individual in the exercise of duties required by his religious order tends to show that the individual is retired; absence of such reduction tends to show that the individual is not retired. Normally, an individual who reduces by at least 75 percent the amount of services performed shall be considered retired.

Where consideration of the factors described in paragraph (b)(2)(ii) of this section does not establish whether an individual is or is not reasonably considered retired, all other factors are considered.

(iii) *Examples.* The rules of this subparagraph may be illustrated by the following examples:

Example 1. A is a member of a religious order who is subject to a vow of poverty. A's religious order is principally engaged in providing nursing services, and A has been fully trained in the nursing profession. In accordance with the practices of her order, upon attaining the age of 65, A is relieved of her nursing duties by reason of her age, and is assigned to a mother house where she is required to perform only such duties as light housekeeping and ordinary gardening. A is reasonably considered retired since the services she is performing are simple in nature, are markedly less skilled than those professional services which she previously performed, are of a type performed principally by retired members of her order, and are performed at a location to which members frequently retire.

Example 2. Assume the same facts as in example 1 except that A is not reassigned to a mother house. Instead, she is reassigned to full-time duties in a hospital not utilizing her nursing skills. Whether A has met the retirement test requires consideration of the nature of her work. If A's new duties are almost entirely of a make-work nature primarily to occupy her body and mind, she is reasonably considered retired. However, if they are essential to the operation of the hospital, she is not reasonably considered retired.

Example 3. B is a member of a religious order who is subject to a vow of poverty. As such, he provides supportive services to his order, such as housekeeping, cooking, and gardening. By reason of having attained the age of 62, he reduces the number of hours spent per day in these services from 8 hours to 2 hours. B is reasonably considered retired in view of the large reduction in the amount of time he devotes to his duties.

Example 4. C is a member of a religious order who is subject to a vow of poverty. In his capacity as a member of the order, he performs duties as president of a university. Upon attaining the age of 65, C is relieved of his duties as president of the university and instead becomes a member of its faculty, teaching two courses whereas full-time members of the faculty normally teach four comparable courses. Although C's duties are no longer as demanding as those he previously performed, and although the amount of his time required for them is less than full time, he is nonetheless performing duties requiring a high degree of skill for a substantial amount of time. Accordingly, C is not reasonably considered retired.

Example 5. Assume the same facts as in example 4, except that C teaches only one course upon being relieved of his position as president by reason of age. C is reasonably considered retired.

Example 6. D is a member of a contemplative order who is subject to a vow of poverty. In accordance with the practices of his order, upon attaining the age of 70, D reduces by 50 percent the amount of time spent performing the normal duties of active members of his order. D is not reasonably considered retired.

Example 7. Assume the same facts as in example 6, except that because of his age D no longer participates in the more rigorous liturgical services of the order and that the amount of time which he spends in all duties which might appropriately be performed by active members of his order is reduced by 75 percent. D is reasonably considered retired

in view of the large reduction in his participation in the usual devotional routine of his order.

(3) *Retirement because of total disability.* For purposes of section 3121(r)(2) and this paragraph, an individual is considered retired because of total disability (i) if he is unable, by reason of a medically determinable physical or mental impairment, to perform the tasks usually required of an active member of his order to the extent necessary to maintain his status as an active member, and (ii) if such impairment is reasonably expected to prevent his resumption of the performance of such tasks to such extent. A physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. Statements of the individual, including his own description of his impairment (symptoms), are, alone, insufficient to establish the presence of a physical or mental impairment.

(4) *Evidentiary requirements with respect to retirement.* There shall be attached to the return of taxes paid pursuant to an election under section 3121(r) a summary of the facts upon which any determination has been made by the religious order or autonomous subdivision that one or more of its members retired during the period covered by such return. Each summary shall contain the name and social security number of each such retired member as well as the date of his retirement. Such order or subdivision shall maintain records of the details relating to each such ''retirement'' sufficient to show whether or not such member or members has in fact retired.

(c) *Certificates of election*—(1) *In general.* A religious order or an autonomous subdivision of such an order desiring to make an election of coverage pursuant to section 3121(r) and this section shall file a certificate of election on Form SS–16 in accordance with the instructions thereto. However, in the case of an election made before August 9, 1973, a document other than Form SS–16 shall constitute a certificate of election if it purports to be a binding election of coverage and if it is filed with an appropriate official of the Internal Revenue Service. Such a document shall be given the effect it would have if it were a certificate of election containing the provisions required by paragraph (c)(2) of this section. However, it should subsequently be supplemented by a Form SS–16.

(2) *Provisions of certificates.* Each certificate of election shall provide that—

(i) Such election of coverage by such order or subdivision shall be irrevocable,

(ii) Such election shall apply to all current and future members of such order, or in the case of a subdivision thereof to all current and future members of such order who belong to such subdivision,

(iii) All services performed by a member of such order or subdivision in the exercise of duties required by such order or subdivision shall be deemed to have been performed by such member as an employee of such order or subdivision, and

(iv) The wages of each member, upon which such order or subdivision shall pay the taxes imposed on employees and employers by sections 3101 and 3111, will be determined as provided in section 3121(i)(4).

(d) *Effective date of election*—(1) *In general.* Except as provided in paragraph (e) of this section, a certificate of election of coverage filed by a religious order or its subdivision pursuant to section 3121(r) and this section shall be in effect, for purposes of section 3121(b)(8)(A) and for purposes of section 210(a)(8)(A) of the Social Security Act, for the period beginning with whichever of the following may be designated by the electing religious order or subdivision:

(i) The first day of the calendar quarter in which the certificate is filed,

(ii) The first day of the calendar quarter immediately following the quarter in which the certificate is filed, or

(iii) The first day of any calendar quarter preceding the calendar quarter in which the certificate is filed, except that such date may not be earlier than the first day of the 20th calendar quarter preceding the quarter in which such certificate is filed.

(2) *Retroactive elections.* Whenever a date is designated as provided in paragraph (d)(1)(iii) of this section, the election shall apply to services performed before the quarter in which the certificate is filed only if the member performing such services was a member at the time such services were performed and is living on the first day of the quarter in which such certificate is filed. Thus, the election applies to an individual who is no longer a member of a religious order on the first day of such quarter if he performed services as a member at any time on or after the date so designated and is living on the first day of the quarter in which such certificate is filed. For purposes of computing interest and for purposes of section 6651 (relating to additions to tax for failure to file tax return or to pay tax), in any case in which such a date is designated the due date for the return and payment of the tax, for calendar quarters prior to the quarter in which the certificate is filed, resulting from the filing of such certificate shall be the last day of the calendar month following the calendar quarter in which the certificate is filed. The statutory period for the assessment of the tax for such prior calendar quarters shall not expire before the expiration of 3 years from such due date.

(e) *Coordination with coverage of lay employees.* If at the time the certificate of election of coverage is filed by a religious order or autonomous subdivision, a certificate of waiver of exemption under section 3121(k) (extending coverage to any lay employees) is not in effect, the certificate of election shall not become effective unless the order or subdivision files a Form SS–15, and a Form SS–15a to accompany the certificate on Form SS–15, as provided by section 3121(k) and §§ 31.3121(k)–1 through 31.3121(k)–3. The preceding sentence applies even though an order or subdivision has no lay employees at the time it files a certificate of election of coverage. The effective date of the certificate of waiver of exemption must be no later than the date on which the certificate of election becomes effective, and it must be specified on the certificate of waiver of exemption that such certificate is irrevocable. The certificate of waiver of exemption required under this paragraph shall be filed notwithstanding the provisions of section 3121(k)(3) (relating to no renewal of the waiver of exemption) which otherwise would prohibit the filing of a waiver of exemption if an earlier waiver of exemption had previously been terminated. If at the time the certificate of election of coverage is filed a certificate of waiver of exemption is in effect with respect to the electing religious order or autonomous subdivision, the filing of the certificate of election shall constitute an amendment of the certificate of waiver of exemption making the latter certificate irrevocable.

[T.D. 7280, 38 FR 18370, July 10, 1973]

§ 31.3121(s)–1 Concurrent employment by related corporations with common paymaster.

(a) *In general.* For purposes of sections 3102, 3111, and 3121(a)(1), except as otherwise provided in paragraph (c) of this section, when two or more related corporations concurrently employ the same individual and compensate that individual through a common paymaster which is one of the related corporations that employs the individual, each of the corporations is considered to have paid only the remuneration it actually disburses to that individual. This rule applies whether the remuneration was paid with respect to the employment relationship of the individual with the disbursing corporation or was paid on behalf of another related corporation. Accordingly, if all of the remuneration to the individual from the related corporations is disbursed through the common paymaster, the total amount of taxes imposed with respect to the remuneration under sections 3102 and 3111 is determined as though the individual has only one employer (the common paymaster). The common paymaster is responsible for filing information and tax returns and issuing Forms W–2 with respect to wages it is considered to have paid under this section. Section 3121(s) and this section apply only to remuneration disbursed in the form of money, check or similar instrument by one of the related corporations or its agent.

(b) *Definitions.* The definitions contained in this paragraph are applicable only for purposes of this section and § 31.3306(p)–1.

(1) *Related corporations.* Corporations shall be considered related corporations for an entire calendar quarter (as defined in § 31.0–2(a)(9)) if they satisfy any one of the following four tests at any time during that calendar quarter:

(i) The corporations are members of a ''controlled group of corporations'', as defined in section 1563 of the Code, or would be members if section 1563(a)(4) and (b) did not apply and if the phrase ''more than 50 percent'' were substituted for the phrase ''at least 80 percent'' wherever it appears in section 1563(a).

(ii) In the case of a corporation that does not issue stock, either fifty percent or more of the members of one corporation's board of directors (or other governing body) are members of the other corporation's board of directors (or other governing body), or the holders of fifty percent or more of the voting power to select such members are concurrently the holders of more than fifty percent of that power with respect to the other corporation.

(iii) Fifty percent or more of one corporation's officers are concurrently officers of the other corporation.

(iv) Thirty percent or more of one corporation's employees are concurrently employees of the other corporation.

The following examples illustrate the application of this paragraph:

Example 1. (a) X Corporation employs individuals A, B, D, E, F, G, and H. Y Corporation employs individuals A, B, and C. Z Corporation employs individuals A, C, I, J, K, L, and M. X Corporation is the paymaster for all thirteen individuals. The corporations have no officers or stockholders in common.

(b) X and Y are related corporations because at least 30 percent of Y's employees are also employees of X. Y and Z are related corporations because at least 30 percent of Y's employees are also employees of Z. X and Z are not related corporations because neither corporation has 30 percent of its employees concurrently employed by the other corporation.

(c) For purposes of determining the amount of the tax liability under sections 3102 and 3111, individual B is treated as having one employer. Individual C has two employers for these purposes, although Y and Z are related corporations, because C is not employed by X Corporation, the common paymaster. Individual A also is treated as having two employers for the purposes of these sections because X and Y Corporations are treated as one employer, and Z Corporation is treated as a second employer (since it is not related to the paymaster, X Corporation). Of course, individuals D, E, F, G, H, I, J, K, L, and M are not concurrently employed by two or more corporations, and, accordingly, section 3121 (s) is inapplicable to them.

Example 2. M and N Corporations are both related to Corporation O but are not related to each other. Individual A is concurrently employed by all three corporations and paid by O, their common paymaster. Although M and N are not related, O is treated as the employer for A's employment with M, N, and O.

Example 3. Corporations X, Y, and Z meet the definition of related corporations for the first time on April 12, 1979, and cease to meet it on July 5, 1979. A is concurrently employed by X, Y, and Z throughout 1979. In each of the four calendar quarters of 1979, A's remuneration from X, Y, and Z is $2,000, $10,000, and $30,000, respectively. All of the remuneration to A from X, Y, and Z for the year is disbursed by X, the common paymaster. Under these circumstances, the amount of wages subject to sections 3102 and 3111 is as follows:

For the first calendar quarter

X	Y	Z
$2,000	$10,000	$22,900

For the second calendar quarter

X	Y	Z
$20,900	0	0

($22,900 – $2,000)

For the third calendar quarter

X	Y	Z
0	0	0

For the fourth calendar quarter

X	Y	Z
0	$10,000	0

Of course, if the corporations had been related throughout all of 1979, only $22,900 of X's first quarter disbursement would have constituted wages subject to sections 3102 and 3111.

(2) *Common paymaster*—(i) *In general.* A common paymaster of a group of related corporations is any member thereof that disburses remuneration to employees of two or more of those corporations on their behalf and that is responsible for keeping books and records for the payroll with respect to those employees. The common paymaster is not required to disburse remuneration to all the employees of those two or more related corporations, but the provisions of this section do not apply to any remuneration to an employee that is not disbursed through a common paymaster. The common paymaster may pay concurrently employed individuals under this section by one combined paycheck, drawn on a single bank account, or by separate paychecks, drawn by the common paymaster on the accounts of one or more employing corporations.

(ii) *Multiple common paymasters.* A group of related corporations may have more than one common paymaster. Some of the related corporations may use one common paymaster and others of the related corporations use another common paymaster with respect to a certain class of employees. A corporation that uses a common paymaster to disburse remuneration to certain of its employees may use a different common paymaster to disburse remuneration to other employees.

(iii) *Examples.* The rules of this subparagraph are illustrated by the following examples:

Example 1. S, T, U, and V are related corporations with 2,000 employees collectively. Forty of these employees are concurrently employed by two or more of the corporations, during a calendar quarter. The four corporations arrange for S to disburse remuneration to thirty of these forty employees for their services. Under these facts, S is the common paymaster of S, T, U, and V with respect to the thirty employees. S is not a common paymaster with respect to the remaining employees.

Example 2. (a) W, X, Y, and Z are related corporations. The corporations collectively have 20,000 employees. Two hundred of the employees are top-level executives and managers, sixty of whom are concurrently employed by two or more of the corporations during a calendar quarter. Six thousand of the employees are skilled artisans, all of whom are concurrently employed by two or more of the corporations during the calendar year. The four corporations arrange for Z to disburse remuneration to the sixty executives who are concurrently employed by two or more of the corporations. W and X arrange for X to disburse remuneration to the artisans who are concurrently employed by W and X.

(b) A is an executive who is concurrently employed only by W, Y, and Z during the calendar year. Under these facts, Z is a common paymaster for W, Y, and Z with respect to A. Assuming that the other requirements of this section are met, the amount of the tax liability under sections 3102 and 3111 is determined as if Z were A's only employer for the calendar quarter.

(c) B is a skilled artisan who is concurrently employed only by W and X during the calendar year. Under these facts, X is a common paymaster for S and X with respect to B. Assuming that the other requirements of this section are met, the amount of the tax liability under sections 3102 and 3111 is determined as if X were B's only employer for the calendar quarter.

(3) *Concurrent employment.* For purposes of this section, the term ''concurrent employment'' means the contemporaneous existence of an employment relationship (within the meaning of section 3121(b)) between an individual and two or more corporations. Such a relationship contemplates the performance of services by the employee for the benefit of the employing corporation (not merely for the benefit of the group of corporations), in exchange for remuneration which, if deductible for the purposes of Federal income tax, would be deductible by the employing corporation. The contemporaneous existence of an employment relationship with each corporation is the decisive factor; if it exists, the fact that a particular employee is on leave or otherwise temporarily inactive is immaterial. However, employment is not concurrent with respect to one of the related corporations if the employee's employment relationship with that corporation is completely nonexistent during periods when the employee is not performing services for that corporation. An employment relationship is completely nonexistent if all rights and obligations of the employer and employee with respect to employment have terminated, other than those that customarily exist after employment relationships terminate. Examples of

rights and obligations that customarily exist after employment relationships terminate include those with respect to remuneration not yet paid, employer's property used by the employee not yet returned to the employer, severance pay, and lump-sum termination payments from a deferred compensation plan. Circumstances that suggest that an employment relationship has become completely nonexistent include unconditional termination of participation in deferred compensation plans of the employer, forfeiture of seniority claims, and forfeiture of unused fringe benefits such as vacation or sick pay. Of course, the continued existence of an employment relationship between an individual and a corporation is not necessarily established by the individual's continued participation in a deferred compensation plan, retention of seniority rights, etc., since continuation of those benefits may be attributable to employment with a second corporation related to the first corporation if the corporations have common benefits plans or if the benefits are continued as a matter of corporate reciprocity. An individual who does not perform substantial services in exchange for remuneration from a corporation is presumed not employed by that corporation. Concurrent employment need not exist for any particular length of time to meet the requirements of this section, but this section only applies to remuneration disbursed by a common paymaster to an individual who is concurrently employed by the common paymaster and at least one other related corporation at the time the individual performs the services for which the remuneration is paid. If the employment relationship is nonexistent during a quarter, that employee may not be counted towards the 30-percent test set forth in paragraph (b)(1)(iv) of this section; however, even if the employment relationship is nonexistent, section 3121(s) of the Code would apply to remuneration paid to the former employee for services rendered while the employee was a common employee. The principles of this subparagraph are illustrated by the following examples.

Example 1. M, N, and O are related corporations which use N as a common paymaster with respect to officers. Their respective headquarters are located in three separate cities several hundred miles apart. A is an officer of M, N, and O who performs substantial services for each corporation. A does not work a set length of time at each corporate headquarters, and when A leaves one corporate headquarters, it is not known when A will return, although it is expected that A will return. Under these facts, A is concurrently employed by the three corporations.

Example 2. P, Q, and R are related corporations whose geographical zones of business activity do not overlap. P, Q, and R have a common pension plan and arrange for Q to be a common paymaster for managers and executives. All three corporations maintain cafeterias for the use of their employees. B is a cafeteria manager who has worked at P's headquarters for 3 years. On June 1, 1980, B is transferred from P to the position of cafeteria manager of R. There are no plans for B's return to P. B's accrued pension benefits, vacation and sick pay, do not change as a result of the transfer. The decision to transfer B was made by Q, the parent corporation. Under these facts, B is not concurrently employed by P and R, because B's employment relationship with P was completely nonexistent during B's employment with R. Furthermore, section 3121(s) is inapplicable since B also was not employed by Q, the common paymaster, because B never contracted to perform services for remuneration from Q, and Q did not have the right to control the day-to-day duties of B's work.

Example 3. C is employed by two related corporations, S and T. C was concurrently employed by these corporations between April 1, 1979, and June 30, 1979. The corporations used T as the common paymaster with respect to C's wages between May 1, 1979, and September 30, 1979. T pays C on May 15 for services performed between April 1 and April 30, on July 15 for services performed between June 1 and June 30, and on August 15 for services performed between July 1 and July 31. Section 3121 (s) applies to the first two payments but does not apply to the third payment (there was no concurrent employment). However, if the third payment was made by T for services performed for T, T counts the amounts previously disbursed to C in 1979 while C was concurrently employed by S and T towards the wage base (see section 3121 (a)(1)).

(c) *Allocation of employment taxes*—(1) *Responsibility to pay tax.* If the requirements of this section are met, the common paymaster has the primary responsibility for remitting taxes pursuant to sections 3102 and 3111 with respect to the remuneration it disburses as the common paymaster. The common paymaster computes these taxes

as though it were the sole employer of the concurrently employed individuals. If the common paymaster fails to remit these taxes (in whole or in part), it remains liable for the full amount of the unpaid portion of these taxes. In addition, each of the other related corporations using the common paymaster is jointly and severally liable for its appropriate share of these taxes. That share is an amount equal to the lesser of:

(i) The amount of the liability of the common paymaster under section 3121(s), after taking account of any tax payments made, or

(ii) The amount of the liability under sections 3102 and 3111 which, but for section 3121(s), would have existed with respect to the remuneration from such other related corporation, reduced by an allocable portion of any taxes previously paid by the common paymaster with respect to that remuneration.

The portion of taxes previously paid by the common paymaster that is allocable to each related corporation is determined by multiplying the amount of taxes paid by a fraction, the numerator of which is the portion of the amount of employment tax liability of the common paymaster under section 3121(s) that is allocable to such related corporation under paragraph (c)(2) of this section, and the denominator of which is the total amount of the common paymaster's liability under section 3121(s), both determined without regard to any prior tax payments. These rules apply whether or not the tax on employees was withheld from the employees' wages.

(2) *Allocation of tax*—(i) *In general.* If the related corporations maintain a record of the remuneration disbursed to the employee for services performed for each corporation, the remuneration-based allocation rules of paragraph (c)(2)(ii) of this section apply. If the related corporations do not maintain this record of remuneration, the group-wide allocation rules of paragraph (c)(2)(iii) of this section apply. In all cases, allocations must be made with respect to each payment of wages. The allocation of employment tax liabilities pursuant to this subparagraph also determines which related corporation may be entitled to income tax deductions with respect to the payments of those taxes.

(ii) *Remuneration-based allocation rules.* Under the remuneration-based method of allocation, each related corporation that remunerates an employee through a common paymaster has allocated to it for each pay period an amount of tax determined according to the following formula:

$$\frac{\text{Portion of wage payment constituting remuneration to the employee for services performed for the corporation}}{\text{Total wage payment constituting remuneration to the employee for all services performed for the related corporations using the common paymaster}} \times \text{Tax on employees under section 3102 and tax on employers under section 3111 that the common paymaster is required to remit with respect to the wage payment}$$

If the remuneration disbursed to an employee for services performed for a corporation is inappropriate, the district director may adjust the remuneration records of the related corporations to reflect appropriate remuneration. The district director may use the principles of § 1.482–2(b) in making the adjustments.

Example. (i) X and Y are related corporations which use Y as common paymaster for their executives. A is a concurrently employed executive who performs services during the first quarter of 1979 for X and Y. Y remunerates $4,000 gross pay every week to A, calculated as follows:

Wage payments	Remuneration			Tax on employers under section 3111	Tax on employees withheld under section 3102	Total
	X	Y	Total			
1	$3,000	$1,000	$4,000	$245.20	$245.20	$490.40
2–3	.....	8,000	8,000	490.40	490.40	980.80
4	1,000	3,000	4,000	245.20	245.20	490.40
5	4,000	.....	4,000	245.20	245.20	490.40

Wage payments	Remuneration			Tax on employers under section 3111	Tax on employees withheld under section 3102	Total
	X	Y	Total			
6	2,000	2,000	4,000	177.77	177.77	355.54
7–13	10,000	18,000	28,000	0	0	0
Total	20,000	32,000	52,000	1,403.77	1,403.77	2,807.54

The amounts of remuneration to A are determined by the district director to be appropriate. Under these facts, the tax is allocated to X and Y in the following amounts:

Wage payments	X	Y
1	$\frac{\$3,000}{\$4,000} \times \$490.40 = \$367.80$	$\frac{\$1,000}{\$4,000} \times \$490.40 = \$122.60$
2-3	--	$\frac{\$8,000}{\$8,000} \times \$980.00 = \$980.80$
4	$\frac{\$1,000}{\$4,000} \times \$490.40 = \$122.60$	$\frac{\$3,000}{\$4,000} \times \$490.00 = \$367.80$
5	$\frac{\$4,000}{\$4,000} \times \$490.40 = \$490.40$	--
6	$\frac{\$2,000}{\$4,000} \times \$355.54 = \$177.77$	$\frac{\$2,000}{\$4,000} \times \$355.54 = \$177.77$
7-13	$\frac{\$10,000}{\$28,000} \times -0- = -0-$	$\frac{\$18,000}{\$28,000} \times -0- = -0-$
	$\underline{\$1,158.57}$	$\underline{\$1,648.97}$

(ii) If Y remits none of the taxes to the Internal Revenue Service, X is liable for $2,452.00 (the entire amount due pursuant to sections 3102 and 3111 with respect to the remuneration to A from X) (12.26% × $20,000). Any amount remitted by X to the Internal Revenue Service under these circumstances is also credited against the liability of the common paymaster, Y. However, only the portion of the employment taxes allocated to X under (i) above may be deducted by X as employment taxes paid by it in respect of wages paid by it to its employees.

(iii) If Y remits $1,000.00 of the total $2,807.54 due, Y as common paymaster remains liable for $1,807.54 ($2,807.54 minus $1,000). X's liability is the lesser of $1,807.54 (the liability of the common paymaster), or X's total liability, in the absence of section 3121 (s), on wages paid through the common paymaster ($2,452.00) minus a credit for an allocable part of the amount remitted by Y. The part is $412.66

$$\frac{\$1,158.57\text{ (X's allocable share of tax)}}{\$2,807.54\text{ (total tax)}} \quad \$1,000$$

(tax remitted). Since $1,807.54 is less than $2,039.34 ($2,452.00 minus $412.66), X and Y are jointly and severally liable for $1,807.54.

(iii) *Group-wide allocation rules.* Under the group-wide method of allocation, the district director may allocate the taxes imposed by sections 3102 and 3111 in an appropriate manner to a related corporation that remunerates an employee through a common paymaster if the common paymaster fails to remit the taxes to the Internal Revenue Service. Allocation in an appropriate manner varies according to the circumstances. It may be based on sales, property, corporate payroll, or any other basis that reflects the distribution of the services performed by the employee, or a combination of the foregoing bases. To the extent practicable, the district director may use the principles of § 1.482–2(b) in making the allocations.

(d) *Effective date.* This section is effective with respect to wages paid after December 31, 1978.

[T.D. 7660, 44 FR 75139, Dec. 19, 1979; 45 FR 17986, Mar. 20, 1980]

§ 31.3121(v)(2)-1 Treatment of amounts deferred under certain nonqualified deferred compensation plans.

(a) *Timing of wage inclusion*—(1) *General timing rule for wages.* Remuneration for employment that constitutes wages within the meaning of section 3121(a) generally is taken into account for purposes of the Federal Insurance Contributions Act (FICA) taxes imposed under sections 3101 and 3111 at the time the remuneration is actually or constructively paid. See § 31.3121(a)-2(a).

(2) *Special timing rule for an amount deferred under a nonqualified deferred compensation plan*—(i) *In general.* To the extent that remuneration deferred under a nonqualified deferred compensation plan constitutes wages within the meaning of section 3121(a), the remuneration is subject to the special timing rule described in this paragraph (a)(2). Remuneration is considered deferred under a nonqualified deferred compensation plan within the meaning of section 3121(v)(2) and this section only if it is provided pursuant to a plan described in paragraph (b) of this section. The amount deferred under a nonqualified deferred compensation plan is determined under paragraph (c) of this section.

(ii) *Special timing rule.* Except as otherwise provided in this section, an amount deferred under a nonqualified deferred compensation plan is required to be taken into account as wages for FICA tax purposes as of the later of—

(A) The date on which the services creating the right to that amount are performed (within the meaning of paragraph (e)(2) of this section); or

(B) The date on which the right to that amount is no longer subject to a substantial risk of forfeiture (within the meaning of paragraph (e)(3) of this section).

(iii) *Inclusion in wages only once (nonduplication rule).* Once an amount deferred under a nonqualified deferred compensation plan is taken into account (within the meaning of paragraph (d)(1) of this section), then neither the amount taken into account nor the income attributable to the amount taken into account (within the meaning of paragraph (d)(2) of this section) is treated as wages for FICA tax purposes at any time thereafter.

(iv) *Benefits that do not result from a deferral of compensation.* If a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section) provides both a benefit that results from the deferral of compensation (within the meaning of paragraph (b)(3) of this section) and a benefit that does not result from the deferral of compensation, the benefit that does not result from the deferral of compensation is not subject to the special timing rule described in this paragraph (a)(2). For example, if a nonqualified deferred compensation plan provides retirement benefits which result from the deferral of compensation and disability pay (within the meaning of paragraph (b)(4)(iv)(C) of this section) which does not result from the deferral of compensation, the retirement benefits provided under the plan are subject to the special timing rule in this paragraph (a)(2) and the disability pay is not.

(v) *Remuneration that does not constitute wages.* If remuneration under a nonqualified deferred compensation plan does not constitute wages within the meaning of section 3121(a), then that remuneration is not taken into account as wages for FICA tax purposes under either the general timing rule described in paragraph (a)(1) of this section or the special timing rule described in this paragraph (a)(2). For example, benefits under a death benefit plan described in section 3121(a)(13) do not constitute wages for FICA tax purposes. Therefore, these benefits are not included as wages under the general timing rule described in paragraph (a)(1) of this section or the special timing rule described in this paragraph (a)(2), even if the death benefit plan would otherwise be considered a nonqualified deferred compensation plan within the meaning of paragraph (b)(1) of this section.

(b) *Nonqualified deferred compensation plan*—(1) *In general.* For purposes of this section, the term *nonqualified deferred compensation plan* means any

plan or other arrangement, other than a plan described in section 3121(a)(5), that is established (within the meaning of paragraph (b)(2) of this section) by an employer for one or more of its employees, and that provides for the deferral of compensation (within the meaning of paragraph (b)(3) of this section). A nonqualified deferred compensation plan may be adopted unilaterally by the employer or may be negotiated among or agreed to by the employer and one or more employees or employee representatives. A plan may constitute a nonqualified deferred compensation plan under this section without regard to whether the deferrals under the plan are made pursuant to an election by the employee or whether the amounts deferred are treated as deferred compensation for income tax purposes (e.g., whether the amounts are subject to the deduction rules of section 404). In addition, a plan may constitute a nonqualified deferred compensation plan under this section whether or not it is an employee benefit plan under section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA), as amended (29 U.S.C. 1002(3)). For purposes of this section, except where the context indicates otherwise, the *term* plan includes a plan or other arrangement.

(2) *Plan establishment*—(i) *Date plan is established.* For purposes of this section, a plan is established on the latest of the date on which it is adopted, the date on which it is effective, and the date on which the material terms of the plan are set forth in writing. For purposes of this section, a plan will be deemed to be set forth in writing if it is set forth in any other form that is approved by the Commissioner. The material terms of the plan include the amount (or the method or formula for determining the amount) of deferred compensation to be provided under the plan and the time when it may or will be provided.

(ii) *Plan amendments.* In the case of an amendment that increases the amount deferred under a nonqualified deferred compensation plan, the plan is not considered established with respect to the additional amount deferred until the plan, as amended, is established in accordance with paragraph (b)(2)(i) of this section.

(iii) *Transition rule for written plan requirement.* For purposes of this section, an unwritten plan that was adopted and effective before March 25, 1996, is treated as established under this section as of the later of the date on which it was adopted or became effective, provided that the material terms of the plan are set forth in writing before January 1, 2000.

(3) *Plan must provide for the deferral of compensation*—(i) *Deferral of compensation defined.* A plan provides for the *deferral of compensation* with respect to an employee only if, under the terms of the plan and the relevant facts and circumstances, the employee has a legally binding right during a calendar year to compensation that has not been actually or constructively received and that, pursuant to the terms of the plan, is payable to (or on behalf of) the employee in a later year. An employee does not have a legally binding right to compensation if that compensation may be unilaterally reduced or eliminated by the employer after the services creating the right to the compensation have been performed. For this purpose, compensation is not considered subject to unilateral reduction or elimination merely because it may be reduced or eliminated by operation of the objective terms of the plan, such as the application of an objective provision creating a substantial risk of forfeiture (within the meaning of section 83). Similarly, an employee does not fail to have a legally binding right to compensation merely because the amount of compensation is determined under a formula that provides for benefits to be offset by benefits provided under a plan that is qualified under section 401(a), or because benefits are reduced due to investment losses or, in a final average pay plan, subsequent decreases in compensation.

(ii) *Compensation payable pursuant to the employer's customary payment timing arrangement.* There is no deferral of compensation (within the meaning of this paragraph (b)(3)) merely because compensation is paid after the last day

of a calendar year pursuant to the timing arrangement under which the employer ordinarily compensates employees for services performed during a payroll period described in section 3401(b).

(iii) *Short-term deferrals.* If, under a nonqualified deferred compensation plan, there is a deferral of compensation (within the meaning of this paragraph (b)(3)) that causes an amount to be deferred from a calendar year to a date that is not more than a brief period of time after the end of that calendar year, then, at the employer's option, that amount may be treated as if it were not subject to the special timing rule described in paragraph (a)(2) of this section. An employer may apply this option only if the employer does so for all employees covered by the plan and all substantially similar nonqualified deferred compensation plans. For purposes of this paragraph (b)(3)(iii), whether compensation is deferred to a date that is not more than a brief period of time after the end of a calendar year is determined in accordance with §1.404(b)–1T, Q&A–2, of this chapter.

(4) *Plans, arrangements, and benefits that do not provide for the deferral of compensation*—(i) *In general.* Notwithstanding paragraph (b)(3)(i) of this section, an amount or benefit described in any of paragraphs (b)(4)(ii) through (viii) of this section is not treated as resulting from the deferral of compensation for purposes of section 3121(v)(2) and this section and, thus, is not subject to the special timing rule of paragraph (a)(2) of this section.

(ii) *Stock options, stock appreciation rights, and other stock value rights.* The grant of a stock option, stock appreciation right, or other stock value right does not constitute the deferral of compensation for purposes of section 3121(v)(2). In addition, amounts received as a result of the exercise of a stock option, stock appreciation right, or other stock value right do not result from the deferral of compensation for purposes of section 3121(v)(2) if such amounts are actually or constructively received in the calendar year of the exercise. For purposes of this paragraph (b)(4)(ii), a *stock value right* is a right granted to an employee with respect to one or more shares of employer stock that, to the extent exercised, entitles the employee to a payment for each share of stock equal to the excess, or a percentage of the excess, of the value of a share of the employer's stock on the date of exercise over a specified price (greater than zero).

Thus, for example, the term stock value right does not include a phantom stock or other arrangement under which an employee is awarded the right to receive a fixed payment equal to the value of a specified number of shares of employer stock.

(iii) *Restricted property.* If an employee receives property from, or pursuant to, a plan maintained by an employer, there is no deferral of compensation (within the meaning of section 3121(v)(2)) merely because the value of the property is not includible in income (under section 83) in the year of receipt by reason of the property being nontransferable and subject to a substantial risk of forfeiture. However, a plan under which an employee obtains a legally binding right to receive property (whether or not the property is restricted property) in a future year may provide for the deferral of compensation within the meaning of paragraph (b)(3) of this section and, accordingly, may constitute a nonqualified deferred compensation plan, even though benefits under the plan are or may be paid in the form of property.

(iv) *Certain welfare benefits*—(A) *In general.* Vacation benefits, sick leave, compensatory time, disability pay, severance pay, and death benefits do not result from the deferral of compensation for purposes of section 3121(v)(2), even if those benefits constitute wages within the meaning of section 3121(a).

(B) *Severance pay.* Benefits that are provided under a severance pay arrangement (within the meaning of section 3(2)(B)(i) of ERISA) that satisfies the conditions in 29 CFR 2510.3–2(b)(1)(i) through (iii) are considered severance pay for purposes of this paragraph (b)(4)(iv). If benefits are provided under a severance pay arrangement (within the meaning of section 3(2)(B)(i) of ERISA), but do not satisfy one or more of the conditions in 29 CFR 2510.3–2(b)(1)(i) through (iii), then whether those benefits are severance

pay within the meaning of this paragraph (b)(4)(iv) depends upon the relevant facts and circumstances. For this purpose, relevant facts and circumstances include whether the benefits are provided over a short period of time commencing immediately after (or shortly after) termination of employment or for a substantial period of time following termination of employment and whether the benefits are provided after any termination or only after retirement (or another specified type of termination). Benefits provided under a severance pay arrangement (within the meaning of section 3(2)(B)(i) of ERISA) are in all cases severance pay within the meaning of this paragraph (b)(4)(iv) if the benefits payable under the plan upon an employee's termination of employment are payable only if that termination is involuntary.

(C) *Death benefits and disability pay*—(*1*) *General definition.* Payments made under a nonqualified deferred compensation plan in the event of death are death benefits within the meaning of this paragraph (b)(4)(iv), but only to the extent the total benefits payable under the plan exceed the lifetime benefits payable under the plan. Similarly, payments made under a nonqualified deferred compensation plan in the event of disability are disability pay within the meaning of this paragraph (b)(4)(iv), but only to the extent the disability benefits payable under the plan exceed the lifetime benefits payable under the plan. Accordingly, any benefits that a nonqualified deferred compensation plan provides in the event of death or disability that are associated with an amount deferred under this section are disregarded in applying this section to the extent the benefits payable under the plan in the event of death or in the event of disability have a value in excess of the lifetime benefits payable under the plan.

(*2*) *Total benefits payable defined.* For purposes of paragraph (b)(4)(iv)(C)(*1*) of this section, the term *total benefits payable* under a plan means the present value of the total benefits payable to or on behalf of the employee (including benefits payable in the event of the employee's death) under the plan, disregarding any benefits that are payable only in the event of disability and determined separately with respect to each form of distribution or other election that may apply with respect to the employee.

(*3*) *Disability benefits payable defined.* For purposes of paragraph (b)(4)(iv)(C)(*1*) of this section, the term *disability benefits payable* under a plan means the present value of the benefits payable to or on behalf of the employee under the plan, including benefits payable in the event of the employee's disability but excluding death benefits within the meaning of this paragraph (b)(4)(iv).

(*4*) *Lifetime benefits payable defined.* For purposes of paragraph (b)(4)(iv)(C)(*1*) of this section, the term *lifetime benefits payable* under a plan means the present value of the benefits that could be payable to the employee under the plan during the employee's lifetime, determined under the plan's optional form of distribution or other election that is or was available to the employee at any time with respect to the amount deferred and that provides the largest present value to the employee during the employee's lifetime of any such form or election so available.

(*5*) *Rules of application.* For purposes of determining present value under this paragraph (b)(4)(iv)(C), present value is determined as of the time immediately preceding the time the amount deferred under a nonqualified deferred compensation plan is required to be taken into account under paragraph (e) of this section, using actuarial assumptions that are reasonable as of that date but taking into consideration only benefits that result from the deferral of compensation, as determined under this paragraph (b), and benefits payable in the event of death or disability. In addition, for purposes of paragraph (b)(4)(iv)(C)(*4*) of this section, present value must be determined without any discount for the probability that the employee may die before benefit payments commence and without regard to any benefits payable solely in the event of disability.

(v) *Certain benefits provided in connection with impending termination*—(A) *In*

general. Benefits provided in connection with impending termination of employment under paragraph (b)(4)(v)(B) or (C) of this section do not result from the deferral of compensation within the meaning of section 3121(v)(2).

(B) *Window benefits*—(*1*) *In general.* For purposes of this paragraph (b)(4)(v), except as provided in paragraph (b)(4)(v)(B)(*3*) of this section, a window benefit is provided in connection with impending termination of employment. For this purpose, a window benefit is an early retirement benefit, retirement-type subsidy, social security supplement, or other form of benefit made available by an employer for a limited period of time (no greater than one year) to employees who terminate employment during that period or to employees who terminate employment during that period under specified circumstances.

(*2*) *Special rule for recurring window benefits.* A benefit will not be considered a window benefit if an employer establishes a pattern of repeatedly providing for similar benefits in similar situations for substantially consecutive, limited periods of time. Whether the recurrence of these benefits constitutes a pattern of amendments is determined based on the facts and circumstances. Although no one factor is determinative, relevant factors include whether the benefits are on account of a specific business event or condition, the degree to which the benefits relate to the event or condition, and whether the event or condition is temporary or discrete or is a permanent aspect of the employer's business.

(*3*) *Transition rule for window benefits.* In the case of a window benefit that is made available for a period of time that begins before January 1, 2000, an employer may choose to treat the window benefit as a benefit that results from the deferral of compensation if the sole reason the window benefit would otherwise fail to be provided pursuant to a nonqualified deferred compensation plan is the application of paragraph (b)(4)(v)(B)(*1*) of this section.

(*C*) *Termination within 12 months of establishment of a benefit or plan.* For purposes of this paragraph (b)(4)(v), a benefit is provided in connection with impending termination of employment, without regard to whether it constitutes a window benefit, if—

(*1*) An employee's termination of employment occurs within 12 months of the establishment of the plan (or amendment) providing the benefit; and

(*2*) The facts and circumstances indicate that the plan (or amendment) is established in contemplation of the employee's impending termination of employment.

(vi) *Benefits established after termination.* Benefits established with respect to an employee after the employee's termination of employment do not result from a deferral of compensation within the meaning of section 3121(v)(2). However, cost-of-living adjustments on benefit payments under a nonqualified deferred compensation plan (within the meaning of paragraph (b) of this section) shall not be considered benefits established after the employee's termination of employment for purposes of this paragraph (b)(4)(vi) merely because the employee does not obtain the right to the adjustment until after the employee's termination of employment. For purposes of the preceding sentence, *cost-of-living adjustments* are payments that satisfy conditions similar to those of 29 CFR 2510.3–2(g)(1)(ii) and (iii).

(vii) *Excess parachute payments.* An excess parachute payment (as defined in section 280G(b)) under an agreement entered into or renewed after June 14, 1984, in taxable years ending after such date, does not result from the deferral of compensation within the meaning of section 3121(v)(2). For this purpose, any contract entered into before June 15, 1984, that is amended after June 14, 1984, in any relevant significant aspect, is treated as a contract entered into after June 14, 1984.

(viii) *Compensation for current services.* A plan does not provide for the deferral of compensation within the meaning of section 3121(v)(2) if, based on the relevant facts and circumstances, the compensation is paid for current services.

(5) *Examples.* This paragraph (b) is illustrated by the following examples:

Example 1: (i) In December of 2001, Employer L tells Employee A that, if specified goals are satisfied for 2002, Employee A will

receive a bonus on July 1, 2003, equal to a specified percentage of 2002 compensation. Because Employee A meets the specified goals, Employer L pays the bonus to Employee A on July 1, 2003, consistent with its oral commitment.

(ii) This arrangement is not a nonqualified deferred compensation plan under this section because its terms were not set forth in writing and, therefore, it was not established in accordance with paragraph (b)(2) of this section.

Example 2: (i) In 2004, Employer M establishes a compensation arrangement for Employee B under which Employer M agrees to pay Employee B a specified amount based on a percentage of his salary for 2004. The amount due is to be paid out of the general assets of Employer M and is payable in 2008.

(ii) Employee B has a legally binding right during 2004 to an amount of compensation that has not been actually or constructively received and that, pursuant to the terms of the arrangement, is payable in a later year. Therefore, the arrangement provides for the deferral of compensation.

Example 3: (i) Employer N establishes a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section) for Employee C in 1984. The plan is amended on January 1, 2001, to increase benefits, and the amendment provides that the increase in benefits is on account of Employee C's performance of services for Employer N from 1985 through 2000.

(ii) The additional benefits that resulted from the plan amendment cannot be taken into account as amounts deferred for 1985 through 2000, even though the plan was established before then. Pursuant to paragraphs (b)(2)(ii) and (e)(1) of this section, the additional benefits cannot be taken into account before the latest of the date on which the amendment is adopted, the date on which the amendment is effective, or the date on which the material terms of the plan, as amended, are set forth in writing.

Example 4: (i) In 2002, Employer O, a state or local government, establishes a plan for certain employees that provides for the deferral of compensation and that is subject to section 457(a).

(ii) Paragraph (b)(1) of this section provides that nonqualified deferred compensation plan means any plan that is established by an employer and that provides for the deferral of compensation, other than a plan described in section 3121(a)(5). Section 3121(a)(5) lists, among other plans, an exempt governmental deferred compensation plan as defined in section 3121(v)(3). Under section 3121(v)(3)(A), this definition does not include any plan to which section 457(a) applies. Thus, the plan established by Employer O is not an exempt governmental deferred compensation plan described in section 3121(v)(3) and, consequently, is not a plan described in section 3121(a)(5). Accordingly, the plan is a nonqualified deferred compensation plan within the meaning of section 3121(v)(2) and paragraph (b)(1) of this section.

(iii) However, the general timing rule of paragraph (a)(1) of this section and the special timing rule of paragraph (a)(2) of this section apply only to remuneration for employment that constitutes wages. Under section 3121(b)(7), certain service performed in the employ of a state, or any political subdivision of a state, is not employment. Thus, even though the plan is a nonqualified deferred compensation plan, the extent to which section 3121(v)(2) applies to a participating employee will depend on whether or not the service performed for Employer O is excluded from the definition of employment under section 3121(b)(7).

Example 5: (i) In 2000, Employer P establishes a plan that provides for bonuses to be paid to employees based on an objective formula that takes into account the employees' performance for the year. Employer P does not have the discretion to reduce the amount of any employee's bonus after the end of the year. The bonus is not actually calculated until March 1 of the following year, and is paid on March 15 of that following year.

(ii) The plan provides for the deferral of compensation because the employees have a legally binding right, as of the last day of a calendar year, to an amount of compensation that has not been actually or constructively received and, pursuant to the terms of the plan, that compensation is payable in a later year. However, because the bonuses under the plan are paid within a brief period of time after the end of the calendar year from which they are deferred, Employer P may choose, pursuant to paragraph (b)(3)(iii) of this section, to treat all the bonuses as if they are not subject to the special timing rule of paragraph (a)(2) of this section.

(iii) If the employer uses the special timing rule, the amount deferred would be taken into account as wages on December 31, 2000. If the employer chooses not to use the special timing rule, the amount of the bonus is wages on the date it is actually or constructively paid, March 15, 2000.

Example 6: (i) Employer Q establishes a plan under which bonuses based on performance in one year may be paid on February 1 of the following year at the discretion of the board of directors. The board of directors meets in January of each year to determine the amount, if any, of the bonuses to be paid based on performance in the prior year.

(ii) Because an employee does not have a legally binding right to any bonus until January of the year in which the bonus is paid, any bonus paid under the plan in that year is not deferred from the preceding calendar year, and the plan does not provide for the deferral of compensation within the meaning of paragraph (b)(3)(i) of this section.

Example 7: (i) Employer R maintains a plan for employees that provides nonqualified stock options described in §1.83–7(a) of this chapter. Under the plan, employees are granted in 2001 the option to acquire shares of employer stock at the fair market value of the shares on the date of grant ($50 per share). The options can be exercised at any time from the date of grant through 2010. The options do not have a readily ascertainable fair market value for purposes of section 83 at the date of grant, and shares are issued upon the exercise of the options without being subject to a substantial risk of forfeiture within the meaning of section 83. In 2005, when the fair market value of a share of employer stock is $80, Employee D exercises an option to acquire 1,000 shares.

(ii) Under paragraph (b)(4)(ii) of this section, neither the grant of a stock option nor amounts received currently as a result of the exercise of a stock option result from the deferral of compensation for purposes of section 3121(v)(2). Thus, under the general timing rule of paragraph (a)(1) of this section, the $30,000 spread between the amount paid for the shares ($50,000) and the fair market value of the shares on the date of exercise ($80,000) is taken into account as wages for FICA tax purposes in the year of exercise.

(iii) If the options had been granted at $45 per share, $5 per share below the fair market value on date of grant, the $35,000 spread between the amount paid for the shares ($45,000) and the fair market value of the shares on the date of exercise ($80,000) would similarly be taken into account as wages for FICA tax purposes in the year of exercise.

Example 8: (i) Employer T establishes a phantom stock plan for certain employees. Under the plan, an employee is credited on the last day of each calendar year with a dollar amount equal to the fair market value of 1,000 shares of employer stock. Upon termination of employment for any reason, each employee is entitled to receive the value on the date of termination, in cash or employer stock, of the shares with which he or she has been credited.

(ii) Because compensation to which the employee has a legally binding right as of the last day of one year is paid in a subsequent year, the phantom stock plan provides for the deferral of compensation. The phantom stock plan does not provide stock value rights within the meaning of paragraph (b)(4)(ii) of this section because it provides for awards equal in value to the full fair market value of a specified number of shares of Employer T stock, rather than the excess of that fair market value over a specified price.

Example 9: (i) Employer U establishes a severance pay arrangement (within the meaning of section 3(2)(b)(i) of ERISA) which provides for payments solely upon an employee's death, disability, or dismissal from employment. The amount of the payments to an employee is based on the length of continuous active service with Employer U at the time of dismissal, and is paid in monthly installments over a period of three years.

(ii) Because benefits payable under the plan upon termination of employment are payable only upon an employee's involuntary termination, the plan is a severance pay plan within the meaning of paragraph (b)(4)(iv)(B) of this section. Thus, the benefits are not treated as resulting from the deferral of compensation for purposes of section 3121(v)(2).

Example 10: (i) Employer V establishes a nonqualified deferred compensation plan under which employees will receive benefit payments commencing at age 65 as a life annuity or in one of several actuarially equivalent annuity forms. If an employee dies before benefit payments commence under the plan, a benefit is payable to the employee's designated beneficiary in a single lump sum payment equal to the present value of the employee's annuity benefit. This benefit (sometimes called a full reserve death benefit) is calculated using the applicable interest rate specified in section 417(e) and, for the period after age 65, the applicable mortality table specified in section 417(e), both of which are reasonable actuarial assumptions. During 2002, Employee E obtains a legally binding right to an annuity benefit under the plan, payable at age 65. This annuity benefit has a present value of $10,000 at the end of 2002, determined using the same assumptions as are used under the plan to calculate the full reserve death benefit.

(ii) The present value, at the end of 2002, of the total benefits payable to or on behalf of Employee E (i.e., the sum of the present value of the annuity benefit commencing at age 65, and the present value of the full reserve death benefit, with both determined using the actuarial assumptions described in paragraph (i) of this *Example 10*, except also taking into account the probability of death prior to age 65) is $10,000. This present value does not exceed the present value of the annuity benefits that could be payable to Employee E under the plan during Employee E's lifetime determined without a discount for the possibility that Employee E might die before age 65 (also $10,000). Thus, the benefit payable in the event of Employee E's death is not a death benefit for purposes of paragraph (b)(4)(iv) of this section.

(iii) The same result would apply in the case of a plan that bases benefits on an interest bearing account balance and pays the account balance at termination of employment or death (because the sum of the deferred benefits payable in the future if the employee terminates employment before death with a discount for the probability of death before that date plus the present value of the

benefit payable in the event of death necessarily equals the present value of the deferred benefits payable with no discount for the probability of death).

Example 11: (i) The facts are the same as in Example 10, except that, in lieu of the full reserve death benefit, the plan provides a monthly life annuity benefit to an employee's spouse in the event of the employee's death before benefit payments commence equal to 100 percent of the monthly annuity that would be payable to the employee at age 65 under the life annuity form. Employee E is age 63 and has a spouse who is age 51. The sum of the present value of Employee E's annuity benefit commencing at age 65 determined with a discount for the possibility that Employee E might die before age 65 and the present value of the 100 percent annuity death benefit for Employee E's spouse exceeds $10,000.

(ii) The amount deferred for 2002 is $10,000 (because the 100 percent annuity death benefit for Employee E's spouse is disregarded to the extent that the total benefits payable to or on behalf of Employee E exceeds the present value of the annuity benefits that could be payable to Employee E under the plan during Employee E's lifetime without a discount for the probability of Employee E's death before benefit payments commence).

Example 12: (i) On January 1, 2001, Employer W establishes a plan that covers only Employee F, who owns a significant portion of the business and who has 30 years of service as of that date. The plan provides that, upon Employee F's termination of employment at any time, he will receive $200,000 per year for each of the immediately succeeding five years. Employee F terminates employment on March 1, 2001.

(ii) Because Employee F terminates employment within 12 months of the establishment of the plan and the facts and circumstances set forth above indicate that the plan was established in contemplation of impending termination of employment, the plan is considered to be established in connection with impending termination within the meaning of paragraph (b)(4)(v) of this section. Therefore, the benefits provided under the plan are not treated as resulting from the deferral of compensation for purposes of section 3121(v)(2).

Example 13: (i) Employer X establishes a plan on January 1, 2004, to supplement the qualified retirement benefits of recently hired 55-year old Employee G, who forfeited retirement benefits with her former employer in order to accept employment with Employer X. The plan provides that Employee G will receive $50,000 per year for life beginning at age 65, regardless of when she terminates employment. On April 15, 2004, Employee G unexpectedly terminates employment.

(ii) The facts and circumstances indicate that the plan was not established in contemplation of impending termination. Thus, even though Employee G terminated employment within 12 months of the establishment of the plan, the plan is not considered to be established in connection with impending termination within the meaning of paragraph (b)(4)(v) of this section. Benefits provided under the plan are treated as resulting from the deferral of compensation for purposes of section 3121(v)(2).

Example 14: (i) Employer Y establishes a plan to provide supplemental retirement benefits to a group of management employees who are at various stages of their careers. All employees covered by the plan are subject to the same benefit formula. Employee H is planning to (and actually does) retire within six months of the date on which the plan is established.

(ii) Even though Employee H terminated employment within 12 months of the establishment of the plan, the plan is not considered to have been established in connection with Employee H's impending termination within the meaning of paragraph (b)(4)(v) of this section because the facts and circumstances indicate otherwise.

Example 15: (i) Employee J owns 100 percent of Employer Z, a corporation that provides consulting services. Substantially all of Employer Z's revenue is derived as a result of the services performed by Employee J. In each of 2001, 2002, and 2003, Employer Z has gross receipts of $180,000 and expenses (other than salary) of $80,000. In each of 2001 and 2002, Employer Z pays Employee J a salary of $100,000 for services performed in each of those years. On December 31, 2002, Employer Z establishes a plan to pay Employee J $80,000 in 2003. The plan recites that the payment is in recognition of prior services. In 2003, Employer Z pays Employee J a salary of $20,000 and the $80,000 due under the plan.

(ii) The facts and circumstances described above indicate that the $80,000 paid pursuant to the plan is based on services performed by Employee J in 2003 and, thus, is paid for current services within the meaning of paragraph (b)(4)(viii) of this section. Accordingly, the plan does not provide for the deferral of compensation within the meaning of section 3121(v)(2), and the $80,000 payment is included as wages in 2003 under the general timing rule of paragraph (a)(1) of this section.

(c) *Determination of the amount deferred*—(1) *Account balance plans*—(i) *General rule.* For purposes of this section, if benefits for an employee are provided under a nonqualified deferred compensation plan that is an account balance plan, the amount deferred for a period equals the principal amount credited to the employee's account for

the period, increased or decreased by any income attributable to the principal amount through the date the principal amount is required to be taken into account as wages under paragraph (e) of this section.

(ii) *Definitions*—(A) *Account balance plan.* For purposes of this section, an account balance plan is a nonqualified deferred compensation plan under the terms of which a principal amount (or amounts) is credited to an individual account for an employee, the income attributable to each principal amount is credited (or debited) to the individual account, and the benefits payable to the employee are based solely on the balance credited to the individual account.

(B) *Income.* For purposes of this section, *income* means any increase or decrease in the amount credited to an employee's account that is attributable to amounts previously credited to the employee's account, regardless of whether the plan denominates that increase or decrease as income.

(iii) *Additional rules*—(A) *Commingled accounts.* A plan does not fail to be an account balance plan merely because, under the terms of the plan, benefits payable to an employee are based solely on a specified percentage of an account maintained for all (or a portion of) plan participants under which principal amounts and income are credited (or debited) to such account.

(B) *Bifurcation permitted.* An employer may treat a portion of a nonqualified deferred compensation plan as a separate account balance plan if that portion satisfies the requirements of this paragraph (c)(1) and the amount payable to employees under that portion is determined independently of the amount payable under the other portion of the plan.

(C) *Actuarial equivalents.* A plan does not fail to be an account balance plan merely because the plan permits employees to elect to receive their benefits under the plan in a form of benefit other than payment of the account balance, provided the amount of benefit payable in that other form is actuarially equivalent to payment of the account balance using actuarial assumptions that are reasonable. Conversely, a plan is not an account balance plan if it provides an optional form of benefit that is not actuarially equivalent to the account balance using actuarial assumptions that are reasonable. For this purpose, the determination of whether forms are actuarially equivalent using actuarial assumptions that are reasonable is determined under the rules applicable to nonaccount balance plans under paragraph (c)(2)(iii) of this section.

(2) *Nonaccount balance plans*—(i) *General rule.* For purposes of this section, if benefits for an employee are provided under a nonqualified deferred compensation plan that is not an account balance plan (a nonaccount balance plan), the amount deferred for a period equals the present value of the additional future payment or payments to which the employee has obtained a legally binding right (as described in paragraph (b)(3)(i) of this section) under the plan during that period.

(ii) *Present value defined.* For purposes of this section, *present value* means the value as of a specified date of an amount or series of amounts due thereafter, where each amount is multiplied by the probability that the condition or conditions on which payment of the amount is contingent will be satisfied, and is discounted according to an assumed rate of interest to reflect the time value of money. For purposes of this section, the present value must be determined as of the date the amount deferred is required to be taken into account as wages under paragraph (e) of this section using actuarial assumptions and methods that are reasonable as of that date. For this purpose, a discount for the probability that an employee will die before commencement of benefit payments is permitted, but only to the extent that benefits will be forfeited upon death. In addition, the present value cannot be discounted for the probability that payments will not be made (or will be reduced) because of the unfunded status of the plan, the risk associated with any deemed or actual investment of amounts deferred under the plan, the risk that the employer, the trustee, or another party will be unwilling or unable to pay, the possibility of future plan amendments, the possibility of a future change in the law, or similar

risks or contingencies. Nor is the present value affected by the possibility that some of the payments due under the plan will be eligible for one of the exclusions from wages in section 3121(a).

(iii) *Treatment of actuarially equivalent benefits*—(A) *In general.* In the case of a nonaccount balance plan that permits employees to receive their benefits in more than one form or commencing at more than one date, the amount deferred is determined by assuming that payments are made in the normal form of benefit commencing at normal commencement date if the requirements of paragraph (c)(2)(iii)(B) of this section are satisfied. Accordingly, in the case of a nonaccount balance plan that permits employees to receive their benefits in more than one form or commencing at more than one date, unless the requirements of paragraph (c)(2)(iii)(B) of this section are satisfied, the amount deferred is treated as not reasonably ascertainable under the rules of paragraph (e)(4)(i)(B) of this section until a form of benefit and a time of commencement are selected.

(B) *Use of normal form commencing at normal commencement date.* The requirements of this paragraph (c)(2)(iii)(B) are satisfied by a nonaccount balance plan if the plan has a single normal form of benefit commencing at normal commencement date for the amount deferred and each other optional form is actuarially equivalent to the normal form of benefit commencing at normal commencement date using actuarial assumptions that are reasonable. For this purpose, each form of benefit for payment of the amount deferred commencing at a date is a separate optional form. For purposes of this paragraph (c)(2)(iii)(B), each optional form is actuarially equivalent to the normal form of benefit commencing at normal commencement date only if the terms of the plan in effect when the amount is deferred provide for every optional form to be actuarially equivalent and further provide for actuarial assumptions to determine actuarial equivalency that will be reasonable at the time the optional form is selected, without regard to whether market interest rates are higher or lower at the time the optional form is selected than at the time the amount is deferred. Thus, a plan that provides for every optional form to be actuarially equivalent satisfies this paragraph (c)(2)(iii)(B) if it provides for actuarial equivalence to be determined—

(*1*) When an optional form is selected or when benefit payments under the optional form commence, based on assumptions that are reasonable then;

(*2*) Based on an index that reflects market rates of interest from time to time (for example, the plan specifies that all benefits will be actuarially equivalent using the applicable interest rate and applicable mortality table specified in section 417(e)); or

(*3*) Based on actuarial assumptions specified in the plan and provides for those assumptions to be revised to be reasonable assumptions if they cease to be reasonable assumptions.

(C) *Fixed mortality assumptions permitted.* A plan does not fail to satisfy paragraph (c)(2)(iii)(B) of this section merely because the plan specifies a fixed mortality assumption that is reasonable at the time the amount is deferred, even if that assumption is not reasonable at the time the optional form is selected. (But see paragraph (c)(2)(iii)(E) of this section for additional rules that apply if the mortality assumption is not reasonable at the time the optional form is selected.)

(D) *Normal form of benefit commencing at normal commencement date defined.* For purposes of this paragraph (c)(2)(iii), the normal form of benefit commencing at normal commencement date under the plan is the form, and date of commencement, under which the payments due to the employee under the plan are expressed, prior to adjustments for form or timing of commencement of payments.

(E) *Rule applicable if actuarial assumptions cease to be reasonable.* If the terms of the plan in effect when an amount is deferred provide for actuarial assumptions to determine actuarial equivalency that will be reasonable at the time the optional form is selected or payments commence as provided in paragraph (c)(2)(iii)(B) of this section, but, at that time, the actuarial assumptions used under the plan are not reasonable, the employee will be treated as obtaining a legally binding right

at that time (or, if earlier, at the date on which the plan is amended to provide actuarial assumptions that are not reasonable) to any additional benefits that result from the use of an unreasonable actuarial assumption. This might occur, for example, if the plan specifies that the actuarial assumptions will be reasonable assumptions to be set at the time the optional form is selected and the assumptions used are in fact not reasonable at that time.

(3) *Separate determination for each period.* The amount deferred under this paragraph (c) is determined separately for each period for which there is an amount deferred under the plan. In addition, paragraphs (d) and (e) of this section are applied separately with respect to the amount deferred for each such period. Thus, for example, the fraction described in paragraph (d)(1)(ii)(B) of this section and the amount of the true-up at the resolution date described in paragraph (e)(4)(ii)(B) of this section are determined separately with respect to each amount deferred. See paragraph (e)(4)(ii)(D) of this section for special rules for allocating amounts deferred over more than one year.

(4) *Examples.* This paragraph (c) is illustrated by the following examples. (The examples illustrate the rules in this paragraph (c) and include various interest rate and mortality table assumptions, including the applicable section 417(e) mortality table, the GAM 83 (male) mortality table, and UP–84 mortality table. These tables can be obtained from the Society of Actuaries at its internet site at http://www.soa.org.) The examples are as follows:

Example 1: (i) Employer M establishes a nonqualified deferred compensation plan for Employee A. Under the plan, 10 percent of annual compensation is credited on behalf of Employee A on December 31 of each year. In addition, a reasonable rate of interest is credited quarterly on the balance credited to Employee A as of the last day of the preceding quarter. All amounts credited under the plan are 100 percent vested and the benefits payable to Employee A are based solely on the balance credited to Employee A's account.

(ii) The plan is an account balance plan. Thus, pursuant to paragraph (c)(1) of this section, the amount deferred for a calendar year is equal to 10 percent of annual compensation.

Example 2: (i) Employer N establishes a nonqualified deferred compensation plan for Employee B. Under the plan, 2.5 percent of annual compensation is credited quarterly on behalf of Employee B. In addition, a reasonable rate of interest is credited quarterly on the balance credited to Employee B's account as of the last day of the preceding quarter. All amounts credited under the plan are 100 percent vested, and the benefits payable to Employee B are based solely on the balance credited to Employee B's account. As permitted by paragraph (e)(5) of this section, any amount deferred under the plan for the calendar year is taken into account as wages on the last day of the year.

(ii) The plan is an account balance plan. Thus, pursuant to paragraph (c)(1) of this section, the amount deferred for a calendar year equals 10 percent of annual compensation (i.e., the sum of the principal amounts credited to Employee B's account for the year) plus the interest credited with respect to that 10 percent principal amount through the last day of the calendar year. If Employer N had not chosen to apply paragraph (e)(5) of this section and, thus, had taken into account 2.5 percent of compensation quarterly, the interest credited with respect to those quarterly amounts would not have been treated as part of the amount deferred for the year.

Example 3: (i) Employer O establishes a nonqualified deferred compensation plan for a group of five employees. Under the plan, a specified sum is credited to an account for the benefit of the group of employees on July 31 of each year. Income on the balance of the account is credited annually at a rate that is reasonable for each year. The benefit payable to an employee is equal to one-fifth of the account balance and is payable, at the employee's option, in a lump sum or in 10 annual installments that reflect income on the balance.

(ii) The plan is an account balance plan notwithstanding the fact that the employee's benefit is equal to a specified percentage of an account maintained for a group of employees.

Example 4: (i) The facts are the same as in *Example 3*, except that the plan also permits an employee to elect a life annuity that is actuarially equivalent to the account balance based on the applicable interest rate and applicable mortality table specified in section 417(e) at the time the benefit is elected by the employee.

(ii) Under paragraphs (c)(1)(iii)(C) and (c)(2)(iii) of this section, the plan does not fail to be an account balance plan merely because the plan permits employees to elect to receive their benefits under the plan in a form that is actuarially equivalent to payment of the account balance using actuarial

assumptions that are reasonable at the time the form is selected.

Example 5: (i) Employer P establishes a nonqualified deferred compensation plan for a group of employees. Under the plan, each participating employee has a fully vested right to receive a life annuity, payable monthly beginning at age 65, equal to the product of 2 percent for each year of service and the employee's highest average annual compensation for any 3-year period. The plan also provides that, if an employee dies before age 65, the present value of the future payments will be paid to his or her beneficiary. As permitted under paragraph (e)(5) of this section, any amount deferred under the plan for a calendar year is taken into account as FICA wages as of the last day of the year. As of December 31, 2002, Employee C is age 60, has 25 years of service, and high 3-year average compensation of $100,000 (the average for the years 2000 through 2002). As of December 31, 2003, Employee C is age 61, has 26 years of service, and has high 3-year average compensation of $104,000. As of December 31, 2004, Employee C is age 62, has 27 years of service, and has high 3-year average compensation of $105,000. The assumptions that Employer P uses to determine the amount deferred for 2003 (a 7 percent interest rate and, for the period after commencement of benefit payments, the GAM 83 (male) mortality table) and for 2004 (a 7.5 percent interest rate and, for the period after commencement of benefit payments, the GAM 83 (male) mortality table) are assumed, solely for purposes of this example, to be reasonable actuarial assumptions.

(ii) As of December 31, 2002, Employee C has a legally binding right to receive lifetime payments of $50,000 (2 percent × 25 years × $100,000) per year. As of December 31, 2003, Employee C has a legally binding right to receive lifetime payments of $54,080 (2 percent × 26 years × $104,000) per year. Thus, during 2003, Employee C has earned a legally binding right to additional lifetime payments of $4,080 ($54,080 − $50,000) per year beginning at age 65. The amount deferred for 2003 is the present value, as of December 31, 2003, of these additional payments, which is $28,767 ($4,080 × the present value factor for a deferred annuity payable at age 65, using the specified actuarial assumptions for 2003). Similarly, during 2004, Employee C has earned a legally binding right to additional lifetime payments of $2,620 (2 percent × 27 years × $105,000, minus $54,080) per year beginning at age 65. The amount deferred for 2004 is the present value, as of December 31, 2004, of these additional payments, which is $18,845 ($2,620 × the present value factor for a deferred annuity payable at age 65, using the specified actuarial assumptions for 2004).

Example 6: (i) Employer Q establishes a nonqualified deferred compensation plan for Employee D on January 1, 2001, when Employee D is age 63. During 2001, Employee D obtains a fully vested right to receive a life annuity under the nonqualified deferred compensation plan equal to the excess of $200,000 over the life annuity benefits payable to Employee D under a qualified defined benefit pension plan sponsored by Employer Q. The life annuity benefit payable annually under the qualified plan is the lesser of $200,000 and the section 415(b)(1)(A) limitation in effect for the year, where the section 415(b)(1)(A) limitation is automatically adjusted to reflect changes in the cost of living. Benefits under both the qualified and nonqualified plan are payable monthly beginning at age 65. For purposes of this example, the section 415(b)(1)(A) limit for 2001 is assumed to be $140,000. The nonqualified plan provides no benefits in the event Employee D dies prior to commencement of benefit payments. As permitted under paragraph (e)(5) of this section, any amount deferred under the plan for a calendar year is taken into account as FICA wages as of the last day of the year. The assumptions that Employer Q uses to determine the amount deferred for 2001 (a 7 percent interest rate, a 3 percent increase in the cost of living and the GAM 83 (male) mortality table) are assumed, solely for purposes of this example, to be reasonable actuarial assumptions. As of December 31, 2001, Employee D has a legally binding right to receive lifetime payments as set forth in the following table:

Year	Annual gross amount	Assumed qualified plan annual payment (based on cost of living)	Net annual payment under nonqualified plan
2003	$200,000	$145,000	$55,000
2004	200,000	150,000	50,000
2005	200,000	155,000	45,000
2006	200,000	160,000	40,000
2007	200,000	165,000	35,000
2008	200,000	170,000	30,000
2009	200,000	175,000	25,000
2010	200,000	180,000	20,000
2011	200,000	185,000	15,000
2012	200,000	190,000	10,000
2013	200,000	195,000	5,000

Year	Annual gross amount	Assumed qualified plan annual payment (based on cost of living)	Net annual payment under nonqualified plan
2014 and thereafter	200,000	205,000 or greater	0

(ii) The amount deferred for 2001 is the present value, as of December 31, 2001, of the net lifetime payments under the nonqualified plan, or $223,753.

(d) *Amounts taken into account and income attributable thereto*—(1) *Amounts taken into account*—(i) *In general.* For purposes of this section, an amount deferred under a nonqualified deferred compensation plan is taken into account as of the date it is included in computing the amount of *wages* as defined in section 3121(a), but only to the extent that any additional FICA tax that results from such inclusion (including any interest and penalties for late payment) is actually paid before the expiration of the applicable period of limitations for the period in which the amount deferred was required to be taken into account under paragraph (e) of this section. Because an amount deferred for a calendar year is combined with the employee's other wages for the year for purposes of computing FICA taxes with respect to the employee for the year, if the employee has other wages that equal or exceed the wage base limitations for the Old-Age, Survivors, and Disability Insurance (OASDI) portion (or, in the case of years before 1994, the Hospital Insurance (HI) portion) of FICA for the year, no portion of the amount deferred will actually result in additional OASDI (or HI) tax. However, because there is no wage base limitation for the HI portion of FICA for years after 1993, the entire amount deferred (in addition to all other wages) is subject to the HI tax for the year and, thus, will not be considered taken into account for purposes of this section unless the HI tax relating to the amount deferred is actually paid. In determining whether any additional FICA tax relating to the amount deferred is actually paid, any FICA tax paid in a year is treated as paid with respect to an amount deferred only after FICA tax is paid on all other wages for the year.

(ii) *Amounts not taken into account*—(A) *Failure to take an amount deferred into account under the special timing rule.* If an amount deferred for a period (as determined under paragraph (c) of this section) is not taken into account, then the nonduplication rule of paragraph (a)(2)(iii) of this section does not apply, and benefit payments attributable to that amount deferred are included as wages in accordance with the general timing rule of paragraph (a)(1) of this section. For example, if an amount deferred is required to be taken into account in a particular year under paragraph (e) of this section, but the employer fails to pay the additional FICA tax resulting from that amount, then the amount deferred and the income attributable to that amount must be included as wages when actually or constructively paid.

(B) *Failure to take a portion of an amount deferred into account under the special timing rule.* If, as of the date an amount deferred is required to be taken into account, only a portion of the amount deferred (as determined under paragraph (c) of this section) has been taken into account, then a portion of each subsequent benefit payment that is attributable to that amount is excluded from wages pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section and the balance is subject to the general timing rule of paragraph (a)(1) of this section. The portion that is excluded from wages is fixed immediately before the attributable benefit payments commence (or, if later, the date the amount deferred is required to be taken into account) and is determined by multiplying each such payment by a fraction, the numerator of which is the amount that was taken into account (plus income attributable to that amount determined under paragraph

(d)(2) of this section through the date the portion is fixed) and the denominator of which is the present value of the future benefit payments attributable to the amount deferred, determined as of the date the portion is fixed. For this purpose, if the requirements of paragraph (c)(2)(iii)(B) of this section are satisfied, the present value is determined by assuming that payments are made in the normal form of benefit commencing at normal commencement date. In addition, if the employer demonstrates that the amount deferred was determined using reasonable actuarial assumptions as determined by the Commissioner, the present value of the future benefit payments attributable to the amount deferred is determined using those assumptions. In any other case, see paragraph (d)(2)(iii) of this section.

(2) *Income attributable to the amount taken into account*—(i) *Account balance plans*—(A) *In general.* For purposes of the nonduplication rule of paragraph (a)(2)(iii) of this section, in the case of an account balance plan, the *income attributable to the amount taken into account* means any amount credited on behalf of an employee under the terms of the plan that is income (within the meaning of paragraph (c)(1)(ii)(B) of this section) attributable to an amount previously taken into account (within the meaning of paragraph (d)(1) of this section), but only if the income reflects a rate of return that does not exceed either the rate of return on a predetermined actual investment (as determined in accordance with paragraph (d)(2)(i)(B) of this section) or, if the income does not reflect the rate of return on a predetermined actual investment (as so determined), a reasonable rate of interest (as determined in accordance with paragraph (d)(2)(i)(C) of this section).

(B) *Rules relating to actual investment—(1) In general.* For purposes of this paragraph (d)(2)(i), the rate of return on a predetermined actual investment for any period means the rate of total return (including increases or decreases in fair market value) that would apply if the account balance were, during the applicable period, actually invested in one or more investments that are identified in accordance with the plan before the beginning of the period. For this purpose, an account balance plan can determine income based on the rate of return of a predetermined actual investment regardless of whether assets associated with the plan or the employer are actually invested therein and regardless of whether that investment is generally available to the public. For example, an account balance plan could provide that income on the account balance is determined based on an employee's prospective election among various investment alternatives that are available under the employer's section 401(k) plan, even if one of those investment alternatives is not generally available to the public. In addition, an actual investment includes an investment identified by reference to any stock index with respect to which there are positions traded on a national securities exchange described in section 1256(g)(7)(A).

(*2*) *Certain rates of return not based on predetermined actual investment.* A rate of return will not be treated as the rate of return on a predetermined actual investment within the meaning of this paragraph (d)(2)(i)(B) if the rate of return (to any extent or under any conditions) is based on the greater of the rate of return of two or more actual investments, is based on the greater of the rate of return on an actual investment and a rate of interest (whether or not the rate of interest would otherwise be reasonable under paragraph (d)(2)(i)(C) of this section), or is based on the rate of return on an actual investment that is not predetermined. For example, if a plan bases the rate of return on the greater of the rate of return on a predetermined actual investment (such as the value of the employer's stock), and a 0 percent interest rate (i.e., without regard to decreases in the value of that investment), the plan is using a rate of return that is not a rate of return on a predetermined actual investment within the meaning of this paragraph (d)(2)(i)(B).

(C) *Rules relating to reasonable interest rates—(1) In general.* If income for a period is credited to an account balance plan on a basis other than the rate of return on a predetermined actual investment (as determined in accordance

with paragraph (d)(2)(i)(B) of this section), then, except as otherwise provided in this paragraph (d)(2)(i)(C), the determination of whether the income for the period is based on a reasonable rate of interest will be made at the time the amount deferred is required to be taken into account and annually thereafter.

(*2*) *Fixed rates permitted.* If, with respect to an amount deferred for a period, an account balance plan provides for a fixed rate of interest to be credited, and the rate is to be reset under the plan at a specified future date that is not later than the end of the fifth calendar year that begins after the beginning of the period, the rate is reasonable at the beginning of the period, and the rate is not changed before the reset date, then the rate will be treated as reasonable in all future periods before the reset date.

(ii) *Nonaccount balance plans.* For purposes of the nonduplication rule of paragraph (a)(2)(iii) of this section, in the case of a nonaccount balance plan, the *income attributable to the amount taken into account* means the increase, due solely to the passage of time, in the present value of the future payments to which the employee has obtained a legally binding right, the present value of which constituted the amount taken into account (determined as of the date such amount was taken into account), but only if the amount taken into account was determined using reasonable actuarial assumptions and methods. Thus, for each year, there will be an increase (determined using the same interest rate used to determine the amount taken into account) resulting from the shortening of the discount period before the future payments are made, plus, if applicable, an increase in the present value resulting from the employee's survivorship during the year. As a result, if the amount deferred for a period is determined using a reasonable interest rate and other reasonable actuarial assumptions and methods, and the amount is taken into account when required under paragraph (e) of this section, then, under the nonduplication rule of paragraph (a)(2)(iii) of this section, none of the future payments attributable to that amount will be subject to FICA tax when paid.

(iii) *Unreasonable rates of return*—(A) *Account balance plans.* This paragraph (d)(2)(iii)(A) applies to an account balance plan under which the income credited is based on neither a predetermined actual investment, within the meaning of paragraph (d)(2)(i)(B) of this section, nor a rate of interest that is reasonable, within the meaning of paragraph (d)(2)(i)(C) of this section, as determined by the Commissioner. In that event, the employer must calculate the amount that would be credited as income under a reasonable rate of interest, determine the excess (if any) of the amount credited under the plan over the income that would be credited using the reasonable rate of interest, and take that excess into account as an additional amount deferred in the year the income is credited. If the employer fails to calculate the amount that would be credited as income under a reasonable rate of interest and to take the excess into account as an additional amount deferred in the year the income is credited, or the employer otherwise fails to take the full amount deferred into account, then the excess of the income credited under the plan over the income that would be credited using AFR will be treated as an amount deferred in the year the income is credited. For purposes of this section, *AFR* means the mid-term applicable federal rate (as defined pursuant to section 1274(d)) for January 1 of the calendar year, compounded annually. In addition, pursuant to paragraph (d)(1)(ii) of this section, the excess over the income that would result from the application of AFR and any income attributable to that excess are subject to the general timing rule of paragraph (a)(1) of this section.

(B) *Nonaccount balance plans.* If any actuarial assumption or method used to determine the amount taken into account under a nonaccount balance plan is not reasonable, as determined by the Commissioner, then the income attributable to the amount taken into account is limited to the income that would result from the application of the AFR and, if applicable, the applicable mortality table under section 417(e)(3)(A)(ii)(I) (the 417(e) mortality

table), both determined as of the January 1 of the calendar year in which the amount was taken into account. In addition, paragraph (d)(1)(ii)(B) of this section applies and, in calculating the fraction described in paragraph (d)(1)(ii)(B) of this section (at the date specified in paragraph (d)(1)(ii)(B) of this section), the numerator is the amount taken into account plus income (as limited under this paragraph (d)(2)(iii)(B)), and the present value in the denominator is determined using the AFR, the 417(e) mortality table, and reasonable assumptions as to cost of living, each determined as of the time the amount deferred was required to be taken into account.

(3) *Examples.* This paragraph (d) is illustrated by the following examples:

Example 1: (i) In 2001, Employer M establishes a nonqualified deferred compensation plan for Employee A under which all benefits are 100 percent vested. In 2002, Employee A has $200,000 of current annual compensation from Employer M that is subject to FICA tax. The amount deferred under the plan on behalf of Employee A for 2002 is $20,000. Thus, Employee A has total wages for FICA tax purposes of $220,000. Because Employee A has other wages that exceed the OASDI wage base for 2002, no additional OASDI tax is due as a result of the $20,000 amount deferred. Because there is no wage base limitation for the HI portion of FICA, additional HI tax liability results from the $20,000 amount deferred. However, Employer M fails to pay the additional HI tax.

(ii) Under paragraph (d)(1)(i) of this section, an amount deferred is considered taken into account as wages for FICA tax purposes as of the date it is included in computing FICA wages, but only if any additional FICA tax liability that results from inclusion of the amount deferred is actually paid. Because the HI tax resulting from the $20,000 amount deferred was not paid, that amount deferred was not taken into account within the meaning of paragraph (d)(1) of this section. Thus, pursuant to paragraph (d)(1)(ii) of this section, benefit payments attributable to the $20,000 amount deferred will be included as wages in accordance with the general timing rule of paragraph (a)(1) of this section and will be subject to the HI portion of FICA tax when actually or constructively paid (and the OASDI portion of FICA tax to the extent Employee A's wages do not exceed the OASDI wage base limitation).

Example 2: (i) The facts are the same as in *Example 1,* except that Employer M takes all actions necessary to correct its failure to pay the additional tax before the applicable period of limitations expires for 2002 (including payment of any applicable interest and penalties).

(ii) Because the HI tax resulting from the $20,000 amount deferred is paid, that amount deferred is considered taken into account for 2002. Thus, in accordance with paragraph (a)(2)(iii) of this section, neither the amount deferred nor the income attributable to the amount taken into account will be treated as wages for FICA tax purposes at any time thereafter.

Example 3: (i) Employer N establishes a nonqualified deferred compensation plan under which all benefits are 100 percent vested. Under the plan, an employee's account is credited with a contribution equal to 10 percent of salary on December 31 of each year. The employee's account balance also is increased each December 31 by *interest* on the total amounts credited to the employee's account as of the preceding December 31. The interest rate specified in the plan results in income credits that are not based on the rate of return on a predetermined actual investment within the meaning of paragraph (d)(2)(i)(B) of this section, and that are greater than the income that would result from application of a reasonable rate of interest within the meaning of paragraph (d)(2)(i)(C) of this section. Employer N fails to take into account an additional amount for the excess of the income credited under the plan over a reasonable rate of interest.

(ii) Pursuant to paragraph (d)(2)(iii)(A) of this section, the income credits in excess of the income that would be credited using the AFR are considered additional amounts deferred in the year credited.

Example 4: (i) The facts are the same as in *Example 3,* except that the annual increase is based on Moody's Average Corporate Bond Yield.

(ii) Because this index reflects a reasonable rate of interest, the income credited under the plan is considered income attributable to the amount taken into account within the meaning of paragraph (d)(2)(i) of this section.

Example 5: (i) The facts are the same as in *Example 3,* except that the annual increase (or decrease) is based on the rate of total return on Employer N's publicly traded common stock.

(ii) Because the income credited under the plan does not exceed the actual rate of return on a predetermined actual investment, the income credited is considered income attributable to the amount taken into account within the meaning of paragraph (d)(2)(i) of this section.

Example 6: (i) The facts are the same as in *Example 3,* except that the annual rate of increase or decrease is equal to the greater of the rate of total return on a specified aggressive growth mutual fund or the rate of return on a specified income-oriented mutual fund. Employer N fails to take into account an additional amount for the excess of the

income credited under the plan over a reasonable rate of interest.

(ii) Because the rate of increase or decrease is based on the greater of two rates of returns, the increase is not based on the return on a predetermined actual investment within the meaning of paragraph (d)(2)(i)(B) of this section. Thus, if the rate of return credited under the plan (i.e., the greater of the rates of return of the two mutual funds) exceeds the income that would be credited using the AFR, the excess is not considered income attributable to the amount taken into account within the meaning of paragraph (d)(2)(i) of this section and, pursuant to paragraph (d)(2)(iii)(A) of this section, is considered an additional amount deferred.

Example 7: (i) The facts are the same as in *Example 6,* except that the annual increase or decrease with respect to 50 percent of the employee's account is equal to the rate of total return on the specified aggressive growth mutual fund and the annual increase or decrease with respect to the other 50 percent of the employee's account is equal to the increase or decrease in the Standard & Poor's 500 Index.

(ii) Because the increase or decrease attributable to any portion of the employee's account is based on the return on a predetermined actual investment, the entire increase or decrease is considered income attributable to the amount taken into account within the meaning of paragraph (d)(2)(i) of this section.

Example 8: (i) The facts are the same as in *Example 3,* except that, pursuant to the terms of the plan, before the beginning of each year, the board of directors of Employer N designates a specific investment on which the following year's annual increase or decrease will be based. The board is authorized to switch investments more frequently on a prospective basis. Before the beginning of 2004, the board designates Company A stock as the investment for 2004. Before the beginning of 2005, the board designates Company B stock as the investment for 2005. At the end of 2005, the board determines that the return on Company B stock was lower than expected and changes its designation for 2005 to the rate of return on Company C stock, which had a higher return during 2005. Employer N fails to take into account an additional amount for the excess of the income credited under the plan over a reasonable rate of interest.

(ii) The annual increase or decrease for 2004 is based on the return of a predetermined actual investment. Although the annual increase or decrease for 2005 is based on an actual investment, the actual investment is not predetermined since it was not designated before the beginning of 2005. Pursuant to paragraph (d)(2)(iii)(A) of this section, the excess of the income credited under the plan over the income determined using AFR is an additional amount deferred for 2005.

Example 9: (i) Employer O establishes a nonqualified deferred compensation plan for Employee B. Under the plan, if Employee B survives until age 65, he has a fully vested right to receive a lump sum payment at that age, equal to the product of 10 percent per year of service and Employee B's highest average annual compensation for any 3-year period, but no benefits are payable in the event Employee B dies prior to age 65. As permitted under paragraph (e)(5) of this section, any amount deferred under the plan for the calendar year is taken into account as wages as of the last day of the year. As of December 31, 2002, Employee B has 25 years of service and Employee B's high 3-year average compensation is $100,000 (the average for the years 2000 through 2002). As of December 31, 2002, Employee B has a legally binding right to receive a payment at age 65 of $250,000 (10 percent × 25 years × $100,000). As of December 31, 2003, Employee B is age 63, has 26 years of service, and has high 3-year average compensation of $104,000. As of December 31, 2003, Employee B has a legally binding right to receive a payment at age 65 of $270,400 (10 percent × 26 years × $104,000). Thus, during 2003, Employee B has earned a legally binding right to an additional payment at age 65 of $20,400 ($270,400 − $250,000). The assumptions that Employer O uses to determine the amount deferred for 2003 are a 7 percent interest rate and the GAM 83 (male) mortality table, which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions. The amount deferred for 2003 is the present value, as of December 31, 2003, of the $20,400 payment, which is $17,353. Employer O takes this amount into account by including it in Employee B's FICA wages for 2003 and paying the additional FICA tax.

(ii) Under paragraph (d)(2)(ii) of this section, the income attributable to the amount that was taken into account is the increase in the present value of the future payment due solely to the passage of time, because the amount deferred was determined using reasonable actuarial assumptions and methods. As of the payment date at age 65, the present value of the future payment earned during 2003 is $20,400. The entire difference between the $20,400 and the $17,353 amount deferred ($3,047) is the increase in the present value of the future payment due solely to the passage of time, and thus constitutes income attributable to the amount taken into account. Because the amount deferred was taken into account, the entire payment of $20,400 represents either an amount deferred that was previously taken into account ($17,353) or income attributable to that amount ($3,047). Accordingly, pursuant to the nonduplication rule of paragraph

(a)(2)(iii) of this section, none of the payment is included in wages.

Example 10: (i) The facts are the same as in *Example 9*, except that, instead of providing a lump sum equal to 10 percent of average compensation per year of service, the plan provides Employee B with a fully vested right to receive a life annuity, payable monthly beginning at age 65, equal to the product of 2 percent for each year of service and Employee B's highest average annual compensation for any 3-year period. The plan also provides that, if Employee B dies before age 65, the present value of the future payments will be paid to his or her beneficiary. As of December 31, 2002, Employee B has a legally binding right to receive lifetime payments of $50,000 (2 percent × 25 years × $100,000) per year. As of December 31, 2003, Employee B has a legally binding right to receive lifetime payments of $54,080 (2 percent × 26 years × $104,000) per year. Thus, during 2003, Employee B has earned a legally binding right to additional lifetime payments of $4,080 ($54,080 − $50,000) per year beginning at age 65. The amount deferred for 2003 is $32,935, which is the present value, as of December 31, 2003, of these additional payments, determined using the same actuarial assumptions and methods used in *Example 9*, except that there is no discount for the probability of death prior to age 65. Employer O takes this amount into account by including it in Employee B's FICA wages for 2003 and paying the additional FICA tax.

(ii) Under paragraph (d)(2)(ii) of this section, the income attributable to the amount that was taken into account is the increase in the present value of the future payments due solely to the passage of time, because the amount deferred was determined using reasonable actuarial assumptions and methods. Because the amount deferred was taken into account, each annual payment of $4,080 attributable to the amount deferred in 2003 represents either an amount deferred that was previously taken into account or income attributable to that amount. Accordingly, pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section, none of the payments are included in wages.

Example 11: (i) The facts are the same as in *Example 10*, except that no amount is taken into account for 2003 because Employer O fails to pay the additional FICA tax.

(ii) Under paragraph (d)(1)(ii)(A) of this section, if an amount deferred for a period is not taken into account, then the benefit payments attributable to that amount deferred are included as wages in accordance with the general timing rule of paragraph (a)(1) of this section. In this case, assuming that the amounts deferred in other periods were taken into account, $4,080 of each year's total benefit payments will be included in wages when actually or constructively paid, in accordance with the general timing rule.

Example 12: (i) Employer P establishes an account balance plan on January 1, 2002, under which all benefits are 100 percent vested. The plan provides that amounts deferred will be credited annually with interest beginning in 2002 at a rate that is greater than a reasonable rate of interest. Employer P treats the excess over the applicable interest rate in section 417(e) as an additional amount deferred for 2002 and in each year thereafter, and takes the additional amount into account by including it in FICA wages and paying the additional FICA tax for the year.

(ii) Under the nonduplication rule in paragraph (a)(2)(iii) of this section, the benefits paid under the plan will be excluded from wages for FICA tax purposes.

Example 13: (i) The facts are the same as in *Example 9*, except that, in determining the amount deferred, Employer O uses a 15 percent interest rate, which, solely for purposes of this example, is assumed not to be a reasonable interest rate. Employer O determines that the amount deferred for 2003 is the present value, as of December 31, 2003, of the $20,400 payment, which is $15,023. Employer O includes $15,023 in wages and pays any resulting FICA tax. Solely for purposes of this example, it is assumed that the AFR as of January 1, 2003, is 7 percent.

(ii) Under paragraph (d)(2)(iii)(B) of this section, if any actuarial assumption or method is not reasonable, then the income attributable to the amount taken into account is limited to the income that would result from application of the AFR and, if applicable, the 417(e) mortality table. Because the 15 percent interest rate is unreasonable, the income attributable to the amount taken into account is limited to the income that would result from using a 7 percent interest rate and, in this case, an increase for survivorship using the 417(e) mortality table. Under these assumptions, the income attributable to the $15,023 amount taken into account for 2003 is $1,199 in 2004 and $1,313 in 2005. Under paragraph (d)(1)(ii) of this section, the sum of these amounts ($17,535) is excluded from Employee B's wages pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section, and the balance of the payment ($2,865) is subject to the general timing rule of paragraph (a)(1) of this section and, thus, is included in Employee B's wages when actually or constructively paid.

(iii) The same result can be reached by multiplying the attributable benefit payments by a fraction, the numerator of which is the amount taken into account, and the denominator of which is the amount deferred that would have been taken into account at the same time had the amount deferred been calculated using the AFR and the 417(e) mortality table. These assumptions are determined as of January 1 of the calendar year in which the amount was taken into account.

In this *Example 13*, the fraction would be $15,023 divided by $17,478, which equals .85954. The $20,400 payment is multiplied by this fraction to determine the amount of the payment that is excluded from wages pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section. Thus, $17,535 ($20,400 x .85954) is excluded from wages and the balance ($2,865) is subject to FICA tax when actually or constructively paid.

Example 14: (i) The facts are the same as *Example 10*, except that Employer O calculates the amount deferred for 2003 as $18,252 and takes that amount into account by including that amount in wages and paying any resulting FICA tax. The assumptions that Employer O uses to determine the amount deferred are a 15 percent interest rate and, for the period after commencement of benefit payments, the GAM 83 (male) mortality table. The 15 percent interest rate is assumed, solely for purposes of this example, not to be a reasonable actuarial assumption. Solely for purposes of this example, it is assumed that the AFR as of January 1, 2003, is 7 percent.

(ii) Under paragraph (d)(2)(iii)(B) of this section, if any actuarial assumption or method used is not reasonable, then the income attributable to the amount taken into account is limited to the income that would result from application of the AFR and, if applicable, the 417(e) mortality table. Because the 15 percent interest rate is not reasonable, the income attributable to the amount taken into account is equal to the income that would result from using a 7 percent interest rate and the amount taken into account is treated as if it represented a portion of the amount deferred for purposes of applying paragraph (d)(1)(ii)(B) of this section. Under these assumptions, the income attributable to the $18,252 amount taken into account for 2003 is $1,278 in 2004 and $1,367 in 2005. Under paragraph (d)(1)(ii)(B) of this section, the portion of each benefit payment attributable to the amount deferred that is excluded from wages pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section is determined at benefit commencement by multiplying each benefit payment by a fraction, the numerator of which is the amount taken into account (plus income attributable to that amount) and the denominator of which is the present value of future benefit payments attributable to the amount deferred. Because the interest rate assumption is not reasonable, not only is the income limited to the application of the AFR, but the present value in the denominator must be determined using the AFR and (if applicable) the 417(e) mortality table. In this case, the present value is $40,283 and thus the fraction is $20,897 divided by $40,283, or .51875. Thus, $2,116 (.51875 × $4,080) of each year's benefit payment is excluded from wages and the balance of each year's payment ($1,964) is subject to the general timing rule of paragraph (a)(1) of this section and is included in wages when actually or constructively paid.

(iii) The same result can be reached by multiplying the attributable benefit payments by a fraction the numerator of which is the amount taken into account, and the denominator of which is the amount deferred that would have been taken into account at the same time had the amount deferred been calculated using the AFR and the 417(e) mortality table. These assumptions are determined as of January 1 of the calendar year in which the amount was taken into account. In this *Example 14*, the fraction would be $18,252 divided by $35,185, which equals .51875. The $4,080 annual payment is multiplied by this fraction to determine the amount of the payment that is excluded from wages pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section. Thus, $2,116 ($4,080 × .51875) is excluded from wages and the balance ($1,964) is subject to FICA tax when actually or constructively paid.

(e) *Time amounts deferred are required to be taken into account*—(1) *In general.* Except as otherwise provided in this paragraph (e), an amount deferred under a nonqualified deferred compensation plan must be taken into account as wages for FICA tax purposes as of the later of the date on which services creating the right to the amount deferred are performed (within the meaning of paragraph (e)(2) of this section) or the date on which the right to the amount deferred is no longer subject to a substantial risk of forfeiture (within the meaning of paragraph (e)(3) of this section). However, in no event may any amount deferred under a nonqualified deferred compensation plan be taken into account as wages for FICA tax purposes prior to the establishment of the plan providing for the amount deferred (or, if later, the plan amendment providing for the amount deferred). Therefore, if an amount is deferred pursuant to the terms of a legally binding agreement that is not put in writing until after the amount would otherwise be taken into account under this paragraph (e)(1), the amount deferred (including any attributable income) must be taken into account as wages for FICA tax purposes as of the date the material terms of the plan are put in writing.

(2) *Services creating the right to an amount deferred.* For purposes of this

section, services creating the right to an amount deferred under a nonqualified deferred compensation plan are considered to be performed as of the date on which, under the terms of the plan and all the facts and circumstances, the employee has performed all of the services necessary to obtain a legally binding right (as described in paragraph (b)(3)(i) of this section) to the amount deferred.

(3) *Substantial risk of forfeiture.* For purposes of this section, the determination of whether a substantial risk of forfeiture exists must be made in accordance with the principles of section 83 and the regulations thereunder.

(4) *Amount deferred that is not reasonably ascertainable under a nonaccount balance plan*—(i) *In general*—(A) *Date required to be taken into account.* Notwithstanding any other provision of this paragraph (e), an amount deferred under a nonaccount balance plan is not required to be taken into account as wages under the special timing rule of paragraph (a)(2) of this section until the first date on which all of the amount deferred is reasonably ascertainable (the resolution date). In this case, the amount required to be taken into account as of the resolution date is determined in accordance with paragraph (c)(2) of this section.

(B) *Definition of reasonably ascertainable.* For purposes of this paragraph (e)(4), an amount deferred is considered reasonably ascertainable on the first date on which the amount, form, and commencement date of the benefit payments attributable to the amount deferred are known, and the only actuarial or other assumptions regarding future events or circumstances needed to determine the amount deferred are interest and mortality. For this purpose, the form and commencement date of the benefit payments attributable to the amount deferred are treated as known if the requirements of paragraph (c)(2)(iii)(B) of this section (under which payments are treated as being made in the normal form of benefit commencing at normal commencement date) are satisfied. In addition, an amount deferred does not fail to be reasonably ascertainable on a date merely because the exact amount of the benefit payable cannot readily be calculated on that date or merely because the exact amount of the benefit payable depends on future changes in the cost of living. If the exact amount of the benefit payable depends on future changes in the cost of living, the amount deferred must be determined using a reasonable assumption as to the future changes in the cost of living. For example, the amount of a benefit is treated as known even if the exact amount of the benefit payable cannot be determined until future changes in the cost of living are reflected in the section 415 limitation on benefits payable under a qualified retirement plan.

(ii) *Earlier inclusion permitted*—(A) *In general.* With respect to an amount deferred that is not reasonably ascertainable, an employer may choose to take an amount into account at any date or dates (an early inclusion date or dates) before the resolution date (but not before the date described in paragraph (e)(1) of this section with respect to the amount deferred). Thus, for example, with respect to an amount deferred under a nonaccount balance plan that is not reasonably ascertainable because the plan permits employees to receive their benefits in more than one form or commencing at more than one date (and the requirements of paragraph (c)(2)(iii) of this section are not satisfied), an employer may choose to take an amount into account on the date otherwise described in paragraph (e)(1) of this section before the form and commencement date are selected (based on assumptions as to the form and commencement date for the benefit payments) or may choose to wait until the form and commencement date of the benefit payments are selected. An employer that chooses to take an amount into account at an early inclusion date under this paragraph (e)(4)(ii) for an employee under a plan is not required until the resolution date to identify the period to which the amount taken into account relates.

(B) *True-up at resolution date.* If, with respect to an amount deferred for a period, an employer chooses to take an amount into account as of an early inclusion date in accordance with this

paragraph (e)(4)(ii) and the benefit payments attributable to the amount deferred exceed the benefit payments that are actuarially equivalent to the amount taken into account at the early inclusion date (payable in the same form and using the same commencement date as the benefit payments attributable to the amount deferred), then the present value of the difference in the benefits, determined in accordance with paragraph (c)(2) of this section, must be taken into account as of the resolution date.

(C) *Actuarial assumptions.* For purposes of determining the benefits that are actuarially equivalent to the amount taken into account as of an early inclusion date, the amount taken into account is converted to an actuarially equivalent benefit payable in the same form and commencing on the same date as the actual benefit payments attributable to the amount deferred using an interest rate, and, if applicable, mortality and cost-of-living assumptions, that were reasonable as of the early inclusion date. Thus, with respect to an amount deferred for a period, the amount required to be taken into account as of the resolution date is the present value (determined using an interest rate, and, if applicable, mortality and cost-of-living assumptions, that are reasonable as of the resolution date) of the excess, if any, of the future benefit payments attributable to the amount deferred over the future benefits payable in the same form and commencing on the same date that are actuarially equivalent to the portion of the amount deferred that was taken into account as of the early inclusion date (where actuarial equivalence is determined using an interest rate, and, if applicable, mortality and cost-of-living assumptions, that were reasonable as of the early inclusion date).

(D) *Allocation rules for amounts deferred over more than one period—(1) General rule.* The rules of this paragraph (e)(4)(ii)(D) apply for purposes of determining whether an amount has been included under this paragraph (e)(4) before the earliest date permitted under paragraph (e)(1) of this section.

(*2*) *Future compensation increases.* Increases in an employee's compensation after the early inclusion date must be disregarded.

(*3*) *Early retirement subsidies.* An early retirement subsidy that the employee ultimately receives may be taken into account at an early inclusion date if the employee would have a legally binding right to the subsidy at the early inclusion date but for any condition that the employee continue to render services. Accordingly, an employer may take into account at an early inclusion date any early retirement subsidy that the employee ultimately receives to the extent that elimination or reduction of that subsidy would violate section 411(d)(6)(B)(i) if that section applied to the plan.

(*4*) *Allocation with respect to offsets.* In any case in which a series of amounts are deferred over more than one period, the amounts deferred are not reasonably ascertainable until a single resolution date and the benefit payments attributable to the entire series are determined under a formula that provides a gross benefit that in the aggregate is subject to an objective reduction for future events under the terms of the plan, such as an offset for the aggregate benefits payable under a plan qualified under section 401(a), the attribution of benefit payments to the amount deferred in each period is determined under the rules of this paragraph (e)(4)(ii)(D)(*4*). In a case described in the preceding sentence, the benefit payments made as a result of the series of amounts deferred may be treated as attributable to the amount deferred as of the earliest period in which the employee obtained a legally binding right to a benefit under the plan equal to the excess, if any, of the amount of the gross benefit attributable to that period (determined at the resolution date), over the amount of the reduction determined as of the end of that period. Thus, for example, if an employee obtains a legally binding right in each of several years to benefit payments from a nonqualified deferred compensation plan that provides for a specified gross benefit for the years to be offset by the benefits payable under a qualified plan, the amount deferred in the first year may be treated as equal to the gross benefit

for the year, reduced by the offset applicable at the end of the year (even if the offset increases after the end of the year).

(E) *Treatment of benefits paid before the resolution date.* If a benefit payment is attributable to an amount deferred that is not reasonably ascertainable at the time of payment (or is paid before the date selected under paragraph (e)(5) of this section), and the employer has previously taken an amount into account with respect to the amount deferred under the early inclusion rule of this paragraph (e)(4), then, in lieu of the pro rata rule provided in paragraph (d)(1)(ii)(B) of this section, a first-in-first-out rule applies in determining the portion of the benefit payment attributable to the amount taken into account. Under this first-in-first-out rule, the benefit payment is compared to the sum of the amount taken into account at the early inclusion date and the income attributable to that amount. If the benefit payment equals or exceeds the amount taken into account at the early inclusion date and the income attributable to that amount as of the date of the benefit payment, the benefit payment is included as wages under the general timing rule of paragraph (a)(1) of this section to the extent of any excess, and the amount taken into account at the early inclusion date (and income attributable to that amount) is disregarded thereafter with respect to the amount deferred. If the amount taken into account at the early inclusion date and the income attributable to that amount as of the date of the benefit payment exceeds the benefit payment, the benefit payment is not included as wages under the general timing rule of paragraph (a)(1) of this section and, in determining the amount that must be taken into account thereafter with respect to the amount deferred, the amount taken into account at the early inclusion date, plus attributable income as of the date of the benefit payment, is reduced by the amount of the benefit payment, and only the excess plus future income attributable to the excess (credited using assumptions that were reasonable on the early inclusion date) is taken into consideration. If amounts have been taken into account at more than one early inclusion date, this paragraph (e)(4)(ii)(E) applies on a first-in-first-out basis, beginning with the amount taken into account at the earliest early inclusion date (including income attributable thereto).

(5) *Rule of administrative convenience.* For purposes of this section, an employer may treat an amount deferred as required to be taken into account under this paragraph (e) on any date that is later than, but within the same calendar year as, the actual date on which the amount deferred is otherwise required to be taken into account under this paragraph (e). For example, if services creating the right to an amount deferred are considered performed under paragraph (e)(2) of this section periodically throughout a year, the employer may nevertheless treat the services creating the right to that amount deferred as performed on December 31 of that year. If an employer uses the rule of administrative convenience described in this paragraph (e)(5), any determination of whether the income attributable to an amount deferred under an account balance plan is based on a reasonable rate of interest or whether the actuarial assumptions used to determine the present value of an amount deferred in a nonaccount balance plan are reasonable will be made as of the date the employer selects to take the amount into account.

(6) *Portions of an amount deferred required to be taken into account on more than one date.* If different portions of an amount deferred are required to be taken into account under paragraph (e)(1) of this section on more than one date (e.g., on account of a graded vesting schedule), then each such portion is considered a separate amount deferred for purposes of this section.

(7) *Examples.* This paragraph (e) is illustrated by the following examples:

Example 1: (i) Employer M establishes a nonqualified deferred compensation plan for Employee A on November 1, 2005. Under the plan, which is an account balance plan, Employee A obtains a legally binding right on the last day of each calendar year (if Employee A is employed on that date) to be credited with a principal amount equal to 5

percent of compensation for the year. In addition, a reasonable rate of interest is credited quarterly. Employee A's account balance is nonforfeitable and is payable upon Employee A's termination of employment. For 2006, the principal amount credited to Employee A under the plan (which, in this case, is also the amount deferred within the meaning of paragraph (c) of this section) is $25,000.

(ii) Under paragraph (e)(2) of this section, the services creating the right to the $25,000 amount deferred are considered performed as of December 31, 2006, the date on which Employee A has performed all of the services necessary to obtain a legally binding right to the amount deferred. Thus, in accordance with paragraph (e)(1) of this section, the $25,000 amount deferred must be taken into account as of December 31, 2006, which is the later of the date on which services creating the right to the amount deferred are performed or the date on which the right to the amount deferred is no longer subject to a substantial risk of forfeiture.

Example 2: (i) The facts are the same as in *Example 1,* except that the principal amount credited under the plan on the last day of each year (and attributable interest) is forfeited if the employee terminates employment within five years of that date.

(ii) Under paragraph (e)(3) of this section, the determination of whether the right to an amount deferred is subject to a substantial risk of forfeiture is made in accordance with the principles of section 83. Under §1.83–3(c) of this chapter, a substantial risk of forfeiture generally exists where rights in property that are transferred are conditioned, directly or indirectly, upon the future performance of substantial services. Because Employee A's right to receive the $25,000 principal amount (and attributable interest) is conditioned on the performance of services for five years, a substantial risk of forfeiture exists with respect to that amount deferred until December 31, 2011.

(iii) December 31, 2011, is the later of the date on which services creating the right to the amount deferred are performed or the date on which the right to the amount deferred is no longer subject to a substantial risk of forfeiture. Thus, in accordance with paragraph (e)(1) of this section, the amount deferred (which, pursuant to paragraph (c)(1) of this section, is equal to the $25,000 principal amount credited to Employee A's account on December 31, 2006, plus the interest credited with respect to that principal amount through December 31, 2011) must be taken into account as of December 31, 2011.

Example 3: (i) The facts are the same as in *Example 2,* except that the principal amount credited under the plan on the last day of each year (and attributable interest) becomes nonforfeitable according to a graded vesting schedule under which 20 percent is vested as of December 31, 2007; 40 percent is vested as of December 31, 2008; 60 percent is vested as of December 31, 2009; 80 percent is vested as of December 31, 2010; and 100 percent is vested as of December 31, 2011. Because these dates are later than the date on which the services creating the right to the amount deferred are considered performed (December 31, 2006), the amount deferred is required to be taken into account as of these dates that fall in five different years.

(ii) Paragraph (e)(6) of this section provides that, if different portions of an amount deferred are required to be taken into account under paragraph (e)(1) of this section on more than one date, then each such portion is considered a separate amount deferred for purposes of this section. Thus, $5,000 of the principal amount, plus interest credited through December 31, 2007, is taken into account as an amount deferred on December 31, 2007; $5,000 of the principal amount, plus interest credited through December 31, 2008, is taken into account as a separate amount deferred on December 31, 2008; etc.

Example 4: (i) On November 21, 2001, Employer N establishes a nonqualified deferred compensation plan under which all benefits are 100 percent vested. The plan provides for Employee B (who is age 45) to receive a lump sum benefit of $500,000 at age 65. This benefit will be forfeited if Employee B dies before age 65.

(ii) Because the amount, form, and commencement date of the benefit are known, and the only assumptions needed to determine the amount deferred are interest and mortality, the amount deferred is reasonably ascertainable within the meaning of paragraph (e)(4)(i) of this section on November 21, 2001.

Example 5: (i) The facts are the same as in *Example 4,* except that plan provides that the lump sum will be paid at the later of age 65 or termination of employment and provides that the $500,000 payable to Employee B is increased by 5 percent per year for each year that payment is deferred beyond age 65.

(ii) Because the commencement date of the benefit payment is contingent on when Employee B terminates employment, the commencement date of the benefit payment is not known. Thus, the amount deferred is not reasonably ascertainable within the meaning of paragraph (e)(4)(i) of this section, unless the plan satisfies the requirements of paragraph (c)(2)(iii)(B) of this section. Because the fixed 5 percent factor may not be reasonable at the time benefit payments commence (i.e., 5 percent might be higher or lower than a reasonable interest rate when payments commence), the plan fails to satisfy paragraph (c)(2)(iii)(B) of this section and accordingly the amount deferred is not reasonably ascertainable until termination of employment.

Example 6: (i) The facts are the same as in *Example 4,* except that the $500,000 is payable to Employee B at the later of age 55 or termination of employment.

(ii) Because the commencement date of the benefit payment is contingent on when Employee B terminates employment, the commencement date of the benefit payment is not known. Thus, the amount deferred is not reasonably ascertainable until termination of employment.

Example 7: (i) The facts are the same as in *Example 4,* except that Employee B may elect to take the benefit in the form of a life annuity of $50,000 per year (commencing at age 65).

(ii) Because the plan permits employees to elect to receive benefits in more than one form and the alternative forms may not have the same value when Employee B makes his election, the plan fails to satisfy the requirements of paragraph (c)(2)(iii)(B) of this section until a form of benefit is selected. Thus, the amount deferred is not reasonably ascertainable until then.

Example 8: (i) Employer O establishes a nonqualified deferred compensation plan. The plan is a supplemental executive retirement plan (SERP) that provides Employee C with a fully vested right to receive a pension, in the form of a life annuity payable monthly, beginning at age 65, equal to the excess of 3 percent of Employee C's final 3-year average pay for each year of participation up to 15 years, over the amount payable to Employee C from Employer O's qualified pension plan. The amount payable under the qualified pension plan is a life annuity payable monthly, beginning at age 65, equal to 1.5 percent of final 3-year average pay for each year of employment, excluding pay in excess of the section 401(a)(17) compensation limit. No benefits are payable under the SERP if Employee C dies before age 65. Employee C becomes a participant in the SERP on January 1, 2001, at age 44. The amount deferred under the SERP for any year is not reasonably ascertainable prior to termination of employment because the amount of the benefit is not known and the determination of the amount deferred requires assumptions other than interest and mortality (e.g., an assumption as to Employee C's average pay for the final three years of employment). As permitted by paragraph (e)(4)(i) of this section, Employer O chooses not to take any amount into account for any year before the resolution date. Employee C terminates employment on December 31, 2018 when he is age 62.

(ii) As of the date Employee C terminates employment, the amount of the benefit is known and the only actuarial or other assumptions needed to determine the amount deferred are an interest rate assumption and a mortality assumption. At that time, the amount deferred in each past year becomes reasonably ascertainable, and Employer O is able to determine that during 2001 Employee C earned a legally binding right to a life annuity of $4,000 per year beginning in 2021 when Employee C is age 65. Employer O determines the present value of Employee C's future benefit payments under the SERP as of this resolution date (December 31, 2018), using a 7 percent interest rate and the UP–84 mortality table, which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2018. The special timing rule will be satisfied if the resulting present value, $26,950, is taken into account on that date in accordance with paragraph (d)(1) of this section.

Example 9: (i) The facts are the same as in *Example 8,* except that the plan provides that Employee C may choose to receive early retirement benefits on an unreduced basis at any time after age 60 if Employee C has completed 15 years of service by that date.

(ii) As of the date Employee C terminates employment, the amount of the benefit is known and the only actuarial or other assumptions needed to determine the amount deferred are an interest rate assumption and a mortality assumption. At that time, the amount deferred in each past year becomes reasonably ascertainable, and Employer O is able to determine that during 2001 Employee C earned a legally binding right to a life annuity of $4,000 per year beginning on December 31, 2018 when Employee C is age 62. Employer O determines the present value of Employee C's future benefit payments under the SERP as of this resolution date (December 31, 2018), using a 7 percent interest rate and the UP–84 mortality table, which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2018. The special timing rule will be satisfied if the resulting present value, $37,576, is taken into account on that date in accordance with paragraph (d)(1) of this section.

Example 10: (i) The facts are the same as in *Example 9,* except that, as permitted under paragraph (e)(4)(ii) of this section, Employer O chooses to take an amount into account before the amount deferred for 2001 is reasonably ascertainable. The amount that Employer O takes into account on December 31, 2001, is $13,043 (the present value of a life annuity of $4,000 per year, payable at age 62, using a 6 percent interest rate and the UP–84 mortality table). Employer O does not take any other amount into account before the resolution date.

(ii) In accordance with paragraph (e)(4)(ii)(B) of this section, Employer O must determine any additional amount required to be taken into account in 2018. If the $4,000 payable in the form of a life annuity beginning at age 62 exceeds the life annuity which is actuarially equivalent to the $13,043 previously taken into account, the present

value of the excess must be taken into account. In this *Example 10,* the $13,043 previously taken into account is actuarially equivalent to a $4,000 annuity commencing at age 62 using a 6 percent interest rate and the UP–84 mortality table (which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2001). Accordingly, no additional amount need be taken into account in 2018, regardless of any changes in market rates of interest between 2001 and 2018.

Example 11: (i) The facts are the same as in Example 9, except that, as permitted under paragraph (e)(4)(ii) of this section, Employer O chooses to take an amount into account before the amount deferred for 2001 is reasonably ascertainable. The amount that Employer O takes into account on December 31, 2001, is $9,569 (the present value of a life annuity of $4,000 per year, payable at age 65, using a 6 percent interest rate and the UP–84 mortality table). Employer O does not take any other amount into account before the resolution date.

(ii) In accordance with paragraph (e)(4)(ii)(B) of this section, Employer O must determine any additional amount required to be taken into account in 2018. If the $4,000 payable in the form of a life annuity beginning in 2018 at age 62 exceeds the life annuity which is actuarially equivalent to the $9,569 previously taken into account, the present value of the excess must be taken into account. In this case, the $9,569 previously taken into account is actuarially equivalent to a $2,935 annuity commencing at age 62 using a 6 percent interest rate and the UP–84 mortality table (which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2001). Accordingly, an additional amount needs to be taken into account in 2018 equal to the present value of the excess of the $4,000 annual stream of benefit payments to which Employee C obtained a legally binding right during 2001 over the $2,935 annual stream of benefit payments which is actuarially equivalent to the amount previously taken into account. This present value (i.e., the present value of a life annuity equal to $4,000 minus $2,935, or $1,065 annually) is determined by Employer O to be $10,005 as of the resolution date using a 7 percent interest rate and the UP–84 mortality table (which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2018).

Example 12: (i) The facts are the same as in *Example 9,* except that the amount that Employer O takes into account on December 31, 2001, is $15,834 (the present value of $4,000, payable at age 60, using a 6 percent interest rate and the UP–84 mortality table). Employer O does not take any other amount into account before the resolution date.

(ii) In accordance with paragraph (e)(4)(ii)(B) of this section, Employer O must determine any additional amount required to be taken into account in 2018. If the $4,000 payable in the form of a life annuity beginning at age 62 exceeds the life annuity which is actuarially equivalent to the $15,834 previously taken into account, the present value of the excess must be taken into account. In this case, the $15,834 previously taken into account is actuarially equivalent to a $4,856 annuity commencing at age 62 using a 6 percent interest rate and the UP–84 mortality table (which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2001). Because the life annuity of $4,856 per year (which is equivalent to the amount taken into account at the early inclusion date) exceeds the $4,000 annuity attributable to the amount deferred in 2001, no additional amount is required to be taken into account for that amount deferred as of the resolution date. Employer O may claim a refund or credit for the overpayment of FICA tax with respect to amounts taken into account prior to the resolution date to the extent permitted by sections 6402, 6413, and 6511.

Example 13: (i) The facts are the same as in *Example 12,* except that Employee C became a participant in the SERP on January 1, 2000. In addition, Employer O determines in 2018 that during 2000 Employee C earned a legally binding right to a life annuity of $1,500 per year beginning on December 31, 2018.

(ii) Employer O may allocate the $15,834 previously taken into account among any amounts deferred on or before the early inclusion date. At the resolution date, Employer O will have to take into account the present value of an annuity equal to the excess of the life annuity attributable to the amounts deferred for 2000 and 2001 over a life annuity of $4,856 per year.

Example 14: (i) In 2003, Employer P establishes a nonqualified deferred compensation plan for Employee D. The plan provides that, in consideration of Employee D's services to be performed on Project X in 2004, Employee D will have a nonforfeitable right to receive 1 percent per year of Employer P's net profits associated with Project X for each of the immediately succeeding three years. No services beyond 2004 are required. The 1 percent of net profits payable each year will be paid on March 31 of the immediately succeeding year. One percent of net profits associated with Project X is $750,000 in 2005, $400,000 in 2006, and $90,000 in 2007. Employee D receives $750,000 on March 31, 2006, $400,000 on March 31, 2007, and $90,000 on March 31, 2008.

(ii) Because the services creating the right to all of the amount deferred are performed in 2004, the benefit payments based on the

2005, 2006, and 2007 net profits are all attributable to the amount deferred in 2004. However, because the present value of Employee D's future benefit is contingent on future profits, the determination of the amount deferred requires the use of assumptions other than interest, mortality, and cost of living. Thus, all of the amount deferred in 2004 will not be reasonably ascertainable within the meaning of paragraph (e)(4)(i) of this section until December 31, 2007 (which is the resolution date). Employer P does not choose to take any amount into account prior to the amount deferred becoming reasonably ascertainable.

(iii) However, paragraph (d)(1)(ii)(A) of this section provides that a benefit payment attributable to an amount deferred under a nonqualified deferred compensation plan must be included as wages when actually or constructively paid if the amount deferred has not been taken into account as wages under the special timing rule of paragraph (a)(2) of this section. Thus, the benefit payments in 2006 and 2007 must be included as wages when paid.

(iv) As of December 31, 2007, all of the amount deferred under the plan becomes reasonably ascertainable because the amount of the benefit payable attributable to the amount deferred is treated as known under paragraph (e)(4)(i)(B) of this section, and the only assumption needed to determine the present value of the future benefits is interest. However, since Employer P was required to treat the payments in 2006 and 2007 as wages when paid under the general timing rule of paragraph (a)(1) of this section, only the present value of the payment to be made in 2008 is required to be taken into account as of the resolution date (December 31, 2007) under the special timing rule of paragraph (a)(2) of this section. Using an interest rate of 10 percent per year (which, solely for purposes of this *Example 14,* is assumed to be reasonable), Employer P determines that on December 31, 2007, the present value of the future benefits is $87,881, and Employer P includes that additional amount in wages for 2007. (Note that Employer P can choose to use the lag method of withholding described in paragraph (f)(3) of this section, which allows the resolution date amount to be taken into account no later than March 31, 2008, provided that the amount deferred is increased by interest using the AFR for January of 2008.)

Example 15: (i) The facts are the same as in *Example 14,* except that Employer P chooses the early inclusion option permitted by paragraph (e)(4)(ii) of this section to take $1,000,000 into account on December 31, 2004, before the amount deferred for 2004 is reasonably ascertainable.

(ii) Pursuant to paragraph (e)(4)(ii)(E) of this section, in applying the nonduplication rule of paragraph (a)(2)(iii) of this section, a first-in-first-out rule applies in determining the benefit payments that are attributable to amounts previously taken into account. Using the 10 percent interest rate, Employer P determines that the $750,000 benefit payment on March 31, 2006, and the March 31, 2007, benefit payment of $400,000 are less than the $1,000,000 taken into account at the early inclusion date, plus attributable income, and, therefore, are not included in wages when paid.

(iii) Under paragraph (e)(4)(ii)(E) of this section, if an employer chooses to take an amount into account before the resolution date, the amount taken into account (plus income attributable to that amount) is disregarded to the extent the amount is attributed to benefit payments made before the resolution date. Thus, Employer P must reduce the $1,000,000 taken into account in 2004 (plus income attributable to that amount) based upon the two benefit payments ($750,000 and $400,000) that were excluded from wages. Using an interest rate of 10 percent, Employer P determines that the amount taken into account in 2004 plus interest to the resolution date and reduced based upon the two benefit payments is $15,228 and the additional amount that is required to be taken into account as of December 31, 2007, is $72,653 ($87,881–$15,228).

Example 16: (i) Employee E obtains a fully vested, legally binding right during 2002, 2003, and 2004 to payments from a nonqualified deferred compensation plan of Employer Q under which the benefits are based on a formula that includes an actuarial offset by the account balance under a qualified defined contribution plan of Employer Q as of December 31, 2004. The payments from the nonqualified deferred compensation plan are to commence on December 31, 2005. At the resolution date for the amounts earned during 2002, 2003, and 2004, which is December 31, 2004, Employee E has a legally binding right to a net annual benefit of $100,000 payable for life to commence on December 31, 2005. On the resolution date, Employer Q determines that on December 31, 2002, Employee E had a legally binding right to receive $100,000 annually for life beginning on December 31, 2005 (as a result of the gross benefit under the nonqualified plan being $120,000 annually for life, and the offset being $20,000 annually for life, as of December 31, 2002). On December 31, 2003, Employee E had a legally binding right to receive $95,000 annually for life beginning on December 31, 2005 (as a result of the gross benefit under the nonqualified plan being $135,000 annually for life, and the offset being $40,000 annually for life, as of December 31, 2003). On December 31, 2004, Employee E had a legally binding right to receive $100,000 annually for life beginning on December 31, 2005 (as a result of the gross benefit under the nonqualified plan being $145,000 annually for life, and the offset being

$45,000 annually for life, as of December 31, 2004).

(ii) In this case, pursuant to paragraph (e)(4)(ii)(D)(*4*) of this section, Employer Q can attribute the entire $100,000 life annuity to the amount deferred for 2002, even though Employee E's benefit under the nonqualified deferred compensation plan is reduced to $95,000 in 2003.

Example 17: (i) In 2010, Employee F performs services for which she earns a right to 10 percent of the proceeds from the sale of a motion picture. In 2011, Employee F performs services for which she earns a right to 10 percent of the proceeds from the sale of another motion picture. These proceeds are calculated by subtracting the total advertising expenses for both movies. Payment is to be made in the year following the date on which both pictures have been sold, but not later than 2018. At the end of 2010, the advertising expenses for both pictures totaled $300,000. The first motion picture is sold for $10,000,000 in 2014. The second motion picture is sold for $17,000,000 in 2017. At the end of 2017, the advertising expenses totaled $1,700,000. In 2018, Employee F is paid $2,530,000 (10 percent of the sum of $10,000,000 and $17,000,000 minus $1,700,000).

(ii) Pursuant to paragraph (e)(4)(ii)(D)(*4*) of this section, $970,000 (10 percent of the excess of the gross proceeds from the sale of the first motion picture at the resolution date in 2017 over the advertising expenses incurred at the end of 2010) of the payment made in 2018 can be attributed to the amount deferred in 2010 (and with the remaining payment of $1,560,000 to be attributed to the amount deferred in 2011).

(f) *Withholding*—(1) *In general.* Unless an employer applies an alternative method described in paragraph (f)(2) or (3) of this section, an amount deferred under a nonqualified deferred compensation plan for any employee is treated, for purposes of withholding and depositing FICA tax, as wages paid by the employer and received by the employee at the time it is taken into account in accordance with paragraph (e) of this section. However, paragraphs (f)(2) and (3) of this section provide alternative methods which may be used with respect to an amount deferred for an employee. An employer is not required to be consistent in applying the alternatives described in this paragraph (f) with respect to different employees or amounts deferred.

(2) *Estimated method*—(i) *In general.* Under the alternative method provided in this paragraph (f)(2), the employer may make a reasonable estimate of the amount deferred on the date on which the amount is taken into account in accordance with paragraph (e) of this section and take that estimated amount into account as wages paid by the employer and received by the employee on that date (the estimate date), for purposes of withholding and depositing FICA tax.

(ii) *Underestimate of the amount deferred*—(A) *General rule.* If the employer underestimates the amount deferred (as determined after calculating the actual amount deferred that should have been taken into account as of the date on which the amount was taken into account in accordance with paragraph (e) of this section, using an interest rate and other actuarial assumptions that are reasonable as of that date), the employer may treat the shortfall as wages paid as of the estimate date or as of any date that is no later than three months after the estimate date. In either case, the shortfall does not include the income credited to the amount deferred after the amount is taken into account in accordance with paragraph (e) of this section.

(B) *Shortfall is treated as wages paid on a date after the estimate date.* If the employer chooses to treat the shortfall as wages paid on a date that is no later than three months after the estimate date, the employer must take that shortfall into account as wages paid by the employer and received by the employee on that date, for purposes of withholding and depositing FICA tax.

(C) *Shortfall is treated as wages paid on the estimate date.* If the employer chooses to treat the shortfall as wages paid as of the estimate date, the shortfall is treated as an error for purposes of withholding and depositing FICA tax. Appropriate adjustments may be made in accordance with section 6205(a) and the regulations thereunder; however, for purposes of §31.6205–1(b), the error need not be treated as ascertained before the date that is three months after the estimate date.

(D) *Reporting.* The employer must report the shortfall as wages on Form 941, Employer's Quarterly Federal Tax Return (and, if applicable, Form 941c, Supporting Statement to Correct Information) and Form W–2, Wage and Tax Statement (or, if applicable, Form W–

2c, Corrected Wage and Tax Statement) in accordance with its treatment of the shortfall under paragraph (f)(2)(ii) (B) or (C) of this section.

(iii) *Overestimate of the amount deferred.* If the employer overestimates the amount deferred (as determined after calculating the actual amount deferred that should have been taken into account as of the date on which the amount was taken into account in accordance with paragraph (e) of this section, using an interest rate and actuarial assumptions that are reasonable as of that date) and deposits more than the amount required, the employer may claim a refund or credit in accordance with sections 6402, 6413, and 6511. A Form 941c, or an equivalent statement, must accompany each claim for refund. In addition, Form W–2 or, if applicable, Form W–2c must also reflect the actual amount deferred that should have been taken into account.

(3) *Lag method.* Under the alternative method provided in this paragraph (f)(3), an amount deferred, plus interest, may be treated as wages paid by the employer and received by the employee, for purposes of withholding and depositing FICA tax, on any date that is no later than three months after the date the amount is required to be taken into account in accordance with paragraph (e) of this section. For purposes of this paragraph (f)(3), the amount deferred must be increased by interest through the date on which the wages are treated as paid, at a rate that is not less than AFR. If the employer withholds and deposits FICA tax in accordance with this paragraph (f)(3), the employer will be treated as having taken into account the amount deferred plus income to the date on which the wages are treated as paid.

(4) *Examples.* This paragraph (f) is illustrated by the following examples:

Example 1: (i) Employer M maintains a nonqualified deferred compensation plan that is an account balance plan. The plan provides for annual bonuses based on current year profits to be deferred until termination of employment. Employer M's profits for 2003, and thus the amount deferred, is reasonably ascertainable, but Employer M calculates the amount deferred on March 3, 2004, when the relevant data is available.

(ii) In accordance with the alternative method described in paragraph (f)(2) of this section, Employer M makes a reasonable estimate that the amount deferred that must be taken into account as of December 31, 2003, for Employee A is $20,000, and withholds and deposits FICA tax on that amount as if it were wages paid by Employer M and received by Employee A on that date. In January of 2004, Employer M files and furnishes Form W–2 for Employee A including the $20,000 in FICA wages. On March 3, 2004, Employer M determines that the actual amount deferred that should have been taken into account on December 31, 2003, was $22,000.

(iii) In accordance with the alternative method described in paragraph (f)(2)(ii) of this section, Employer M may treat the additional $2,000 as wages paid to and received by Employee A on December 31, 2003, the estimate date. Employer M may treat the $2,000 shortfall as an error ascertained on March 3, 2004, and withhold and deposit FICA tax on that amount. Form W–2c for Employee A for 2003 must include the $2,000 shortfall in FICA wages. Employer M must also correct the information on Form 941 for the last quarter of 2003, reporting the adjustment on Form 941 for the first quarter of 2004, accompanied by Form 941c for the last quarter of 2003.

(iv) Instead, Employer M may treat the $2,000 shortfall as wages paid on March 31, 2004, and withhold and deposit FICA tax on that amount as if it were wages paid by Employer M and received by Employee A on that date. Form W–2 for Employee A for 2004 and Form 941 for the first quarter of 2004 must include the $2,000 shortfall in FICA wages.

Example 2: (i) The facts are the same as in *Example 1,* except that on March 3, 2004, Employer M determines that the actual amount deferred that should have been taken into account on December 31, 2003, was $19,000.

(ii) Under paragraph (f)(2)(iii) of this section, Employer M may, in accordance with sections 6402, 6413, and 6511, claim a refund or credit for the overpayment of tax resulting from the overestimate. In addition, Employer M must file and furnish a Form W–2c for Employee A and must correct the information on Form 941 for the last quarter of 2003.

Example 3: (i) The facts are the same as in *Example 1,* except that Employer M does not make a reasonable estimate of the amount deferred that must be taken into account as of December 31, 2003. Instead, Employer M withholds and deposits FICA tax on the amount deferred plus interest on that amount using AFR (for January 2004) as if it were wages paid by Employer M and received by Employee A on March 15, 2004.

(ii) Under the alternative method described in paragraph (f)(3) of this section, the amount taken into account on March 15, 2004 (including the interest), will be treated as FICA wages paid to and received by Employee A on March 15, 2004.

Example 4: (i) The facts are the same as in *Example 1,* except that an amount is also deferred for Employee B which is required to be taken into account on October 15, 2003, and Employer M chooses to use the lag method in paragraph (f)(3) of this section in order to provide time to calculate the amount deferred.

(ii) Employer M may use any date not later than January 15, 2004, to take the amount deferred into account (provided that the amount deferred includes interest, at AFR for January 1, 2003, through December 31, 2003, and at AFR for January 1, 2004, through January 15, 2004).

(g) *Effective date and transition rules*—(1) *General effective date.* Except for paragraphs (g)(2) through (4) of this section, this section is applicable on and after January 1, 2000. Thus, paragraphs (a) through (f) of this section apply to amounts deferred on or after January 1, 2000; to amounts deferred before January 1, 2000, which cease to be subject to a substantial risk of forfeiture on or after January 1, 2000, or for which a resolution date occurs on or after January 1, 2000; and to benefits actually or constructively paid on or after January 1, 2000.

(2) *Reasonable, good faith interpretation for amounts deferred and benefits paid before January 1, 2000*—(i) *In general.* For periods before January 1, 2000 (including amounts deferred before January 1, 2000, and any benefits actually or constructively paid before January 1, 2000, that are attributable to those amounts deferred), an employer may rely on a reasonable, good faith interpretation of section 3121(v)(2), taking into account pre-existing guidance. An employer will be deemed to have determined FICA tax liability and satisfied FICA withholding requirements in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer has complied with paragraphs (a) through (f) of this section. For purposes of paragraphs (g)(2) through (4) of this section, and subject to paragraphs (g)(2)(ii) and (iii) of this section, whether an employer that has not complied with paragraphs (a) through (f) of this section has determined FICA tax liability and satisfied FICA withholding requirements in accordance with a reasonable, good faith interpretation of section 3121(v)(2) will be determined based on the relevant facts and circumstances, including consistency of treatment by the employer and the extent to which the employer has resolved unclear issues in its favor.

(ii) *Plan must be established or adopted.* If an amount is deferred under a plan before January 1, 2000, and benefit payments attributable to that amount are actually or constructively paid on or after January 1, 2000, then in no event will an employer's treatment of the amount deferred be considered to be in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer treats that amount as taken into account as wages for FICA tax purposes prior to the establishment of the plan (within the meaning of paragraph (b)(2) of this section) providing for the deferred compensation (or, if later, the establishment of the plan as amended to provide for the deferred compensation, as provided in paragraph (b)(2)(ii) of this section). If an amount is deferred under a plan before January 1, 2000, and benefit payments attributable to that amount are actually or constructively paid before January 1, 2000, then in no event will the employer's treatment of that amount deferred be considered to be in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer treats that amount as taken into account as wages for FICA tax purposes prior to the adoption of the plan providing for the deferred compensation (or, if later, the adoption of the plan amendment providing the deferred compensation). For example, awards, bonuses, raises, incentive payments, and other similar amounts granted under a plan as compensation for past services may not be taken into account under section 3121(v)(2) prior to the establishment (or, if applicable, the adoption) of the plan.

(iii) *Certain changes in position for stock options, stock appreciation rights, and other stock value rights not reasonable, good faith interpretation.* In the case of a stock option, stock appreciation right, or other stock value right (as defined in paragraph (b)(4)(ii) of this section) that is exercised before January 1, 2000, an employer that treats the exercise as not subject to FICA tax as a result of the nonduplication rule of section 3121(v)(2)(B) is not

acting in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer has not treated that grant and all earlier grants as subject to section 3121(v)(2) by reporting the current value of such options and rights as FICA wages on Form 941 filed for the quarter during which each grant was made (or, if later, for the quarter during which each grant ceased to be subject to a substantial risk of forfeiture).

(3) *Optional adjustments to conform with this section for pre-effective-date open periods*—(i) *General rule.* If an employer determined FICA tax liability with respect to section 3121(v)(2) in any period ending before January 1, 2000, for which the applicable period of limitations has not expired on January 1, 2000 (pre-effective-date open periods), in a manner that was not in accordance with this section, the employer may adjust its FICA tax determination for that period to conform to this section. Thus, if an amount deferred was taken into account in a pre-effective-date open period when it was not required to be taken into account (e.g., an amount taken into account before it became reasonably ascertainable), the employer may claim a refund or credit for any FICA tax paid on that amount to the extent permitted by sections 6402, 6413, and 6511.

(ii) *Consistency required.* In the case of a plan that is not a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section), if any payment was actually or constructively paid to an employee under the plan in a pre-effective-date open period and that payment was not included in FICA wages by reason of the employer's treatment of the plan as a nonqualified deferred compensation plan, then the employer may claim a refund or credit for FICA tax paid on amounts treated as amounts deferred under the plan (in accordance with the employer's treatment of the plan as a nonqualified deferred compensation plan) for that employee for pre-effective-date open periods only to the extent that the FICA tax paid on all amounts treated as amounts deferred for the employee in all pre-effective-date open periods under the plan exceeds the FICA tax that would have been due on the benefits actually or constructively paid to the employee in those periods under the plan if those benefits were included in FICA wages when paid. If any benefit payments attributable to amounts deferred after December 31, 1993, were actually or constructively paid to an employee under a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section) in a pre-effective-date open period, but these payments were treated as subject to FICA tax because the employer treated the plan as not being a nonqualified deferred compensation plan, then the employer may claim a refund or credit for the FICA tax paid on those benefit payments only to the extent that the FICA tax paid on those benefit payments exceeds the FICA tax that would have been due on the amounts deferred to which those benefit payments are attributable if those amounts deferred had been taken into account when they would have been required to have been taken into account under this section (if this section had been in effect then).

(iii) *Reporting.* Any employer that adjusts its FICA tax determination in accordance with paragraphs (g)(3)(i) and (ii) of this section must make appropriate adjustments on Form 941 and Form 941c for the affected periods, and, in addition, must file and furnish Form W–2, or, if applicable, Form W–2c, for any affected employee so that the Social Security Administration may correctly post the amount deferred to the employee's earnings record. The adjustments may be made in accordance with section 6205(a) and the regulations thereunder; however, for purposes of §31.6205–1(b), the error is not required to be treated as ascertained before March 31, 2000.

(4) *Application of reasonable, good faith standard*—(i) *Plans that are not subject to section 3121(v)(2).* If a plan is not a nonqualified deferred compensation plan within the meaning of paragraph (b)(1) of this section, but, for a period ending prior to January 1, 2000, and, pursuant to a reasonable, good faith interpretation of section 3121(v)(2), an amount under the plan was taken into account (within the meaning of paragraph (d)(1) of this section) as an amount deferred

under a nonqualified deferred compensation plan, then, pursuant to paragraph (g)(2) of this section, the following rules shall apply—

(A) With respect to benefit payments actually or constructively paid before January 1, 2000, that are attributable to amounts previously taken into account under the plan, no additional FICA tax will be due;

(B) On or after January 1, 2000, benefit payments under the plan must be taken into account as wages when actually or constructively paid in accordance with paragraph (a)(1) of this section; and

(C) To the extent permitted by paragraph (g)(3) of this section, the employer may claim a refund or credit for FICA tax actually paid on amounts taken into account prior to January 1, 2000.

(ii) *Plans that are subject to section 3121(v)(2) for which the amount deferred has not been fully taken into account*—(A) *In general.* The rules of paragraphs (g)(4)(ii)(B) through (E) of this section apply if a plan is a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section) and, with respect to an amount deferred under the plan for an employee prior to January 1, 2000, the employer, in accordance with a reasonable, good faith interpretation of section 3121(v)(2), either took into account an amount that is less than the amount that would have been required to be taken into account if paragraphs (a) through (f) of this section had been in effect for that period or took no amount into account. Thus, paragraphs (g)(4)(ii)(B) through (E) of this section apply both to an employer that treated the plan as if it were not a nonqualified deferred compensation plan within the meaning of section 3121(v)(2) (by withholding and paying FICA tax due on benefits actually or constructively paid under the plan during that period, if any) and to an employer that treated the plan as a nonqualified deferred compensation plan within the meaning of section 3121(v)(2).

(B) *No additional tax required.* Pursuant to paragraph (g)(2) of this section, no additional FICA tax will be due for any period ending prior to January 1, 2000.

(C) *General timing rule applicable.* In accordance with paragraph (d)(1)(ii) of this section, except as provided in paragraphs (g)(4)(ii) (D) and (E), the general timing rule described in paragraph (a)(1) of this section applies to benefits actually or constructively paid on or after January 1, 2000, attributable to an amount deferred in a period before January 1, 2000, to the extent the amount taken into account was less than the amount that would have been required to be taken into account if paragraphs (a) through (f) of this section had been in effect before January 1, 2000.

(D) *Special rule for amounts deferred before 1994.* The difference between the amount that was taken into account in any period ending prior to January 1, 1994, and the amount that would have been required or permitted to be taken into account in that period if paragraphs (a) through (f) of this section had been in effect is treated as if it had been taken into account within the meaning of paragraph (d)(1) of this section. For example, in the case of an amount deferred before 1994 that was not reasonably ascertainable (and which was not subject to a substantial risk of forfeiture), the employer is treated as if it had anticipated the actual amount, form, and commencement date for the benefit payments attributable to the amount deferred and had taken the amount deferred into account at an early inclusion date before 1994 using a method permitted under this section. Thus, with respect to such an amount deferred, the employer is not required to take any additional amount into account when the amount deferred becomes reasonably ascertainable, and no additional FICA tax will be due when the benefit payments attributable to the amount deferred are actually or constructively paid.

(E) *Special rule for amounts required to be taken into account in 1994 or 1995.* In the case of an amount deferred that would have been required to be taken into account in 1994 or 1995 if paragraphs (a) through (f) of this section had been in effect, an employer will be treated as taking the amount deferred into account under paragraph (d)(1) of this section to the extent the employer takes the amount into account by

treating it as wages paid by the employer and received by the employee as of any date prior to April 1, 2000.

(iii) *Plans that are subject to section 3121(v)(2) for which more than the amount deferred has been taken into account.* If a plan is a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section) and an amount was taken into account under the plan for an employee before January 1, 2000, in accordance with a reasonable, good faith interpretation of section 3121(v)(2), but that amount could not have been taken into account before January 1, 2000, if paragraphs (a) through (f) of this section had been in effect then, the following rules apply—

(A) The determination of the amount deferred for any period beginning on or after January 1, 2000, must be made in accordance with paragraph (c) of this section, and the time when amounts deferred under the plan are required to be taken into account must be determined in accordance with paragraph (e) of this section, without regard to any such amount that was taken into account for any period ending before January 1, 2000; and

(B) To the extent permitted by sections 6402, 6413, and 6511, the employer may claim a refund or credit for an overpayment of tax caused by the over-inclusion of wages that occurred before January 1, 2000.

(5) *Examples.* This paragraph (g) is illustrated by the following examples:

Example 1: (i) In 1996, Employer M establishes a nonqualified deferred compensation plan that is a nonaccount balance plan for Employee A. All benefits under the plan are 100 percent vested. In order to determine the amount deferred on behalf of Employee A under the plan for 1996 and 1997, Employer M must make assumptions as to the date on which Employee A will retire and the form of benefit Employee A will elect, in addition to interest, mortality, and cost-of-living assumptions. Based on assumptions made with respect to all of these contingencies, Employer M determines that the amount deferred for 1996 is $50,000 and the amount deferred for 1997 is $55,000. In 1996 and 1997, Employee A's total wages (without regard to the amounts deferred) exceed the OASDI wage bases. Employer M withholds and deposits HI tax on the $50,000 and $55,000 amounts. Employee A does not retire before January 1, 2000. Employer M chooses under paragraph (g)(3) of this section to apply this section to 1996 and 1997 before the January 1, 2000, general effective date.

(ii) Under this section, the amounts deferred in 1996 and 1997 are not reasonably ascertainable (within the meaning of paragraph (e)(4)(i) of this section) before January 1, 2000. Thus, as long as the applicable period of limitations has not expired for the periods in 1996 and 1997, Employer M may, to the extent permitted under paragraph (g)(3) of this section, apply for a refund or credit for the HI tax paid on the amounts deferred for 1996 and 1997 and, in accordance with paragraph (e)(4) of this section, take into account the amounts deferred when they become reasonably ascertainable.

Example 2: (i) Employer N adopts a plan on January 1, 1994, that covers Employee B, who has 10 years of service as of that date. The plan provides that, in consideration of Employee B's outstanding services over the past 10 years, Employee B will be paid a $500,000 lump sum distribution upon termination of employment at any time. On January 15, 1996, Employee B terminates employment with Employer N. Employer N determines, based on a reasonable, good faith interpretation of section 3121(v)(2), that the plan is a nonqualified deferred compensation plan under that section. Employer N treats the $500,000 as having been taken into account as an amount deferred in 1993 and earlier years.

(ii) Under paragraph (g)(2)(ii) of this section, if all amounts are deferred and all benefits are paid under a plan before January 1, 2000, then in no event will an employer's treatment of amounts deferred under the plan be considered to be in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer treats these amounts as taken into account as wages for FICA tax purposes prior to the adoption of the plan. Accordingly, Employer N's treatment is not in accordance with a reasonable, good faith interpretation of section 3121(v)(2) because Employer N treated amounts as taken into account in years before the adoption of the plan. As a result, the payment made to Employee B in 1996 was subject to both the OASDI and HI portions of FICA tax when paid.

Example 3: (i) Employer O adopts a bonus plan on December 1, 1993, that becomes effective and legally binding on January 1, 1994. Under the plan, which is not set forth in writing, a specified bonus amount (which is 100 percent vested) is credited to Employee C's account each December 31. A reasonable rate of interest on Employee C's account balance is credited quarterly. Employee C's account balance will begin to be paid in equal annual installments over 10 years beginning on January 1, 2000. Employer O determines, based on a reasonable, good faith interpretation of section 3121(v)(2), that the bonus plan is a nonqualified deferred compensation plan

under that section and, therefore, treats the amounts credited from January 1, 1994, through December 31, 1999, as amounts deferred and, in accordance with a reasonable, good faith interpretation of section 3121(v)(2), takes those amounts deferred into account as wages for FICA tax purposes as of those dates. The bonus plan is set forth in writing on May 1, 1999, and, thus, is treated as established as of January 1, 1994.

(ii) Under paragraph (g)(2)(ii) of this section, if an amount is deferred before January 1, 2000, and the attributable benefit is paid on or after January 1, 2000, then in no event will an employer's treatment of the amount deferred under a plan be considered to be in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer treats the amount deferred as taken into account as wages for FICA tax purposes prior to the establishment of the plan (within the meaning of paragraph (b)(2) of this section). Because the bonus plan is treated as established on January 1, 1994 (pursuant to the transition rule for unwritten plans in paragraph (b)(2)(iii) of this section), and because Employer O, in accordance with a reasonable, good faith interpretation of section 3121(v)(2), took amounts deferred into account in 1994 through 1999, the amounts paid to Employee C attributable to those amounts deferred will not be subject to FICA tax when paid.

Example 4: (i) In 1985, Employer P establishes a compensation arrangement for Employee D that provides for a lump sum payment to be made after termination of employment but the arrangement is not a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section). However, prior to January 1, 2000, and in accordance with a reasonable, good faith interpretation of section 3121(v)(2), Employer P treats the arrangement as a nonqualified deferred compensation plan under section 3121(v)(2). Employer P determines that Employee D's total wages (without regard to the amount deferred) for each year from 1985 through 1993 exceed the applicable OASDI and HI wage bases for each of those years and, consequently, there is no FICA tax liability with respect to the amounts deferred for those years. In 1994, Employee D's total wages (without regard to the amount deferred) exceed the OASDI wage base. However, because there is no limit on the HI wage base, the amount deferred for 1994 results in additional HI tax liability of $290, which is timely paid by Employer P.

(ii) Employee D terminates employment with Employer P in 1995 and receives a plan payment of $50,000. In that year, Employee D also receives wages of $60,000 from Employer P. In accordance with its treatment of the plan as a nonqualified deferred compensation plan under section 3121(v)(2), Employer P does not treat the $50,000 payment in 1995 as wages for FICA tax purposes in that year.

(iii) Because amounts under a plan were taken into account (within the meaning of paragraph (d)(1) of this section) as amounts deferred under a nonqualified deferred compensation plan pursuant to a reasonable, good faith interpretation of section 3121(v)(2)(A), but that plan is not a nonqualified deferred compensation plan within the meaning of paragraph (b)(1) of this section, the transition rules provided in paragraph (g)(4)(i) of this section apply. Thus, no additional FICA tax will be due on the benefits paid in 1995.

(iv) Because $290 of HI tax was paid on the amount deferred in 1994, Employer P is entitled to a refund or credit for that amount to the extent permitted under sections 6402, 6413, and 6511—but only to the extent that $290 exceeds the FICA tax that would have been due on the $50,000 payment in 1995 if that payment had been subject to FICA tax when paid (i.e., if paragraphs (a) through (f) of this section had been effective for those years). In 1995, Employee D had other wages of $60,000. Thus, only $1,200 (the $61,200 OASDI wage base, less the $60,000 of other wages) of the $50,000 payment would have been subject to OASDI; the full $50,000 would have been subject to HI. This would have resulted in $148.80 of OASDI tax ($1,200 x 12.4 percent) and $1,450 of HI tax ($50,000 x 2.9 percent). Employer P is not entitled to a refund or credit under the consistency rule of paragraph (g)(3)(ii) because the $290 of HI tax paid in 1994 is less than the total $1,598.80 of FICA tax liability that would have resulted if this section had applied for 1995.

(v) However, if the benefit payment is instead actually or constructively paid on or after January 1, 2000, the benefit payment must be taken into account as wages when actually or constructively paid in accordance with the general timing rule of paragraph (a)(1) of this section (and paragraph (g)(4)(i)(B) of this section).

Example 5: (i) In 1985, Employer Q establishes a compensation arrangement for Employee E that is a nonqualified deferred compensation plan within the meaning of paragraph (b)(1) of this section. However, prior to January 1, 2000, Employer Q determines, based on a reasonable, good faith interpretation of section 3121(v)(2), that the arrangement is not a nonqualified deferred compensation plan within the meaning of that section. Thus, when Employee E retires at the end of 1996 and benefit payments under the arrangement begin in 1997, Employer Q withholds and deposits FICA tax on the amounts paid to Employee E. Payments under the arrangement continue on or after January 1, 2000. Employer Q does not choose

(under paragraph (g)(3) of this section) to adjust its FICA tax determination for a pre-effective-date open period by treating this section as in effect for all amounts deferred and benefits actually or constructively paid for any such period. The periods in 1994 and 1995 are not pre-effective-date open periods for Employer Q.

(ii) Under paragraph (g)(4)(ii) of this section, for purposes of determining whether benefits actually or constructively paid on or after January 1, 2000, were previously taken into account for purposes of applying the nonduplication rule of section 3121(v)(2)(B), any amount that would have been required to have been taken into account before 1994 will be treated as if it had been taken into account within the meaning of paragraph (d)(1) of this section. Under the nonduplication rule, benefit payments attributable to an amount that has been so treated as taken into account is not treated as wages for FICA tax purposes at any later time (such as upon payment).

(iii) Because Employer Q does not adjust its FICA tax determination by treating this section as in effect for all amounts deferred for periods ending after December 31, 1993, any benefit payments attributable to amounts deferred in periods ending after December 31, 1993, will be included in wages when actually or constructively paid in accordance with the general timing rule of paragraph (a)(1) of this section.

Example 6: (i) The facts are the same as in *Example 5,* except that Employer Q chooses (in accordance with paragraph (g)(3) of this section) to adjust its FICA tax determination for all pre-effective-date open periods by treating this section as in effect for all amounts deferred for those periods. In addition, Employer Q chooses (in accordance with paragraph (g)(4)(ii)(E) of this section) to take the amounts deferred for 1994 and 1995 into account by treating these amounts as FICA wages paid and received by Employee E on January 15, 2000.

(ii) In accordance with the nonduplication rule of paragraph (a)(2)(iii) of this section, because all amounts deferred for Employee E under the plan were taken into account (or treated as taken into account), any benefit payments made to Employee E under the plan will not be included as FICA wages when actually or constructively paid.

Example 7: (i) The facts are the same as in Example 5, except that Employer Q does not withhold and deposit the FICA tax due on benefits actually or constructively paid before January 1, 2000.

(ii) Because Employer Q did not withhold and deposit the FICA tax due on benefits actually or constructively paid before January 1, 2000, Employer Q did not determine FICA tax liability and satisfy FICA tax withholding requirements in accordance with a reasonable, good faith interpretation of section 3121(v)(2). Thus, the transition rules provided in paragraphs (g)(3) and (4) of this section do not apply. As a result, any amount that would have been required to have been taken into account under this section before 1994 is not treated as if it had been so taken into account under paragraph (g)(4)(ii)(D) of this section, and benefit payments attributable to amounts deferred before January 1, 2000, are treated as FICA wages when actually or constructively paid in accordance with the general timing rule of paragraph (a)(1) of this section.

Example 8: (i) In 1993, Employer R establishes a nonqualified deferred compensation plan for Employee F under which Employee F will have a fully vested right to receive a lump sum payment in 2000 equal to 50 percent of Employee F's highest rate of salary. On December 31, 1993, Employee F's highest salary is $1 million. In accordance with a reasonable, good faith interpretation of section 3121(v)(2), Employer R determines that, for 1993, there is an amount deferred that must be taken into account as wages for FICA tax purposes. Based on Employer R's estimate that Employee F's highest salary will be $3 million in 2000, Employer R determines that the amount deferred is equal to the present value in 1993 of $1.5 million payable in 2000. However, because Employee F has other wages in 1993 that exceed the applicable OASDI and HI wage bases for that year, no additional FICA tax is paid as a result of that amount deferred being taken into account for 1993. In addition, Employer R takes no amounts into account under the plan after 1993 for Employee F. Under paragraphs (e)(1) and (4)(ii)(D)(*2*) of this section, the largest amount that could have been taken into account in 1993 is the present value of a lump sum payment of $500,000, payable in 2000, because that is the maximum amount to which Employee F has a legally binding right as of December 31, 1993. Employee F's highest salary is, in fact, $3 million in 2000 and Employee F receives $1.5 million under the plan on December 31, 2000.

(ii) In accordance with paragraphs (g)(1) and (4)(iii)(A) of this section, the determination of the amount deferred under the plan for any period beginning on or after January 1, 2000, and the time when that amount deferred is required to be taken into account must be determined in accordance with this section. In addition, these determinations must be made without regard to any amount deferred that was taken into account for any period ending before January 1, 2000, that could not be taken into account before January 1, 2000, if paragraphs (a) through (f) of this section had been in effect. Because no FICA tax was actually paid on that $1 million in 1993, no overpayment of tax was caused by the overinclusion of wages in 1993 and, thus, Employer R is not entitled to a refund or credit (even assuming that the period

of limitations has been kept open for periods in 1993). In addition, because the difference between the present value of the $1.5 million payment and the present value of a $500,000 payment was not taken into account for periods beginning on or after January 1, 1994, $1 million must be included in FICA wages under the general timing rule when paid.

[64 FR 4547, Jan. 29, 1999; 64 FR 15687, Apr. 1, 1999]

§ 31.3121(v)(2)–2 Effective dates and transition rules.

(a) *General statutory effective date.* Except as otherwise provided in paragraphs (b) through (e) of this section, section 3121(v)(2) and the amendments made to section 3121(a)(2), (a)(3), and (a)(13) by the Social Security Amendments of 1983 (Pub. L. 98–21, 97 Stat. 65), as amended by section 2662(f)(2) of the Deficit Reduction Act of 1984 (Pub. L. 98–369, 98 Stat. 494), apply to amounts deferred and benefits paid after December 31, 1983.

(b) *Definitions.* For purposes of §31.3121(v)(2)–1 and this section, the following definitions apply:

(1) *FICA. FICA* means the Federal Insurance Contributions Act (26 U.S.C. 3101 *et seq.*).

(2) *457(a) plan. A 457(a) plan* means an eligible deferred compensation plan of a State or local government or of a tax-exempt organization to which section 457(a) applies.

(3) *Gap agreement. Gap agreement* means an agreement adopted after March 24, 1983, and on or before December 31, 1983, between an individual and a nonqualified deferred compensation plan within the meaning of §31.3121(v)(2)–1(b). Such an agreement does not fail to be a gap agreement merely because the terms of the plan are changed after December 31,1983.

(4) *Individual party to a gap agreement. Individual party to a gap agreement* means an individual who was eligible to participate in a gap agreement on December 31, 1983, under the terms of the agreement on that date. An individual will be treated as an individual party to a gap agreement even if the individual has not accrued any benefits under the plan by December 31, 1983, and regardless of whether the individual has taken any specific action to become a party to the agreement. However, an individual who becomes eligible to participate in a gap agreement after December 31, 1983, is not an individual party to a gap agreement.

(5) *Individual party to a March 24, 1983 agreement. Individual party to a March 24, 1983 agreement* means an individual who was eligible to participate in a March 24, 1983 agreement under the terms of the agreement on March 24, 1983. An individual will be treated as an individual party to a March 24, 1983 agreement even if the individual has not accrued any benefits under the plan by March 24, 1983, and regardless of whether the individual has taken any specific action to become a party to the agreement. However, an individual who becomes eligible to participate in a March 24, 1983 agreement after March 24, 1983, is not an individual party to a March 24, 1983 agreement.

(6) *March 24, 1983 agreement. March 24, 1983 agreement* means an agreement in existence on March 24, 1983, between an individual and a nonqualified deferred compensation plan within the meaning of §31.3121(v)(2)–1(b). Such an agreement does not fail to be a March 24, 1983 agreement merely because the terms of the plan are changed after March 24, 1983. In addition, for purposes of this paragraph (b)(6) only, any plan (or agreement) that provides for payments that qualify for one of the retirement payment exclusions is treated as a nonqualified deferred compensation plan. For example, §31.3121(v)(2)–1(b)(4)(v) provides that certain benefits established in connection with impending termination do not result from the deferral of compensation and thus are not considered deferred under a nonqualified deferred compensation plan. However, a plan that provides such benefits and that was in existence on March 24, 1983, is treated as a nonqualified deferred compensation plan for purposes of this paragraph (b) to the extent it provides benefits that would have satisfied one of the retirement payment exclusions.

(7) *Retirement payment exclusions. Retirement payment exclusions* are the exclusions from wages (for FICA tax purposes) for retirement payments under section 3121(a)(2)(A), (a)(3), and (a)(13)(A)(iii), as in effect on April 19,

1983 (the day before enactment of the Social Security Amendments of 1983).

(8) *Transition benefits. Transition benefits* are payments made after December 31, 1983, attributable to services rendered before January 1, 1984. For this purpose, transition benefits are determined without regard to any changes made in the terms of the plan after March 24, 1983, in the case of a March 24, 1983 agreement or after December 31, 1983, in the case of a gap agreement.

(c) *Transition rules*—(1) *In general.* Except as provided in paragraph (c)(2) or (3) of this section, the general statutory effective date described in paragraph (a) of this section applies to benefit payments after December 31, 1983. Thus, except as provided in paragraph (c)(2) or (3) of this section, section 3121(v)(2) applies, and the retirement payment exclusions do not apply, to benefit payments made after December 31, 1983, even if the benefit payments are made under a March 24, 1983 agreement or a gap agreement.

(2) *Transition benefits under a March 24, 1983 agreement.* With respect to an individual party to a March 24, 1983 agreement, transition benefits paid under that March 24, 1983 agreement (except for those paid under a 457(a) plan) are not subject to the special timing rule of section 3121(v)(2) and are subject to section 3121(a) as in effect on April 19, 1983. Thus, transition benefits under a March 24, 1983 agreement (except for those under a 457(a) plan) to an individual party to a March 24, 1983 agreement are excluded from wages (for FICA tax purposes) only if they qualify for any of the retirement payment exclusions (or any other exclusion provided under section 3121(a) as in effect on April 19, 1983).

(3) *Transition benefits under a gap agreement.* With respect to an individual party to a gap agreement, the payor of transition benefits under the gap agreement must choose to either—

(i) Take the transition benefits into account as wages when paid; or

(ii) Take the amount deferred (within the meaning of §31.3121(v)(2)–1(c)) with respect to the transition benefits into account as wages under section 3121(v)(2) (as if section 3121(v)(2) had applied before its general statutory effective date).

(d) *Determining transition benefit portion.* For purposes of determining the portion of total benefits under a nonqualified deferred compensation plan that represents transition benefits, if, under the terms of the plan, benefit payments are not attributed to specific years of service, the employer may use any reasonable method. For example, if a plan provides that the employee will receive benefits equal to 2 percent of high 3-year average compensation multiplied by years of service, and the employee retires after 25 years of service, 9 of which are before 1984, the employer may determine that 9/25 of the total benefit payments to be received beginning in 2000 are transition benefits attributable to services performed before 1984.

(e) *Order of payment.* If an employer determines, in accordance with paragraph (d) of this section, that a portion of the total benefits under a nonqualified deferred compensation plan constitutes transition benefits, then, for purposes of determining the portion of each benefit payment that constitutes transition benefits, the employer must treat each benefit payment as consisting of transition benefits in the same proportion as the transition benefits that have not been paid (as of January 1, 2000) bear to total benefits that have not been paid (as of January 1, 2000), unless such allocation is inconsistent with the terms of the plan. However, for a benefit payment made before January 1, 2000, the employer may use any reasonable allocation method to determine the portion of a payment that consists of transition benefits, provided that the allocation method is consistent with the terms of the plan.

[64 FR 4567, Jan. 29, 1999]

§31.3123–1 Deductions by an employer from remuneration of an employee.

Any amount deducted by an employer from the remuneration of an employee is considered to be part of the employee's remuneration and is considered to be paid to the employee as remuneration at the time that the deduction is made. It is immaterial that any act of Congress or the law of any State requires or permits such deductions and the payment of the

amount thereof to the United States, a State, or any political subdivision thereof.

Subpart C—Railroad Retirement Tax Act (Chapter 22, Internal Revenue Code of 1954)

TAX ON EMPLOYEES

§ 31.3201–1 Measure of employee tax.

The employee tax is measured by the amount of compensation received for services rendered as an employee. For provisions relating to compensation, see § 31.3231(e)–1. For provisions relating to the circumstances under which certain compensation is to be disregarded for the purpose of determining the employee tax, see paragraphs (b)(1) and (2) of § 31.3231(e)–1.

[T.D. 8582, 59 FR 66189, Dec. 23, 1994]

§ 31.3201–2 Rates and computation of employee tax.

(a) *Rates*—(1)(i) *Tier 1 tax.* The Tier 1 employee tax rate equals the sum of the tax rates in effect under section 3101(a), relating to old-age, survivors, and disability insurance, and section 3101(b), relating to hospital insurance. The Tier 1 employee tax rate is applied to compensation up to the contribution base described in section 3231(e)(2)(B)(i). The contribution base is determined under section 230 of the Social Security Act and is identical to the old-age, survivors, and disability insurance wage base and the hospital insurance wage base, respectively, under the Federal Insurance Contributions Act.

(ii) *Example.* The rule in paragraph (a)(1)(i) of this section is illustrated by the following example.

Example. A received compensation of $60,000 in 1992. The section 3101(a) rate of 6.2 percent would be applied to *A*'s compensation up to $55,500, the applicable contribution base for 1992. The section 3101(b) rate of 1.45 percent would be applied to the entire $60,000 of *A*'s compensation because the applicable contribution base for 1992 is $130,200.

(2)(i) *Tier 2 tax.* The Tier 2 employee tax rate equals the percentage set forth in section 3201(b) of the Code. This rate is applied to compensation up to the contribution base described in section 3231(e)(2)(B)(ii).

(ii) *Example.* The rule in paragraph (a)(2)(i) of this section is illustrated by the following example.

Example. A received compensation of $60,000 in 1992. The section 3201(b) rate of 4.90 percent would be applied to *A*'s compensation up to $41,400, the applicable contribution base for 1992.

(b)(1) *Computation.* The employee tax is computed by multiplying the amount of the employee's compensation with respect to which the employee tax is imposed by the rate applicable to such compensation, as determined under paragraph (a) of this section. The applicable rate is the rate in effect when the compensation is received by the employee. For rules relating to the time of receipt, see § 31.3121(a)–2 (a) and (b).

(2) *Example.* The rule in paragraph (b)(1) of this section is illustrated by the following example.

Example. In 1990, employee *A* received compensation of $1,000 as remuneration for services performed for employer *R* in 1989. The employee tax is payable at the rate of 12.55 percent (7.65 percent plus 4.90 percent) in effect for 1990 (the year the compensation was received), and not the 12.41 percent rate (7.51 percent plus 4.90 percent) in effect for 1989 (the year the services were performed).

[T.D. 8582, 59 FR 66189, Dec. 23, 1994]

§ 31.3202–1 Collection of, and liability for, employee tax.

(a) *Collection; general rule.* The employer shall collect from each of his employees the employee tax imposed with respect to the compensation of the employee by deducting or causing to be deducted the amount of such tax from the compensation subject to the tax as and when such compensation is paid. As to the measure of the employee tax, see § 31.3201–1.

(b) *Collection; payments by two or more employers in excess of annual compensation limitation.* For rules relating to payments by two or more employers in excess of the annual compensation limitation see § 31.3121(a)(1)–1.

(c) *Undercollections or overcollections.* Any undercollection or overcollection of employee tax resulting from the employer's inability to determine, at the time compensation is paid, the correct