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payments complies with the requirements of subdivisions (i) and (ii) of subparagraph (2) of paragraph (e) and notifies the plan of the amount of wages paid on which tax was withheld and deposited within the time required for notification of the employer under subparagraph (2) of paragraph (e), then the plan (and not the third party insurer) shall be required to pay the tax imposed by section 3111 and to comply with the requirements of section 6051 and §§31.6051–1 and 31.6051–2 with respect to such payments unless, within 6 business days of the receipt of such notification, the plan notifies the employer for whom services are normally rendered of the amount of the wages on which tax was withheld and deposited. If the plan provides such notice to the employer, the employer (and not the plan) shall be required to pay the tax imposed by section 3111 and to comply with the requirements of section 6051 and §§31.6051–1 and 31.6051–2 with respect to the wages.

[T.D. 7823, 47 FR 29225, July 6, 1982, as amended by T. D. 7867, 48 FR 793, Jan. 7, 1983]

### §32.2 Railroad retirement taxes with respect to payments on account of sickness or accident disability.

(a) *General rule.* Notwithstanding the provisions of §31.3231(e)–1(a)(3)(i), the amount of any payment on or after January 1, 1982, made to, or on behalf of, an employee or any of his dependents on account of sickness or accident disability is not excluded from the term ''compensation'' as defined in section 3231(e)(1) (for purposes of applying sections 3201(b) and 3221(b) (and so much of section 3211(a) as relates to the rates of the taxes imposed by sections 3101 and 3111)) unless such payment is—

(1) Received under a workmen's compensation law,

(2) Received as a benefit under the Railroad Retirement Act of 1974,

(3) Made after the expiration of 6 calendar months following the last calendar month in which such employee worked,

(4) Made by a third party pursuant to a contractual agreement between the employer and third party entered into prior to December 14, 1981, but then only if—

(i) The third party's coverage for that employee's group ceases prior to March 1, 1982,

(ii) No third party payment is made to such employee under that contract after February 28, 1982, and

(iii) The cessation of the third party's coverage for that employee's group terminates indefinitely the contractual relationship between the third party and the employer as to sickness and accident disability benefits for that employee's group; or

(5) Made under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness, to the extent that such sickness (as determined in accordance with standards prescribed by the Railroad Retirement Board) is the result of on-the-job injury.

The 6-calendar-month provision described in subparagraph (3) of this paragraph shall be applied in a manner comparable to the 6-calendar-month provision described in §31.3121(a)(4)–1.

(b) *Examples.* The application of the provisions of subparagraph (4) of paragraph (a) may be illustrated by the following examples:

*Example 1.* Company Q enters into a contract on August 31, 1981, with Insurance Company R to provide sickness and accident disability payments to Q's employees. The contract expires on February 28, 1982. On March 1, 1982, Q enters into a new contract with R to provide sickness and accident disability payments to Q's employees. Payments made by R pursuant to the contract expiring February 28, 1982, are included in ''compensation'' as defined in section 3231(e)(1).

*Example 2.* Company S enters into a contract on November 15, 1981 with Insurance Company T to provide sickness and accident disability payments to S's employees. The contract expires on February 15, 1982, and is not renewed. A, one of S's employees, has been receiving sickness payments from T since December 1, 1981. T makes its final payment to A on February 22, 1982. The payments made by T to A pursuant to its contract with S are not included in ''compensation'' as defined in section 3231(e)(1).

(c) *Workmen's compensation laws.* (1) For purposes of paragraph (a)(1) of this section, a payment made under a workmen's compensation law does not include a payment made pursuant to a State temporary disability insurance law.

(2) If an employee receives a payment on account of sickness or accident disability which is not excluded from the term ''compensation'' under paragraph (a) (1) or (2) of this section and which must be repaid if the employee receives a workmen's compensation award with respect to the same period of absence from work, such payment is not excluded from the term ''compensation'' as defined in section 3231(e)(1).

(d) *Sickness or accident disability.* For purposes of paragraph (a) of this section, a payment made on account of sickness or accident disability includes any payment for personal injuries or sickness includible in gross income under section 105(a) and the regulations thereunder and thus does not include—

(1) Any amount which is expended for medical care as described in section 105(b) and §1.105–2,

(2) Any payment which is unrelated to absence from work as described in section 105(c) and §1.105–3, or

(3) Any payment or a portion thereof which is attributable to a contribution by the employee as determined in paragraphs (d) and (e) of §1.105–1.

A payment made on account of sickness or accident disability does not include any payment which is excludable from gross income under section 104(a)(4) or (5).

An employee who elects to reduce his compensation or to forgo an increase in his compensation under a salary reduction agreement with an employer will not be deemed to have made employee contributions to the sickness or accident disability plan or system if the employee is not subject to income or railroad retirement taxes on the reduction in compensation.

A tax which is paid by an employee to fund a State temporary disability insurance program is considered a contribution by the employee for purposes of paragraph (d)(3) of this section.

(e) *Payments by third parties.* (1) Any third party making a payment on account of sickness or accident disability which payment is not excluded from the term ''compensation'' under paragraph (a) of this section shall be treated as the employer with respect to such compensation, except as provided in subparagraphs (2) and (3) of this paragraph. Accordingly, such third party must withhold from such payment the tax imposed on the employee by section 3201 and the tax imposed on the employee representative by section 3211, if applicable, pay the tax imposed on employers by section 3221, deposit such taxes pursuant to section 6302 and §31.6302(c)–2(a), and provide the receipts required by section 6051 and §§31.6051–1 and 31.6051–2.

(2) If any third party who is treated as the employer solely by reason of the applicability of subparagraph (1) of this paragraph promptly—

(i) Withholds the tax imposed on the employee by section 3201 and the tax imposed on the employee representative by section 3211, if applicable,

(ii) Deposits such tax pursuant to section 6302 and §31.6302(c)–2(a), and

(iii) Notifies the employer for whom services are normally rendered of the amount of the compensation paid on which tax was withheld and deposited,

then the employer (and not the third party) shall be required to pay the tax imposed by section 3221 and to comply with the requirements of section 6051 and §§31.6051–1 and 31.6051–2 with respect to the compensation. For purposes of subdivision (ii) of this subparagraph, the tax described in subdivision (i) shall be treated by the third party as if included in the employee tax described in §31.6302(c)–2(a)(1)(i). For purposes of subdivision (iii) of this subparagraph, the notice must be provided by the third party within the time required for the deposit of the tax under subdivision (ii) of this subparagraph. For the purpose of providing the notice, the rules of section 7502(a), relating to timely mailing being treated as timely filing, shall apply. The employer, if notified pursuant to subdivision (iii) of this subparagraph by a third party who has complied with the requirements of subdivisions (i) and (ii) of this subparagraph, must deposit the tax imposed by section 3221 in accordance with §31.6302(c)–(2)(a). For purposes of §31.6302(c)–2(a)(1)(ii), with respect to the employer for whom services are normally rendered the term ''taxes'' shall not include any tax imposed on employers by section 3111 that is required to be paid by a third party

under subparagraph (1) of this paragraph until the employer receives notification from the third party under subdivision (iii) of this subparagraph (2).

(3) A third party making a payment on account of sickness or accident disability to an employee as agent for the employer or making such a payment directly to the employer shall not be treated as the employer under subparagraph (1) with respect to such payment unless the agency agreement so provides. The determining factor as to whether a third party is an agent of the employer is whether the third party bears any insurance risk. If the third party bears no insurance risk and is reimbursed on a cost plus fee basis, the third party is an agent of the employer even if the third party is responsible for making determinations of the eligibility of individual employees of the employer for payments on account of sickness or accident disability. If the third party is paid an insurance premium and not reimbursed on a cost plus fee basis, the third party is not a agent of the employer, but the third party is treated as the employer as provided in paragraph (1) of this paragraph (e).

(4) In order to avoid overpayment of taxes which would result from paying taxes—

(i) On remuneration which exceeds one-twelfth of the annual contribution and benefit base (as described in section 3121(a)(1)) each month,

(ii) With respect to a period of time which exceeds the 6-calendar-month period described in subparagraph (3) of paragraph (a) of this section, or

(iii) On a payment or a portion thereof which is attributable to a contribution by the employee,

the third party may request information from the employer as to the total wages earned by the employee for the calendar month in which the third party is making payments, as to the last date on which the employee worked for the employer, and as to the amount of any contribution by the employee. Except if the third party has reason not to believe any information supplied by the employer as the result of a request made pursuant to the preceding sentence, the third party may rely on such information in complying with the requirements of subparagraphs (1) and (2) of this paragraph (e). The third party may not rely on representations of the employee as to the information which may be requested of the employer in complying with the requirements of subparagraphs (1) and (2) of this paragraph (e).

(5) The application of the provisions of this paragraph (e) may be illustrated by the following examples:

*Example 1.* Pursuant to an agreement with Company U, Insurance Company V makes payments on account of sickness or accident disability to U's employees. Such payments are not made under a workmen's compensation law, the Railroad Retirement Act of 1974, or the Railroad Unemployment Insurance Act for days of sickness. U reimburses V for all such payments and pays V a fee for its expenses of administering the payments. V is not treated as the employer with respect to such payments.

*Example 2.* Pursuant to an agreement with Company W, Insurance Company X indemnifies W for the amount of any payments which X must make to an employee on account of sickness or accident disability. Such payments are not made under a workmen's compensation law, the Railroad Retirement Act of 1974, or the Railroad Unemployment Insurance Act for days of sickness. X makes its indemnity payments directly to W. W makes the payments to its employees. X is not treated as the employer with respect to such payments.

*Example 3.* Pursuant to an agreement with Company Y (which is not an agency agreement described in subparagraph (3) of this §32.2(e)), Insurance Company Z makes payments on account of sickness or accident disability to Y's employees. Such payments are not made under a workmen's compensation law, the Railroad Retirement Act of 1974, or the Railroad Unemployment Insurance Act for days of sickness. Z does not notify Y of the amount of such payments. Z is treated as the employer with respect to such payments.

(f) *Penalties and interest on payments made from January 1, 1982 to June 30, 1982.* No penalty under section 6656(a) or interest under section 6601 will be assessed for the failure to make timely payments of the tax imposed by section 3201, 3211, or 3221 on payments made on account of sickness or accident disability, which payments of tax are made after December 31, 1981, and before July 1, 1982, to the extent that the

failure is due to reasonable cause and not willful neglect.

(g) *Special rules.* (1) For purposes of subdivision (iii) of paragraph (e)(2), the last employer for whom the employee worked prior to becoming sick or disabled or for whom the employee was working at the time he became sick or disabled shall be deemed to be the employer for whom services are normally rendered, provided that such employer made contributions on behalf of such employee to the plan or system under which the employee is being paid.

(2) The application of the provisions of subparagraph (1) of this paragraph (g) may be illustrated by the following examples:

*Example 1.* B is employed by Company M. B becomes sick and is absent from work for 3 months. While B is absent from work, he receives sick pay from Insurance Company N pursuant to a plan established by M and to which M has made contributions on behalf of B. M is the employer for whom services are normally rendered by B.

*Example 2.* C is employed by Company O and is also employed on a part-time basis by Company Q. C becomes sick while at work at Qs place of business. C is absent from work for 3 months. While C is absent from work, he receives sick pay from Insurance Company P pursuant to a a plan established by O and to which O has made contributions on behalf of C. O is the employer for whom services are normally rendered by C.

*Example 3.* D is a member of a labor union whose members receive health and welfare benefit payments from a trust fund which is supported by the contributions of the various employers who employ the labor union's members. D has been employed by Company R for 4 days when he becomes sick and is absent from work for 3 months. While D is absent from work he receives sick pay from his union's trust fund to which R has made contributions on D's behalf. R is the employer for whom services are normally rendered by D.

(3) For purposes of paragraph (e) of this section, in the case of payments on account of sickness or accident disability made to employees by a third party insurer pursuant to a contract of insurance with a multiemployer plan which is obligated to make payments on account of sickness or accident disability to such employees pursuant to a collectively bargained agreement, if the third party insurer making the payments complies with the requirements of subdivisions (i) and (ii) of subparagraph (2) of paragraph (e) and notifies the plan of the amount of compensation paid on which tax was withheld and deposited within the time required for notification of the employer under subparagraph (2) of paragraph (e), then the plan (and not the third party insurer) shall be required to pay the tax imposed by section 3221 and to comply with the requirements of section 6051 and §§31.6051–1 and 31.6051–2 with respect to such payments unless, within 6 business days of the receipt of such notification, the plan notifies the employer for whom services are normally rendered of the amount of the compenation on which tax was withheld and deposited. If the plan provides such notice to the employer, the employer (and not the plan) shall be required to pay the tax imposed by section 3221 and to comply with the requirements of section 6051 and §§31.6051–1 and 31.6051–2 with respect to the compensation.

[T.D. 7823, 47 FR 29225, July 6, 1982, as amended by T. D. 7867, 48 FR 793, Jan. 7, 1983]

## PART 34—[RESERVED]

## PART 35—EMPLOYMENT TAX AND COLLECTION OF INCOME TAX AT SOURCE REGULATIONS UNDER THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982

Sec.

35.3405–1 Questions and answers relating to withholding on pensions, annuities, and certain other deferred income.

35.3405–1T Questions and answers relating to withholding on pensions, annuities, and certain other deferred income (temporary regulations).

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