

§ 3401. Definitions**(a) Wages**

For purposes of this chapter, the term “wages” means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include remuneration paid—

(1) for active service performed in a month for which such employee is entitled to the benefits of section 112 (relating to certain combat zone compensation of members of the Armed Forces of the United States) to the extent remuneration for such service is excludable from gross income under such section; or

(2) for agricultural labor (as defined in section 3121(g)) unless the remuneration paid for such labor is wages (as defined in section 3121(a)); or

(3) for domestic service in a private home, local college club, or local chapter of a college fraternity or sorority; or

(4) for service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is \$50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if—

(A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business; or

(B) such individual was regularly employed (as determined under subparagraph (A)) by such employer in the performance of such service during the preceding calendar quarter; or

(5) for services by a citizen or resident of the United States for a foreign government or an international organization; or

(6) for such services, performed by a non-resident alien individual, as may be designated by regulations prescribed by the Secretary; or

[(7) Repealed. Pub. L. 89-809, title I, §103(k), Nov. 13, 1966, 80 Stat. 1554]

(8)(A) for services for an employer (other than the United States or any agency thereof)—

(i) performed by a citizen of the United States if, at the time of the payment of such remuneration, it is reasonable to believe that such remuneration will be excluded from gross income under section 911; or

(ii) performed in a foreign country or in a possession of the United States by such a citizen if, at the time of the payment of such remuneration, the employer is required by the law of any foreign country or possession of the United States to withhold income tax upon such remuneration; or

(B) for services for an employer (other than the United States or any agency thereof) per-

formed by a citizen of the United States within a possession of the United States (other than Puerto Rico), if it is reasonable to believe that at least 80 percent of the remuneration to be paid to the employee by such employer during the calendar year will be for such services; or

(C) for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within Puerto Rico, if it is reasonable to believe that during the entire calendar year the employee will be a bona fide resident of Puerto Rico; or

(D) for services for the United States (or any agency thereof) performed by a citizen of the United States within a possession of the United States to the extent the United States (or such agency) withholds taxes on such remuneration pursuant to an agreement with such possession; or

(9) for 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 duties required by such order; or

(10)(A) for services performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution; or

(B) for services performed by an individual 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, whether or not he is guaranteed a minimum amount of compensation for such services, or is entitled to be credited with the unsold newspapers or magazines turned back; or

(11) for services not in the course of the employer's trade or business, to the extent paid in any medium other than cash; or

(12) to, or on behalf of, an employee or his beneficiary—

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust; or

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a); or

(C) for a payment described in section 402(h)(1) and (2) if, at the time of such payment, it is reasonable to believe that the employee will be entitled to an exclusion under such section for payment; or

(D) under an arrangement to which section 408(p) applies; or

(E) under or to an eligible deferred compensation plan which, at the time of such payment, is a plan described in section 457(b)

which is maintained by an eligible employer described in section 457(e)(1)(A),¹ or

(13) pursuant to any provision of law other than section 5(c) or 6(1) of the Peace Corps Act, for service performed as a volunteer or volunteer leader within the meaning of such Act; or

(14) in the form of group-term life insurance on the life of an employee; or

(15) to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 (determined without regard to section 274(n)); or

(16)(A) as tips in any medium other than cash;

(B) as cash tips to an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is \$20 or more;²

(17) for service described in section 3121(b)(20);²

(18) for any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127, 129, 134(b)(4), or 134(b)(5);²

(19) for any benefit provided to or on behalf of an employee 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 74(c), 108(f)(4), 117, or 132;²

(20) for any medical care reimbursement made to or for the benefit of an employee under a self-insured medical reimbursement plan (within the meaning of section 105(h)(6));²

(21) for any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b);²

(22) any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d); or

(23) for any benefit or payment which is excludable from the gross income of the employee under section 139B(b).

The term “wages” includes any amount includible in gross income of an employee under section 409A and payment of such amount shall be treated as having been made in the taxable year in which the amount is so includible.

(b) Payroll period

For purposes of this chapter, the term “payroll period” means a period for which a payment of wages is ordinarily made to the employee by his employer, and the term “miscellaneous payroll period” means a payroll period other than a daily, weekly, biweekly, semimonthly, monthly, quarterly, semiannual or annual payroll period.

¹ So in original. The comma probably should be a semicolon.

² So in original. Probably should be followed by “or”.

(c) Employee

For purposes of this chapter, the term “employee” includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term “employee” also includes an officer of a corporation.

(d) Employer

For purposes of this chapter, the term “employer” means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that—

(1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term “employer” (except for purposes of subsection (a)) means the person having control of the payment of such wages, and

(2) in the case of a person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, the term “employer” (except for purposes of subsection (a)) means such person.

(e) Number of withholding exemptions claimed

For purposes of this chapter, the term “number of withholding exemptions claimed” means the number of withholding exemptions claimed in a withholding exemption certificate in effect under section 3402(f), or in effect under the corresponding section of prior law, except that if no such certificate is in effect, the number of withholding exemptions claimed shall be considered to be zero.

(f) Tips

For purposes of subsection (a), the term “wages” includes tips received by an employee in the course of his employment. Such wages shall be deemed to be paid at the time a written statement including such tips is furnished to the employer pursuant to section 6053(a) or (if no statement including such tips is so furnished) at the time received.

(g) Crew leader rules to apply

Rules similar to the rules of section 3121(o) shall apply for purposes of this chapter.

(h) Differential wage payments to active duty members of the uniformed services

(1) In general

For purposes of subsection (a), any differential wage payment shall be treated as a payment of wages by the employer to the employee.

(2) Differential wage payment

For purposes of paragraph (1), the term “differential wage payment” means any payment which—

(A) is made by an employer to an individual with respect to any period during which the individual is performing service in the uniformed services (as defined in chapter 43 of title 38, United States Code) while on active duty for a period of more than 30 days, and

(B) represents all or a portion of the wages the individual would have received from the employer if the individual were performing service for the employer.

(Aug. 16, 1954, ch. 736, 68A Stat. 455; Aug. 9, 1955, ch. 681, 69 Stat. 616; Pub. L. 87-256, §110(g)(1), Sept. 21, 1961, 75 Stat. 537; Pub. L. 87-293, title II, §201(c), Sept. 22, 1961, 75 Stat. 625; Pub. L. 87-792, §7(I), Oct. 10, 1962, 76 Stat. 830; Pub. L. 88-272, title II, §§204(b), 213(c), Feb. 26, 1964, 78 Stat. 36, 52; Pub. L. 89-97, title III, §313(d)(1), (2), July 30, 1965, 79 Stat. 383, 384; Pub. L. 89-809, title I, §103(k), Nov. 13, 1966, 80 Stat. 1554; Pub. L. 92-279, §2, Apr. 26, 1972, 86 Stat. 125; Pub. L. 93-406, title II, §2002(g)(7), Sept. 2, 1974, 88 Stat. 970; Pub. L. 94-455, title XII, §1207(e)(1)(C), title XV, §1501(b)(7), title XIX, §§1903(c), 1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1707, 1736, 1810, 1834; Pub. L. 95-600, title I, §164(b)(1), Nov. 6, 1978, 92 Stat. 2813; Pub. L. 95-615, §207(a), Nov. 8, 1978, 92 Stat. 3108; Pub. L. 96-222, title I, §103(a)(13)(A), Apr. 1, 1980, 94 Stat. 213; Pub. L. 97-34, title I, §§112(b)(5), 124(e)(2)(A), title III, §311(h)(6), Aug. 13, 1981, 95 Stat. 195, 200, 282; Pub. L. 97-448, title I, §103(c)(12)(B), Jan. 12, 1983, 96 Stat. 2377; Pub. L. 98-369, div. A, title IV, §491(d)(38), title V, §531(d)(4), July 18, 1984, 98 Stat. 851, 885; Pub. L. 99-514, title I, §122(e)(4), title XII, §1272(c), Oct. 22, 1986, 100 Stat. 2112, 2594; Pub. L. 100-647, title I, §§1001(g)(4)(B)(iii), 1011(f)(9), 1011B(a)(22)(D), (33), Nov. 10, 1988, 102 Stat. 3352, 3463, 3486, 3488; Pub. L. 101-140, title II, §203(a)(2), Nov. 8, 1989, 103 Stat. 830; Pub. L. 101-239, title VII, §7631(a), (b), Dec. 19, 1989, 103 Stat. 2378; Pub. L. 101-508, title XI, §11703(f)(1), Nov. 5, 1990, 104 Stat. 1388-517; Pub. L. 104-117, §1(c), Mar. 20, 1996, 110 Stat. 828; Pub. L. 104-188, title I, §§1421(b)(8)(D), 1704(t)(4)(C), Aug. 20, 1996, 110 Stat. 1798, 1887; Pub. L. 104-191, title III, §301(c)(2)(C), Aug. 21, 1996, 110 Stat. 2049; Pub. L. 105-206, title VI, §6023(14), (15), July 22, 1998, 112 Stat. 825; Pub. L. 107-16, title VI, §641(a)(1)(D)(i), June 7, 2001, 115 Stat. 119; Pub. L. 108-121, title I, §106(b)(4), Nov. 11, 2003, 117 Stat. 1339; Pub. L. 108-173, title XII, §1201(d)(2)(C), Dec. 8, 2003, 117 Stat. 2477; Pub. L. 108-357, title III, §320(b)(4), title VIII, §885(b)(2), Oct. 22, 2004, 118 Stat. 1473, 1639; Pub. L. 108-375, div. A, title V, §585(b)(2)(D), Oct. 28, 2004, 118 Stat. 1932; Pub. L. 109-135, title IV, §412(tt), Dec. 21, 2005, 119 Stat. 2640; Pub. L. 110-245, title I, §§105(a)(1), 115(c), June 17, 2008, 122 Stat. 1628, 1637.)

REFERENCES IN TEXT

Sections 5(c) and 6(1) of the Peace Corps Act, referred to in subsec. (a)(13), are classified to sections 2504(c) and 2505(1), respectively, of Title 22, Foreign Relations and Intercourse.

AMENDMENTS

2008—Subsec. (a)(23). Pub. L. 110-245, §115(c), added par. (23).

Subsec. (h). Pub. L. 110-245, §105(a)(1), added subsec. (h).

2005—Subsecs. (g), (h). Pub. L. 109-135 redesignated subsec. (h) as (g).

2004—Subsec. (a). Pub. L. 108-357, §885(b)(2), inserted concluding provisions.

Subsec. (a)(18). Pub. L. 108-375 substituted “134(b)(4), or 134(b)(5)” for “or 134(b)(4)”.

Subsec. (a)(19). Pub. L. 108-357, §320(b)(4), inserted “108(f)(4),” after “74(c),”.

2003—Subsec. (a)(18). Pub. L. 108-121 substituted “129, or 134(b)(4)” for “or 129”.

Subsec. (a)(22). Pub. L. 108-173 added par. (22).

2001—Subsec. (a)(12)(E). Pub. L. 107-16 added subpar. (E).

1998—Subsec. (a)(19), (21). Pub. L. 105-206 inserted “for” after par. designation.

1996—Subsec. (a)(1). Pub. L. 104-188, §1704(t)(4)(C), substituted “combat zone compensation” for “combat pay”.

Pub. L. 104-117 inserted before semicolon “to the extent remuneration for such service is excludable from gross income under such section”.

Subsec. (a)(12)(D). Pub. L. 104-188, §1421(b)(8)(D), added subpar. (D).

Subsec. (a)(21). Pub. L. 104-191 added par. (21).

1990—Subsec. (a)(20). Pub. L. 101-508 added par. (20).

1989—Subsec. (a)(2). Pub. L. 101-239, §7631(a), amended par. (2) generally. Prior to amendment, par. (2) read as follows: “for agricultural labor (as defined in section 3121(g)); or”.

Subsec. (g). Pub. L. 101-140 amended this section to read as if amendments by Pub. L. 100-647, §1011B(a)(22)(D), had not been enacted, see 1988 Amendment note below.

Subsec. (h). Pub. L. 101-239, §7631(b), added subsec. (h).

1988—Subsec. (a)(12)(C). Pub. L. 100-647, §1011(f)(9), substituted “section 402(h)(1) and (2)” for “section 219” and “an exclusion” for “a deduction”.

Subsec. (a)(15). Pub. L. 100-647, §1001(g)(4)(B)(iii), inserted “(determined without regard to section 274(n))” after “section 217”.

Subsec. (a)(19), (20). Pub. L. 100-647, §1011B(a)(33), redesignated par. (20) as (19) and struck out former par. (19) which excluded medical care reimbursement made to or for benefit of employee under self-insured medical reimbursement plan.

Subsec. (g). Pub. L. 100-647, §1011B(a)(22)(D), added subsec. (g) relating to benefits provided under certain employee benefit plans.

1986—Subsec. (a)(8)(D). Pub. L. 99-514, §1272(c), added subpar. (D).

Subsec. (a)(20). Pub. L. 99-514, §122(e)(4), inserted reference to section 74(c).

1984—Subsec. (a). Pub. L. 98-369, §531(d)(4)(A), inserted “(including benefits)” in introductory provisions.

Subsec. (a)(12). Pub. L. 98-369, §491(d)(38), struck out subpar. (C) which provided: “under or to a bond purchase plan which, at the time of such payment, is a qualified bond purchase plan described in section 405(a);” and redesignated subpar. (D) as (C).

Subsec. (a)(20). Pub. L. 98-369, §531(d)(4)(B), added par. (20).

1983—Subsec. (a)(12)(D). Pub. L. 97-448 substituted “section 219” for “section 219(a)”.

1981—Subsec. (a)(12)(D). Pub. L. 97-34, §311(h)(6), substituted “section 219(a)” for “section 219(a) or 220(a)”.

Subsec. (a)(18). Pub. L. 97-34, §124(e)(2)(A), substituted “section 127 or 129” for “section 127”.

Pub. L. 97-34, §112(b)(5), redesignated par. (19) as (18). Former par. (18), relating to remuneration paid to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it was reasonable to believe that a corresponding deduction was allowable under section 913 (relating to deduction for certain expenses of living abroad), was struck out.

Subsec. (a)(19), (20). Pub. L. 97-34, §112(b)(5), redesignated par. (20) as (19). Former par. (19) redesignated (18).

1980—Subsec. (a)(18) to (20). Pub. L. 96-222 redesignated par. (18), added by Pub. L. 95-600, as (19), in par. (19) as so redesignated, substituted “section 127; or” for “section 124,” and added par. (20).

1978—Subsec. (a)(18). Pub. L. 95-615 added par. (18) relating to payments or benefits excludable from income under section 124.

Pub. L. 95-600 added par. (18) relating to remuneration for which a corresponding deduction is allowable under section 913.

1976—Subsec. (a)(6). Pub. L. 94-455, §1906(b)(13)(A), struck out “or his delegate” after “Secretary”.

Subsec. (a)(12)(D). Pub. L. 94-455, §1501(b)(7), inserted “or 220(a)” after “section 219(a)”.

Subsec. (a)(17). Pub. L. 94-455, §1207(e)(1)(C), added par. (17).

Subsec. (c). Pub. L. 94-455, §1903(c), struck out “Territory” after “a State”.

1974—Subsec. (a)(12)(D). Pub. L. 93-406 added subpar. (D).

1972—Subsec. (a)(1). Pub. L. 92-279 struck out “as a member of the Armed Forces of the United States” after “active service”, substituted “employee” for “member”, and parenthetical text “(relating to certain combat pay of members of the Armed Forces of the United States)”.

1966—Subsec. (a)(6), (7). Pub. L. 89-809, §103(k), struck out par. (6) dealing with services performed by non-resident alien individuals other than residents of contiguous countries who enter and leave the United States at frequent intervals, residents of Puerto Rico if such services are performed as an employee of the United States or any agency thereof, or individuals temporarily present in the United States as nonimmigrants under certain conditions, redesignated par. (7) as (6), and in par. (6) as so redesignated, struck out “who is a resident of a contiguous country and who enters and leaves the United States at frequent intervals” after “nonresident alien individual”.

1965—Subsec. (a)(16). Pub. L. 89-97, §313(d)(2), added par. (16).

Subsec. (f). Pub. L. 89-97, §313(d)(1), added subsec. (f).

1964—Subsec. (a)(14). Pub. L. 88-272, §204(b), added par. (14).

Subsec. (a)(15). Pub. L. 88-272, §213(c), added par. (15).

1962—Subsec. (a)(12)(B), (C). Pub. L. 87-792 substituted “is a plan described in section 403(a)” for “meets the requirements of section 401(a)(3), (4), (5), and (6)”, in subpar. (B), and added subpar. (C).

1961—Subsec. (a)(6)(C). Pub. L. 87-256 added subpar. (C).

Subsec. (a)(13). Pub. L. 87-293 added par. (13).

1955—Subsec. (a). Act Aug. 9, 1955, excluded from definition of wages, remuneration paid for services performed in a possession of the United States by a United States citizen if the employer is required by the law of the possession to withhold income tax on the remuneration.

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110-245, title I, §105(a)(2), June 17, 2008, 122 Stat. 1628, provided that: “The amendment made by this subsection [amending this section] shall apply to remuneration paid after December 31, 2008.”

Amendment by section 115(c) of Pub. L. 110-245 effective as if included in section 5 of Pub. L. 110-142, see section 115(d) of Pub. L. 110-245, set out as a note under section 3121 of this title.

EFFECTIVE DATE OF 2004 AMENDMENTS

Amendment by Pub. L. 108-375 applicable to travel benefits provided after Oct. 28, 2004, see section 585(b)(3) of Pub. L. 108-375, set out as a note under section 134 of this title.

Amendment by section 320(b)(4) of Pub. L. 108-357 applicable to amounts received by an individual in taxable years beginning after Dec. 31, 2003, see section 320(c) of Pub. L. 108-357, set out as a note under section 108 of this title.

Amendment by section 885(b)(2) of Pub. L. 108-357 applicable to amounts deferred after Dec. 31, 2004, with special rules relating to earnings and material modifications and exception for nonelective deferred compensation, see section 885(d) of Pub. L. 108-357, set out as an Effective Date note under section 409A of this title.

EFFECTIVE DATE OF 2003 AMENDMENTS

Amendment by Pub. L. 108-173 applicable to taxable years beginning after Dec. 31, 2003, see section 1201(k) of

Pub. L. 108-173, set out as a note under section 62 of this title.

Amendment by Pub. L. 108-121 applicable to taxable years beginning after Dec. 31, 2002, see section 106(c) of Pub. L. 108-121, set out as a note under section 134 of this title.

EFFECTIVE DATE OF 2001 AMENDMENT

Amendment by Pub. L. 107-16 applicable to distributions after Dec. 31, 2001, see section 641(f)(1) of Pub. L. 107-16, set out as a note under section 402 of this title.

EFFECTIVE DATE OF 1996 AMENDMENTS

Amendment by Pub. L. 104-191 applicable to taxable years beginning after Dec. 31, 1996, see section 301(j) of Pub. L. 104-191, set out as a note under section 62 of this title.

Amendment by section 1421(b)(8)(D) of Pub. L. 104-188 applicable to taxable years beginning after Dec. 31, 1996, see section 1421(e) of Pub. L. 104-188, set out as a note under section 72 of this title.

Amendment by Pub. L. 104-117 applicable to remuneration paid after Mar. 20, 1996, see section 1(e) of Pub. L. 104-117, set out in a Treatment of Certain Individuals Performing Services in Certain Hazardous Duty Areas; Effective Date note under section 112 of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Pub. L. 101-508, title XI, §11703(f)(2), Nov. 5, 1990, 104 Stat. 1388-518, provided that: “The amendment made by paragraph (1) [amending this section] shall apply as if included in the amendments made by section 1151 of the Tax Reform Act of 1986 [Pub. L. 99-514, see Effective Date of 1986 Amendment note set out under section 79 of this title] but shall not apply to any amount paid before the date of the enactment of this Act [Nov. 5, 1990] which the employer treated as wages for purposes of chapter 24 of the Internal Revenue Code of 1986 when paid.”

EFFECTIVE DATE OF 1989 AMENDMENTS

Pub. L. 101-239, title VII, §7631(c), Dec. 19, 1989, 103 Stat. 2378, provided that: “The amendments made by this section [amending this section] shall apply to remuneration paid after December 31, 1989.”

Amendment by Pub. L. 101-140 effective as if included in section 1151 of Pub. L. 99-514, see section 203(c) of Pub. L. 101-140, set out as a note under section 79 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by sections 1001(g)(4)(B)(iii), 1011(f)(9), and 1011B(a)(33) of Pub. L. 100-647 effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99-514, to which such amendment relates, see section 1019(a) of Pub. L. 100-647, set out as a note under section 1 of this title.

Amendment by section 1011B(a)(22)(D) of Pub. L. 100-647 not applicable to any individual who separated from service with the employer before Jan. 1, 1989, see section 1011B(a)(22)(F) of Pub. L. 100-647, set out as a note under section 3121 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 122(e)(4) of Pub. L. 99-514 applicable to prizes and awards granted after Dec. 31, 1986, see section 151(c) of Pub. L. 99-514, set out as a note under section 1 of this title.

Amendment by section 1272(c) of Pub. L. 99-514 applicable to taxable years beginning after Dec. 31, 1986, with certain exceptions and qualifications, see section 1277 of Pub. L. 99-514, set out as a note under section 931 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by section 491(d)(38) of Pub. L. 98-369 applicable to obligations issued after Dec. 31, 1983, see section 491(f)(1) of Pub. L. 98-369, set out as a note under section 62 of this title.

Amendment by section 531(d)(4) of Pub. L. 98-369 effective Jan. 1, 1985, see section 531(h) of Pub. L. 98-369, set out as an Effective Date note under section 132 of this title.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 97-448 effective, except as otherwise provided, as if it had been included in the provision of the Economic Recovery Tax Act of 1981, Pub. L. 97-34, to which such amendment relates, see section 109 of Pub. L. 97-448, set out as a note under section 1 of this title.

EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by section 112(b)(5) of Pub. L. 97-34 applicable with respect to taxable years beginning after Dec. 31, 1981, see section 115 of Pub. L. 97-34, set out as a note under section 911 of this title.

Amendment by section 124(e)(2)(A) of Pub. L. 97-34 applicable to remuneration paid after Dec. 31, 1981, see section 124(f)(2) of Pub. L. 97-34, set out as a note under section 21 of this title.

Amendment by section 311(h)(6) of Pub. L. 97-34 applicable to taxable years beginning after Dec. 31, 1981, see section 311(i)(1) of Pub. L. 97-34, set out as a note under section 219 of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96-222 effective, except as otherwise provided, as if it had been included in the provisions of the Revenue Act of 1978, Pub. L. 95-600, to which such amendment relates, see section 201 of Pub. L. 96-222, set out as a note under section 32 of this title.

EFFECTIVE DATE OF 1978 AMENDMENTS

Amendment by Pub. L. 95-615 applicable to remuneration paid after Nov. 8, 1978, but with taxpayers allowed to elect not to have the amendment apply with respect to any taxable year beginning after Dec. 31, 1977, and before Jan. 1, 1979, see section 209(b), (c) of Pub. L. 95-615, set out as a note under section 911 of this title.

Amendment by Pub. L. 95-600 applicable with respect to taxable years beginning after Dec. 31, 1978, see section 164(d) of Pub. L. 95-600, set out as a note under section 127 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by section 1501(b)(7) of Pub. L. 94-455 effective for taxable years beginning after Dec. 31, 1976, see section 1501(d) of Pub. L. 94-455, set out as a note under section 62 of this title.

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93-406 effective on Jan. 1, 1975, see section 2002(i)(2) of Pub. L. 93-406, set out as an Effective Date note under section 4973 of this title.

EFFECTIVE DATE OF 1972 AMENDMENT

Pub. L. 92-279, §3(b), Apr. 26, 1972, 86 Stat. 125, provided that: "The amendments made by section 2 [amending this section] shall apply to wages paid on or after the first day of the first calendar month which begins more than 30 days after the date of the enactment of this Act [Apr. 26, 1972]."

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-809 applicable with respect to remuneration paid after Dec. 31, 1966, see section 103(n)(4) of Pub. L. 89-809, set out as a note under section 871 of this title.

EFFECTIVE DATE OF 1965 AMENDMENT

Amendment by section 313(d)(1), (2) of Pub. L. 89-97 applicable only with respect to tips received by employees after 1965, see section 313(f) of Pub. L. 89-97, set out as a note under section 6053 of this title.

EFFECTIVE DATE OF 1964 AMENDMENT

Amendment by section 204(b) of Pub. L. 88-272 applicable to remuneration paid after Dec. 31, 1963, in the

form of group-term life insurance provided after such date, see section 204(d) of Pub. L. 88-272, set out as an Effective Date note under section 79 of this title.

Amendment by section 213(c) of Pub. L. 88-272 applicable to remuneration paid after the seventh day following Feb. 26, 1964, see section 213(d) of Pub. L. 88-272, set out as a note under section 62 of this title.

EFFECTIVE DATE OF 1962 AMENDMENT

Amendment by Pub. L. 87-792 applicable to taxable years beginning after Dec. 31, 1962, see section 8 of Pub. L. 87-792, set out as a note under section 22 of this title.

EFFECTIVE DATE OF 1961 AMENDMENTS

Amendment by Pub. L. 87-293 applicable with respect to remuneration paid after Sept. 22, 1961, see section 201(d) of Pub. L. 87-293, set out as a note under section 912 of this title.

Pub. L. 87-256, §110(h)(4), Sept. 21, 1961, 75 Stat. 538, provided that: "The amendments made by subsection (g) of this section [amending this section and section 3402 of this title] shall apply with respect to wages paid after December 31, 1961."

SHORT TITLE OF 1966 AMENDMENT

Pub. L. 89-368, §1, Mar. 15, 1966, 80 Stat. 38, provided that: "This Act [enacting sections 276 and 6682 of this title and section 428 of Title 42, The Public Health and Welfare, amending sections 1402, 1403, 3402, 4061, 4251, 4253, 6015, 6154, 6211, 6412, 6654, 7205, and 7701 of this title and section 1202 of Title 19, Customs Duties, and enacting provisions set out as notes under sections 276, 3402, 4061, 4251, 6154, and 6654 of this title and section 428 of Title 42] may be cited as the 'Tax Adjustment Act of 1966'."

REPEALS; AMENDMENTS AND APPLICATION OF AMENDMENTS UNAFFECTED

Section 201(c) of Pub. L. 87-293, cited as a credit to this section, was repealed by Pub. L. 89-572, §5(a), Sept. 13, 1966, 80 Stat. 765. Such repeal not deemed to affect amendments to this section contained in such provisions, and continuation in full force and effect until modified by appropriate authority of all determinations, authorization, regulations, orders, contracts, agreements, and other actions issued, undertaken, or entered into under authority of the repealed provisions, see section 5(b) of Pub. L. 89-572, set out as a note under former section 2515 of Title 22, Foreign Relations and Intercourse.

NO INFERENCE TO BE DRAWN FROM AMENDMENT BY PUB. L. 108-121

No inference to be drawn from amendment to subsec. (a)(18) of this section by section 106 of Pub. L. 108-121 with respect to tax treatment of any amounts under program described in section 134(b)(4) of this title for any taxable year beginning before Jan. 1, 2003, see section 106(d) of Pub. L. 108-121, set out as a note under section 134 of this title.

PLAN AMENDMENTS NOT REQUIRED UNTIL JANUARY 1, 1998

For provisions directing that if any amendments made by subtitle D [§§1401-1465] of title I of Pub. L. 104-188 require an amendment to any plan or annuity contract, such amendment shall not be required to be made before the first day of the first plan year beginning on or after Jan. 1, 1998, see section 1465 of Pub. L. 104-188, set out as a note under section 401 of this title.

CONTROVERSIES INVOLVING WHETHER INDIVIDUALS ARE EMPLOYEES FOR PURPOSES OF EMPLOYMENT TAXES

Pub. L. 95-600, title V, §530, Nov. 6, 1978, 92 Stat. 2885, as amended by Pub. L. 96-167, §9(d), Dec. 29, 1979, 93 Stat. 1278; Pub. L. 96-541, §1, Dec. 17, 1980, 94 Stat. 3204; Pub. L. 97-248, title II, §269(c)(1), (2), 96 Stat. 552; Pub. L. 99-514, §2, title XVII, §1706(a), Oct. 22, 1986, 100 Stat.

2095, 2781; Pub. L. 104-188, title I, §1122(a), Aug. 20, 1996, 110 Stat. 1766; Pub. L. 109-280, title VIII, §864(a), Aug. 17, 2006, 120 Stat. 1024; Pub. L. 110-458, title I, §108(m), Dec. 23, 2008, 122 Stat. 5110, provided that:

“(a) TERMINATION OF CERTAIN EMPLOYMENT TAX LIABILITY.—

“(1) IN GENERAL.—If—

“(A) for purposes of employment taxes, the taxpayer did not treat an individual as an employee for any period, and

“(B) in the case of periods after December 31, 1978, all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on a basis consistent with the taxpayer's treatment of such individual as not being an employee, then, for purposes of applying such taxes for such period with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no reasonable basis for not treating such individual as an employee.

“(2) STATUTORY STANDARDS PROVIDING ONE METHOD OF SATISFYING THE REQUIREMENTS OF PARAGRAPH (1).—For purposes of paragraph (1), a taxpayer shall in any case be treated as having a reasonable basis for not treating an individual as an employee for a period if the taxpayer's treatment of such individual for such period was in reasonable reliance on any of the following:

“(A) judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;

“(B) a past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual; or

“(C) long-standing recognized practice of a significant segment of the industry in which such individual was engaged.

“(3) CONSISTENCY REQUIRED IN THE CASE OF PRIOR TAX TREATMENT.—Paragraph (1) shall not apply with respect to the treatment of any individual for employment tax purposes for any period ending after December 31, 1978, if the taxpayer (or a predecessor) has treated any individual holding a substantially similar position as an employee for purposes of the employment taxes for any period beginning after December 31, 1977.

“(4) REFUND OR CREDIT OF OVERPAYMENT.—If refund or credit of any overpayment of an employment tax resulting from the application of paragraph (1) is not barred on the date of the enactment of this Act [Nov. 6, 1978] by any law or rule of law, the period for filing a claim for refund or credit of such overpayment (to the extent attributable to the application of paragraph (1)) shall not expire before the date 1 year after the date of the enactment of this Act.

“(b) PROHIBITION AGAINST REGULATIONS AND RULINGS ON EMPLOYMENT STATUS.—No regulation or Revenue Ruling shall be published on or after the date of the enactment of this Act [Nov. 6, 1978] and before the effective date of any law hereafter enacted clarifying the employment status of individuals for purposes of the employment taxes by the Department of the Treasury (including the Internal Revenue Service) with respect to the employment status of any individual for purposes of the employment taxes.

“(c) DEFINITIONS.—For purposes of this section—

“(1) EMPLOYMENT TAX.—The term ‘employment tax’ means any tax imposed by subtitle C of the Internal Revenue Code of 1986 [formerly I.R.C. 1954, section 3101 et seq. of this title].

“(2) EMPLOYMENT STATUS.—The term ‘employment status’ means the status of an individual, under the usual common law rules applicable in determining the employer-employee relationship, as an employee or as an independent contractor (or other individual who is not an employee).

“(d) EXCEPTION.—This section shall not apply in the case of an individual who, pursuant to an arrangement between the taxpayer and another person, provides services for such other person as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work.

“(e) SPECIAL RULES FOR APPLICATION OF SECTION.—

“(1) NOTICE OF AVAILABILITY OF SECTION.—An officer or employee of the Internal Revenue Service shall, before or at the commencement of any audit inquiry relating to the employment status of one or more individuals who perform services for the taxpayer, provide the taxpayer with a written notice of the provisions of this section.

“(2) RULES RELATING TO STATUTORY STANDARDS.—For purposes of subsection (a)(2)—

“(A) a taxpayer may not rely on an audit commenced after December 31, 1996, for purposes of subparagraph (B) thereof unless such audit included an examination for employment tax purposes of whether the individual involved (or any individual holding a position substantially similar to the position held by the individual involved) should be treated as an employee of the taxpayer.

“(B) in no event shall the significant segment requirement of subparagraph (C) thereof be construed to require a reasonable showing of the practice of more than 25 percent of the industry (determined by not taking into account the taxpayer), and

“(C) in applying the long-standing recognized practice requirement of subparagraph (C) thereof—

“(i) such requirement shall not be construed as requiring the practice to have continued for more than 10 years, and

“(ii) a practice shall not fail to be treated as long-standing merely because such practice began after 1978.

“(3) AVAILABILITY OF SAFE HARBORS.—Nothing in this section shall be construed to provide that subsection (a) only applies where the individual involved is otherwise an employee of the taxpayer.

“(4) BURDEN OF PROOF.—

“(A) IN GENERAL.—If—

“(i) a taxpayer establishes a prima facie case that it was reasonable not to treat an individual as an employee for purposes of this section, and

“(ii) the taxpayer has fully cooperated with reasonable requests from the Secretary of the Treasury or his delegate,

then the burden of proof with respect to such treatment shall be on the Secretary.

“(B) EXCEPTION FOR OTHER REASONABLE BASIS.—In the case of any issue involving whether the taxpayer had a reasonable basis not to treat an individual as an employee for purposes of this section, subparagraph (A) shall only apply for purposes of determining whether the taxpayer meets the requirements of subparagraph (A), (B), or (C) of subsection (a)(2).

“(5) PRESERVATION OF PRIOR PERIOD SAFE HARBOR.—If—

“(A) an individual would (but for the treatment referred to in subparagraph (B)) be deemed not to be an employee of the taxpayer under subsection (a) for any prior period, and

“(B) such individual is treated by the taxpayer as an employee for employment tax purposes for any subsequent period,

then, for purposes of applying such taxes for such prior period with respect to the taxpayer, the individual shall be deemed not to be an employee.

“(6) SUBSTANTIALLY SIMILAR POSITION.—For purposes of this section, the determination as to whether an individual holds a position substantially similar to a position held by another individual shall include consideration of the relationship between the taxpayer and such individuals.

“(f) TREATMENT OF TEST ROOM SUPERVISORS AND PROCTORS WHO ASSIST IN THE ADMINISTRATION OF COLLEGE ENTRANCE AND PLACEMENT EXAMS.—

“(1) IN GENERAL.—In the case of an individual described in paragraph (2) who is providing services as a test proctor or room supervisor by assisting in the administration of college entrance or placement examinations, this section shall be applied to such services performed after December 31, 2006 (and remuneration paid for such services) without regard to subsection (a)(3) thereof.

“(2) APPLICABILITY.—An individual is described in this paragraph if the individual—

“(A) is providing the services described in subsection (a) to an organization described in section 501(c), and exempt from tax under section 501(a), of the Internal Revenue Code of 1986, and

“(B) is not otherwise treated as an employee of such organization for purposes of subtitle C of such Code (relating to employment taxes).”

[Pub. L. 109-280, title VIII, §864(b), Aug. 17, 2006, 120 Stat. 1024, provided that: “The amendment made by this section [amending section 530 of Pub. L. 95-600, set out above] shall apply to remuneration for services performed after December 31, 2006.”]

[Pub. L. 104-188, title I, §1122(b), Aug. 20, 1996, 110 Stat. 1767, provided that:

[[“(1) IN GENERAL.—The amendment made by this section [amending section 530 of Pub. L. 95-600, set out above] shall apply to periods after December 31, 1996.

[[“(2) NOTICE BY INTERNAL REVENUE SERVICE.—Section 530(e)(1) of the Revenue Act of 1978 [Pub. L. 95-600] (as added by subsection (a)) shall apply to audits which commence after December 31, 1996.

[[“(3) BURDEN OF PROOF.—

[[“(A) IN GENERAL.—Section 530(e)(4) of the Revenue Act of 1978 (as added by subsection (a)) shall apply to disputes involving periods after December 31, 1996.

[[“(B) NO INFERENCE.—Nothing in the amendments made by this section shall be construed to infer the proper treatment of the burden of proof with respect to disputes involving periods before January 1, 1997.”]

[Pub. L. 99-514, title XVII, §1706(b), Oct. 22, 1986, 100 Stat. 2781, provided that: “The amendment made by this section [amending section 530 of Pub. L. 95-600, set out above] shall apply to remuneration paid and services rendered after December 31, 1986.”]

§ 3402. Income tax collected at source

(a) Requirement of withholding

(1) In general

Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary. Any tables or procedures prescribed under this paragraph shall—

(A) apply with respect to the amount of wages paid during such periods as the Secretary may prescribe, and

(B) be in such form, and provide for such amounts to be deducted and withheld, as the Secretary determines to be most appropriate to carry out the purposes of this chapter and to reflect the provisions of chapter 1 applicable to such periods.

(2) Amount of wages

For purposes of applying tables or procedures prescribed under paragraph (1), the term “the amount of wages” means the amount by which the wages exceed the number of withholding exemptions claimed multiplied by the amount of one such exemption. The amount of each withholding exemption shall be equal to the amount of one personal exemption provided in section 151(b), prorated to the payroll

period. The maximum number of withholding exemptions permitted shall be calculated in accordance with regulations prescribed by the Secretary under this section, taking into account any reduction in withholding to which an employee is entitled under this section.

(b) Percentage method of withholding

(1) If wages are paid with respect to a period which is not a payroll period, the withholding exemption allowable with respect to each payment of such wages shall be the exemption allowed for a miscellaneous payroll period containing a number of days (including Sundays and holidays) equal to the number of days in the period with respect to which such wages are paid.

(2) In any case in which wages are paid by an employer without regard to any payroll period or other period, the withholding exemption allowable with respect to each payment of such wages shall be the exemption allowed for a miscellaneous payroll period containing a number of days equal to the number of days (including Sundays and holidays) which have elapsed since the date of the last payment of such wages by such employer during the calendar year, or the date of commencement of employment with such employer during such year, or January 1 of such year, whichever is the later.

(3) In any case in which the period, or the time described in paragraph (2), in respect of any wages is less than one week, the Secretary, under regulations prescribed by him, may authorize an employer to compute the tax to be deducted and withheld as if the aggregate of the wages paid to the employee during the calendar week were paid for a weekly payroll period.

(4) In determining the amount to be deducted and withheld under this subsection, the wages may, at the election of the employer, be computed to the nearest dollar.

(c) Wage bracket withholding

(1) At the election of the employer with respect to any employee, the employer shall deduct and withhold upon the wages paid to such employee a tax (in lieu of the tax required to be deducted and withheld under subsection (a)) determined in accordance with tables prescribed by the Secretary in accordance with paragraph (6).

(2) If wages are paid with respect to a period which is not a payroll period, the amount to be deducted and withheld shall be that applicable in the case of a miscellaneous payroll period containing a number of days (including Sundays and holidays) equal to the number of days in the period with respect to which such wages are paid.

(3) In any case in which wages are paid by an employer without regard to any payroll period or other period, the amount to be deducted and withheld shall be that applicable in the case of a miscellaneous payroll period containing a number of days equal to the number of days (including Sundays and holidays) which have elapsed since the date of the last payment of such wages by such employer during the calendar year, or the date of commencement of employment with such employer during such year, or January 1 of such year, whichever is the later.