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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.

(a) Table of contents.
(b) Introduction.
(c) General rule.
(1) Inclusion in employment of service by employees who are not members of a retirement system.
(2) Treatment of individuals employed in more than one position.
(d) Definition of qualified participant.
(1) General rule.
(2) Special rule for part time, seasonal and temporary employees.
(3) Alternative lookback rule.
(4) Treatment of former participants.
(e) Definition of retirement system.
(1) Requirement that system provide retirement-type benefits.
(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 $3,500.

(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 reemployed 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]

§ 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 semi-skilled 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
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 -
	$1,158.57	$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]

§ 31.3123–1 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 amount of compensation with respect to which the deduction should be made shall be corrected in accordance with the provisions of Subpart G of the regulations in this part relating to adjustments, credits, refunds, and abatements.

(d) *When fractional part of cent may be disregarded.* In collecting the employee tax, the employer shall disregard any fractional part of a cent of such tax unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

(e) *Employer's liability.* The employer is liable for the employee tax with respect to compensation paid by him, whether or not collected from the employee. If the employer deducts less than the correct amount of employee tax or fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax. Until collected from him, the employee is also liable for the employee tax. Any employee tax collected by or on behalf of an employer is a special fund in trust for the United States. See section 7501. An employer is not liable to any person for the amount of the employee tax deducted by him and paid to the district director.

(f) *Concurrent employment.* If two or more related corporations who are rail employers concurrently employ the same individual and compensate that individual through a common paymaster, which is one of the related corporations employing the individual, see § 31.3121(s)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6541, 26 FR 553, Jan 20, 1961; T.D. 6727, 29 FR 5866, May 5, 1964; T.D. 8582, 59 FR 66189, Dec. 23, 1994]

TAX ON EMPLOYEE REPRESENTATIVES

§ 31.3211–1 Measure of employee representative tax.

The employee representative tax is measured by the amount of compensation received for services rendered as an employee representative. For provisions relating to compensation, see § 31.3231(e)–1.

[T.D. 8582, 59 FR 66190, Dec. 23, 1994]

§ 31.3211–2 Rates and computation of employee representative tax.

(a) *Rates*—(1)(i) *Tier 1 tax.* The Tier 1 employee representative tax rate equals the sum of the tax rates in effect under sections 3101(a) and 3111(a), relating to the employee and the employer tax for old-age, survivors, and disability insurance, and sections 3101(b) and 3111(b), relating to the employee and the employer tax for hospital insurance. The Tier 1 employee representative 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. B, an employee representative, received compensation of $60,000 in 1992. The sections 3101(a) and 3111(a) rates of 12.4 percent (6.2 percent plus 6.2 percent) would be applied to *B*'s compensation up to $55,500, the

applicable contribution base for 1992. The sections 3101(b) and 3111(b) rates of 2.9 percent (1.45 percent plus 1.45 percent) would be applied to the entire $60,000 of *B*'s compensation because the applicable contribution base for 1992 is $130,200.

(2) (i) *Tier 2 tax.* The Tier 2 employee representative tax rate equals the percentage set forth in section 3211(a)(2) of the Code. This rate is applied 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. B received compensation of $60,000 in 1992. The section 3211(a)(2) rate of 14.75 percent would be applied to *B*'s compensation up to $41,400, the applicable contribution base for 1992.

(3) *Supplemental Annuity Tax.* The supplemental annuity tax for each work-hour for which compensation is paid to an employee representative for services rendered as an employee representative is imposed at the same rate as the excise tax imposed on every employer under section 3221(c). See also § 31.3211–3.

(b) (1) *Computation.* The employee representative tax is computed by multiplying the amount of the employee representative's compensation with respect to which the employee representative 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 representative. 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 representative *B* received $1,000 as remuneration for services performed for employer *R* in 1989. The employee representative tax is payable at the rate of 30.05 percent (15.30 percent plus 14.75 percent) in effect for 1990 (the year the compensation was received), and not the 29.77 percent rate (15.02 percent plus 14.75 percent) in effect for 1989 (the year the services were performed).

(c) (1) *Rule where compensation is received both as an employee representative and employee.* The following rule applies to an individual who renders service both as an employee representative and as an employee. The employee representative tax is imposed on compensation received as an employee representative under the rules described in § 31.3211–2. The employee tax is imposed on compensation received as an employee under the rules described in § 31.3201–2. However, if the total compensation received is greater than the applicable contribution base, the employee representative tax is imposed on the amount equal to the contribution base less the amount received for services rendered as an employee.

(2) *Example.* The rule in paragraph (c)(1) of this section is illustrated by the following example.

Example. C performed services both as an employee and an employee representative in 1992. *C* received compensation of $40,000 as an employee and $20,000 as an employee representative. *C*'s entire compensation of $40,000 is subject to tax under the rules described in § 31.3201–2. The amount of employee representative compensation subject to the section 3101(a) and the section 3111(a) rate is $15,500 ($55,500 − $40,000). The entire $20,000 is subject to the sections 3101(b) and 3111(b) rates since the combined compensation is less than $130,200, the applicable contribution base for 1992. The amount of the employee representative compensation subject to the section 3211(a)(2) rate is $1,400 ($41,400 − $40,000).

[T.D. 8582, 59 FR 66190, Dec. 23, 1994]

§ 31.3211–3 Employee representative supplemental tax.

See paragraphs (a), (b), and (c) of § 31.3221–3 for rules applicable to the supplemental tax for each work-hour for which compensation is paid to an employee representative for services rendered as an employee representative.

[T.D. 8525, 59 FR 9666, Mar. 1, 1994]

§ 31.3212–1 Determination of compensation.

See § 31.3231(e)–1 for regulations applicable to compensation.

TAX ON EMPLOYERS

§ 31.3221–1 Measure of employer tax.

(a) *General Rule*—The employer tax is measured by the amount of compensation paid by an employer to its employees. 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 purposes of determining the employer tax, see paragraphs (b) (1) and (2) of § 31.3231(e)–1.

(b) *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) *Underpayments or overpayments.* Any underpayment or overpayment of employer tax resulting from the employer's inability to determine, at the time such tax is paid, the correct amount of compensation with respect to which the tax should be paid shall be corrected in accordance with the provisions of Subpart G of the regulations in this part relating to adjustments, credits, refunds, and abatements.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6541, 26 FR 555, Jan. 20, 1961; T.D. 8582, 59 FR 66190, Dec. 23, 1994]

§ 31.3221–2 Rates and computation of employer tax.

(a) *Rates*—(1)(i) *Tier 1 tax.* The Tier 1 employer tax rate equals the sum of the tax rates in effect under section 3111(a), relating to old-age, survivors, and disability insurance, and section 3111(b), relating to hospital insurance. The Tier 1 employer 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. *R*'s employee, *A*, received compensation of $60,000 in 1992. The section 3111(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 3111(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 employer tax rate equals the percentage set forth in section 3221(b) of the Internal Revenue Code. This rate is applied 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. *R*'s employee, *A*, received compensation of $60,000 in 1992. The section 3221(b) rate of 16.10 percent would be applied to *A*'s compensation up to $41,400, the applicable contribution base for 1992.

(3) *Supplemental Annuity Tax.* The supplemental annuity tax for each work-hour for which compensation is paid by an employer for services rendered during any calendar quarter by employees is imposed at the tax rate determined each calendar quarter by the Railroad Retirement Board. See also § 31.3221–3.

(b)(1) *Computation.* The employer tax is computed by multiplying the amount of the compensation with respect to which the employer 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 at the time the compensation is paid. For rules relating to the time of payment, 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, *R*'s employee *A* received $1,000 as remuneration for services performed for *R* in 1989. The employer tax is payable at the rate of 23.75 percent (7.65 percent plus 16.10 percent) in effect for 1990 (the year the compensation was received) and not the 23.61 percent rate (7.51 percent plus 16.10 percent) in effect for 1989 (the year the services were performed).

[T.D. 8582, 59 FR 66190, Dec. 23, 1994]

§ 31.3221–3 Supplemental tax.

(a) *Introduction*—(1) *In general.* Section 3221(c) imposes an excise tax on every employer, as defined in section 3231(a) and § 31.3231(a)–1, with respect to

individuals employed by the employer. The tax is imposed for each work-hour for which the employer pays compensation, as defined in section 3231(e) and § 31.3231(e)–1, for services rendered to the employer during a calendar quarter. This § 31.3221–3 provides rules for determining the number of taxable work-hours.

(2) *Overview.* Paragraph (b) of this section defines *work-hours.* Paragraph (c) of this section demonstrates the calculation of work-hours. Paragraph (d) of this section offers a safe harbor calculation of work-hours for use by any employer in lieu of calculating the number of work-hours for each employee.

(b) *Definition of work-hours*—(1) *In general.* For purposes of section 3221(c) and this section, *work-hours* are hours for which the employee is compensated, whether or not the employee performs services.

(i) *Payments included in work-hours.* Work-hours include regular time worked; overtime; time paid for vacations and holidays; time allowed for meals; away-from-home terminal time; called and not used, runaround, and deadheading time; time for attending court, participating in investigations, and attending claim and safety meetings; and guaranteed time not worked. Work-hours also include conversion hours, that is, compensation converted into work-hours. Conversion hours may be derived from payment by the mile or by the piece. Work-hours also include time for which the employee is paid for periods of absence not due to sickness or accident disability, such as for routine medical and dental examinations or for time lost.

(ii) *Payments excluded from work-hours.* Certain kinds of payments are not subject to conversion into work-hours. These include those payments that are specifically excluded from *compensation* within the meaning of section 3231(e), such as certain sick pay payments (section 3231(e)(1)(i)); tips (section 3231(e)(1)(ii)); and amounts paid specifically (either as an advance, as reimbursement, or allowance) for traveling expenses (section 3231(e)(1)(iii)). Traveling expenses paid under a nonaccountable plan are excluded from work-hours even though they are includible in compensation. See § 31.3231(e)–1(a)(5). Also excluded from work-hours are amounts representing bonuses, amounts received pursuant to the exercise of an employee stock option, and all separation payments or severance allowances.

(2) *Hourly compensation.* Because the tax under section 3221(c) is calculated on the basis of work-hours, the number of hours for which an employee receives compensation is the figure used to determine work-hours. In the case of an hourly-rated employee, each hour for which the employee receives compensation is one work-hour.

(3) *Daily, weekly, monthly compensation.* (i) If an employee is paid by the day, week, month, or other period of time, the tax is imposed on the number of hours comprehended in the rate and, if any, the number of overtime hours for which additional compensation is paid. Thus, in the case of an office worker who receives an annual salary based on an 8-hour, 5-day-a-week work schedule that includes paid holidays, vacations, and sick time, the number of work-hours for one month is 174 (2088 hours/year ÷12 months).

(ii) The rule in paragraph (b)(3)(i) of this section is illustrated by the following examples.

Example 1. A, an office worker, receives an annual salary that is paid monthly. The salary is based on an 8-hour, Monday through Friday work schedule. *A* is not paid for overtime hours. *A* is not expected to work on holidays, during *A*'s annual vacation, or during periods that *A* is ill. The number of work-hours for one month is 174 (2088 hours/year ÷12 months). This figure remains constant, even though some months have more workdays than others.

Example 2. B is paid a stated amount for each day *B* works, regardless of the number of hours worked. However, if *B* works more than 8 hours during any day, *B* is paid overtime for each additional hour worked that day. *B* is not paid for holidays, vacations, or sick time. During May, *B* worked 6 hours on 4 days, 7 hours on 6 days, 8 hours on 6 days, and 9 hours on 5 days. Because *B* is paid a daily rate for up to 8 hours, 8 hours are comprehended in the daily rate. Therefore, the number of work-hours for May is 173 (21 days×8 hours/day+5 overtime hours), even though *B* actually worked 159 hours.

(4) *Conversion hours*—(i) Compensation not based on time (hour, day, month, etc.), such as compensation

paid by the mile or by the piece, must be converted into the number of hours represented by the compensation paid. Thus, if an employee is paid by the mile, 1 work-hour equals the number of miles constituting a workday, divided by 8 hours. However, in the case of a collective bargaining agreement that specifies a number of hours as constituting a workday, the number of hours specified under the agreement may be used instead of 8.

(ii) The rule in paragraph (b)(4)(i) of this section is illustrated by the following example.

Example. *C*'s normal workday consists of 2 150-mile round trips that together take 6 hours. *C* is paid by the mile. The collective bargaining agreement does not specify the number of hours in a workday. Thus, the number of work-hours for each day *C* works is 8, or 1 work-hour for each 37.5 miles (300 miles/day ÷ 8 hours/day). If the applicable collective bargaining agreement specifies that 6 hours constitute a workday, the number of work-hours for each day *C* works would be 6.

(c) *Calculation of work-hours*—(1) An employer may calculate the work-hours separately for each employee, as described in the examples in this paragraph. If the employer chooses to calculate work-hours separately for each employee, the employer must calculate the number of regular hours, overtime hours, and conversion hours for each employee for each month. In lieu of separate calculations, the employer may calculate the work-hours for all the employer's employees using the safe harbor formula described in paragraph (d) of this section.

(2) The rules in paragraph (c) of this section are illustrated by the following examples.

Example 1. *D* worked 8 hours a day, Monday through Friday, during the months of February and March 1992. *D* did not work on President's Day, but was paid for the holiday. *D*'s work-hours for February were 160 (19 days × 8 hours a day + 8 holiday hours). *D*'s work-hours for March were 176 (22 days × 8 hours a day).

Example 2. *E* worked 7-hour shifts every Tuesday through Saturday during the months of February and March 1992. *E* also worked 7 overtime hours during February and 21 overtime hours during March. Also, *E* was paid for 7 hours on President's Day, even though *E* did not work on that day. The number of work-hours for February was 161 (21 days × 7 hours a day + 7 overtime hours + 7 holiday hours). The number of work-hours for March was 168 (21 days × 7 hours a day + 21 overtime hours). Because *E* receives an hourly wage and was paid for the President's Day holiday, the number of hours (7) for which *E* was paid are added to the hours *E* actually worked. If *E* had worked on President's Day and had received extra pay for working on a holiday and holiday pay for 7 hours, the employer would include 14 hours in *E*'s work-hours for that day, the 7 hours *E* actually worked and the 7 holiday hours for which *E* was paid.

Example 3. *Employment beginning during month.* *F* began employment on March 16, a Monday, and worked 8 hours a day, Monday through Friday. The employer calculates that *F*'s hours for the month were 96, because *F* worked 12 8-hour days during the month. If March 16 were on a Friday, the employer would calculate 11 days, or 88 hours.

Example 4. *Employment ending during month.* *G*'s last day of employment was Friday, March 13. *G* worked 8 hours a day, Monday through Friday, except for March 3, when *G* was ill. *G* was paid for 8 hours for March 3. The employer calculates that *G*'s work-hours for March were 80, because *G* worked 9 8-hour days and was paid for an additional 8 hours.

(d) *Safe harbor*—(1) *In general.* In lieu of calculating work-hours separately for each employee, an employer may use the safe harbor for all employees. If the employer elects to use the safe harbor for a calendar year, the employer must use the safe harbor for all employees for the entire calendar year. If an employer uses the safe harbor for a calendar year, the employer need not elect the safe harbor for the following calendar year. An employer that elects the safe harbor for a calendar year may not subsequently elect to separately calculate employee work-hours for that calendar year.

(2) *Method of calculation.* The safe harbor treats each employee of the employer as receiving monthly compensation for a number of hours equal to the safe harbor number. To determine the number of work-hours for a month, the employer multiplies the safe harbor number by the number that equals the total number of employees to whom the employer paid compensation during the month.

(i) *Safe harbor number defined.* The safe harbor number is the number established in guidance of general applicability promulgated by the Commissioner.

(ii) *Employee defined.* Solely for purposes of this paragraph, an employee is any individual who is paid compensation, within the meaning of § 31.3231(e)–1, regardless of the amount, during the month. Thus, for example, a part-time, temporary, or seasonal employee is counted as an employee. A terminated employee is counted in the month of termination (provided the terminated employee received compensation in the month of termination), but not in any subsequent month in which the employee does not perform service for the employer as an employee, even if the terminated employee is paid compensation in a subsequent month. Thus, for example, an employee who terminates employment during the month, receives compensation during the month of termination, and receives a final paycheck the following month is counted as an employee of the employer for the month of termination but not for the following month.

(3) *Method of election.* An employer makes the safe harbor election for a calendar year on the employment tax return filed for the previous calendar year.

(4) *Additional rules.* The Commissioner may, in revenue procedures, revenue rulings, notices, or other guidance of general applicability, revise the safe harbor number or provide additional safe harbors that satisfy section 3221(c).

(e) *Effective dates.* This § 31.3221–3 is effective for calendar years beginning after December 31, 1992, except that paragraph (d) is effective for calendar years beginning after December 31, 1993. Taxpayers may apply the rules in paragraphs (a), (b), and (c) of this section before January 1, 1993.

[T.D. 8525, 59 FR 9666, Mar. 1, 1994]

GENERAL PROVISIONS

§ 31.3231(a)–1 Who are employers.

(a) Each of the following persons is an employer within the meaning of the act:

(1) Any carrier, that is, any express carrier, sleeping car carrier, or rail carrier providing transportation subject to subchapter I of chapter 105 of title 49;

(2) Any company—

(i) Which is directly or indirectly owned or controlled by one or more employers as defined in paragraph (a)(1) of this section, or under common control therewith, and

(ii) Which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with—

(*a*) The transportation of passengers or property by railroad, or

(*b*) The receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad;

(3) Any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any employer as defined in paragraph (a)(1) or (2) of this section;

(4) Any railroad association, traffic association, tariff bureau, demurrage bureau, weighing and inspection bureau, collection agency, and any other association, bureau, agency, or organization controlled and maintained wholly or principally by two or more employers as defined in paragraph (a)(1), (2) or (3) of this section and engaged in the performance of services in connection with or incidental to railroad transportation;

(5) Any railway labor organization, national in scope, which has been or may be organized in accordance with the provisions of the Railway Labor Act; and

(6) Any subordinate unit of a national railway-labor-organization employer, that is, any State or National legislative committee, general committee, insurance department, or local lodge or division, of an employer as defined in paragraph (a)(5) of this section, established pursuant to the constitution and bylaws of such employer.

(b) As used in paragraph (a)(2) of this section, the term ''controlled'' includes direct or indirect control, whether legally enforceable and however exercisable or exercised. The control may be by means of stock ownership, or by agreements, licenses, or any other devices which insure that the operation of the company is in the interest of one or more carriers. It is the reality of the

control, however, which is decisive, not its form nor the mode of its exercise.

(c) As used in paragraph (a)(2) of this section, the term *casual* applies when the service rendered or the operation of equipment or facilities by a controlled company or person in connection with the transportation of passengers or property by railroad is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service or operation is insubstantial.

(d) The term ''employer'' does not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation which is operated by any other motive power.

(e) The term ''employer'' does not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple and the operation of equipment or facilities for such mining or supplying of coal, or in any of such activities.

(f) Any company that is described in paragraph (a)(2) of this section is an employer under section 3231. In certain cases, based on all the facts and circumstances, it may be appropriate to segregate those businesses engaged in rail services and therefore subject to the Railroad Retirement Tax Act from those businesses engaged exclusively in nonrail services and therefore not subject to the Railroad Retirement Tax Act. The factors considered are set forth in guidance published by the Internal Revenue Service.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960; T.D. 8582, 59 FR 66191, Dec. 23, 1994]

§ 31.3231(b)–1 Who are employees.

(a) *In general.* (1) An individual who is in the service of one or more employers for compensation is an employee within the meaning of the act. (For definitions of the terms ''employer'', ''service'', and ''compensation'', see subsections (a), (d), and (e), respectively, of section 3231.) An individual is in the service of an employer, with respect to services rendered for compensation, if—

(i) He is subject to the continuing authority of the employer to supervise and direct the manner in which he renders such services; or

(ii) He is rendering professional or technical services and is integrated into the staff of the employer; or

(iii) He is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations.

(2) In order that an individual may be in the service of an employer within the meaning of paragraph (a)(1)(i) of this section, it is not necessary that the employer actually direct or control the manner in which the services are rendered; it is sufficient if the employer has the right to do so. The right of an employer to discharge an individual is also an important factor indicating that the individual is subject to the continuing authority of the employer to supervise and direct the manner of rendition of the services. Other factors indicating that an individual is subject to the continuing authority of the employer to supervise and direct the manner of rendition of the services are the furnishing of tools and the furnishing of a place to work by the employer to the individual who renders the services.

(3) In general, if an individual is subject to the control or direction of an employer 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. On individual performing services as an independent contractor is not, as to such services, in the service of an employer within the meaning of paragraph (a)(1)(i) of this section. However, an individual performing services as an independent contractor may be, as to such services, in the service of an employer within the meaning of paragraph (a)(1) (ii) or (iii) of this section.

(4) Whether or not an individual is an employee will be determined upon an examination of the particular facts of the case.

(5) If an individual is an employee, it is of no consequence that he is designated as a partner, coadventurer, agent, independent contractor, or otherwise, or that he performs services on a part-time basis.

(6) No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other supervisory personnel are employees within the meaning of the act. An officer of an employer is an employee, but a director as such is not.

(7) In determining whether an individual is an employee with respect to services rendered within the United States, the citizenship or residence of the individual, or the place where the contract of service was entered into is immaterial.

(8) If an individual performs services for an employer (other than a local lodge or division or a general committee of a railway-labor-organization employer) which does not conduct the principal part of its business within the United States, such individual shall be deemed to be in the service of such employer only to the extent that he performs services for it in the United States. Thus, with respect to services rendered for such employer outside the United States, such individual is not in the service of an employer.

(9) If an individual performs services for an employer (other than a local lodge or division or a general committee of a railway-labor-organization employer) which conducts the principal part of its business within the United States, he is in the service of such employer whether his services are rendered within or without the United States. In the case of an individual, not a citizen or resident of the United States, rendering services in a place outside the United States to an employer which is required under the laws applicable in such place to employ, in whole or in part, citizens or residents thereof, such individual shall not be deemed to be in the service of an employer with respect to services so rendered.

(10) The term ''employee'' does not include any individual while he is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

(b) *Employees of local lodges or divisions of railway-labor-organization employers.* (1) An individual is in the service of a local lodge or division of a railway-labor-organization employer (see paragraph (a)(6) of § 31.3231(a)–1) only if—

(i) All, or substantially all, the individuals constituting the membership of such local lodge or division are employees of an employer conducting the principal part of its business in the United States; or

(ii) The headquarters of such local lodge or division is located in the United States.

(2) (i) An individual in the service of a local lodge or division is not an employee within the meaning of the act unless he was, on or after August 29, 1935, in the service of a carrier (see § 31.3231(g) for definition of carrier) or he was, on August 29, 1935, in the ''employment relation'' to a carrier.

(ii) An individual shall be deemed to have been in the employment relation to a carrier on August 29, 1935, if *(a)* he was on that date on leave of absence from his employment expressly granted to him by the carrier by whom he was employed, or by a duly authorized representative or such carrier, and the grant of such leave of absence was established to the satisfaction of the Railroad Retirement Board before July 1947; or *(b)* he was in the service of a carrier after August 29, 1935, and before January 1946 in each of six calendar months whether or not consecutive; or *(c)* before August 29, 1935, he did not retire and was not retired or discharged from the service of the last carrier by whom he was employed or its corporate or operating successor, but *(1)* solely by reason of his physical or mental disability he ceased before August 29, 1935, to be in the service of such carrier and thereafter remained continuously disabled until he attained age sixty-five or until August 1945, or *(2)* solely for such last stated reason a carrier by whom he was employed before August 29, 1935, or a carrier who is its successor did not on or after August 29, 1935,

and before August 1945 call him to return to service, or *(3)* if he was so called he was solely for such reason unable to render service in six calendar months as provided in *(b)* of this subdivision; or *(d)* he was on August 29, 1935, absent from the service of a carrier by reason of a discharge which, within one year after the effective date thereof, was protested, to an appropriate labor representative or to the carrier, as wrongful, and which was followed within 10 years of the effective date thereof by his reinstatement in good faith to his former service with all his seniority rights. However, an individual shall not be deemed to have been in the employment relation to a carrier on August 29, 1935, if before that date he was granted a pension or gratuity on the basis of which a pension was awarded to him pursuant to section 6 of the Railroad Retirement Act of 1937 (45 U.S.C. 228f), or if during the last payroll period before August 29, 1935, in which he rendered service to a carrier he was not, with respect to any service in such payroll period, in the service of an employer (see paragraph (a) of this section).

(c) *Employees of general committees of railway-labor-organization employers.* An individual is in the service of a general committee of a railway-labor-organization employer (see paragraph (a)(6) of §31.3231(a)–1) only if—

(1) He is representing a local lodge or division described in paragraph (b)(1) of this section; or

(2) All, or substantially all, the individuals represented by such general committee are employees of an employer conducting the principal part of its business in the United States; or

(3) He acts in the capacity of a general chairman or an assistant general chairman of a general committee which represents individuals rendering service in the United States to an employer. In such case, if his office or headquarters is not located in the United States and the individuals represented by such general committee are employees of an employer not conducting the principal part of its business in the United States, only a part of his remuneration for such service shall be regarded as compensation. The part of his remuneration regarded as compensation shall be in the same proportion to his total remuneration as the mileage in the United States under the jurisdiction of such general committee bears to the total mileage under its jurisdiction, unless such mileage formula is inapplicable, in which case such other formula as the Railroad Retirement Board may have prescribed pursuant to section 1(c) of the Railroad Retirement Act of 1937 (45 U.S.C. 228a) shall be applicable. However, no part of his remuneration for such service shall be regarded as compensation if the application of such mileage formula, or such other formula as the Railroad Retirement Board may have prescribed, would result in his compensation for the service being less than 10 percent of his remuneration for such service.

§31.3231(c)–1 Who are employee representatives.

(a) An employee representative within the meaning of the act is—

(1) Any officer or official representative of a railway labor organization which is not included as an employer under section 3231(a) who—

(i) Was in the service of an employer either before or after June 29, 1937, and

(ii) Is duly authorized and designated to represent employees in accordance with the Railway Labor Act.

For railway labor organizations which are employers under section 3231(a), see paragraph (a) (5) and (6) of §31.3231(a)–1.

(2) Any individual who is regularly assigned to or regularly employed by an employee representative, as defined in paragraph (a)(1) of this section, in connection with the duties of such employee representative's office.

(b) In determining whether an individual is an employee representative, his citizenship or residence is material only insofar as those factors may affect the determination of whether he was ''in the service of an employer'' (see paragraph (a) of §31.3231(b)–1).

§31.3231(d)–1 Service.

See §31.3231(b)–1 for regulations relating to the term ''in the service of an employer.''

§ 31.3231(e)–1 Compensation.

(a) *Definition*—(1) The term *compensation* has the same meaning as the term *wages* in section 3121(a), 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).

(2) A payment made by an employer to an individual through the employer's payroll is presumed, in the absence of evidence to the contrary, to be compensation for services rendered as an employee of the employer. Likewise, a payment made by an employee organization to an employee representative through the organization's payroll is presumed, in the absence of evidence to the contrary, to be compensation for services rendered by the employee representative as such. For rules regarding the treatment of deductions by an employer from remuneration of an employee, see § 31.3123–1.

(3) The term *compensation* is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer and, in the case of an employee representative, amounts paid for an identifiable period during which the employee representative is absent from the active service of the employee organization.

(4) Compensation includes amounts paid to an employee for loss of earnings during an identifiable period as the result of the displacement of the employee to a less remunerative position or occupation as well as pay for time lost.

(5) For rules regarding the treatment of reimbursement and other expense allowance amounts, see § 31.3121(a)–3. For rules regarding the inclusion of fringe benefits in compensation, see § 31.3121(a)–1T.

(b) *Special Rules.* (1) If the amount of compensation earned in any calendar month by an individual as an employee in the service of a local lodge or division of a railway-labor-organization employer is less than $25, the amount is disregarded for purposes of determining the employee tax under section 3201 and the employer tax under section 3221.

(2) Compensation for service as a delegate to a national or international convention of a railway-labor-organization employer is disregarded for purposes of determining the employee tax under section 3201 and the employer tax under section 3221 if the individual rendering the service has not previously rendered service, other than as a delegate, which may be included in the individual's years of service for purposes of the Railroad Retirement Act.

(3) For special provisions relating to the compensation of certain general chairs or assistant general chairs of a general committee of a railway-labor-organization employer, see paragraph (c)(3) of § 31.3231(b)–1.

[T.D. 8582, 59 FR 66191, Dec. 23, 1994]

§ 31.3231(e)–2 Contribution base.

The term *compensation* does not include any remuneration paid during any calendar year by an employer to an employee for services rendered in excess of the applicable contribution base. For rules applying this provision, see § 31.3121(a)(1)–1.

[T.D. 8582, 59 FR 66191, Dec. 23, 1994]

Subpart D—Federal Unemployment Tax Act (Chapter 23, Internal Revenue Code of 1954)

§ 31.3301–1 Persons liable for tax.

Every person who is an employer as defined in section 3306(a) (see § 31.3306(a)–1) is liable for the tax. Even if an employer is not subject to any State unemployment compensation law, he is nevertheless liable for the tax. However, if he is subject to such a State law, he may be entitled to certain credits against the tax (see §§ 31.3302(a)1 to 31.3302(c)–1, inclusive). For provisions relating to payment of the tax, see Subpart G of the regulations in this part.

§ 31.3301–2 Measure of tax.

The tax for any calendar year is measured by the amount of wages paid by the employer during such year with

respect to employment after December 31, 1938. (See §31.3306(b)–1, relating to wages, and §§31.3306(c)–1 to 31.3306(c)–3, inclusive, relating to employment.)

[T.D. 6658, 28 FR 6632, June 27, 1963]

§31.3301–3 Rate and computation of tax.

(a) The rates of tax with respect to wages paid in calendar years after 1954 are as follows:

	Percent
In the calendar years 1955 to 1960, both inclusive	3
In the calendar year 1961	3.1
In the calendar year 1962	3.5
In the calendar year 1963	3.35
In the calendar year 1964 and subsequent calendar years	3.1

(b) The tax is computed by applying to the wages paid in a calendar year, with respect to employment after December 31, 1938, the rate in effect at the time the wages are paid.

[T.D. 6658, 28 FR 6632, June 27, 1963]

§31.3301–4 When wages are paid.

Wages are paid when actually or constructively paid. 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. See §31.6011(a)–3, relating to the return on which wages are to be reported.

§31.3302(a)–1 Credit against tax for contributions paid.

(a) *In general.* Subject to the provision of paragraphs (b) and (c) of this section and to the provisions of §31.3302(c)–1, the taxpayer may credit against the tax for any taxable year the total amount of contributions paid by him into an unemployment fund maintained during such year under a State law which has been found by the Secretary of Labor to contain the provisions specified in section 3304(a); *Provided, however,* That no credit may be taken for contributions under a State law if such State has not been duly certified for the calendar year to the Secretary of the Treasury by the Secretary of Labor. The contributions may be credited against the tax whether or not they are paid with respect to employment as defined in section 3306(c). For provisions relating to additional credit against the tax, see §31.3302(b)–1.

(b) *Limitation on the taxable year with respect to which contributions are allowable.* In order to be allowable as credit against the tax for any taxable year, the contributions must have been paid with respect to such year.

Example 1. Under the unemployment compensation law of State X, employer M is required to report in his contribution return for the quarter ending December 31, 1955, all remuneration payable for services rendered in such quarter. A portion of such remuneration is not paid to his employees until February 1, 1956. On January 20, 1956, M pays to the State the total amount of contributions due with respect to all remuneration so required to be reported. Such contributions, including those with respect to the remuneration paid on February 1, 1956, may be included in computing the credit against the tax for the calendar year 1955. This is true even though the remuneration paid on February 1, 1956 (if it constitutes ''wages'') is required to be reported in the Federal return for 1956 and not in the Federal return for 1955.

Example 2. Under the unemployment compensation law of State Y, employer N is required to include in his contribution return for the quarter ending December 31, 1955, certain remuneration paid on December 30, to 1955, to an employee for services to be rendered after December 31. On January 20, 1956, N pays to the State the total amount of contributions due with respect to all remuneration required to be reported on the contribution return. Such contributions, including those with respect to the remuneration paid on December 30, 1955, may be included in computing the credit against the tax for the calendar year 1955.

(c) *Limitation on amount of credit allowable based on time when contributions are paid*—(1) *In general.* The amount of credit allowable for contributions paid into a State unemployment fund depends in part on the time of payment of such contributions. Although contributions paid at any time may be

credited against the tax (subject to the limitations referred to in paragraphs (c)(2) and (3) of this section), no refund or credit of the tax based on credit for contributions paid will be allowed unless the contributions are paid prior to the expiration of the period of limitations applicable to refund or credit of the tax. For general provisions relating to the limitation period and to refunds, credits and abatements of the tax, see respectively §§ 301.6511(a)–1, 301.6402–2 and 301.6404–1 of this chapter (Regulations on Procedure and Administration).

(2) *Amount of credit allowable when contributions are paid on or before last day for filing return.* Contributions paid into a State unemployment fund on or before the last day upon which the Federal return for the taxable year is required to be filed may be credited against the tax in an amount equal to such contributions, but not, however, to exceed the total credits, determined pursuant to § 31.3302(c)–1. For provisions relating to the time for filing the return, see § 31.6071(a)–1 in Subpart G of this part.

(3) *Amount of credit allowable when contributions are paid after last day for filing return.* Contributions paid into a State unemployment fund after the last day upon which the Federal return for the taxable year is required to be filed may be credited against the tax in an amount not to exceed 90 percent of the amount which would have been allowable as credit on account of such contributions had they been paid into a State unemployment fund on or before such last day. However, see paragraph (c)(4) of this section relating to the payment of contributions to the wrong State. For general provisions relating to refunds, credits, and abatements of the tax, see §§ 301.6402–2 and 301.6404–1 of this chapter (Regulations on Procedure and Administration).

Example 1. The Federal return of the M Company for the calendar year 1961 discloses total wages of $400,000. The Federal tax, imposed at the rate of 3.1 percent, is $12,400. The company is liable for total State contributions of $8,000 for 1961. The due date of the Federal return is January 31, 1962, no extension of time for filing the return having been granted. The contributions are not paid until February 1, 1962. If the contributions had been paid on or before January 31, 1962, the entire amount of $8,000 could have been credited against the tax. (Credits could not exceed 2.7 percent of the wages, or $10,800. See § 31.3302(c)–1.) Since the contributions were paid after January 31, 1962, the M Company is entitled to a credit of 90 percent of the amount which would have been allowable as credit had the contributions been paid on time (90 percent of $8,000, or $7,200), the net liability for Federal tax being $5,200 ($12,400 minus $7,200).

Example 2. The facts are the same as in example 1, except that the M Company is liable for and pays total State contributions of $12,000, instead of $8,000. If the contributions had been paid on or before January 31, 1962, the amount allowable as credit would have been $10,800 (2.7 percent of wages of $400,000). Since the contributions were paid after January 31, 1962, the M Company is entitled to a credit of 90 percent of $10,800, or $9,720, the net liability for Federal tax being $2,680 ($12,400 minus $9,720).

Example 3. The Federal return of the R Company for the calendar year 1961 discloses a total tax of $3,100. The company is liable for total State contributions of $2,700 for such year. The due date of the Federal return is January 31, 1962, no extension of time for filing the return having been granted. The R Company pays $1,700 of the total State contributions on or before such date, and the remaining $1,000 on February 1, 1962. If the $1,000 had been paid on or before January 31, 1962, that amount could have been credited against the tax (such amount plus the $1,700 paid on or before January 31, 1962, not exceeding the aggregate credit allowable). Since the $1,000 was paid after January 31, 1962, the R Company is entitled to a credit of 90 percent of this amount or $900, plus the credit of $1,700 allowable for the contributions paid on or before January 31, 1962. The net liability for Federal tax is thus $500 ($3,100 minus $2,600).

(4) *Amount of credit allowable when contributions are paid to wrong State.* Contributions for the taxable year paid into a State unemployment fund which are required under the unemployment compensation law of that State, but which are paid with respect to remuneration on the basis of which the taxpayer had, prior to such payment, erroneously paid an amount as contributions under another unemployment compensation law, shall be deemed for purposes of the credit to have been paid at the time of the erroneous payment. If, by reason of such other law, the taxpayer was entitled to cease paying contributions for such taxable year with respect to services subject to such

other law, the payment into the proper fund shall be deemed for purposes of credit to have been made on the date the Federal return for such year was actually filed by the taxpayer under §31.6011(a)–3.

Example. Employee N, whose Federal return for the calendar year 1961 discloses a total tax of $3,100, employs individuals in State X and State Y during the calendar year 1961. N assumes in good faith that the services of his employees are covered by the unemployment compensation law of State Y, and pays as contributions to State Y the amount of $2,700 based upon the remuneration of the employees. All of the services were in fact covered by the unemployment compensation law of State X, and none by the law of State Y. The payment to State Y was made on January 31, 1962. When the error was discovered thereafter, N paid to State X contributions in the amount of $2,700 based upon such remuneration. Since the contributions were paid to State Y on January 31, 1962, the contributions to State X are, for purposes of the credit, deemed to have been paid on such date. N is entitled to a credit of $2,700 against the Federal tax of $3,100, the net liability for Federal tax being $400 ($3,100 minus $2,700).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6632, June 27, 1963]

§31.3302(a)–2 Refund of State contributions.

If, subsequent to the filing of the return, a refund is made by a State to the taxpayer of any part of his contribution credited against the tax, the taxpayer is required to advise the district director of the date and amount of such refund and the reason therefor, and to pay the tax, if any, due as a result of such refund, together with interest from the date when the tax was due.

§31.3302(a)–3 Proof of credit under section 3302(a).

Credit against the tax for any calendar year for contributions paid into State unemployment funds shall not be allowed unless there is submitted to the district director:

(a) A certificate of the proper officer of each State (the laws of which required the contributions to be paid) showing, for the taxpayer:

(1) The total amount of contributions required to be paid under the State law with respect to such calendar year (exclusive of penalties and interest) which was actually paid on or before the date the Federal return is required to be filed; and

(2) The amounts and dates of such required payments (exclusive of penalties and interest) actually paid after the date the Federal return is required to be filed.

(b) A statement by the taxpayer that no part of any payment made by him into a State unemployment fund for such calendar year, which is claimed as a credit against the tax, was deducted or is to be deducted from the remuneration of individuals in his employ. Such statement shall contain or be verified by a written declaration that it is made under the penalties of perjury.

(c) Such other or additional proof as the Commissioner or the district director may deem necessary to establish the right to the credit provided for under section 3302(a).

§31.3302(b)–1 Additional credit against tax.

(a) *In general.* In addition to the credit against the tax allowable for contributions actually paid to State unemployment funds (see §31.3302(a)–1), the taxpayer may be entitled to a credit under section 3302(b). This additional credit is allowable to the taxpayer with respect to the amount of contributions which he is relieved from paying to an unemployment fund under the provisions of a State law which have been certified for the taxable year as provided in section 3303. Generally, an additional credit is available to an employer, if under the provisions of a State law which have been so certified he is permitted to pay contributions to such State for the taxable year, or portion thereof, at a rate which is both lower than the highest rate applied under such law in such year and lower than 2.7 percent. No additional credit is allowable except with respect to a State law certified by the Secretary of Labor for the taxable year as provided in section 3303 (or with respect to any provisions thereof so certified).

(b) *Method of computing amount of additional credit allowable with respect to a State law*—(1) *Certification of a State law*

as a whole. In ascertaining the additional credit for any taxable year with respect to a particular State law which the Secretary of Labor certifies as a whole to the Secretary of the Treasury in accordance with the provisions of section 3303, the taxpayer must first compute the following amounts:

(i) The amount of contributions (whether or not with respect to employment as defined in section 3306(c)) which the taxpayer would have been required to pay under the State law for such year if throughout the year he had been subject to the highest rate applied under such law in such year, or to a rate of 2.7 percent, whichever rate is lower.

(ii) The amount of contributions (whether or not with respect to employment as defined in section 3306 (c)) he was required to pay under the State law with respect to such year, whether or not paid.

The amount computed under paragraph (b)(1)(ii) of this section should then be subtracted from the amount computed under paragraph (b)(1)(i) of this section and the result will be the additional credit for the taxable year with respect to the law of that State.

Example. A employs individuals only in State X during the calendar year 1955. The unemployment compensation law of State X has been certified in its entirety to the Secretary of the Treasury by the Secretary of Labor for such year. The highest rate applied in such year under such State law to any taxpayer is 3 percent. However, A has obtained a rate of 1 percent under the law of such State and is required to pay his entire year's contribution at that rate. The amount of remuneration of A's employees subject to contributions under such State law is $25,000. A's additional credit under section 3302(b) is $425, computed as follows:

Remuneration subject to contributions	$25,000
Contributions at 2.7 percent rate	675
Less:	
Contributions required to be paid at 1 percent rate	250
Additional credit to A	425

Since the 2.7 percent rate is less than the highest rate applied (3 percent), the 2.7 percent rate is used in computing the amount ($675) from which the amount of contributions required to be paid at the 1 percent rate ($250) is deducted in order to ascertain the additional credit ($425).

(2) *Certification with respect to particular provisions of a State law.* If the Secretary of Labor makes a certification to the Secretary of the Treasury with respect to particular provisions of a State law for any taxable year pursuant to section 3303, the additional credit of the taxpayer for such year with respect to such law shall be computed in such manner as the Commissioner shall determine.

(c) *Amount of additional credit allowable to taxpayer with respect to more than one State law.* If the taxpayer is entitled to additional credit with respect to more than one State law in any taxable year, the additional credit allowable with respect to each State law shall be computed separately (in accordance with paragraph (b) of this section) and the total additional credit allowable against the tax for such year shall be the aggregate of the additional credits allowable with respect to such State laws. For limitation on total credits, see § 31.3302(c)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6632, June 27, 1963]

§ 31.3302(b)–2 Proof of additional credit under section 3302(b).

Additional credit under section 3302(b) shall not be allowed against the tax for any calendar year unless there is submitted—

(a) To the Commissioner a certificate of the proper officer of each State (with respect to the law of which the additional credit is claimed) showing the highest rate of contributions applied under the State law in such calendar year to any person having individuals in his employ; and

(b) To the district director a certificate of the proper officer of each State (with respect to the law of which the additional credit is claimed) showing for the taxpayer—

(1) The total remuneration with respect to which contributions were required to be paid by the taxpayer under the State law with respect to such calendar year; and

(2) The rate of contributions applied to the taxpayer under the State law with respect to such calendar year.

If under the law of such State different rates of contributions were applied to

the taxpayer during particular periods of such calendar year, the certificate shall set forth the information called for in paragraphs (b)(1) and (2) of this section with respect to each such period.

(c) Such other or additional proof as the Commissioner or the district director may deem necessary to establish the right to the additional credit provided for under section 3302(b).

§ 31.3302(c)–1 Limit on total credits.

(a) *In general.* Paragraph (b) of this section relates to the limitation on the aggregate of the credits allowable under section 3302 (a) and (b). Paragraph (c) of this section relates to reductions, under certain circumstances, of the total credits allowable after applying section 3302 (a), (b), and (c)(1). In paragraphs (c)(1), (2), and (3) of this section, relate, respectively, to reductions of credits in respect of advances under title XII of the Social Security Act before September 13, 1960, advances under title XII of the Social Security Act after September 12, 1960, and payments under the Temporary Unemployment Compensation Act of 1958. A reduction of credit under paragraph (c)(1), (2), or (3) of this section applies separately from, and in addition to, a reduction under any other such subparagraph. See section 3302(d) and § 31.3302(d)–1 for definitions and special rules relating to section 3302(c), and for a provision that, in applying section 3302(c), the Federal tax shall be computed at the rate of 3 percent.

(b) *Limitation on aggregate credit.* The aggregate of the credit under section 3302(a) and the additional credit under section 3302(b) shall not exceed 90 percent of the tax against which credit is taken, computed as if the tax were imposed at the rate of 3 percent. Thus, the aggregate of the credit which is allowable to an employer for any taxable year shall not exceed 2.7 percent of the wages paid by the employer during the year.

(c) *Reductions of amount of credit otherwise allowable*—(1) *Advances before September 13, 1960, under title XII of Social Security Act*—(i) *Credit reductions for 1961 and 1962.* Pursuant to section 3302(c)(2), as applicable to credit allowable for any year ended before 1963, the total credits otherwise allowable under section 3302 to a taxpayer subject to the unemployment compensation law of the State of—

(a) Alaska shall be reduced for the taxable year 1961 by an amount equal to 0.15 percent of the wages paid by the taxpayer during 1961 which are attributable to Alaska, and shall be reduced for the taxable year 1962 by an amount equal to 0.3 percent of the wages paid by the taxpayer during 1962 which are attributable to Alaska; or

(b) Michigan shall be reduced for the taxable year 1962 by an amount equal to 0.15 percent of the wages paid by the taxpayer during 1962 which are attributable to Michigan.

(ii) *Credit reductions for 1963 and subsequent years.* If any balance of an advance or advances under title XII of the Social Security Act, made before September 13, 1960, to the unemployment account of a State, remains unpaid on January 1, 1963, or on January 1 of any succeeding taxable year, the total credits otherwise allowable under section 3302 to a taxpayer subject to the unemployment compensation law of the State shall be reduced for the taxable year unless—

(a) No balance of such advance or advances exists as of the beginning of November 10 of the taxable year, or

(b) The State pays into the Federal unemployment account, before November 10 of the taxable year, the amount certified by the Secretary of Labor pursuant to section 3302(c)(2), and designates such payment as being made for purposes of the last sentence of section 3302(c)(2).

The credit reduction for a taxable year shall be a percentage of the wages paid by the taxpayer during that taxable year which are attributable to the State. The percentage for the taxable year 1963, or for any succeeding taxable year beginning before January 1, 1968, is 0.15 percent (that is, 5 percent of the Federal tax, computed as if imposed at the rate of 3 percent of the wages). The percentage for any taxable year beginning on or after January 1, 1968, is the percentage reduction for the immediately preceding taxable year plus 0.15 percent. Thus, for 1968 the percentage is 0.3 percent, for 1969 the percentage is

0.45 percent, and for 1970 the percentage is 0.6 percent.

(2) *Advances after September 12, 1960, under title XII of Social Security Act*—(i) *In general.* If any balance of an advance or advances under title XII of the Social Security Act, made after September 12, 1960, to the unemployment account of a State, remains unpaid on January 1 of two consecutive taxable years, the total credits otherwise allowable under section 3302 to a taxpayer subject to the unemployment compensation law of the State shall be reduced for the taxable year beginning with the second consecutive January 1, unless prior to November 10 of that taxable year the total amount of any such advance or advances made to the account of the State has been fully repaid. The reduction made pursuant to this subdivision in the total credits otherwise allowable for the taxable year beginning with the second consecutive January 1 shall be 0.3 percent of the wages paid by the taxpayer during the taxable year which are attributable to the State (that is, 10 percent of the Federal tax, computed as if imposed at the rate of 3 percent of the wages). In the case of any succeeding taxable year beginning with a consecutive January 1 on which there exists such a balance of an unreturned advance or advances made after September 12, 1960, the total credits otherwise allowable shall be further reduced unless prior to November 10 of that succeeding taxable year the total amount of any such advance or advances made to the account of the State has been fully repaid. The reduction for each such succeeding taxable year beginning with a consecutive January 1 on which such a balance exists shall be a percentage of the wages paid by the taxpayer during that succeeding taxable year which are attributable to the State. The percentage reduction for any such succeeding taxable year shall be the aggregate of *(a)* the percentage reduction (without regard to paragraph (c)(2)(ii) or (iii) of this section) for the immediately preceding taxable year, *(b)* 0.3 percent of the wages paid by the taxpayer during the taxable year which are attributable to the State, and *(c)* the percentage, if any, described in paragraph (c)(2)(ii) or (iii) of this section.

(ii) *Additional reduction if a balance of advances exists after third or fourth consecutive January 1.* If the credit reduction described in subdivision (i) of this subparagraph is made for the third or fourth consecutive taxable year, the total credits otherwise allowable under section 3302 to a taxpayer subject to the unemployment compensation law of the State shall be further reduced for the taxable year unless the average employer contribution rate (see section 3302(d)(4)) for such State for the calendar year preceding such taxable year is at least 2.7 percent. The percentage of reduction, if any, under this subdivision shall be the percentage referred to in section 3302(c)(3)(B) which is certified by the Secretary of Labor pursuant to section 3302(d)(7).

(iii) *Additional reduction if a balance of advances exists after fifth or any succeeding consecutive January 1.* If the credit reduction described in subdivision (i) of this subparagraph is made for the fifth or any succeeding taxable year, the total credits otherwise allowable under section 3302 to a taxpayer subject to the unemployment compensation law of the State shall be further reduced for the taxable year unless the average employer contribution rate (see section 3302(d)(4)) for the State for the calendar year preceding such taxable year equals or exceeds the 5-year benefit cost rate (see section 3302(d)(5)) applicable to the State for the taxable year or 2.7 percent, whichever is higher. The percentage of reduction, if any, under this subdivision for a taxable year shall be the percentage referred to in section 3302(c)(3)(C) which is certified by the Secretary of Labor pursuant to section 3302(d)(7).

(3) *Payments under the Temporary Unemployment Compensation Act of 1958.* If any amount of temporary unemployment compensation was paid in a State under the Temporary Unemployment Compensation Act of 1958, the total credits otherwise allowable under section 3302 to a taxpayer with respect to wages attributable to the State for the taxable year beginning January 1, 1963, and for each taxable year thereafter, shall be reduced unless prior to November 10 of the taxable year—

(i) There have been restored to the Treasury the amounts of temporary unemployment compensation paid in the State (except amounts paid to individuals who exhausted their unemployment compensation under title XV of the Social Security Act and title IV of the Veterans' Readjustment Assistance Act of 1952 prior to their making their first claims under the Temporary Unemployment Compensation Act of 1958), the amount of costs incurred in the administration of the Temporary Unemployment Compensation Act of 1958); with respect to the State, and the amount estimated by the Secretary of Labor as the State's proportionate share of other costs incurred in the administration of such Act, or

(ii) The State restores to the general fund of the Treasury the amount certified by the Secretary of Labor pursuant to section 104 of the Temporary Unemployment Compensation Act of 1958, and designates such restoration as being made for purposes of the last sentence of such section.

The credit reduction for a taxable year shall be a percentage of the wages paid by the taxpayer during that year which are attributable to the State. The percentage for the taxable year 1963 is 0.15 percent (that is, 5 percent of the Federal tax, computed as if imposed at the rate of 3 percent). The percentage for any succeeding year is 0.3 percent (that is, 10 percent of the Federal tax, computed as if imposed at the rate of 3 percent).

(4) *Example.* The cumulative effect of the credit reductions described in this paragraph may be illustrated by the following example:

Example. Advances to the unemployment account of State X were made in 1957 and in 1961 under title XII of the Social Security Act. Payments under the Temporary Unemployment Compensation Act of 1958 were made in State X in 1958. No portion of the advances or payments is returned before November 10, 1964. As a consequence:

(a) The credit reduction applicable under subparagraph (1) of this paragraph is made for 1964 at the rate of 0.15 percent;

(b) The credit reduction described in subparagraph (2) of this paragraph has been made for 1963 (the second successive year after 1961) at the rate of 0.3 percent. The rate of credit reduction under subparagraph (2) for 1964 is 1 percent (the aggregate of 0.6 percent under section 3302(c)(3)(A) and 0.4 percent (assumed for purposes of this example to be the percentage referred to in section 3302(c)(3)(B) which is certified by the Secretary of Labor), and

(c) The credit reduction described in subparagraph (3) of this paragraph has been made for 1963 at the rate of 0.15 percent. The rate of credit reduction for 1964 is 0.3 percent.

The cumulative rate of credit reduction applicable for 1964 to wages attributable to State X is 1.45 percent, representing the aggregate of the percentage reductions applicable under subparagraphs (1), (2), and (3) of this paragraph (0.15 percent, 1 percent, and 0.3 percent, respectively). In 1964 Employer A paid wages of $100,000, all of which are subject to the unemployment compensation law of State X. The credit which would be allowable (under section 3302 (a), (b), and (c)(1)) if there were no credit reduction is $2,700. Employer A's tax is computed as follows for 1964:

Total taxable wages (attributable to State X)	$100,000
Gross Federal tax (3.1 percent of wages)	3,100
Less credit:	
Gross credit	$2,700
Credit reduction (1.45 percent of wages)	1,450
Net credit	1,250
Amount of Federal tax due	1,850

[T.D. 6658, 28 FR 6633, June 27, 1963, as amended by T.D. 6708, 29 FR 3198, Mar. 10, 1964]

§ 31.3302(d)–1 Definitions and special rules relating to limit on total credits.

(a) *Rate of tax deemed to be 3 percent.* In applying the provisions of section 3302(c) relating to the limitation on total credits, and to reductions of credits otherwise allowable, the tax imposed by section 3301 shall be computed at the rate of 3 percent in lieu of any other rate prescribed in section 3301 (see § 31.3301–3).

(b) *Wages attributable to a particular State.* For purposes of section 3302(c) (2) or (3), wages are attributable to a particular State if they are subject to the unemployment compensation law of the State. If wages are not subject to the unemployment compensation law of any State, the determination as to whether such wages, or any portion thereof, are attributable to the particular State with respect to which the

reduction in total credits is imposed shall be made in accordance with rules prescribed by the Commissioner.

(c) *Employment Security Act of 1960.* The Employment Security Act of 1960, referred to in section 3302(c)(2), means title V of the Social Security Amendments of 1960.

[T.D. 6658, 28 FR 6635, June 27, 1963]

§ 31.3302(e)–1 Successor employer.

(a) *In general.* In addition to the credits against the tax allowable under section 3302(a) and (b) for any taxable year after 1960, the taxpayer may be entitled to an amount of credit under section 3302(e). Credit under section 3302(e) is provided in the case of a taxpayer who (1) acquires substantially all of the property used in a trade or business, or in a separate unit of a trade or business, of another person (referred to in this section as a predecessor) who is not an employer (see § 31.3306(a)–1) for the calendar year in which the acquisition takes place, and (2) immediately after the acquisition employs in his trade or business one or more individuals who immediately prior to the acquisition were employed in the trade or business of the predecessor.

(b) *Method of computing credit under section 3302(e).* (1) Except as provided in paragraph (b)(2) of this section, the amount of credit to which the taxpayer may be entitled under section 3302(e) is the amount of credit to which the predecessor would be entitled under section 3302 (a), (b), and (e), without regard to the limits in section 3302(c), if the predecessor were an employer.

(2) If, during the calendar year in which the acquisition takes place, the predecessor pays remuneration, subject to contributions under the unemployment compensation law of a State, to any employee other than the individuals referred to in paragraph (a) of this section, the taxpayer will be entitled only to a portion of the amount of credit described in paragraph (b)(1) of this section. The portion is determined by multiplying such amount by a fraction. The numerator of the fraction is the total amount of remuneration, subject to such contributions, paid by the predecessor during such year to the individuals referred to in paragraph (a) of this section. The denominator of the fraction is the total amount of remuneration, subject to such contributions, paid by the predecessor during such year to all employees for services performed by them in the trade or business, or unit thereof, acquired by the taxpayer.

Example. In April 1961 the X Partnership terminated after selling all of its property to the Y Corporation. During 1961, the X Partnership paid its employees and former employees a total of $1,000,000 as remuneration subject to contributions under the employment compensation law of a State. (Note that the X Partnership did not qualify as an employer for 1961 for purposes of the Federal unemployment tax, because it had employees during less than 20 weeks in 1961.) When the Y Corporation acquired the property it concurrently employed all individuals who were then in the employ of the X Partnership. Assume that the X Partnership, if it had qualified as an employer for 1961, would have been entitled to a total credit against the Federal tax of $30,000 under section 3302 (a) and (b), without regard to the limits in section 3302(c). Of the $1,000,000 remuneration paid by the X Partnership in 1961, one-fifth (or $200,000) was paid to individuals who were employed by the Y Corporation at the time it acquired the property of the X Partnership. Under section 3302(e), therefore, the Y Corporation is entitled to credit of $6,000, which is one-fifth of the credit ($30,000) which would have been available to the X Partnership.

(3) The aggregate amount of credit allowable to the taxpayer under section 3302 (a), (b), and (e) is subject to the limits in section 3302(c).

(c) *Proof of credit under section 3302(e).* Credit under section 3302(e) shall not be allowed against the tax for any taxable year unless there is submitted to the district director (1) such information or proof as may be called for in the return on which the credit is reported, or in the instructions relating to the return, and (2) such other or additional proof as the Commissioner or the district director may deem necessary to establish the right to the credit provided for under section 3302(e).

(d) *Cross-references.* See paragraph (b) of § 31.3306(b)(1)–1 for examples of the acquisition of property used in a trade or business, or in a separate unit thereof.

[T.D. 6658, 28 FR 6635, June 27, 1963]

§ 31.3306(a)–1 Who are employers.

(a) *Definition*—(1) *For calendar years 1956 through 1969, inclusive.* Every person who employs 4 or more employees in employment (within the meaning of section 3306 (c) and (d)) on a total of 20 or more calendar days during any calendar year after 1955 and before 1970, each such day being in a different calendar week, is with respect to such year an employer subject to the tax.

(1a) *For 1970 and subsequent calendar years.* Every person who employs 4 or more employees in employment (within the meaning of section 3306 (c) and (d)) on a total of 20 or more calendar days during a calendar year after 1969, or during the calendar year immediately preceding such a calendar year, each such day being in a different calendar week, is with respect to such year an employer subject to the tax.

(2) *For calendar year 1955.* Every person who employs 8 or more employees in employment (within the meaning of section 3306 (c) and (d)) on a total of 20 or more calendar days during the calendar year 1955, each such day being in a different calendar week, is with respect to such year an employer subject to the tax.

(3) *General agents of the Secretary of Commerce.* For provisions relating to the circumstances under which an employee who performs services as an officer or member of the crew of an American vessel (i) which is owned by or bareboat chartered to the United States and (ii) whose business is conducted by a general agent of the Secretary of Commerce shall be deemed to be performing services for such general agent rather than for the United States, see § 31.3306 (N)–1.

(b) The several weeks in each of which occurs a day on which the prescribed number of employees are employed need not be consecutive weeks. It is not necessary that the employees so employed be the same individuals; they may be different individuals on each day. Neither is it necessary that the prescribed number of employees be employed at the same moment of time or for any particular length of time or on any particular basis of compensation. It is sufficient if the total number of employees employed during the 24 hours of a calendar day is 4 or more (8 or more for the calendar year 1955).

(c) In determining whether a person employs a sufficient number of employees to be an employer subject to the tax, each employee is counted with respect to services which constitute employment as defined in section 3306(c) (see § 31.3306(c)–2). No employee is counted with respect to services which do not constitute employment as so defined. See, however, paragraph (d) of this section.

(d) The provisions of paragraph (c) of this section are subject to the provisions of section 3306(d), relating to services which do not constitute employment but which are deemed to be employment, and relating to services which constitute employment but which are deemed not to be employment (see § 31.3306(d)–1). For example, if the services of an employee during a pay period are deemed to be employment under section 3306(d), even though a portion thereof does not constitute employment under section 3306(c), the employee is counted with respect to all services during the pay period. On the other hand, if the services of an employee during a pay period are deemed not to be employment, even though a portion thereof constitutes employment, the employee is not counted with respect to any services during the pay period.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7037, 35 FR 6709, Apr. 28, 1970]

§ 31.3306(b)–1 Wages.

(a) *Applicable law and regulations*—(1) *Remuneration paid after 1954.* Whether remuneration paid after 1954 for employment performed after 1938 constitutes wages is determined under section 3306(b). Accordingly, only remuneration paid after 1954 for employment performed after 1938 is covered by this section of the regulations and by the sections relating to the statutory exclusions from wages (§§ 31.3306(b)(1)–1 to 31.3306(b)(10)–1).

(2) *Remuneration paid after 1939 and before 1955.* Whether remuneration paid after 1939 and before 1955 for employment performed after 1938 constitutes wages shall be determined in accordance with the applicable provisions of

law and of 26 CFR (1939) Part 403 (Regulations 107).

(3) *Remuneration paid in 1939.* Whether remuneration paid in 1939 for employment performed after 1938 constitutes wages shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 400 (Regulations 90).

(b) The term ''wages'' means all remuneration for employment unless specifically excepted under section 3306(b) (see §§ 31.3306(b)(1)–1 to 31.3306(b)(10)–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 are wages if paid as compensation for employment.

(d) 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.

(e) Except in the case of remuneration paid for services not in the course of the employer's trade or business (see § 31.3306(b)(7)–1), 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 payments.

(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 § 31.3306(b)–2.

(i) Remuneration paid by an employer to an individual for employment, unless such remuneration is specifically excepted under section 3306(b), constitutes wages even though at the time paid the individual is no longer an employee.

Example. A is employed by B, an employer, during the month of June 1955 in employment and is entitled to receive remuneration of $100 for the services performed for B during the month. A leaves the employ of B at the close of business on June 30, 1955. On July 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 June. The $100 is wages, and the tax is payable with respect thereto.

(j) In addition to the exclusions specified in §§ 31.3306(b)(1)–1 to 31.3306(b)(10)–1, inclusive, the following types of payments are excluded from wages:

(1) Remuneration for services which do not constitute employment under section 3306(c).

(2) Remuneration for services which are deemed not to be employment under section 3306(d) (§ 31.3306(d)–1).

(3) Tips or gratuities paid directly to an employee by a customer of an employer, and not accounted for by the employee to the employer.

(k) For provisions relating to the treatment of deductions from remuneration as payments of remuneration, see §31.3307–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6636, June 27, 1963; T.D. 7375, 40 FR 42350, Sept. 12, 1975; T.D. 8276, 54 FR 51028, Dec. 12, 1989; T.D. 8324, 55 FR 51697, Dec. 17, 1990]

§31.3306(b)–1T Question and answer relating to the definition of wages in section 3306(b) (Temporary).

The following question and answer relates to the definition of wages in section 3306(b) of the Internal Revenue Code of 1954, as amended by section 531(d)(3) of the Tax Reform Act of 1984 (98 Stat. 885):

Q–1: Are fringe benefits included in the definition of wages under section 3306(b)?

A–1: Yes, unless specifically excluded from the definition of ''wages'' pursuant to section 3306(b) (1) through (16). 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]

§31.3306(b)–2 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 satisfied 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 51697, Dec. 17, 1990]

§ 31.3306(b)(1)–1 $3,000 limitation.

(a) *In general.* (1) the term ''wages'' does not include that part of the remuneration paid within any calendar year by an employer to an employee which exceeds the first $3,000 of remuneration (exclusive of remuneration excepted from wages in accordance with paragraph (j) of § 31.3306(b)–1 or §§ 31.3306(b)(2)–1 to 31.3306(b)(8)–1, inclusive), paid within such calendar year by such employer to such employee for employment performed for him at any time after 1938.

(2) The $3,000 limitation applies only if the remuneration paid during any one calendar year by an employer to the same employee for employment performed after 1938 exceeds $3,000. The limitation in such case relates to the amount of remuneration paid during any one calendar year for employment after 1938 and not to the amount of remuneration for employment performed in any one calendar year.

Example. Employer B, in 1955, pays employee A $2,500 on account of $3,000 due him for employment performed in 1955. In 1956 employer B pays employee A the balance of $500 due him for employment performed in the prior year (1955), and thereafter in 1956 also pays A $3,000 for employment performed in 1956. The $2,500 paid in 1955 is subject to tax in 1955. The balance of $500 paid in 1956 for employment during 1955 is subject to tax in 1956, as is also the first $2,500 paid of the $3,000 for employment during 1956 (this $500 for 1955 employment added to the first $2,500 paid for 1956 employment constitutes the maximum wages subject to the tax which could be paid in 1956 by B to A). The final $500 paid by B to A in 1956 is not included as wages and is not subject to the tax.

(3) If during a calendar year an employee is paid remuneration by more than one employer, the limitation of wages to the first $3,000 of remuneration paid applies, not to the aggregate remuneration paid by all employers with respect to employment performed after 1938, but instead to the remuneration paid during such calendar year by each employer with respect to employment performed after 1938. In such case the first $3,000 paid during the calendar year by each employer constitutes wages and is subject to the tax. In connection with the application of the $3,000 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 after December 31, 1978 from two or more related corporations that compensate an employee through a common paymaster, see § 31.3306(p)–1.

Example 1. During 1955 employer D pays to employee C a salary of $600 a month for employment performed for D during the first seven months of 1955, or total remuneration of $4,200. At the end of the fifth month C has been paid $3,000 by employer D, and only that part of his total remuneration from D constitutes wages subject to the tax. The $600 paid to employee C by employer D in the sixth month, and the like amount paid in the seventh month, are not included as wages and are not subject to the tax. At the end of the seventh month C leaves the employ of D and enters the employ of E. Employer E pays to C remuneration of $600 a month in each of the remaining five months of 1955, or total remuneration of $3,000. The entire $3,000 paid by E to employee C constitutes wages and is subject to the tax. Thus, the first $3,000 paid by employer D and the entire $3,000 paid by employer E constitute wages.

Example 2. During the calendar year 1955 F is simultaneously an officer (an employee) of the X Corporation, the Y Corporation, and the Z Corporation, each such corporation being an employer for such year. During such year F is paid a salary of $3,000 by each Corporation. Each $3,000 paid to F by each of the corporations, X, Y, and Z (whether or not such corporations are related), constitutes wages and is subject to the tax.

(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 $3,000 limitation set forth in paragraph (a) of this section, any remuneration (exclusive of remuneration excepted from wages in accordance with paragraph (j) of § 31.3306(b)–1 or §§ 31.3306(b)(2)–1 to 31.3306(b)(8)–1, inclusive), with respect to employment paid (or considered under this provision as having been paid to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor. Wages paid by a predecessor shall not be considered as having been paid by the successor unless both the predecessor and the successor are employers as defined in section 3306(a) for the calendar year in which the acquisition occurs (see § 31.3306(a)–1, relating to who are employers).

(2) The wages paid, or considered as having been paid, by a predecessor to an employee shall, for purposes of the $3,000 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 of 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 operations 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 1955 acquires all the property of the X Manufacturing 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. Both the Y Corporation and the X

Company are employers, as defined in the Act, for the calendar year 1955. The X Company has in 1955 (the calendar year in which the acquisition occurs) and prior to the acquisition paid $2,000 of wages to A. The Y Corporation in 1955 pays to A remuneration with respect to employment of $2,000. Only $1,000 of such remuneration is considered to be wages. For purposes of the $3,000 limitation, the Y Corporation is credited with the $2,000 paid to A by the X Company. If, in the same calendar year, the property is acquired from the Y Corporation by the Z Company, an employer for such year, and A immediately after the acquisition 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 $3,000 limitation as having also been paid by the Y Corporation).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6636, June 27, 1963; T.D. 7660, 44 FR 75142, Dec. 19, 1979]

§ 31.3306(b)(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.

§ 31.3306(b)(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.

§ 31.3306(b)(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.

§ 31.3306(b)(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. 6658, 28 FR 6636, June 27, 1963]

§ 31.3306(b)(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.

§ 31.3306(b)(7)–1 Payments other than in cash for service not in the course of employer's trade or business.

The term ''wages'' does not include remuneration paid in any medium other than cash for service not in the course of the employer's trade or business. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any medium other than cash, such as lodging, food, or other goods or commodities, for service not in the course of the employer's trade or business does not constitute wages. Remuneration paid in any medium other than cash for other types of services does not come within this exclusion from wages. For provisions relating to the circumstances under which service not in the course of the employer's trade or business does not constitute employment, see § 31.3306(c)(3)–1.

§ 31.3306(b)(8)–1 Payments to employees for non-work periods.

The term ''wages'' does not include any payment (other than vacation or sick pay) made by an employer to an employee after the calendar month in which the employee attains age 65, if—

(a) Such employee does no work (other than being subject to call for the performance of work) for such employer in the period for which such payment is made; and

(b) The employer-employee relationship exists between the employer and employee throughout the period for which such payment is made.

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. For example, if employee A, who attained the age of 65 in January 1955, is employed by the X Company on a stand-by basis and is paid $200 by the X Company for being subject to call during the month of February 1955 and an additional $25 for work performed for the X Company on one day in February 1955, then none of the $225 is excluded from wages under this exception.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6708, 29 FR 3199, Mar. 10, 1964]

§ 31.3306(b)(9)–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 3306(b), amounts paid to or on behalf of an employee for moving expenses are wages for purposes of section 3306(b).

[T.D. 7375, 40 FR 42351, Sept. 12, 1975]

§ 31.3306(b)(10)–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 as 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 3306(b)(10). 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.'' Further, if any payment is made upon or after termination of employment for any reason other than those set out in paragraphs (a)(1), (2), and (3) of this section 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 payments.* It is immaterial for purposes of this exclusion whether the amount or possibility of such 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 30951, July 24, 1975]

§ 31.3306(b)(13)–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]

§ 31.3306(c)–1 Employment; services performed before 1955.

(a) Services performed after 1938 and before 1955 constitute employment under section 3306(c) if such services were employment under the law applicable to the period in which they were performed.

(b) The tax applies with respect to remuneration paid by an employer after 1954 for services performed after 1938 and before 1955, as well as for services performed after 1954, to the extent that the remuneration and services constitute wages and employment. See §§ 31.3306(b)–1 to 31.3306(b)(8)–1, inclusive, relating to wages.

(c) Determination of whether services performed after 1938 and before 1955 constitute employment shall be made in accordance with the provisions of law applicable to the period in which they were performed and of the regulations thereunder. The regulations applicable in determining whether services performed after 1938 and before 1955 constitute employment are as follows:

(1) Services performed in 1939—26 CFR (1939) Part 400 (Regulations 90).

(2) Services performed after 1939 and before 1955—26 CFR (1939) Part 403 (Regulations 107).

§ 31.3306(c)–2 Employment; services performed after 1954.

(a) *In general.* Whether services performed after 1954 constitute employment is determined under subsections (c) and (n) of section 3306.

(b) *Services performed within the United States.* Services performed after 1954 within the United States (see

§ 31.3306(j)–1) by an employee for the person employing him, unless specifically excepted under section 3306(c), 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 person employing him also is immaterial except to the extent provided in any specific exception from employment. Thus, the employee and the person employing him 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 subparagraph (2) of this paragraph, services performed outside the United States (see § 31.3306(j)–1) do not constitute employment.

(2) *On or in connection with an American vessel or American aircraft.* (i) This subparagraph relates to services performed after 1954 ''on or in connection with'' an American vessel, and to services performed after 1961 ''on or in connection with'' an American aircraft to the extent that the remuneration for the latter services is paid after 1961. Such services performed outside the United States by an employee for the person employing him 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 person employing him, 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 3306(c). (See particularly § 31.3306(c)(17)–1, relating to fishing.)

(ii) An employee performs services on and in connection with the vessel or aircraft if he performs services on the 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 the 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 in *(b)* and *(c)* of paragraph (c)(2)(i) 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, notwithstanding that service 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 §31.3306(m)–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.

[T.D. 6658, 28 FR 6636, June 27, 1963]

§31.3306(c)–3 Employment; excepted services in general.

(a) Services performed by an employee for the person employing him do not constitute employment for purposes of the tax if they are specifically excepted from employment under any of the numbered paragraphs of section 3306(c). Services so excepted do not constitute employment for purposes of the tax 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. If not otherwise provided in the regulations relating to the numbered paragraphs of section 3306(c), such regulations apply with respect 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 rendered by the employee in an excepted class.

Example. A is an individual who is employed part time by B to perform services which constitutes ''agricultural labor'' (see §31.3306 (k)–1). A is also employed by C part time to perform services as a grocery clerk in a store owned by him. While A's services which constitute ''agricultural labor'' are expected, the exception does not embrace the services performed by A as a grocery clerk in the employ of C and the latter services are not excepted from employment.

(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 §31.3306(d)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6637, June 27, 1963]

§31.3306(c)(1)–1 Agricultural labor.

Services performed by an employee for the person employing him which constitute ''agricultural labor'' as defined in section 3306(k) are excepted from employment. For provisions relating to the definition of the term ''agricultural labor'', see §31.3306(k)–1.

§31.3306(c)(2)–1 Domestic service.

(a) *In a private home.* (1) Services of a household nature performed by an employee in or about a private home of the person by whom he is employed are excepted from employment. 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 and the services performed therein are not excepted.

(2) 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 automobile for family use.

(b) *In a local college club or local chapter of a college fraternity or sorority.* (1) Services of a household nature performed by an employee in or about the club rooms or house of a local college club or of a local chapter of a college fraternity or sorority by which he is employed are excepted from employment. 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.

(2) 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) *Services not excepted.* Services not of a household nature, such as services performed as a private secretary, tutor, or librarian, even though performed in the employer's private home or in a local college club or local chapter of a college fraternity or sorority, are not within the exception. 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.

§ 31.3306(c)(3)–1 Services not in the course of employer's trade or business.

(a) Services not in the course of the employer's trade or business performed by an employe for an employer in a calendar quarter are excepted from employment unless—

(1) The cash remuneration paid for such services performed by the employee for the employer in the calendar quarter is $50 or more; and

(2) Such employee is regularly employed in the calendar quarter by such employer to perform such services.

Unless the tests set forth in both paragraphs (a)(1) and (2) of this section are met, the services are excepted from employment.

(b) 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. Services performed for a corporation do not come within the exception.

(c) The test relating to cash remuneration of $50 or more is based on the remuneration earned during a calendar quarter rather than on the remuneration paid in a calendar quarter. However, for purposes of determining whether the test is met, it is also required that the remuneration be paid, although it is immaterial when the remuneration is paid. Furthermore, in determining whether $50 or more has been paid for services not in the course of the employer's trade or business, only cash remuneration for such services shall be taken into account. The term ''cash remuneration'' includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as lodging, food, or other goods or commodities, is disregarded in determining whether the cash-remuneration test is met.

(d) For purposes of this exception, an individual is deemed to be regularly employed by an employer during a calendar quarter only if—

(1) Such individual performs services not in the course of the employer's trade or business for such employer for some portion of the day on at least 24 days (whether or not consecutive) during such calendar quarter; or

(2) Such individual was regularly employed (as determined under paragraph (d)(1) of this section) by such employer in the performance of services not in the course of the employer's trade or business during the preceding calender quarter (including the last calendar quarter of 1954).

(e) In determining whether an employee has performed services not in the course of the employer's trade or business on at least 24 days during a calendar quarter, there shall be counted as one day—

(1) Any day or portion thereof on which the employee actually performs such services; and

(2) Any day or portion thereof on which the employee does not perform services of the prescribed character but with respect to which cash remuneration is paid or payable to the employee for such services, 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 services not in the course of the employer's trade or business shall be considered to be engaged in the actual performance of such services on that day. For purposes of this exception, a day is a period of 24 hours commencing at midnight and ending at midnight.

(f) For provisions relating to the exclusion from wages of remuneration paid in any medium other than cash for services not in the course of the employer's trade or business, see § 31.3306(b) (7)–1.

§ 31.3306(c)(4)–1 Services 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 the employee is employed by the employer ''on and in connection with'' the vessel or aircraft when outside the United States.

(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) The citizenship or residence of the employee and the place where the contract of service is entered into are immaterial for purposes of this exception, and the citizenship or residence of the person employing him is material only in case it has a bearing in determining whether the vessel is an American vessel. For definitions of the terms ''vessel'' and ''aircraft'', see paragraph (c)(2)(v) of § 31.3306(c)–2. For definitions of the terms ''American vessel'' and ''American aircraft'', see § 31.3306(m)–1.

(e) Since the only services performed outside the United States which constitute employment are those described in section 3306(c) and paragraph (c) of § 31.3306(c)–2 (relating to services performed outside the United States on or in connection with an American vessel or American aircraft), services performed outside the United States on or in connection with a vessel not an American vessel, or an aircraft not an American aircraft, do not constitute employment in any event.

(f) The provisions of section 3306(c) (4) and of this section, insofar as they relate to services performed on or in connection with an aircraft not an American aircraft, apply only to services performed after 1961 for which remuneration is paid after 1961.

[T.D. 6658, 28 FR 6637, June 27, 1963]

§ 31.3306(c)(5)–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) Services performed by a father or mother in the employ of his or her son or daughter; 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) of this section, the exception is conditioned solely upon the family relationship between the employee and the individual employing him. 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 such 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.

§ 31.3306(c)(6)–1 Services in employ of United States or instrumentality thereof.

(a) *Services in employ of United States or wholly-owned instrumentality thereof.* Services performed in the employ of the United States Government, except as provided in section 3306(n) (see § 31.3306(n)–1), are excepted from employment. Services performed in the employ of an instrumentality of the United States which is wholly owned by the United States also are excepted from employment.

(b) *Services in employ of instrumentality not wholly owned by United States*—(1) *Services performed after 1961.* Services performed after 1961 in the employ of an instrumentality of the United States which is partially owned by the United States are excepted from employment, if the remuneration for such service is paid after 1961. Services performed after 1961 in the employ of an instrumentality of the United States which is neither wholly owned nor partially owned by the United States are excepted from employment if (i) the instrumentality is exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to section 3301 or the corresponding section of prior law in granting exemption from such tax, and (ii) the remuneration for such service is paid after 1961. For provisions which make general exemptions from Federal taxation ineffectual as to the tax imposed by section 3301, see § 31.3308–1.

(2) *Services performed before 1962.* Services performed in the employ of an instrumentality of the United States which is not wholly owned by the United States are excepted from employment if the instrumentality is exempt from the tax imposed by section 3301 by virtue of any other provision of law, and (i) the services are performed before 1962 or (ii) remuneration for the services is paid before 1962.

[T.D. 6658, 28 FR 6638, June 27, 1963]

§ 31.3306(c)(7)–1 Services in employ of States or their political subdivisions or instrumentalities.

(a) Services performed in the employ of any State, or of any political subdivision thereof, are excepted from employment. Services performed in the employ of an instrumentality of one or more States or political subdivisions thereof are excepted if the instrumentality is wholly owned by one or more of the foregoing. Services performed in the employ of an instrumentality of one or more of the several States or political subdivisions thereof which is not wholly owned by one or more of the foregoing are excepted only to the extent that the instrumentality is with respect to such services immune under the Constitution of the United States from the tax imposed by section 3301.

(b) For provisions relating to the term ''State'' see § 31.3306(j)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6638, June 27, 1963]

§ 31.3306(c)(8)–1 Services in employ of religious, charitable, educational, or certain other organizations exempt from income tax.

(a) *Services performed after 1961.* Services performed by an employee after 1961 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, if the remuneration for such service is paid after 1961. 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).

(b) *Services performed before 1962.* (1) Services performed by an employee in the employ of an organization described in section 3306(c)(8) as in effect before 1962, that is, a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, are excepted from employment if (i) the services are performed before 1962, or (ii) remuneration for the services is paid before 1962.

(2) Any organization which is an organization of a type described in section 501(c)(3) and which—

(i) Is exempt from income tax under section 501(a), or

(ii) Has been denied exemption from income tax under section 501(a) by reason of the provisions of section 503 or 504, relating to prohibited transactions and to accumulations out of income, respectively,

is an organization of a type described in section 3306(c)(8) as in effect before 1962. An organization which would be an organization of a type described in section 501(c)(3) except for those provisions of section 501(c)(3) which are not contained in section 3306(c)(8) as in effect before 1962 (provisions relating to participation or intervention in a political campaign on behalf of a candidate for public office) is also an organization of a type described in section 3306(c)(8) as in effect before 1962.

[T.D. 6658, 28 FR 6638, June 27, 1963]

§ 31.3306(c)(9)–1 Railroad industry; services performed by an employee or an employee representative under the Railroad Unemployment Insurance Act.

(a) Services performed by an individual as an ''employee'' or as an ''employee representative'', as those terms are defined in section 1 of the Railroad Unemployment Insurance Act, as amended, are excepted from employment.

(b) Section 1 of the Railroad Unemployment Insurance Act (45 U.S.C. 351), as amended, provides, in part, as follows:

For the purposes of this Act, except when used in amending the provisions of other Acts—

(a) The term ''employer'' means any carrier (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term ''employer'' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term ''employer'' shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies, and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations. The term ''employer'' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

(b) The term ''carrier'' means an express company, sleeping-car company, or carrier

by railroad, subject to part I of the Interstate Commerce Act.

(c) The term ''company'' includes corporations, associations, and joint-stock companies.

(d) The term ''employee'' (except when used in phrases establishing a different meaning) means any individual who is or has been (i) in the service of one or more employers for compensation, or (ii) an employee representative. The term ''employee'' shall include an employee of a local lodge or division defined as an employer in section 1 (a) only if he was in the service of a carrier on or after August 29, 1935. The term ''employee'' includes an officer of an employer.

The term ''employee'' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

(e) An individual is in the service of an employer whether his service is rendered within or without the United States if (i) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and (ii) he renders such service for compensation: *Provided, however,* That an individual shall be deemed to be in the service of an employer, other than a local lodge or division or a general committee of a railway-labor-organization employer, not conducting the principal part of its business in the United States only when he is rendering service to it in the United States; and an individual shall be deemed to be in the service of such a local lodge or division only if (1) all, or substantially all, the individuals constituting its membership are employees of an employer conducting the principal part of its business in the United States; or (2) the headquarters of such local lodge or division is located in the United States; and an individual shall be deemed to be in the service of such a general committee only if (1) he is representing a local lodge or division described in clauses (1) or (2) immediately above; or (2) all, or substantially all, the individuals represented by it are employees of an employer conducting the principal part of its business in the United States; or (3) he acts in the capacity of a general chairman or an assistant general chairman of a general committee which represents individuals rendering service in the United States to an employer, but in such case if his office or headquarters is not located in the United States and the individuals represented by such general committee are employees of an employer not conducting the principal part of its business in the United States, only such proportion of the remuneration for such service shall be regarded as compensation as the proportion which the mileage in the United States under the jurisdiction of such general committee bears to the total mileage under its jurisdiction, unless such mileage formula is inapplicable, in which case the Board may prescribe such other formula as it finds to be equitable, and if the application of such mileage formula, or such other formula as the Board may prescribe, would result in the compensation of the individual being less than 10 per centum of his remuneration for such service no part of such remuneration shall be regarded as compensation: *Provided further,* That an individual not a citizen or resident of the United States shall not be deemed to be in the service of an employer when rendering service outside the United States to an employer who is required under the laws applicable in the place where the service is rendered to employ therein, in whole or in part, citizens or residents thereof.

(f) The term ''employee representative'' means any officer or official representative of a railway labor organization other than a labor organization included in the term employer as defined in section 1(a) who before or after August 29, 1935, was in the service of an employer as defined in section 1(a) and who is duly authorized and designated to represent employees in accordance with the Railway Labor Act, and any individual who is regularly assigned to or regularly employed by such officer or official representative in connection with the duties of his office.

* * * * *

(i) The term ''compensation'' means any form of money remuneration, including pay for time lost but excluding tips, paid for services rendered as an employee to one or more employers, or as an employee representative: *Provided, however,* That in computing the compensation paid to any employee, no part of any month's compensation in excess of $300 for any month before July 1, 1954, or in excess of $350 for any month after June 30, 1954, and before the calendar month next following the month [May] in which this Act was amended in 1959, or in excess of $400 for any month after the month [May] in which this Act was so amended, shall be recognized. A payment made by an employer to an individual through the employer's pay roll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. An

employee shall be deemed to be paid, ''for time lost'' the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost. Compensation earned in any calendar month before 1947 shall be deemed paid in such month regardless of whether or when payment will have been in fact made, and compensation earned in any calendar year after 1946 but paid after the end of such calendar year shall be deemed to be compensation paid in the calendar year in which it will have been earned if it is so reported by the employer before February 1 of the next succeeding calendar year or, if the employee establishes, subject to the provisions of section 8, the period during which such compensation will have been earned.

* * * * *

(r) The term ''Board'' means the Railroad Retirement Board.

(s) The term ''United States'', when used in a geographical sense, means the States, Alaska, Hawaii, and the District of Columbia.

* * * * *

[Sec. 1, Railroad Unemployment Insurance Act, as amended by secs. 1 and 2, Act of June 20, 1939, 53 Stat. 845; secs. 1 and 3, Act of Aug. 13, 1940, 54 Stat. 785, 786; sec. 15, Act of Apr. 8, 1942, 56 Stat. 210; secs. 1 and 2, Act of July 31, 1946, 60 Stat. 722; sec. 302, Act of Aug. 31, 1954, 68 Stat. 1040; sec. 301, Act of May 19, 1959, Pub. L. 86–28, 73 Stat. 30]

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6638, June 27, 1963]

§ 31.3306(c)(10)–1 Services in the employ of certain organizations exempt from income tax.

(a) *In general.* (1) This section deals with the exception from employment of certain services performed in the employ of any organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521. (See the provisions of §§ 1.401–1, 1.501(a)–1, and 1.521–1 of this chapter (Income Tax Regulations).) If the services meet the tests set forth in paragraphs (b), (c), (d), or (e) of this section, the services are excepted.

(2) See also § 31.3306(c)(8)–1 for provisions relating to the exception of services performed in the employ of religious, charitable, educational, or certain other organizations exempt from income tax; § 31.3306(c)(10)–2 for provisions relating to the exception of services performed by certain students in the employ of a school, college, or university; and § 31.3306(c)(10)–3 for provisions relating to the exception of services performed before 1962 in the employ of certain employees' beneficiary associations.

(b) *Remuneration less than $50 for calendar quarter.* 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 service 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.

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 a number of paid employees, among them being 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 during the same calendar 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 excepted. Thus, A is not counted as an employee in employment on any of the days during such quarter for purposes of determining whether the X organization is an employer (see § 31.3306(a)–1). Even though it is subsequently determined that X is an employer, A's remuneration of $30 for services performed during the first calendar quarter of such year is not subject to tax. B's services, however, are not excepted during such quarter since the remuneration therefor is not less than $50. Thus, B is counted as an employee in employment during all of such quarter for purposes of determining whether the X organization is an employer. If it is determined that the X organization is an employer, B's remuneration of $180 for services performed during the first calendar quarter is included in computing the tax.

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 $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. A, therefore, is counted as an employee in employment during all of the second quarter for the purpose of determining whether the X organization is an employer. If it is determined that the X organization is an employer, A's remuneration of $60 for services performed during the second calendar quarter is included in computing the tax.

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. In such case, A is not counted as an employee in employment on any of the days during such quarter for purposes of determining whether the X organization is an employer. 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. In the latter case, A is counted as an employee in employment during all of such quarter and, if it is determined that the X organization is an employer, that portion of the $120 attributable to services performed in such quarter is included in computing the tax.

(c) *Collection of dues or premiums for fraternal beneficiary societies, and ritualistic services in connection with such societies, before 1962.* The following services performed by an employee in the employ of a fraternal beneficiary society, order, or association exempt from income tax under section 501(a) are excepted from employment if the services are performed before 1962 or if remuneration for the services is paid before 1962:

(1) Services performed away from the home office of such a society, order, or association in connection with the collection of dues or premiums for such society, order, or association; and

(2) Ritualistic services (wherever performed) in connection with such a society, order, or association.

For purposes of the paragraph the amount of the remuneration for services performed by the employee in the calendar quarter is immaterial; the tests are the character of the organization in whose employ the services are performed, the type of services, and, in the case of collection of dues or premiums, the place where the services are performed.

(d) *Students employed before 1962.* (1) Services performed 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 by a student who is enrolled and is regularly attending classes at a school, college, or university, are excepted from employment if the services are performed before 1962 or if remuneration for the services is paid before 1962. For purposes of this paragraph, the amount of remuneration for services performed by the employee in the calendar quarter, the type of services, and the place where the services are performed are immaterial; the tests are the character of the organization in whose employ the services are performed and the status of the employee as a student enrolled and regularly attending classes at a school, college, or university.

(2) The term ''school, college, or university'' as used in this paragraph is to be taken in its commonly or generally accepted sense. For provisions relating to services performed before 1962 by a student enrolled and regularly attending classes at a school, college, or university not exempt from income tax in

the employ of such school, college, or university, see paragraph (b) of § 31.3306(c)(10)–2. For provisions relating to services performed after 1961 by a student enrolled and regularly attending classes at a school, college, or university in the employ of such school, college, or university, see paragraph (a) or § 31.3306(c)(10)–2.

(e) *Services performed before 1962 in employ of agricultural or horticultural organization exempt from income tax.* (1) Services performed by an employee in the employ of an agricultural or horticultural organization which is described in section 501(c)(5) and the regulations thereunder and which is exempt from income tax under section 501(a) are excepted from employment if the services are performed before 1962 or if remuneration for the services is paid before 1962.

(2) For purposes of this paragraph, the type of services performed by the employee, the amount of remuneration for the services, and the place where the services are performed are immaterial; the test is the character of the organization in whose employ the services are performed.

[T.D. 6658, 28 FR 6639, June 27, 1963]

§ 31.3306(c)(10)–2 Services of student in employ of school, college, or university.

(a) *Services performed after 1961.* Services performed after 1961 in the employ of a school, college, or university, by a student who is enrolled and is regularly attending classes at the school, college, or university, are excepted from employment (whether or not the school, college, or university is exempt from income tax), if remuneration for the services is paid after 1961.

(b) *Services performed before 1962.* Services performed in the employ of a school, college, or university not exempt from income tax under section 501(a), by a student who is enrolled and is regularly attending classes at the school, college, or university, are excepted from employment if the services are performed before 1962 or if remuneration for the services is paid before 1962.

(c) *Application of section.* (1) For purposes of this section, the type of services performed by the employee, the place where the services are performed, and the amount of remuneration for services performed by the employee are immaterial; the tests are the character of the organization in the employ of which the services are performed and the status of the employee as a student enrolled and regularly attending classes at the school, college, or university, in the employ of which he performs the services.

(2) 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.

(3) The term ''school, college, or university'' as used in this section is to be taken in its commonly or generally accepted sense.

(4) For provisions relating to services performed before 1962 by a student in the employ of an organization exempt from income tax, see paragraph (d) of § 31.3306(c)(10)–1.

[T.D. 6658, 28 FR 6640, June 27, 1963]

§ 31.3306(c)(10)–3 Services before 1962 in employ of certain employees' beneficiary associations.

(a) *Voluntary employees' beneficiary associations.* Services performed by an employee in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents are excepted from employment if—

(1) No part of its net earnings inures (other than through such payments) to the benefit of any private shareholder or individual,

(2) 85 percent or more of the income consists of amounts collected from members for the sole purpose of making such payments and meeting expenses, and

(3) The services are performed before 1962, or remuneration for the services is paid before 1962.

(b) *Federal employees' beneficiary associations.* Services performed by an employee in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries are excepted from employment if—

(1) Admission to membership in the association is limited to individuals who are officers or employees of the United States Government,

(2) No part of the net earnings of the association inures (other than through such payments) to the benefit of any private shareholder or individual, and

(3) The services are performed before 1962, or remuneration for the services is paid before 1962.

(c) *Application of tests.* For purposes of this section, the type of services performed by the employee, the amount of remuneration for the services, and the place where the services are performed are immaterial; the test is the character of the organization in whose employ the services are performed.

[T.D. 6658, 28 FR 6640, June 27, 1963]

§ 31.3306(c)(11)–1 Services in employ of 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.

§ 31.3306(c)(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 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.

§ 31.3306(c)(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 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.

§ 31.3306(c)(14)–1 Services of insurance agent or solicitor.

(a) Services performed for a person by an employee as an insurance agent or insurance solicitor are excepted from employment, if all such services performed for such person by such individual are performed for remuneration solely by way of commission.

(b) If all or any part of the remuneration of an employee for services performed as an insurance agent or insurance solicitor for a person is a salary, none of his services performed as an insurance agent or insurance solicitor for

such person are excepted from employment, and his total remuneration (for example, salary, or salary and commissions) for such services is included for purposes of computing the tax.

§ 31.3306(c)(15)–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. The services are excepted irrespective of the form or method of compensation. Incidental services by the employee 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.

§ 31.3306(c)(16)–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. 228), services performed in the employ of an international organization as defined in section 7701(a)(18) are excepted from employment.

(b) (1) Section 701(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.

§ 31.3306(c)(17)–1 Fishing services.

(a) *In general.* Subject to the limitations prescribed in paragraphs (b) and (c) of this section, services described in this paragraph are excepted from employment. Services performed by an individual in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shell-fish (for example, oysters, clams, and mussels), crustacea (for example, lobsters, crabs, and shrimps), sponges, seaweeds, or other aquatic forms of animal and vegetable life are excepted. The exception extends to services performed as an officer or member of the crew of a vessel while the vessel is engaged in any such activity whether or not the officer or member of the crew is himself so engaged. In the case of an individual who is engaged in any such activity in the employ of any person, the services performed, by such individual in the employ of such person, as an ordinary incident to any such activity are also excepted. Similarly, for example, the shore services of an officer or member of the crew of a vessel engaged in any such activity are excepted if such services are an ordinary incident to any such activity. Services performed as an ordinary incident to any such activity may include, for example, services performed in such cleaning, icing, and packing of fish as are necessary for the immediate preservation of the catch.

(b) *Salmon and halibut fishing.* Services performed in connection with the catching or taking of salmon or halibut, for commercial purposes, are not within the exception. Thus, neither the services of an officer or member of the crew of a vessel (irrespective of its tonnage) which is engaged in the catching or taking of salmon or halibut, for commercial purposes, nor the services of any other individual in connection with such activity, are within the exception.

(c) *Vessels of more than 10 net tons.* Services described in paragraph (a) of this section performed on or in connection with a vessel of more than 10 net tons are not within the exception. For purposes of the exception, the tonnage of the vessel shall be determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States.

§ 31.3306(c)(18)–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 (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—

* * * * *

(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. 6658, 28 FR 6640, June 27, 1963, as amended by T.D. 8411, 57 FR 15241, Apr. 27, 1992]

§ 31.3306(d)–1 Included and excluded service.

(a) If a portion of the services performed by an employee for the person employing him during a pay period constitutes employment, and the remainder does not constitute employment, all the services of the employee during the period shall for purposes of the tax be treated alike, that is, either all as included or all as excluded. The time during which the employee performs services which under section 3306(c) 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 examples:

Example 1. Employer B, who operates a farm and a store, employs A to perform services in connection with both operations. A's services on the farm are such that they are excepted as agricultural labor and do not constitute employment, and his services in the store constitute employment. He is paid at the end of each month. During a particular month A works 120 hours on the farm and 80 hours in the store. None of A'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 A works 75 hours on the farm and 120 hours in the store. All of A's services during the month are deemed to be employment, since one-half or more of his services during the month constitutes employment.

Example 2. Employee C is employed as a maid by D, a medical doctor, whose home and office are located in the same building. C's services in the home are excepted as domestic service and do not constitute employment, and her services in the office constitute employment. She is paid each week. During a particular week C works 20 hours in the home and 20 hours in the office. All of C's services during that week are deemed to be employment, since one-half or more of her services during the week constitutes employment. During another week C works 22 hours in the home and 15 hours in the office. None of C's services during that week are deemed to be employment, since less than one-half of her services during the week 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 person employing him. Thus, if the periods for which payments of remuneration are made to the employee by such person 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 such person, even though that period does not coincide with the actual period for which a particular payment of remuneration is made. For example, if a person 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 person and receives at the end of the third week a single remuneration payment for 3 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 person employing him, 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 person employing him if the periods for which such person 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 person employing him if the period for which a payment of remuneration is ordinarily made to the employee by such person exceeds 31 consecutive calendar days, or (3) with respect to any service performed by the employee for the person employing him during a pay period if any of such service is excepted by section 3306(c) (9) (see § 31.3306(c) (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 tax attaches with respect to such services as constitute employment as defined in section 3306(c) (provided such person is an employer as defined in section 3306(a) and § 31.3306(a)–1).

§ 31.3306(i)–1 Who are employees.

(a) Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (The word ''employer'' as used in this section only, notwithstanding the provisions of § 31.3306(a)–1, includes a person who employs one or more employees.)

(b) 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. 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.

(c) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) 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.

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

(f) 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 § 31.3306(c)–2).

§ 31.3306(j)–1 State, United States, and citizen.

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

(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), and the District of Columbia. When used in the regulations in this subpart with respect to remuneration paid after 1960 for services performed after 1960, the term ''United States'' also includes the Commonwealth of Puerto Rico when the term is used in a geographical sense, and the term ''citizen of the United States'' includes a citizen of the Commonwealth of Puerto Rico.

[T.D. 6658, 28 FR 6641, June 27, 1963]

§ 31.3306(k)–1 Agricultural labor.

(a) *In general.* (1) Services performed by an employee for the person employing him which constitute ''agricultural labor'' as defined in section 3306(k) are excepted from employment by reason of section 3306(c)(1). See § 31.3306(c)(1)–1. The term ''agricultural labor'' as defined in section 3306(k) includes services of the character described in paragraphs (b), (c), (d), and (e) 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 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''.

(b) *Services described in section 3306(k)(1).* Services performed on a farm by an employee of any person in connection with any of the following activities constitute agricultural labor:

(1) The cultivation of the soil;

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

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

(c) *Services described in section 3306(k)(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, if 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 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 semi-skilled 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, services performed by employees of a commercial painting concern, for example, which contracts with a farmer to renovate his farm properties, do not constitute agricultural labor.

(d) *Services described in section 3306(k)(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 hatching of poultry;

(3) The raising or harvesting of mushrooms;

(4) The operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying or storing water for farming purposes;

(5) The production or harvesting of maple sap or the processing of maple sap into maple sirup or maple sugar (but not the subsequent blending or other processing of such sirup or sugar with other products); or

(6) 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 3306(k)(4).* (1)(i) Services performed by an employee in the employ of a farmer or a farmers' cooperative organization or group 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, other than fruits and vegetables (see paragraph (e)(2) of this section), produced by such farmer or farmer-members of such organization or group of farmers constitute agricultural labor, if such services are performed as an incident to ordinary farming operations.

(ii) Generally services are performed ''as an incident to ordinary farming operations'' within the meaning of this paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmers' cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group. Services performed by employees of such farmer or farmers' organization or group 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 commodities produced by persons other than such farmer or members of such farmers' organization or group are not performed ''as an incident to ordinary farming operations''.

(2) Services performed by an employee in the employ of any person 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 fruits and vegetables, whether or not of a perishable nature, constitute agricultural labor, if such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading, or storing of fruits, or in the cleaning of beans, are performed as an incident to their preparation for market, such services may constitute agricultural labor, whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

(3) The services described in paragraphs (e)(1) and (2) of this section 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 such subparagraphs 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.

§ 31.3306(m)–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 § 31.3306(j)–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) of § 31.3306(c)–2.

[T.D. 6658, 28 FR 6641, June 27, 1963]

§ 31.3306(n)–1 Services on American vessel whose business is conducted by general agent of Secretary of Commerce.

(a) Section 3306(n) and this section of the regulations apply with respect only to services performed by an officer or member of the crew of an American vessel (1) which is owned by or bareboat chartered to the United States, and (2) whose business is conducted by a general agent of the Secretary of Commerce. Whether services performed by such an officer or member of a crew under the above conditions constitute employment is determined under section 3306(c) and (n), but without regard to section 3306(c)(6). See § 31.3306(c)(6)–1, relating to services performed in the employ of the United States and instrumentalities thereof. If, without regard to section 3306(c)(6), such services constitute employment, they are not excepted from employment by reason of the fact that they are performed on or in connection with an American vessel which is owned by or bareboat chartered to the United States and whose business is conducted by a general agent of the Secretary of Commerce, that is, such services are not excepted from employment by section 3306(c)(6). For provisions relating

to services performed within the United States and services performed outside the United States which constitute employment, see § 31.3306(c)–2.

(b) The expression ''officer or member of the crew'' includes the master or officer in charge of the vessel, however designated, and every individual, subject to his authority, serving on board and contributing in any way to the operation and welfare of the vessel. Thus, the expression includes, for example, the master, mates, pilots, pursers, surgeons, stewards, engineers, firemen, cooks, clerks, carpenters, and deck hands.

(c) An employee of the United States who performs services as an officer or member of the crew of an American vessel which is owned by or bareboat chartered to the United States and whose business is conducted by a general agent of the Secretary of Commerce shall be deemed, under section 3306(n), to be performing services for such general agent rather than for the United States. Any such general agent of the Secretary of Commerce is considered a legal entity in his capacity as such general agent, separate and distinct from his identity as a person employing individuals on his own account. Each such general agent who in his capacity as such qualifies as an employer under section 3306(a) is with respect to each calendar year for which he so qualifies subject to the tax imposed by section 3301, and to all the requirements imposed upon an employer as defined in section 3306(a) by the regulations in this part, with respect to services which constitute employment by reason of section 3306(n) and this section of the regulations.

§ 31.3306(p)–1 Employees of related corporations.

(a) *In general.* For purposes of sections 3301, 3302, and 3306(b)(1), 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 for which the individual performs services, each of the corporations is considered to have paid only the remuneration it actually disburses to that individual (unless the disbursing corporation fails to remit the taxes due). Paragraphs (b) and (c) of § 31.3121(s)–1 contain rules defining related corporations, common paymasters, and concurrent employment, and rules for determining the liability of the other related corporations for employment taxes if the common paymaster fails to remit the taxes pursuant to sections 3102 and 3111, and for allocating these taxes among the related corporations. Those rules also apply to the tax under section 3301. For purposes of applying those rules to this section, references in those rules to section 3111 are considered references to sections 3301 and 3302, and references to section 3121 are considered references to section 3306.

(b) *Allocation of credit for contributions to State unemployment funds.* A special rule for applying the rules of § 31.3121(s)–1 to this section applies if it is necessary to determine the ultimate liability of each related corporation for which services are performed in the event the common paymaster fails to remit the tax to the Internal Revenue Service. In determining the ultimate liability of a corporation, the credit for contributions to State unemployment funds that the corporation may claim under section 3302 is calculated as if each corporation were a separate employer.

(c) *Effective date.* This section is effective with respect to wages paid after December 31, 1978.

[T.D. 7660, 44 FR 75142, Dec. 19, 1979]

§ 31.3307–1 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 a 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.

§31.3308–1 Instrumentalities of the United States specifically exempted from tax imposed by section 3301.

Section 3308 makes ineffectual as to the tax imposed by section 3301 (with respect to remuneration paid after 1961 for services performed after 1961) 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 3301 by an express reference to such section or the corresponding section of prior law. Thus, the general exceptions from Federal taxation granted by various statutes to certain instrumentalities of the United States without specific reference to the tax imposed by section 3301 or the corresponding section of prior law are rendered inoperative insofar as such exemptions relate to the tax imposed by section 3301. 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 tax imposed by section 3301, see §31.3306(c)(6)–1.

[T.D. 6658, 28 FR 6641, June 27, 1963]

Subpart E—Collection of Income Tax at Source

§31.3401(a)–1 Wages.

(a) *In general.* (1) The term ''wages'' means all remuneration for services performed by an employee for his employer unless specifically excepted under section 3401(a) or excepted under section 3402(e).

(2) The name by which the remuneration for services is designated is immaterial. Thus, salaries, fees, bonuses, commissions on sales or on insurance premiums, pensions, and retired pay are wages within the meaning of the statute if paid as compensation for services performed by the employee for his employer.

(3) 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 may be paid hourly, daily, weekly, monthly, or annually.

(4) Generally the medium in which remuneration is paid is also immaterial. It may be paid in cash or in something other than cash, as for example, stocks, bonds, or other forms of property. (See, however, §31.3401(a)(11)–1, relating to the exclusion from wages of remuneration paid in any medium other than cash for services not in the course of the employer's trade or business, and §31.3401(a)(16)–1, relating to the exclusion from wages of tips paid in any medium other than cash.) If services are paid for in a medium other than cash, the fair market value of the thing taken in payment is the amount to be included as wages. If the services were rendered at a stipulated price, in the absence of evidence to the contrary, such price will be presumed to be the fair value of the remuneration received. If a corporation transfers to its employees its own stock as remuneration for services rendered by the employee, the amount of such remuneration is the fair market value of the stock at the time of the transfer.

(5) Remuneration for services, unless such remuneration is specifically excepted by the statute, 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 R during the month of January 1955 and is entitled to receive remuneration of $100 for the services performed for R, the employer, during the month. A leaves the employ of R at the close of business on January 31, 1955. On February 15, 1955 (when A is no longer an employee of R), R pays A the remuneration of $100 which was earned for the services performed in January. The $100 is wages within the meaning of the statute.

(b) *Certain specific items*—(1) *Pensions and retirement pay.* (i) In general, pensions and retired pay are wages subject to withholding. However, no withholding is required with respect to amounts paid to an employee upon retirement which are taxable as annuities under the provisions of section 72 or 403. So-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and do not constitute wages. Those payments of

pensions or other benefits by the Federal Government under Title 38 of the United States Code which are excluded from gross income are not wages subject to withholding.

(ii) Amounts received as retirement pay for service in the Armed Forces of the United States, the Coast and Geodetic Survey, or the Public Health Service or as a disability annuity paid under the provisions of section 831 of the Foreign Service Act of 1946, as amended (22) U.S.C. 1081; 60 Stat. 1021), are subject to withholding unless such pay or disability annuity is excluded from gross income under section 104(a)(4), or is taxable as an annuity under the provisions of section 72. Where such retirement pay or disability annuity (not excluded from gross income under section 104(a)(4) and not taxable as an annuity under the provisions of section 72) is paid to a nonresident alien individual, withholding is required only in the case of such amounts paid to a nonresident alien individual who is a resident of Puerto Rico.

(2) *Traveling and other expenses.* 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 and are not subject to withholding. 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 § 31.3401 (a)–4.

(3) *Vacation allowances.* 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.

(4) *Dismissal payments.* Any payments made by an employer to an employee on account of dismissal, that is, involuntary separation from the service of the employer, constitute wages regardless of whether the employer is legally bound by contract, statute, or otherwise to make such payments.

(5) *Deductions by employer from remuneration of an employee.* Any amount deducted by an employer from the remuneration of an employee is considered to be a 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 or of Puerto Rico, requires or permits such deductions and the payment of the amounts thereof to the United States, a State, a Territory, Puerto Rico, or the District of Columbia, or any political subdivision of any one or more of the foregoing.

(6) *Payment by an employer of employee's tax, or employee's contributions under a State law.* The term ''wages'' includes the amount paid by an employer on behalf of an employee (without deduction from the remuneration of, or other reimbursement from, the employee) on account of any payment required from an employee under a State unemployment compensation law, or on account of any tax imposed upon the employee by any taxing authority, including the taxes imposed by sections 3101 and 3201.

(7) *Remuneration for services as employee of nonresident alien individual or foreign entity.* The term ''wages'' includes remuneration for services performed by a citizen or resident (including, in regard to wages paid after February 28, 1979, an individual treated as a resident under section 6013 (g) or (h)) of the United States as an employee of a nonresident alien individual, foreign partnership, or foreign corporation whether or not such alien individual or foreign entity is engaged in trade or business within the United States. Any 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 (including Puerto Rico as if a part of the United States), is subject to all the provisions of law and regulations applicable with respect to an employer. See § 31.3401(d)–1, relating to the term ''employer'', and § 31.3401(a)(8)(C)–1, relating to remuneration paid for services performed by

a citizen of the United States in Puerto Rico.

(8) *Amounts paid under accident or health plans*—(i) *Amounts paid in taxable years beginning on or after January 1, 1977—(a) In general.* Withholding is required on all payments of amounts includible in gross income under section 105(a) and § 1.105–1 (relating to amounts attributable to employer contributions), made in taxable years beginning on or after January 1, 1977, to an employee under an accident or health plan for a period of absence from work on account of personal injuries or sickness. Payments on which withholding is required by this subdivision are wages as defined in section 3401(a), and the employer shall deduct and withhold in accordance with the requirements of chapter 24 of subtitle C of the Code. Third party payments of sick pay, as defined in section 3402(o) and the regulations thereunder, are not wages for purposes of this section.

(*b*) *Payments made by an agent of the employer. (1)* Payments are considered made by the employer if a third party makes the payments as an agent of the employer. 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 sick pay payments. If the third party is paid an insurance premium and not reimbursed on a cost plus fee basis, the third party is not an agent of the employer, but the third party is a payor of third party sick pay for purposes of voluntary withholding from sick pay under sections 3402(o) and 6051(f) and the regulations thereunder. If a third party and an employer enter into an agency agreement as provided in paragraph (c) of § 31.6051–3 (relating to statements required in case of sick pay paid by third parties), that agency agreement does not make the third party an agent of the employer for purposes of this paragraph.

(*2*) Payments made by agents subject to this paragraph are supplemental wages as defined in § 31.3402(g)–1. Unless the agent is also an agent for purposes of withholding tax from the employee's regular wages, the agent may deem tax to have been withheld from the employee's regular wages. Consequently, the agent may determine the tax to be withheld from supplemental wages by using a flat percentage rate of 20 percent as provided in § 31.3402 (g)–1.

(*3*) This paragraph is only applicable to amounts paid on or after May 25, 1983 unless the agent actually withheld taxes before that date.

(*c*) *Exceptions to withholding. (1)* Withholding is not required on payments that are specifically excepted under the numbered paragraphs of section 3401(a) (relating to the definition of wages), under section 3402(e) (relating to included and excluded wages), or under section 3402(n) (relating to employees incurring no income tax liability).

(*2*) Withholding is not required on disability payments to the extent that the payments are excludable from gross income under section 105(d). In determining the excludable portion of the disability payments, the employer may assume that payments that the employer makes to the employee are the employee's sole source of income. This exception applies only if the employee furnishes the employer with adequate verification of disability. A certificate from a qualified physician attesting that the employee is permanently and totally disabled (within the meaning of section 105(d)) shall be deemed to constitute adequate verification. This exception does not affect the requirement that a statement (which includes any amount paid under section 105(d)) be furnished under either section 6041 (relating to information at source) or section 6051 (relating to receipts for employees) and the regulations thereunder.

(ii) *Amounts paid after December 31, 1955 and before January 1, 1977—(a) In general.* The term ''wage continuation payment'', as used in this subdivision, means any payment to an employee which is made after December 31, 1955, and before January 1, 1977 under a wage continuation plan (as defined in paragraph (a)(2)(i) of § 1.105–4 and § 1.105–5 of Part 1 of this chapter (Income Tax Regulations)) for a period of absence from

work on account of personal injuries or sickness, to the extent such payment is attributable to contributions made by the employer which were not includable in the employee's gross income or is paid by the employer. Any such payment, whether or not excluded from the gross income of the employee under section 105(d), constitutes ''wages'' (unless specifically excepted under any of the numbered paragraphs of section 3401(a) or under section 3402(e) and withholding thereon is required except as provided in paragraphs (b)(8)(ii) *(b), (c),* and *(d)* of this section.

(b) Amounts paid before January 1, 1977, by employer for whom services are performed for period of absence beginning after December 31, 1963. (*1*) Withholding is not required upon the amount of any wage continuation payment for a period of absence beginning after December 31, 1963, paid before January 1, 1977, to an employee directly by the employer for whom he performs services to the extent that such payment is excludable from the gross income of the employee under the provisions of section 105(d) in effect with respect to such payments, provided the records maintained by the employer—

(i) Separately show the amount of each such payment and the excludable portion thereof, and

(ii) Contain data substantiating the employee's entitlement to the exclusion provided in section 105(d) with respect to such amount, either by a written statement from the employee specifying whether his absence from work during the period for which the payment was made was due to a personal injury or to sickness and whether he was hospitalized for at least one day during this period; or by any other information which the employer reasonably believes establishes the employee's entitlement to the exclusion under section 105(d). Employers shall not be required to ascertain the accuracy of any written statement submitted by an employee in accordance with this subdivision *(b)(1)(ii).*

For purposes of this subdivision *(b)(1),* wage continuation payments reasonably expected by the employer to be made on behalf of the employer by another person shall be taken into account in determining whether the 75 percent test contained in section 105(d) is met and in computing the amount of any wage continuation payment made directly by the employer for whom services are performed by the employee which is within the $75 or $100 weekly rate of exclusion from the gross income of the employee provided in section 105(d). In making this latter computation, the amount excludable under section 105(d) shall be applied first against payments reasonably expected to be made on behalf of the employer by the other person and then, to the extent any part of the exclusion remains, against the payments made directly by the employer. In a case in which wage continuation payments are not paid at a constant rate for the first 30 calendar days of the period of absence, the determination of whether the 75 percent test contained in section 105(d) is met shall be based upon the length of the employee's absence as of the end of the period for which the payment by the employer is made, without regard to the effect which any further extension of such absence may have upon the excludability of the payment.

(2) The computation of the amount of any wage continuation payment with repect to which the employer may refrain from withholding may be illustrated by the following examples:

Example 1. A, an employee of B, normally works Monday through Friday and has a regular weekly rate of wages of $100. On Monday, November 5, 1974, A becomes ill, and as a result is absent from work for two weeks, returing to work on Monday, November 19, 1974. A is not hospitalized. Under B's noncontributory wage continuation plan, A receives no benefits for the first three working days of absence and is paid benefits directly by B at the rate of $85 a week thereafter ($34 for the last two days of the first week of absence and $85 for the second week of absence). No wage continuation payment is made by any other person. Since the benefits are entirely attributable to contributions to the plan by B, such benefits are wage continuation payments in their entirety. The wage continuation payments for the first seven calender days of absence are not excludable from A's gross income because A was not hospitalized for at least one day during his period of absence, and therefore B must withhold with respect to such payments. Under section 105(a), the wage continuation payments attributable to absence after the first seven calendar days of absence are excludable to the extent that they do not

exceed a rate of $75 a week. Under the principles stated in paragraph (e)(6)(iv) of § 1.105–4 of this chapter (Income Tax Regulations), the wage continuation payments in this case are at a rate not in excess of 75 percent (119/200 or 59.5 percent) of A's regular weekly rate of wages. Accordingly, B may refrain from withholding with respect to $75 of the wage continuation payment attributable to the second week of absence.

Example 2. Assume the facts in example 1 except that A is unable to return to work until Monday, February 11, 1975, and that, of the $85 a week of wage continuation payments $35 is paid directly by B and $50 is reasonably expected by B to be paid by C, an insurance company, on behalf of B. In such a case, both the $50 and the $35 payments constitute wage continuation payments and the amount of such payments which is attributable to the first 30 calendar days of absence is at a rate not in excess of 75 percent (323/440 or 73.4 percent) of A's regular weekly rate of wages. Therefore, under section 105(d), the portion of such payments which is attributable to absence after the first seven calendar days of absence is excludable to the extent that it does not exceed a rate of $75 a week for the eighth through the thirtieth calendar day of absence and does not exceed a rate of $100 a week thereafter. B may refrain from withholding with repect to $25 a week (the amount by which the $75 maximum excludable amount exceeds the $50 reasonably expected by B to be paid by C) of his direct payments for the eighth through the thirtieth calendar day of absence. Thereafter, B may refrain from withholding with respect to the entire $35 paid directly by him since the maximum excludable amount ($100 a week) exceeds the total of payments made by B and payments which B reasonably expects will be made by C.

(c) Amounts paid by employer for whom services are performed for period of absence beginning before January 1, 1964. Withholding is not required upon the amount of any wage continuation payment for a period of absence beginning before January 1, 1964, made to an employee directly by the employer for whom he performs services to the extent that such payment is excludable from the gross income of the employee under the provisions of section 105(d) in effect with respect to such payments, provided the records maintained by the employer—

(1) Separately show the amount of each such payment and the excludable portion thereof, and

(2) Contain data substantiating the employee's entitlement to the exclusion provided in section 105(d) with respect to such amount, either by a written statement from the employee specifying whether his absence from work during the period for which the payment was made was due to a personal injury or whether such absence was due to sickness, and, if the latter, whether he was hospitalized for at least one day during this period; or by any other information which the employer reasonably believes establishes the employee's entitlement to the exclusion under section 105(d). Employers shall not be required to ascertain the accuracy of the information contained in any written statement submitted by an employee in accordance with this paragraph (b)(8)(ii) *(c)(2).* For purposes of this paragraph (b)(8) (ii)(*c*), the computation of the amount excludable form the gross income of the employee under section 105(d) may be made either on the basis of the wage continuation payments which are made directly by the employer for whom the employee performs services, or on the basis of such payments in conjunction with any wage continuation payments made on behalf of the employer by a person who is regarded as an employer under section 3401(d)(1).

(d) Amounts paid before January 1, 1977 by person other than the employer for whom services are performed. No tax shall be withheld upon any wage continuation payment made to an employee by or on behalf of a person who is not the employer for whom the employee performs services but who is regarded as an employer under section 3401(d)(1). For example, no tax shall be withheld with respect to wage continuation payments made on behalf of an employer by an insurance company under an accident or health policy, by a separate trust under an accident or health plan, or by a State agency from a sickness and disability fund maintained under State law.

(e) Cross references. See sections 6001 and 6051 and the regulations thereunder for rules with respect to the records which must be maintained in connection with wage continuation payments and for rules with respect to the statements which must be furnished an employee in connection with

wage continuation payments, respectively. See also section 105 and § 1.105–4 of this chapter (Income Tax Regulations).

(9) *Value of meals and lodging.* The value of any meals or lodging furnished to an employee by his employer is not subject to withholding if the value of the meals or lodging is excludable from the gross income of the employee. See § 1.119–1 of this chapter (Income Tax Regulations).

(10) *Facilities or privileges.* 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 wages subject to withholding 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.

(11) *Tips or gratuities.* 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 are not subject to withholding. For provisions relating to the treatment of tips received by an employee after December 31, 1965, as wages, see §§ 31.3401(f)–1 and 31.3402(k)–1.

(12) *Remuneration for services performed by permanent resident of Virgin Islands*—(i) *Exemption from withholding.* No tax shall be withheld for the United States under chapter 24 from a payment of wages by an employer, including the United States or any agency thereof, to an employee if at the time of payment it is reasonable to believe that the employee will be required to satisfy his income tax obligations with respect to such wages under section 28(a) of the Revised Organic Act of the Virgin Islands (68 Stat. 508). That section provides that all persons whose permanent residence is in the Virgin Islands ''shall satisfy their income tax obligations under applicable taxing statutes of the United States by paying their tax on income derived from all sources both within and outside the Virgin Islands into the treasury of the Virgin Islands''.

(ii) *Claiming exemption.* If the employee furnishes to the employer a statement in duplicate that he expects to satisfy his income tax obligations under section 28(a) of the Revised Organic Act of the Virgin Islands with respect to all wages subsequently to be paid to him by the employer during the taxable year to which the statement relates, the employer may, in the absence of information to the contrary, rely on such statement as establishing reasonable belief that the employee will so satisfy his income tax obligations. The employee's statement shall identify the taxable year to which it relates, and both the original and the duplicate copy thereof shall be signed and dated by the employee.

(iii) *Disposition of statement.* The original of the statement shall be retained by the employer. The duplicate copy of the statement shall be sent by the employer to the Director of International Operations, Washington, D.C. 20225, on or before the last day of the calendar year in which the employer receives the statement from the employee.

(iv) *Applicability of subparagraph.* This subparagraph has no application with respect to any payment of remuneration which is not subject to withholding by reason of any other provision of the regulations in this subpart.

(13) *Federal employees resident in Puerto Rico.* Except as provided in paragraph (d) of § 31.3401(a)(6)–1, the term ''wages'' includes remuneration for services performed by a nonresident alien individual who is a resident of Puerto Rico if such services are performed as an employee of the United States or any agency thereof. The place where the services are performed is immaterial for purposes of this subparagraph.

(14) *Supplemental unemployment compensation benefits.* (i) Supplemental unemployment compensation benefits paid to an individual after December 31, 1970, shall be treated (for purposes of the provisions of Subparts E, F, and G of this part which relate to withholding of income tax) as if they were wages, to the extent such benefits are includible in the gross income of such individual.

(ii) For purposes of this subparagraph, the term ''supplemental unemployment compensation benefits'' means amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of the employee's involuntary separation from the employment of the employer, whether or not such separation is temporary, but only when such separation is one resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions.

(iii) For the meanings of the terms ''involuntary separation from the employment of the employer'' and ''other similar conditions'', see subparagraphs (3) and (4) of § 1.501(c)(17)–1(b) of this chapter (Income Tax Regulations).

(iv) As used in this subparagraph, the term ''employee'' means an employee within the meaning of paragraph (a) of § 31.3401(c)–1, the term ''employer'' means an employer within the meaning of paragraph (a) of § 31.3401(d)–1, and the term ''employment'' means employment as defined under the usual common law rules.

(v) References in this chapter to wages as defined in section 3401(a) shall be deemed to refer also to supplemental unemployment compensation benefits which are treated under this subparagraph as if they were wages.

(c) *Geographical definitions.* For definition of the term ''United States'' and for other geographical definitions relating to the Continental Shelf see section 638 and § 1.638–1 of this chapter.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6654, 28 FR 5251, May 28, 1963; T.D. 6908, 31 FR 16775, Dec. 31, 1966; T.D. 7001, 34 FR 1000, Jan. 23, 1969; T.D. 7068, 35 FR 17328, Nov. 11, 1970; T.D. 7277, 38 FR 12742, May 15, 1973; T.D. 7493, 42 FR 33728, July 1, 1977; T.D. 7670, 45 FR 6932, Jan. 31, 1980; T.D. 7888, 48 FR 17587, Apr. 25, 1983; T.D. 8276, 54 FR 51028, Dec. 12, 1989; T.D. 8324, 55 FR 51697, Dec. 17, 1990]

§ 31.3401(a)–1T Question and answer relating to the definition of wages in section 3401(a) (Temporary).

The following question and answer relates to the definition of wages in section 3401(a) of the Internal Revenue Code of 1954, as amended by section 531(d)(4) of the Tax Reform Act of 1984 (98 Stat. 886):

Q–1: Are fringe benefits included in the definition of ''wages'' under section 3401(a)?

A–1: Yes, unless specifically excluded from the definition of ''wages'' pursuant to section 3401(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 756, Jan. 7, 1985]

§ 31.3401(a)–2 Exclusions from wages.

(a) *In general.* (1) The term ''wages'' does not include any remuneration for services performed by an employee for his employer which is specifically excepted from wages under section 3401(a).

(2) The exception attaches to the remuneration for services performed by an employee and not to the employee as an individual; that is, the exception applies only to the remuneration in an excepted category.

Example. A is an individual who is employed part time by B to perform domestic service in his home (see § 31.3401(a)(3)–1). A is also employed by C part time to perform services as a clerk in a department store owned by him. While no withholding is required with respect to A's remuneration for services performed in the employ of B (the remuneration being excluded from wages), the exception does not embrace the remuneration for services performed by A in the employ of C and withholding is required with respect to the wages for such services.

(3) For provisions relating to the circumstances under which remuneration which is excepted is nevertheless deemed to be wages, and relating to the circumstances under which remuneration which is not excepted is nevertheless deemed not to be wages, see § 31.3402(e)–1.

(4) For provisions relating to payments with respect to which a voluntary withholding agreement is in effect, which are not defined as wages in section 3401(a) but which are nevertheless deemed to be wages, see §§ 31.3401(a)–3 and 31.3402(p)–1.

(b) *Fees paid a public official.* (1) Authorized fees paid to public officials

such as notaries public, clerks of courts, sheriffs, etc., for services rendered in the performance of their official duties are excepted from wages and hence are not subject to withholding. However, salaries paid such officials by the Government, or by a Government agency or instrumentality, are subject to withholding.

(2) Amounts paid to precinct workers for services performed at election booths in State, county, and municipal elections and fees paid to jurors and witnesses are in the nature of fees paid to public officials and therefore are not subject to withholding.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6654, 28 FR 5251, May 28, 1963; T.D. 7096, 36 FR 5216, Mar. 18, 1971]

§ 31.3401(a)–3 Amounts deemed wages under voluntary withholding agreements.

(a) *In general.* Notwithstanding the exceptions to the definition of wages specified in section 3401(a) and the regulations thereunder, the term ''wages'' includes the amounts described in paragraph (b)(1) of this section with respect to which there is a voluntary withholding agreement in effect under section 3402(p). References in this chapter to the definition of wages contained in section 3401(a) shall be deemed to refer also to this section (§ 31.3401(a)–3).

(b) *Remuneration for services.* (1) Except as provided in subparagraph (2) of this paragraph, the amounts referred to in paragraph (a) of this section include any remuneration for services performed by an employee for an employer which, without regard to this section, does not constitute wages under section 3401(a). For example, remuneration for services performed by an agricultural worker or a domestic worker in a private home (amounts which are specifically excluded from the definition of wages by section 3401(a) (2) and (3), respectively) are amounts with respect to which a voluntary withholding agreement may be entered into under section 3402(p). See §§ 31.3401(c)–1 and 31.3401(d)–1 for the definitions of ''employee'' and ''employer''.

(2) For purposes of this paragraph, remuneration for services shall not include amounts not subject to withholding under § 31.3401(a)–1(b)(12) (relating to remuneration for services performed by a permanent resident of the Virgin Islands), § 31.3401(a)–2(b) (relating to fees paid to a public official), section 3401(a)(5) (relating to remuneration for services for foreign government or international organization), section 3401(a)(8)(B) (relating to remuneration for services performed in a possession of the United States (other than Puerto Rico) by citizens of the United States), section 3401(a)(8)(C) (relating to remuneration for services performed in Puerto Rico by citizens of the United States), section 3401(a)(11) (relating to remuneration other than in cash for service not in the course of employer's trade or business), section 3401(a)(12) (relating to payments from or to certain tax-exempt trusts, or under or to certain annuity plans or bond purchase plans), section 3401(a)(14) (relating to group-term life insurance), section 3401(a)(15) (relating to moving expenses), or section 3401(a)(16)(A) (relating to tips paid in any medium other than cash).

[T.D. 7096, 36 FR 5216, Mar. 18, 1971]

§ 31.3401(a)–4 Reimbursements 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) *Withholding rate.* Employers may add any payments made under reimbursement or other expense allowance arrangements that are subject to income tax withholding to the employee's regular wages for a payroll period and compute withholding taxes on the total. Alternatively, the employer may withhold income tax from the reimbursement or other expense allowance at the flat 20-percent rate applicable to supplemental wages, provided the employer withholds income tax from the employee's regular wages and provided the reimbursement or allowance is paid separately (or separately identified if wages and reimbursement amounts are combined in a single payment). See §31.3401 (g)–1 regarding supplemental wage payments.

(d) *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 51698, Dec. 17, 1990]

§31.3401(a)(1)–1 Remuneration of members of the Armed Forces of the United States for active service in combat zone or while hospitalized as a result of such service.

Remuneration paid for active service as a member of the Armed Forces of the United States performed in a month during any part of which such member served in a combat zone (as determined under section 112) or is hospitalized at any place as a result of wounds, disease, or injury incurred while serving in such a combat zone is excepted from wages and is, therefore, not subject to withholding. The exception with respect to hospitalization is applicable, however, only if during all of such month there are combatant activities in some combat zone (as determined under section 112). See §1.112–1 of this chapter (Income Tax Regulations).

§ 31.3401(a)(2)–1 Agricultural labor.

The term ''wages'' does not include remuneration for services which constitute agricultural labor as defined in section 3121(g). For regulations relating to the definition of the term ''agricultural labor'', see § 31.3121(g)–1.

§ 31.3401(a)(3)–1 Remuneration for domestic service.

(a) *In a private home.* (1) Remuneration paid for services of a household nature performed by an employee in or about a private home of the person by whom he is employed is excepted from wages and hence is not subject to withholding. 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, and the remuneration paid for services performed therein is not within the exception.

(2) 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.

(b) *In a local college club or local chapter of a college fraternity or sorority.* (1) Remuneration paid for services of a household nature performed by an employee in or about the club rooms or house of a local college club or of a local chapter of a college fraternity or sorority by which he is employed is excepted from wages and hence is not subject to withholding. 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 remuneration paid for services performed therein is not within the exception.

(2) 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) *Remuneration not excepted.* Remuneration paid for services not of a household nature, such as services performed as a private secretary, tutor, or librarian, even though performed in the employer's private home or in a local college club or local chapter of a college fraternity or sorority, is not within the exception. Remuneration paid for services of a household nature is 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.

§ 31.3401(a)(4)–1 Cash remuneration for service not in the course of employer's trade or business.

(a) Cash remuneration paid for services not in the course of the employer's trade or business performed by an employee for an employer in a calendar quarter is excepted from wages and hence is not subject to withholding unless—

(1) The cash remuneration paid for such services performed by the employee for the employer in the calendar quarter is $50 or more; and

(2) Such employee is regularly employed in the calendar quarter by such employer to perform such services.

Unless the tests set forth in both paragraphs (a)(1) and (2) of this section are met, cash remuneration for service not in the course of the employer's trade or business is excluded from wages. (For provisions relating to the exclusion from wages of remuneration paid in any medium other than cash for services not in the course of the employer's trade or business, see § 31.3401(a)(11)–1.)

(b) 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. 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, local college club, or local chapter of a college fraternity or sorority. Accordingly, this exception does not apply with respect to remuneration which is excepted from wages under section 3401(a)(2) or section 3401(a)(3) (see §§ 31.3401(a)(2)–1 and 31.3401(a)(3)–1, respectively). Remuneration paid for service performed for a corporation does not come within the exception.

(c) The test relating to cash remuneration of $50 or more is based on the remuneration earned during a calendar quarter rather than on the remuneration paid in a calendar quarter. However, for purposes of determining whether the test is met, it is also required that the remuneration be paid, although it is immaterial when the remuneration is paid. Furthemore, in determining whether $50 or more has been paid for service not in the course of the employer's trade or business, only cash remuneration for such service shall be taken into account. The term ''cash remuneration'' includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as lodging, food, or other goods or commodities, is disregarded in determining whether the cash-remuneration test is met.

(d) For purposes of this exception, an individual is deemed to be regularly employed by an employer during a calendar quarter only if—

(1) Such individual performs service not in the course of the employer's trade or business for such employer for some portion of the day on at least 24 days (whether or not consecutive) during such calendar quarter; or

(2) Such individual was regularly employed (as determined under paragraph (d)(1) of this section) by such employer in the performance of service not in the course of the employer's trade or business during the preceding calendar quarter.

(e) In determining whether an employee has performed service not in the course of the employer's trade or business on at least 24 days during a calendar quarter, there shall be counted as one day—

(1) Any day or portion thereof on which the employee actually performs such service; and

(2) Any day or portion thereof on which the employee does not perform service of the prescribed character but with respect to which cash remuneration is paid or payable to the employee for such service, 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 service not in the course of the employer's trade or business shall be considered to be engaged in the actual performance of such service on that day. For purposes of this exception, a day is a continuous period of 24 hours commencing at midnight and ending at midnight.

§ 31.3401(a)(5)–1 Remuneration for services for foreign government or international organization.

(a) *Services for foreign government.* (1) Remuneration paid for services performed as an employee of a foreign government is excepted from wages and hence is not subject to withholding. The exception includes not only remuneration paid for services performed by ambassadors, ministers, and other diplomatic officers and employees but also remuneration paid for services performed as a consular or other officer or employee of a foreign government or as a nondiplomatic representative of such a government. However, the exception does not include remuneration for services performed for a corporation created or organized in the United States or under the laws of the United States or any State (including the District of Columbia or the Territory of Alaska or Hawaii) or of Puerto Rico even though such corporation is wholly owned by such a government.

(2) The citizenship or residence of the employee and the place where the services are performed are immaterial for purposes of the exception.

(b) *Services for international organization.* (1) Subject to the provisions of section 1 of the International Organizations Immunities Act (22 U.S.C. 288),

remuneration paid for services performed within or without the United States by an employee for an international organization as defined in section 7701(a)(18) is excepted from wages and hence is not subject to withholding. The term ''employee'' as used in the preceding sentence includes not only an employee who is a citizen or resident of the United States but also an employee who is a nonresident alien individual. The term ''employee'' also includes an officer. An organization designated by the President through appropriate Executive order as entitled to enjoy the privileges, exemptions, and immunities provided in the International Organizations Immunities Act may enjoy the benefits of the exclusion from wages with respect to remuneration paid for services performed for such organization prior to the date of the issuance of such Executive order, if (i) the Executive order does not provide otherwise and (ii) the organization is a public international organization in which the United States participates, pursuant to a treaty or under the authority of an act of Congress authorizing such participation or making an appropriation for such participation, at the time such services are performed.

(2) 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).

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

SECTION 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, exemption, 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.

§ 31.3401(a)(6)–1 Remuneration for services of nonresident alien individuals paid after December 31, 1966.

(a) *In general.* All remuneration paid after December 31, 1966, for services performed by a nonresident alien individual, if such remuneration otherwise constitutes wages within the meaning of § 31.3401(a)–1 and if such remuneration is effectively connected with the conduct of a trade or business within the United States, is subject to withholding under section 3402 unless excepted from wages under this section. In regard to wages paid under this section after February 28, 1979, the term ''nonresident alien individual'' does not include a nonresident alien individual treated as a resident under section 6013 (g) or (h).

(b) *Remuneration for services performed outside the United States.* Remuneration paid to a nonresident alien individual (other than a resident of Puerto Rico) for services performed outside the United States is excepted from wages and hence is not subject to withholding.

(c) *Remuneration for services of residents of Canada or Mexico who enter and*

leave the United States at frequent intervals—(1) *Transportation service.* Remuneration paid to a nonresident alien individual who is a resident of Canada or Mexico and who, in the performance of his duties in transportation service between points in the United States and points in such foreign country, enters and leaves the United States at frequent intervals, is excepted from wages and hence is not subject to withholding. This exception applies to personnel engaged in railroad, bus, truck, ferry, steamboat, aircraft, or other transportation services and applies whether the employer is a domestic or foreign entity. Thus, the remuneration of a nonresident alien individual who is a resident of Canada and an employee of a domestic railroad, for services as a member of the crew of a train operating between points in Canada and points in the United States, is not subject to withholding under section 3402.

(2) *Service on international projects.* Remuneration paid to a nonresident alien individual who is a resident of Canada or Mexico and who, in the performance of his duties in connection with the construction, maintenance, or operation of a waterway, viaduct, dam, or bridge traversed by, or traversing, the boundary between the United States and Canada or the boundary between the United States and Mexico, as the case may be, enters and leaves the United States at frequent intervals, is excepted from wages and hence is not subject to withholding. Thus, the remuneration of a nonresident alien individual who is a resident of Canada, for services as an employee in connection with the construction, maintenance, or operation of the Saint Lawrence Seaway and who, in the performance of such services, enters and leaves the United States at frequent intervals, is not subject to withholding under section 3402.

(3) *Limitation.* The exceptions provided by this paragraph do not apply to the remuneration of a resident of Canada or of Mexico who is employed wholly within the United States as, for example, where such a resident is employed to perform service at a fixed point or points in the United States, such as a factory, store, office, or designated area or areas within the United States, and who commutes from his home in Canada or Mexico, in the pursuit of his employment within the United States.

(4) *Certificate required.* In order for an exception provided by this paragraph to apply for any taxable year, the nonresident alien employee must furnish his employer a statement in duplicate for the taxable year setting forth the employee's name, address, and taxpayer identifying number, and certifying (i) that he is not a citizen or resident of the United States, (ii) that he is a resident of Canada or Mexico, as the case may be, and (iii) that he expects to meet the requirements of paragraph (c)(1) or (2) of this section with respect to remuneration to be paid during the taxable year in respect of which the statement is filed. The statement shall be dated, shall identify the taxable year to which it relates, shall be signed by the employee, and shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. No particular form is prescribed for this statement. The duplicate copy of each statement filed during any calendar year pursuant to this paragraph shall be forwarded by the employer with, and attached to, the Form 1042S required by paragraph (c) of § 1.1461–2 with respect to such remuneration for such calendar year.

(d) *Remuneration for services performed by residents of Puerto Rico.* (1) Remuneration paid for services performed in Puerto Rico by a nonresident alien individual who is a resident of Puerto Rico for an employer (other than the United States or any agency thereof) is excepted from wages and hence is not subject to withholding.

(2) Remuneration paid for services performed outside the United States but not in Puerto Rico by a nonresident alien individual who is a resident of Puerto Rico for an employer (other than the United States or any agency thereof) is excepted from wages and hence is not subject to withholding if such individual does not expect to be a resident of Puerto Rico during the entire taxable year. In order for the exception provided by this subparagraph to apply for any taxable year, the nonresident alien employee must furnish

his employer a statement for the taxable year setting forth the employee's name and address and certifying (i) that he is not a citizen or resident of the United States and (ii) that he is a resident of Puerto Rico but does not expect to be a resident of Puerto Rico during the entire taxable year. The statement shall be dated, shall identify the taxable year to which it relates, shall be signed by the employee, and shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. No particular form is prescribed for this statement.

(3) Remuneration paid for services performed outside the United States by a nonresident alien individual who is a resident of Puerto Rico as an employee of the United States or any agency thereof is excepted from wages and hence is not subject to withholding if such individual does not expect to be a resident of Puerto Rico during the entire taxable year. In order for the exception provided by this subparagraph to apply for any taxable year, the nonresident alien employee must furnish his employer a statement for the taxable year setting forth the employee's name and address and certifying (i) that he is not a citizen or resident of the United States and (ii) that he is a resident of Puerto Rico but does not expect to be a resident of Puerto Rico during the entire taxable year. This statement shall be dated, shall identify the taxable year to which it relates, shall be signed by the employee, and shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. No particular form is prescribed for this statement.

(e) *Income exempt from income tax.* Remuneration paid for services performed within the United States by a nonresident alien individual is excepted from wages and hence is not subject to withholding if such remuneration is, or will be, exempt from the income tax imposed by chapter 1 of the Code by reason of a provision of the Internal Revenue Code or an income tax convention to which the United States is a party. In order for the exception provided by this paragraph to apply for any taxable year, the nonresident alien employee must furnish his employer a statement in duplicate for the taxable year setting forth the employee's name, address, and taxpayer identifying number, and certifying (1) that he is not a citizen or resident of the United States, (2) that the remuneration to be paid to him during the taxable year is, or will be, exempt from the tax imposed by chapter 1 of the Code, and (3) the reason why such remuneration is so exempt from tax. If the remuneration is claimed to be exempt from tax by reason of a provision of an income tax convention to which the United States is a party, the statement shall also indicate the provision and tax convention under which the exemption is claimed, the country of which the employee is a resident, and sufficient facts to justify the claim to exemption. The statement shall be dated, shall identify the taxable year for which it is to apply and the remuneration to which it relates, shall be signed by the employee, and shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. No particular form is prescribed for this statement. The duplicate copy of each statement filed during any calendar year pursuant to this paragraph shall be forwarded by the employer with, and attached to, the Form 1042S required by paragraph (c) of § 1.1461–2 with respect to such remuneration for such calendar year.

(Secs. 1441(c)(4) (80 Stat. 1553; 26 U.S.C. 1441(c)(4)), 3401(a)(6) (80 Stat. 1554; 26 U.S.C. 3401(a)(6)), and 7805 (68A Stat. 917; 26 U.S.C. 7805) of the Internal Revenue Code of 1954)

[T.D. 6908, 31 FR 16775, Dec. 31, 1966, as amended by T.D. 7670, 45 FR 6932, Jan. 31, 1980; T.D. 7977, 49 FR 36836, Sept. 20, 1984]

§ 31.3401(a)(6)–1A Remuneration for services of certain nonresident alien individuals paid before January 1, 1967.

(a) Except in the case of certain nonresident alien individuals who are residents of Canada, Mexico, or Puerto Rico or individuals who are temporarily present in the United States as nonimmigrants under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, remuneration for services performed by nonresident alien individuals does not constitute wages subject to withholding under

section 3402. For withholding of income tax on remuneration paid for services performed within the United States in the case of nonresident alien individuals generally, see § 1.1441–1 and following of this chapter (Income Tax Regulations).

(b) Remuneration paid to nonresident aliens who are residents of a contiguous country (Canada or Mexico) and who enter and leave the United States at frequent intervals is not excepted from wages under section 3401(a)(6). See, however, § 31.3401(a)(7)–1, relating to remuneration paid to such nonresident alien individuals when engaged in transportation service.

(c) Remuneration paid to a nonresident alien individual for services performed in Puerto Rico for an employer (other than the United States or any agency thereof) is excepted from wages and hence is not subject to withholding, even though such alien individual is a resident of Puerto Rico at the time when such services are performed. Wages paid for services performed by a nonresident alien individual who is a resident of Puerto Rico are subject to withholding if such services are performed as an employee of the United States or any agency thereof. The place of performance of such services is immaterial, provided such alien individual is a resident of Puerto Rico at the time of performance of the services. Wages representing retirement pay for services in the Armed Forces of the United States, the Coast and Geodetic Survey, or the Public Health Service, or a disability annuity paid under the provisions of section 831 of the Foreign Service Act of 1946, as amended (22 U.S.C. 1081; 60 Stat. 1021), are subject to withholding, under the limitations specified in paragraph (b)(1)(ii) of § 31.3401(a)–1, in the case of an alien resident of Puerto Rico.

(d) (1) Remuneration paid after 1961 to 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, is not excepted from wages under section 3401(a)(6) if the remuneration is exempt from withholding under section 1441(a) by reason of section 1441(c)(4)(B) and is not exempt from taxation under section 872(b)(3). See §§ 1.872–2 and 1.1441–4 of this chapter (Income Tax Regulations). A nonresident alien individual who is temporarily present in the United States as a nonimmigrant under 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) 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 (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—

* * * * *

(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.

(e) This section shall not apply with respect to remuneration paid after December 31, 1966. For rules with respect to such remuneration see § 31.3401(a)(6)–1.

[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. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6654, 28 FR 5251, May 28, 1963; T.D. 6727, 29 FR 5869, May 5, 1964; T.D. 6908, 31 FR 16775, Dec. 31, 1966]

§ 31.3401(a)(7)–1 Remuneration paid before January 1, 1967, for services performed by nonresident alien individuals who are residents of a contiguous country and who enter and leave the United States at frequent intervals.

(a) *Transportation service.* Remuneration paid to nonresident aliens who are residents of a contiguous country (Canada or Mexico) and who, in the performance of their duties in transportation service between points in the United States and points in a contiguous country, enter and leave the United States at frequent intervals, is excepted from wages and hence is not subject to withholding. This exception applies to personnel engaged in railroad, bus, ferry, steamboat, and aircraft services and applies whether the employer is a domestic or foreign entity. Thus, the remuneration of a nonresident alien individual who is a resident of Canada and an employee of a domestic railroad, for services as a member of the crew of a train operating between points in Canada and points in the United States, is not subject to withholding under section 3402.

(b) *Service on international projects.* Remuneration paid to nonresident aliens who are residents of a contiguous country (Canada or Mexico) and who, in the performance of their duties in connection with the construction, maintenance or operation of a waterway, viaduct, dam, or bridge traversed by or traversing the boundary between the United States and Canada or the boundary between the United States and Mexico, as the case may be, enter and leave the United States at frequent intervals, is excepted from wages and hence is not subject to withholding. Thus, the remuneration of a nonresident alien individual who is a resident of Canada, for services as an employee in connection with the construction, maintenance, or operation of the Saint Lawrence Seaway and who, in the performance of such services, enters and leaves the United States at frequent intervals, is not subject to withholding under section 3402.

(c) *Limitation on application of section.* The exception provided by this section has no application to the remuneration of a resident of Canada or of Mexico who is employed wholly within the United States as, for example, where such a resident is employed to perform service at a fixed point or points in the United States, such as a factory, store, office, or designated area or areas within the United States, and who commutes from his home in Canada or Mexico in the pursuit of his employment within the United States.

(d) *Certificate required.* In order for the exception to apply, the nonresident alien employee must furnish his employer a statement setting forth the employee's name and address and certifying (1) that he is not a citizen of the United States, (2) that he is a resident of Canada or Mexico, as the case may be, and (3) the approximate period of time during which he has had such status. Such statement shall be dated, shall be signed by the employee, and shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. No particular form is prescribed for this statement.

(e) *Effective date.* This section shall not apply with respect to remuneration paid after December 31, 1966. For rules with respect to such remuneration see § 31.3401(a)(6)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6908, 31 FR 16776, Dec. 31, 1966]

§ 31.3401(a)(8)(A)–1 Remuneration for services performed outside the United States by citizens of the United States.

(a) *Remuneration excluded from gross income under section 911.* (1) (i) Remuneration paid for services performed outside the United States for an employer (other than the United States or any agency thereof) by a citizen of the United States does not constitute

wages and hence is not subject to withholding, if at the time of payment it is reasonable to believe that such remuneration will be excluded from gross income under the provisions of section 911. 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 the remuneration is excludable from gross income under the provisions of section 911. The reasonable belief shall be based upon the application of section 911 and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations).

(ii) Remuneration paid by an employer to an employee constitutes wages, and hence is subject to withholding only to the extent that the remuneration is expected to exceed the aggregate amount which is excludable from the employee's gross income under section 911(a). For amounts paid after December 31, 1984, the determination of the amount subject to withholding shall be made by applying the excludable amount, on a pro rata basis, to each payment of remuneration to the employee. For this purpose, an employer is not required to ascertain information with respect to amounts received by his employee from any other source; but, if the employer has such information, he shall take it into account in determining whether the earned income of the employee is in excess of the applicable limitation. For purposes of section 911(d)(5) and §1.911–2(c), relating to an employee who states to the authorities of a foreign country that he is not a resident of that country, the employer is not required to ascertain whether such a statement has been made; but if an employer knows that such a statement has been made, he shall presume that the employee is not a bona fide resident of that country, unless the employer also knows that the authorities of the foreign country have determined, notwithstanding the statement that the employee is a resident of that country. For purposes of section 911(d)(1) or §1.911–2(a) relating to the definition of a qualified individual, the reasonable belief contemplated by the statute may be based on a presumption as set forth in subparagraph (2) or (3) of this paragraph. For purposes of sections 911(a)(2) and 911(c)(2) and §1.911–4(b) and (d)(1), relating to the housing cost amount exclusion and the definition of housing expenses, the reasonable belief contemplated by the statute may be based on the presumption set forth in subparagraph (4) of this paragraph.

(2)(i) The employer may, in the absence of cause for a reasonable belief to the contrary, presume that an employee will maintain a tax home in a foreign country or countries and be a bona fide resident of a foreign country or countries, within the meaning of section 911(d)(1), for an uninterrupted period which includes each taxable year of the employee, or applicable portion thereof, in respect of which the employee properly executes and delivers to the employer a statement that the employee meets or will meet the requirement of §1.911–2(a) relating to maintaining a tax home and a bona fide residence in a foreign country for the taxable year. This statement must set forth the facts alleged as the basis for this determination and contain a declaration by the employee that the statement is made under the penalties of perjury. Sample forms of acceptable statements may be obtained by writing to the Foreign Operations District, Internal Revenue Service, Washington, D.C. 20225 (Form IO–673).

(ii) If the employer was entitled to presume for the two consecutive taxable years immediately preceding an employee's current taxable year that such employee was a bona fide resident of a foreign country or countries for an uninterrupted period which includes such preceding taxable years, he may, if such employee is residing in a foreign country on the first day of such current taxable year, presume, in the absence of cause for a reasonable belief to the contrary, and without obtaining from the employee the statement prescribed in subdivision (i) of this subparagraph, that the employee will be a bona fide resident of a foreign country or countries in such current taxable year.

(3) The employer may, in the absence of cause for a reasonable belief to the contrary, presume that an employee will maintain a tax home in a foreign country or countries and be present in a foreign country or countries during at least 330 full days during any period of twelve consecutive months, within the meaning of section 911(d)(1), and that such period includes each taxable year of the employee, or applicable portion thereof, in respect of which the employee properly executes and delivers to the employer a statement that the employee meets or will meet the requirements of § 1.911–2(a) relating to maintaining a tax home and being physically present in a foreign country for the taxable year. This statement must set forth the facts alleged as the basis for this determination and contain a declaration by the employee that the statement is made under the penalties of perjury. Sample forms of acceptable statements may be obtained by writing to the Foreign Operations District, Internal Revenue Service, Washington, D.C. 20225 (Form IO–673).

(4) The employer may, in the absence of cause for a reasonable belief to the contrary, presume that an employee's housing cost amount will be the amount shown on a statement properly executed and delivered to the employer. This statement must set forth the employee's estimation of the following items: housing expenses (as defined in § 1.911–4(b)), the housing cost amount exclusion (as defined in § 1.911–4(d)(1)), and the qualifying period (as defined in § 1.911–2(a)). The statement must contain a declaration by the employee that it is made under the penalties of perjury. Sample forms of acceptable statements may be obtained by writing to the Foreign Operations District, Internal Revenue Service, Washington, D.C. 20225 (IO–673). The employer may not rely on a statement from an employee if the employer, based on his or her knowledge of housing costs in the vicinity of the employee's tax home (as defined in § 1.911–2(b)), believes the employee's housing expenses are lavish or extravagant under the circumstances.

(b) *Remuneration subject to withholding of income tax under law of a foreign country or a possession of the United States.* (1) Remuneration paid for services performed in a foreign country or in a possession of the United States for an employer (other than the United States or any agency thereof) by a citizen of the United States does not constitute wages and hence is not subject to withholding, if at the time of the payment of such remuneration the employer is required by the law of any foreign country or of any possession of the United States to withhold income tax upon such remuneration. This paragraph, insofar as it relates to remuneration paid for services performed in a possession of the United States, applies only with respect to remuneration paid on or after August 9, 1955.

(2) Remuneration is not exempt from withholding under this paragraph if the employer is not required by the law of a foreign country or of a possession of the United States to withhold income tax upon such remuneration. Mere agreements between the employer and the employee whereby the estimated income tax of a foreign country or of a possession of the United States is withheld from the remuneration in anticipation of actual liability under the law of such country or possession will not suffice.

(3) The exemption from withholding provided by this paragraph does not apply by reason of withholding of income tax pursuant to the law of a territory of the United States, of a political subdivision of a possession of the United States, or of a political subdivision of a foreign state.

(4) For provisions relating to remuneration for services performed by a permanent resident of the Virgin Islands, see paragraph (b)(12) of § 31.3401(a)–1.

(c) *Limitation on application of section.* This section has no application to the remuneration paid to a citizen of the United States for services performed

outside the United States as an employee of the United States or any agency thereof.

(Approved by the Office of Management and Budget under control number 1545—0067)

(Sec. 911, 95 Stat. 194; 26 U.S.C. 911), sec. 7805 (68A Stat. 917; 26 U.S.C. 7805) of the Internal Revenue Code of 1954)

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6697, 28 FR 13745, Dec. 17, 1963; T.D. 8006, 50 FR 2977, Jan. 23, 1985]

§ 31.3401(a)(8)(B)–1 Remuneration for services performed in possession of the United States (other than Puerto Rico) by citizen of the United States.

(a) Remuneration paid for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within a possession of the United States (other than Puerto Rico) does not constitute wages and hence is not subject to withholding, 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. The reasonable belief contemplated by section 3401(a)(8)(B) 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 at least 80 percent of the remuneration paid by the employer to the employee during the calendar year was for services performed within such a possession of the United States.

(b) This section has no application to remuneration paid to a citizen of the United States for services performed in any possession of the United States as an employee of the United States or any agency thereof.

(c) For provisions relating to remuneration for services performed by a permanent resident of the Virgin Islands, see paragraph (b)(12) of § 31.3401(a)–1.

§ 31.3401(a)(8)(C)–1 Remuneration for services performed in Puerto Rico by citizen of the United States.

(a) Remuneration paid for services performed within Puerto Rico for an employer (other than the United States or any agency thereof) by a citizen of the United States does not constitute wages and hence is not subject to withholding, if it is reasonable to believe that during the entire calendar year the employee will be a bona fide resident of Puerto Rico. The reasonable belief contemplated by section 3401(a)(8)(C) 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 the employee was a bona fide resident of Puerto Rico for the entire calendar year.

(b) The employer may, in the absence of cause for a reasonable belief to the contrary, presume that an employee will be a bona fide resident of Puerto Rico during the entire calendar year.

(1) Unless the employee is known by the employer to have maintained his abode at a place outside Puerto Rico at some time during the current or the preceding calendar year; or

(2) In any case where the employee files with the employer a statement (containing a declaration under the penalties of perjury that such statement is true to the best of the employee's knowledge and belief) that such employee has at all times during the current calendar year been a bona fide resident of Puerto Rico and that he intends to remain a bona fide resident of Puerto Rico during the entire remaining portion of such current calendar year.

(c) This section has no application to remuneration paid to a citizen of the United States for services performed in Puerto Rico as an employee of the United States or any agency thereof.

§ 31.3401(a)(9)–1 Remuneration for services performed by a minister of a church or a member of a religious order.

(a) *In general.* Remuneration paid 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, is excepted from wages and hence is not subject to withholding.

(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 tenents 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 tenents 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 subdivision (i) of this subparagraph 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 3401(a)(9) does not except from wages remuneration for 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 (b)(3) of this section.

(ii) The rule in subdivision (i) of this subparagraph 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 collection of income tax at source on wages, even though such service may involve the ministration of sacerdotal functions 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.

§ 31.3401(a)(10)–1 Remuneration for services in delivery or distribution of newspapers, shopping news, or magazines.

(a) *Services of individuals under age 18.* Remuneration for 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, is excepted from wages and hence is not subject to withholding. Thus, remuneration for 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, is excepted from wages. The remuneration is excepted irrespective of the form or method thereof. Remuneration for incidental services by the employee who makes the house-to-house delivery, such as services in assembling newspapers, is 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.* Remuneration for 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 remuneration being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, is excepted from wages and hence is not subject to withholding. The remuneration is excepted whether or not the employee is guaranteed a minimum amount or remuneration, or is entitled to be credited with the unsold newspapers or magazines turned back. Moreover, the remuneration is excepted without regard to the

age of the employee. Remuneration for services performed other than at the time of sale to the ultimate consumer is not within the exception. Thus, remuneration for services of a regional distributor which are antecedent to but not immediately part of the sale to the ultimate consumer is not within the exception. However, remuneration for 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, is considered to be within the exception.

§ 31.3401(a)(11)–1 Remuneration other than in cash for service not in the course of employer's trade or business.

(a) Remuneration paid in any medium other than cash for services not in the course of the employer's trade or business is excepted from wages and hence is not subject to withholding. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any medium other than cash, such as lodging, food, or other goods or commodities, for services not in the course of the employer's trade or business does not constitute wages. Remuneration paid in any medium other than cash for other types of services does not come within this exception from wages. For provisions relating to cash remuneration for service not in the course of employer's trade or business, see § 31.3401(a)(4)–1.

(b) As used in this section, the term ''services not in the course of the employer's trade or business'' has the same meaning as when used in § 31.3401(a)(4)–1.

§ 31.3401(a)(12)–1 Payments from or to certain tax-exempt trusts, or under or to certain annuity plans or bond purchase plans, or to individual retirement plans.

(a) *Payments from or to certain taxexempt 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. Also, since supplemental unemployment compensation benefits are treated under paragraph (b) (14) of § 31.3401 (a)–1 as if they were wages for purposes of this chapter, this section does not apply to such benefits.

(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).

(d) *Payment to individual retirement plans.* (1) The term ''wages'' does not include any payment to an individual retirement plan described in section 7701(a)(37) by an employer after December 31, 1974, on behalf of an employee, if, at the time of such payment, it is reasonable for the employer to believe

that the employee will be entitled to a deduction for such payment under section 219(a).

(2) The term ''wages'' does not include any payment to an individual retirement plan described in section 7701(a)(37) by an employer after December 31, 1976, on behalf of an employee, if, at the time of such payment, it is reasonable for the employer to believe that the employee on whose behalf the payment is made will be entitled to a deduction for such payment under section 220(a).

(3) The term ''wages'' does not include any payment to a simplified employee pension arrangement described in section 408(k) by an employer after December 31, 1978, on behalf of an employee, if, at the time of such payment, it is reasonable for the employer to believe that the employee on whose behalf the payment is made will be entitled to a deduction for such payment under section 219(a).

[T.D. 6654, 28 FR 5252, May 28, 1963, as amended by T.D. 7068, 35 FR 17329, Nov. 11, 1970; T.D. 7730, 45 FR 72652, Nov. 3, 1980]

§ 31.3401(a)(13)–1 Remuneration for services performed by Peace Corps volunteers.

(a) Remuneration paid after September 22, 1961, for services performed as a volunteer or volunteer leader within the meaning of the Peace Corps Act (22 U.S.C. 2501) is excepted from wages, and hence is not subject to withholding, unless the remuneration is paid pursuant to section 5(c) or section 6(1) of the Peace Corps Act.

(b) Sections 5 and 6 of the Peace Corps Act (22 U.S.C. 2504, 2505) provide, in part, as follows:

Sec. 5 *Peace Corps Volunteers* [Peace Corps Act (75 Stat. 613); as amended by sec. 2(b), Act of December 13, 1963 (P.L. 88–200, 77 Stat. 359); sec. 2(a), Act of August 24, 1965, (P.L. 89–134, 79 Stat. 549); sec. 3(a), Act of July 24, 1970 (P.L. 91–352, 84 Stat. 464)]

* * * * *

(c) *Readjustment allowances.* Volunteers shall be entitled to receive a readjustment allowance at a rate not to exceed $75 for each month of satisfactory service as determined by the President; except that, in the cases of volunteers who have one or more minor children at the time of their entering a period of pre-enrollment training, one parent shall be entitled to receive a readjustment allowance at a rate not to exceed $125 for each month of satisfactory service as determined by the President. The readjustment allowance of each volunteer shall be payable on his return to the United States: *Provided, however,* That, under such circumstances as the President may determine, the accrued readjustment allowance, or any part thereof, may be paid to the volunteer, members of his family or others, during the period of his service, or prior to his return to the United States. In the event of the volunteer's death during the period of his service, the amount of any unpaid readjustment allowance shall be paid in accordance with the provisions of section 5582(b) of Title 5. For purposes of the Internal Revenue Code of 1954, a volunteer shall be deemed to be paid and to receive each amount of a readjustment allowance to which he is entitled after December 31, 1964, when such amount is transferred from funds made available under this chapter to the fund from which such readjustment allowance is payable.

* * * * *

Sec. 6 Peace Corps Volunteer Leaders; number; applicability of chapter; benefits [Peace Corps Act (75 Stat. 615), as amended by sec. 3, Act of December 13, 1963 (P.L. 88–200, 77 Stat. 360)] The President may enroll in the Peace Corps qualified citizens or nationals of the United States whose services are required for supervisory or other special duties or responsibilities in connection with programs under this chapter (referred to in this Act as ''volunteer leaders''). The ratio of the total number of volunteer leaders to the total number of volunteers in service at any one time shall not exceed one to twenty-five. Except as otherwise provided in this Act, all of the provisions of this Act applicable to volunteers shall be applicable to volunteer leaders, and the term ''volunteers'' shall include ''volunteer leaders'': *Provided, however,* That—

(1) Volunteer leaders shall be entitled to receive a readjustment allowance at a rate not to exceed $125 for each month of satisfactory service as determined by the President;

[T.D. 6654, 28 FR 5252, May 28, 1963, as amended by T.D. 7493, 42 FR 33729, July 1, 1977]

§ 31.3401(a)(14)–1 Group-term life insurance.

(a) The cost of group-term life insurance on the life of an employee is excepted from wages, and hence is not subject to withholding. For provisions relating generally to such remuneration, and for reporting requirements with respect to such remuneration, see

sections 79 and 6052, respectively, and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations).

(b) The cost of group-term life insurance on the life of an employee's spouse or children is not subject to withholding if it is excludable from the employee's gross income because it is merely incidental. See paragraph (d)(2)(ii)(*b*) of § 1.61–2 in Part 1 of this chapter (Income Tax Regulations).

[T.D. 7493, 42 FR 33730, July 1, 1977]

§ 31.3401(a)(15)–1 Moving expenses.

(a) An amount paid to or on behalf of an employee after March 4, 1964, either as an advance or a reimbusement, specifically for moving expenses incurred or expected to be incurred is excepted from wages, and hence is not subject to withholding, 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. See § 1.6041–2(a) in Part 1 of this chapter (Income Tax Regulations), relating to return of information as to payments to employees, and § 31.6051–1(e), relating to the reporting of reimbursements of or payments of certain moving expenses.

(b) Except as otherwise provided in paragraph (a) of this section, or in a numbered paragraph of section 3401(a), amounts paid to or on behalf of an employee for moving expenses constitute wages subject to withholding.

[T.D. 7493, 42 FR 33730, July 1, 1977]

§ 31.3401(a)(16)–1 Tips.

Tips paid to an employee are excepted from wages and hence not subject to withholding 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.

However, if the cash tips received by an employee in a calendar month 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 excepted from 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 § 31.3401(f)–1. For provisions relating to the treatment of tips received by an employee prior to 1966, see paragraph (b)(11) of § 31.3401(a)–1.

[T.D. 7001, 34 FR 1001, Jan. 23, 1969]

§ 31.3401(a)(17)–1 Remuneration for services performed on a boat engaged in catching fish.

(a) Remuneration for services 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'') is excepted from wages and hence is not subject to withholding if—

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

(2) 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,

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

(4) 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.

(b) The requirement of paragraph (a)(2) of this section 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 union contract, 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 as a share of the catch and are not excepted from employment by section 3121(b)(20).

(c) 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.

(d) 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.

[T.D. 7716, 45 FR 57124, Aug. 27, 1980]

§31.3401(a)(18)–1 Payments or benefits under a qualified educational assistance program.

A payment made, or benefit furnished, to or for the benefit of an employee in a taxable year beginning after December 31, 1978, does not constitute wages and hence is not subject to withholding 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]

§31.3401(a)(19)–1 Reimbursements under a self-insured medical reimbursement plan.

Amounts reimbursed to or on behalf of an employee after December 31, 1979, as a medical care reimbursement under a self-insured medical reimbursement plan (within the meaning of section 105(h)(6)) do not constitute wages and hence are not subject to withholding even though such reimbursement is includible in the gross income of an employee. For rules with respect to self-insured medical reimbursement plans, see section 105(h) and §1.105–11 of this Chapter (Income Tax Regulations).

(Secs. 105(h) and 7805 Internal Revenue Code of 1954; 94 Stat. 2855, 68A Stat. 917 (26 U.S.C. 105(h) and 7805))

[T.D. 7754, 46 FR 3509, Jan. 15, 1981. Redesignated by T.D. 7898, 48 FR 31019, July 6, 1983]

§31.3401(b)–1 Payroll period.

(a) The term *payroll period* means the period of service for which a payment of wages is ordinarily made to an employee by his employer. It is immaterial that the wages are not always paid at regular intervals. For example, if an employer ordinarily pays a particular employee for each calendar week at the end of the week, but if for some reason the employee in a given week 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 payroll period is still the calendar week; or if, instead, that employee is sent on a 3-week trip by his employer and receives at the end of the trip a single wage payment for three weeks' services, the payroll period is still the calendar week, and the wage payment shall be treated as though it were three separate weekly wage payments.

(b) For the purpose of section 3402, an employee can have but one payroll period with respect to wages paid by any one employer. Thus, if an employee is paid a regular wage for a weekly payroll period and in addition thereto is

paid supplemental wages (for example, bonuses) determined with respect to a different period, the payroll period is the weekly payroll period. For computation of tax on supplemental wage payments, see § 31.3402(g)–1.

(c) The term *payroll period* also means the period of accrual of supplemental unemployment compensation benefits for which a payment of such benefits is ordinarily made. Thus if benefits are ordinarily accrued and paid on a monthly basis, the payroll period is deemed to be monthly.

(d) The term *miscellaneous payroll period* means a payroll period other than a daily, weekly, biweekly, semi-monthly, monthly, quarterly, semiannual, or annual payroll period.

[T.D. 6516, 25 FR 13096, Dec. 20, 1960, as amended by T.D. 7068, 35 FR 17329, Nov. 11, 1970]

§ 31.3401(c)–1 Employee.

(a) The term *employee* includes every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee. The term includes officers and employees, whether elected or appointed, of the United States, a State, Territory, Puerto Rico, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing.

(b) Generally the relationship of employer and employee 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 not an employee.

(c) Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are not employees.

(d) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(e) 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.

(f) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers and other supervisory personnel are employees. 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 not considered to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(g) The term *employee* includes every individual who receives a supplemental unemployment compensation benefit which is treated under paragraph (b)(14) of § 31.3401(a)–1 as if it were wages.

(h) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, that the remuneration paid for such services

does not constitute wages within the meaning of section 3401(a).

[T.D. 6516, 25 FR 13096, Dec. 20, 1960, as amended by T.D. 7068, 35 FR 17329, Nov. 11, 1970]

§ 31.3401(d)–1 Employer.

(a) The term *employer* means any person for whom an individual performs or performed any service, of whatever nature, as the employee of such person.

(b) It is not necessary that the services be continuing at the time the wages are paid in order that the status of employer exist. Thus, for purposes of withholding, a person for whom an individual has performed past services for which he is still receiving wages from such person is an *employer*.

(c) 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 or on behalf of the trust or estate, is generally the employer.

(d) The term *employer* embraces not only individuals and organizations engaged in trade or business, but organizations exempt from income tax, such as religious and charitable organizations, educational institutions, clubs, social organizations and societies, as well as the governments of the United States, the States, Territories, Puerto Rico, and the District of Columbia, including their agencies, instrumentalities, and political subdivisions.

(e) The term *employer* also means (except for the purpose of the definition of *wages*) any 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 (including Puerto Rico as if a part of the United States).

(f) If the person for whom the services are or were performed does not have legal control of the payment of the wages for such services, the term *employer* means (except for the purpose of the definition of *wages*) the person having such control. For example, where wages, such as certain types of pensions or retired pay, are paid by a trust and the person for whom the services were performed has no legal control over the payment of such wages, the trust is the *employer*.

(g) The term *employer* also means a person making a payment of a supplemental unemployment compensation benefit which is treated under paragraph (b)(14) of § 31.3401(a)–1 as if it were wages. For example, if supplemental unemployment compensation benefits are paid from a trust which was created under the terms of a collective bargaining agreement, the trust shall generally be deemed to be the employer. However, if the person making such payment is acting solely as an agent for another person, the term *employer* shall mean such other person and not the person actually making the payment.

(h) It is a basic purpose to centralize in the employer the responsibility for withholding, returning, and paying the tax, and for furnishing the statements required under section 6051 and § 31.6051–1. The special definitions of the term *employer* in paragraphs (e), (f), and (g) of this section are designed solely to meet special or unusual situations. They are not intended as a departure from the basic purpose.

[T.D. 6516, 25 FR 13096, Dec. 20, 1960, as amended by T.D. 7068, 35 FR 17329, Nov. 11, 1970]

§ 31.3401(e)–1 Number of withholding exemptions claimed.

(a) 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) of the Internal Revenue Code of 1954 or in effect under section 1622(h) of the Internal Revenue Code of 1939. If no such certificate is in effect, the number of withholding exemptions claimed shall be considered to be zero. The number of withholding exemptions claimed must be taken into account in determining the amount of tax to be deducted and withheld under section 3402, whether the employer computes the tax in accordance with the provisions of subsection (a) or subsection (c) of section 3402.

(b) The employer is not required to ascertain whether or not the number of

withholding exemptions claimed is greater than the number of withholding exemptions to which the employee is entitled. For rules relating to invalid withholding exemption certificates, see § 31.3402(f)(2)–1(e), and for rules relating to required submission of copies of certain withholding exemption certificates to the Internal Revenue Service, see § 31.3402(f)(2)–1(g).

(c) As to the number of withholding exemptions to which an employee is entitled, see § 31.3402(f)(1)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7423, 41 FR 26217, June 23, 1976; T.D. 7682, 45 FR 15526, Mar. 11, 1980; T.D. 7803, 47 FR 3547, Jan. 26, 1982]

§ 31.3401(f)–1 Tips.

(a) *Tips considered wages.* Tips received after 1965 by an employee in the course of his employment are considered to be wages, and thus subject to withholding of income tax at source. For an exception to the rule that tips constitute wages, see §§ 31.3401(a)(16) and 31.3401(a)(16)–1, relating to tips paid in a medium other than cash and cash tips of less than $20. For definition of the term ''employee,'' see §§ 31.3401(c) and 31.3401(c)–1.

(b) *When tips deemed paid.* 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.

[T.D. 7001, 34 FR 1001, Jan. 23, 1969]

§ 31.3402(a)–1 Requirement of withholding.

(a) Section 3402 provides alternative methods, at the election of the employer, for use in computing the amount of income tax to be collected at source on wages. Under the percentage method of withholding (see § 31.3402(b)–1), the employer is required to deduct and withhold a tax computed in accordance with the provisions of section 3402(a). Under the wage bracket method of withholding (see § 31.3402(c)–1), the employer is required to deduct and withhold a tax determined in accordance with the provisions of section 3402(c). The employer may elect to use the percentage method, the wage bracket method, or certain other methods (see § 31.3402(h) (4)–1). Different methods may be used by the employer with respect to different groups of employees.

(b) The employer is required to collect the tax by deducting and withholding the amount thereof from the employee's wages as and when paid, either actually or constructively. 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.

(c) Except as provided in sections 3402 (j) and (k) (see §§ 31.3402(j)–1 and 31.3402(k)–1, relating to noncash remuneration paid to retail commission salesman and to tips received by an employee in the course of his employment, respectively), an employer is required to deduct and withhold the tax notwithstanding the wages are paid in something other than money (for example, wages paid in stocks or bonds; see § 31.3401 (a)–1) and to pay over the tax in money. If wages are paid in property other than money, the employer should make necessary arrangements to insure that the amount of the tax required to be withheld is available for payment in money.

(d) For provisions relating to the circumstances under which tax is required to be deducted and withheld from certain amounts received under accident and health plans, see paragraph (b)(8) of § 31.3401(a)–1.

(e) As a matter of business administration, certain of the mechanical details of the withholding process may be

handled by representatives of the employer. Thus, in the case of an employer having branch offices, the branch manager or other representative may actually, as a matter of internal administration, withhold the tax or prepare the statements required under section 6051. Nevertheless, the legal responsibility for withholding, paying, and returning the tax and furnishing such statements rests with the employer. For provisions relating to statements under section 6051, see § 31.6051–1.

(f) The amount of any tax withheld and collected by the employer is a special fund in trust for the United States. See section 7501.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7001, 34 FR 1001, Jan. 23, 1969; T.D. 7115, 36 FR 9209, May 21, 1971; T.D. 7888, 48 FR 17588, Apr. 25, 1983]

§ 31.3402(b)–1 Percentage method of withholding.

With respect to wages paid after April 30, 1975, the amount of tax to be deducted and withheld under the percentage method of withholding shall be determined under the applicable percentage method withholding table contained in Circular E (Employer's Tax Guide) according to the instructions contained therein.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7915, 48 FR 44073, Sept. 27, 1983]

§ 31.3402(c)–1 Wage bracket withholding.

(a) *In general.* (1) The employer may elect to use the wage bracket method provided in section 3402(c) instead of the percentage method with respect to any employee. The tax computed under the wage bracket method shall be in lieu of the tax required to be deducted and withheld under section 3402(a). With respect to wages paid after July 13, 1968, the correct amount of withholding shall be determined under the applicable wage bracket withholding table contained in the Circular E (Employer's Tax Guide) issued for use with respect to the period in which such wages are paid.

(2) For provisions relating to the treatment of wages paid under accident and health plans and wages paid other than in cash to retail commission salesmen, see paragraph (b)(8) of § 31.3401(a)–1 and § 31.3402(j)–1, respectively.

(b) *Established payroll periods, other than daily or miscellaneous, covered by wage bracket withholding tables.* The wage bracket withholding tables contained in Circular E for established periods other than daily or miscellaneous should be used in determining the tax to be withheld for any such period without reference to the time the employee is actually engaged in the performance of services during such payroll period.

Example 1. On June 30, 1971, employee A is paid wages for a semimonthly payroll period. A has in effect a withholding exemption certificate indicating that he claims two withholding exemptions and that he is married. A's wages are determined at the rate of $2 per hour. During a certain payroll period he works only 24 hours and earns $48. Although A worked only 24 hours during the semimonthly payroll period, the applicable wage bracket withholding table contained in Circular E for a semimonthly payroll period for an employee who is married should be used in determining the tax to be withheld. Under this table it will be found that no tax is required to be withheld from a wage payment of $48 when two withholding exemptions are claimed.

Example 2. On May 14, 1971, employee B is paid wages for a weekly payroll period. B has in effect a withholding exemption certification indicating that he claims one withholding exemption and that he is single. B's wages are determined at the rate of $2 per hour. During a certain payroll period B works 18 hours and earns $36. Although B worked only 18 hours during the weekly payroll period the applicable wage bracket withholding table for a weekly payroll period for an employee who is single should be used in determining the tax to be withheld. Under this table it will be found that $0.50 is the amount of tax to be withheld from a wage payment of $36 when one withholding exemption is claimed.

(c) *Periods to which the tables for a daily or miscellaneous payroll period are applicable*—(1) *In general.* The tables applicable to a daily or miscellaneous payroll period show the tax for employees who are to be withheld from as single persons and for employees who are to be withheld from as married persons

on the amount of wages for one day. Where the withholding is computed under the rules applicable to a miscellaneous payroll period, the wages and the amounts shown in the applicable table must be placed on a comparable basis. This may be accomplished by reducing the wages paid for the period to a daily basis by dividing the total wages by the number of days (including Sundays and holidays) in the period. The amount of the tax shown in the applicable table as the tax required to be withheld from the wages, as so reduced to a daily basis, should then be multiplied by the number of days (including Sundays and holidays) in the period.

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

Example. An individual performs services for a contractor in connection with a construction project. He has in effect a withholding exemption certificate indicating that he claims two withholding exemptions and that he is married. Wages have been fixed at the rate of $36 per day, to be paid upon completion of the project. The project is completed before July 1, 1971, in 12 consecutive days, at the end of which period the individual is paid wages of $360 for 10 days' services performed during the period. Under the wage bracket method the amount to be deducted and withheld from such wages is determined by dividing the amount of the wages ($360) by the number of days in the period (12), the result being $30. The amount of tax required to be withheld is determined under the appropriate table applicable to a miscellaneous payroll period for an employee who is married. Under this table the tax required to be withheld is $47.40 (12 × $3.95).

(3) *Wages paid without regard to any period.* If wages are paid to an employee without regard to any particular period, as, for example, commissions paid to a salesman upon consummation of a sale, the amount of tax to be deducted and withheld shall be determined in the same manner as in the case of a miscellaneous payroll period containing a number of days (including Sundays and holidays) equal to the number of days (including Sundays and holidays) which have elapsed, beginning with the latest of the following days:

(i) The first day after the last payment of wages to such employee by such employer in the calendar year, or

(ii) The date on which such individual's employment with such employer began in the calendar year, or

(iii) January 1 of such calendar year, and ending with (and including) the date on which such wages are paid.

Example. On April 2, 1971, C is employed by the X Real Estate Company to sell real estate on a commission basis, commissions to be paid only upon consummation of sales. C has in effect a withholding exemption certificate indicating that he claims one withholding exemption and that he is not married. On May 22, 1971, C receives a commission of $300, his first commission since April 2, 1971. Again on June 19, 1971, C receives a commission of $420. Under the wage bracket method, the amount of tax to be deducted and withheld in respect of the commission paid on May 22, is $10, which amount is obtained by multiplying $0.20 (tax per day under the appropriate wage bracket table applicable to a daily or miscellaneous payroll period for an employee who is not married where wages are at least $6 but less than $6.25 a day) by 50 (number of days elapsed); and the amount of tax to be withheld with respect to the commission paid on June 19 is $54.60, which amount is obtained by multiplying $1.95 (tax under the appropriate wage bracket table for a daily or miscellaneous payroll period where wages are at least $15 but less than $15.50 a day) by 28 (number of days elapsed).

(d) *Period or elapsed time less than 1 week.* (1) It is the general rule that if wages are paid for a payroll period or other period of less than 1 week, the tax to be deducted and withheld under the wage bracket method shall be the amount computed for a daily payroll period, or for a miscellaneous payroll period containing the same number of days (including Sundays and holidays) as the payroll period, or other period, for which such wages are paid. In the case of wages paid without regard to any period, if the elapsed time computed as provided in paragraph (c) of this section is less than 1 week, the same rule is applicable.

Example 1. On May 14, 1971, an employee who has a daily payroll period is paid wages

of $15 per day. The employee has in effect a withholding exemption certificate indicating that he claims one withholding exemption and that he is not married. Under the applicable table for a daily payroll period for an employee who is not married, the amount of tax to be deducted and withheld from each such payment of wages is $1.95.

Example 2. An employee works for a certain employer on 4 consecutive days for which he is paid wages totalling $60 on July 25, 1971. The employee has in effect a withholding exemption certificate claiming two withholding exemptions and indicating that he is married. The amount of tax to be deducted and withheld under the wage bracket method is $5.60 (4×$1.40).

(2) If the payroll period, other period or elapsed time where wages are paid without regard to any period, is less than one week, the employer may, under certain conditions, elect to deduct and withhold the tax determined by the application of the wage table for a weekly payroll period to the aggregate of the wages paid to the employee during the calendar week. The election to use the weekly wage table in such cases is subject to the limitations and conditions prescribed in Circular E with respect to employers using the percentage method in similar cases.

(3) As used in this paragraph the term ''calendar week'' means a period of seven consecutive days beginning with Sunday and ending with Saturday.

(e) *Rounding off of wage payment.* In determining the amount to be deducted and withheld under the wage bracket method the wages may, at the election of the employer, be computed to the nearest dollar, provided such wages are in excess of the highest wage bracket of the applicable table. 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 $1.00. Thus, if the payroll period of an employee is weekly and the wage payment of such employee is $255.49, the employer may compute the tax on the excess over $200 as if the excess were $55 instead of $55.49. If the weekly wage payment is $255.50, the employer may, in computing the tax, consider the excess over $200 to be $56 instead of $55.50.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6860, 30 FR 13942, Nov. 4, 1965; T.D. 7115, 36 FR 9215, May 21, 1971; T.D. 7888, 48 FR 17588, Apr. 25, 1983; T.D. 7915, 48 FR 44073, Sept. 27, 1983]

§ 31.3402(d)–1 Failure to withhold.

If the employer in violation of the provisions of section 3402 fails to deduct and withhold the tax, and thereafter the income tax against which the tax under section 3402 may be credited is paid, the tax under section 3402 shall not be collected from the employer. Such payment does not, however, operate to relieve the employer from liability for penalties or additions to the tax applicable in respect of such failure to deduct and withhold. The employer will not be relieved of his liability for payment of the tax required to be withheld unless he can show that the tax against which the tax under section 3402 may be credited has been paid. See § 31.3403–1, relating to liability for tax.

§ 31.3402(e)–1 Included and excluded wages.

(a) If a portion of the remuneration paid by an employer to his employee for services performed during a payroll period of not more than 31 consecutive days constitutes wages, and the remainder does not constitute wages, all the remuneration paid the employee for services performed during such period shall for purposes of withholding be treated alike, that is, either all included as wages or all excluded. The time during which the employee performs services, the remuneration for which under section 3401(a) constitutes wages, and the time during which he performs services, the remuneration for which under such section does not constitute wages, determine whether all the remuneration for services performed during the payroll 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 employer in a payroll period is spent in performing services the remuneration for which consititutes wages, then all

the remuneration paid the employee for services performed in that payroll period shall be deemed to be wages.

(c) If less than one-half of the employee's time in the employ of a particular employer in a payroll period is spent in performing services the remuneration for which constitutes wages, then none of the remuneration paid the employee for services performed in that payroll period shall be deemed to be wages.

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

Example 1. Employer B, who operates a store and a farm, employs A to perform services in connection with both operations. The remuneration paid A for services on the farm is excepted as remuneration for agricultural labor, and the remuneration for services performed in the store constitutes wages. Employee A is paid on a monthly basis. During a particular month, A works 120 hours on the farm and 80 hours in the store. None of the remuneration paid by B to A for services performed during the month is deemed to be wages, since the remuneration paid for less than one-half of the services performed during the month constitutes wages. During another month A works 75 hours on the farm and 120 hours in the store. All of the remuneration paid by B to A for services performed during the month is deemed to be wages since the remuneration paid for one-half or more of the services performed during the month constitutes wages.

Example 2. Employee C is employed as a maid by D, a physician, whose home and office are located in the same building. The remuneration paid C for services in the home is excepted as remuneration for domestic service, and the remuneration paid for her services in the office constitutes wages. C is paid on a weekly basis. During a particular week C works 20 hours in the home and 20 hours in the office. All of the remuneration paid by D to C for services performed during that week is deemed to be wages, since the remuneration paid for one-half or more of the services performed during the week constitutes wages. During another week C works 22 hours in the home and 15 hours in the office. None of the remuneration paid by D to C for services performed during that week is deemed to be wages, since the remuneration paid for less than one-half of the services performed during the week constitutes wages.

(e) The rules set forth in this section do not apply (1) with respect to any remuneration paid for services performed by an employee for his employer if the periods for which remuneration is paid by the employer vary to the extent that there is no period which constitutes a payroll period within the meaning of section 3401(b) (see § 31.3401(b)–1), or (2) with respect to any remuneration paid for services performed by an employee for his employer if the payroll period for which remuneration is paid exceeds 31 consecutive days. In any such case withholding is required with respect to that portion of such remuneration which constitutes wages.

§ 31.3402(f)(1)–1 Withholding exemptions.

(a) *In general.* (1) Except as otherwise provided in section 3402(f)(6) (see § 31.3402(f)(6)–1), an employee receiving wages shall on any day be entitled to withholding exemptions as provided in section 3402(f)(1). In order to receive the benefit of such exemptions, the employee must file with his employer a withholding exemption certificate as provided in section 3402(f)(2). See § 31.3402(f)(2)–1.

(2) The number of exemptions to which an employee is entitled on any day depends upon his status as single or married, upon his status as to old age and blindness, upon the number of his dependents, upon the number of exemptions claimed by his spouse (if he is married), and upon the number of withholding allowances to which he is entitled under section 3402(m).

(b) *Withholding exemptions to which an employee is entitled in respect of himself.* An employee is entitled to one withholding exemption for himself. An employee shall on any day be entitled to an additional withholding exemption for himself if he will have attained the age of 65 before the close of his taxable year which begins in, or with, the calendar year in which such day falls. If the employee is blind, he may claim an additional withholding exemption for blindness. For purposes of claiming a withholding exemption for blindness, an individual shall be considered blind only if his central visual acuity does not exceed 20/200 in the better eye with correcting lenses or if his visual acuity is greater than 20/200 but is accompanied by a limitation in the fields of

vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees. For definition of the term ''blindness'', see section 151(d)(3). An employee may also be entitled under section 3402(m) to withholding exemptions with respect to withholding allowances (see § 31.3402(m)–1).

(c) *Withholding exemptions to which an employee is entitled in respect to his spouse.* (1) A married employee, whose spouse is an employee receiving wages, is entitled to claim any withholding exemption to which his spouse is entitled under paragraph (b) of this section, unless the spouse has in effect a withholding exemption certificate claiming such withholding exemption. A married employee, whose spouse is not an employee receiving wages, is entitled to claim any withholding exemption to which his spouse would be entitled under paragraph (b) of this section if the spouse were an employee receiving wages.

Example 1. Assume that both the husband and wife have attained the age of 65 and are employees receiving wages. Each spouse is entitled under paragraph (b) of this section to claim 2 withholding exemptions in respect of himself or herself. Either spouse may claim, in addition to the withholding exemptions to which he or she is entitled in respect of himself or herself, any withholding exemption to which the other spouse is entitled under such paragraph (b) of this section but does not claim on a withholding exemption certificate.

Example 2. Assume the same facts as in Example 1 except that only the husband is an employee receiving wages. The husband is entitled to claim 4 withholding exemptions, that is, the 2 withholding exemptions to which he is entitled in respect of himself and the 2 withholding exemptions to which his spouse would be entitled under paragraph (b) of this section if she were an employee receiving wages.

(2) In determining the number of withholding exemptions to which an employee is entitled for himself and his spouse on any day, the employee's status as a single person or a married person and, if married, whether a withholding exemption is claimed by his spouse, shall be determined as of such day. However, in the case of an employee whose spouse dies in the taxable year of the employee which begins in, or with, the calendar year in which the spouse dies, any withholding exemption which would be allowable to the employee in respect of such spouse, if living and not an employee receiving wages, may be claimed by the employee for that portion of the calendar year which occurs after his spouse's death. For provisions applicable in the case of an employee whose taxable year is not a calendar year, and whose spouse dies in that portion of the calendar year which precedes the first day of the taxable year of the employee which begins in the calendar year, see paragraph (b) of § 31.3402(f)(2)–1. An employee legally separated from his spouse under a decree of divorce or of separate maintenance or an employee who is a surviving spouse (as defined in section 2 and the regulations thereunder) shall not be entitled to any withholding exemptions in respect of his spouse.

(d) *Withholding exemptions to which an employee is entitled in respect of dependents.* Subject to the limitations stated in this paragraph, an employee shall be entitled on any day to a withholding exemption for each individual who may reasonably be expected to be his dependent for his taxable year beginning in, or with, the calendar year in which such day falls. For purposes of the withholding exemption for an individual who may reasonably be expected to be a dependent, the following rules shall apply:

(1) The determination that an individual may or may not reasonably be expected to be a dependent shall be made on the basis of facts existing at the beginning of the day for which a withholding exemption for such individual is to be claimed. The individual in respect of whom an exemption is claimed by an employee must, on the day in question, be in existence and be within one of the categories listed in section 152(a), which defines the term ''dependent''. However, a withholding exemption for a dependent who dies continues for the portion of the calendar year which occurs after the dependent's death, except that, in the case of an employee whose taxable year is not a calendar year, the withholding exemption does not continue for a dependent, within the meaning of section

152(a) (9) or (10), whose death occurs before the first day of the employee's taxable year beginning in the calendar year of death.

(2) The determination that an individual may or may not reasonably be expected to be a dependent shall be made for the taxable year of the employee in respect of which amounts deducted and withheld in the calendar year in which the day in question falls are allowed as a credit. In general, amounts deducted and withheld during any calendar year are allowed as a credit against the tax imposed by chapter 1 of the Code for the taxable year which begins in, or with, such calendar year. Thus, in order for an employee to be able to claim for a calendar year a withholding exemption with respect to a particular individual as a dependent there must be a reasonable expectation that the employee will be allowed an exemption with respect to such individual under section 151(e) for his taxable year which begins in, or with, such calendar year.

(3) For the employee to be entitled on any day of the calendar year to a withholding exemption for an individual as a dependent, such individual must on such day—

(i) Be an individual referred to in one of the numbered paragraphs in section 152(a),

(ii) Reasonably be expected to receive over one-half of his support, within the meaning of section 152, from the employee in the calendar year, and

(iii) Either *(a)* reasonably be expected to have gross income of less than the amount determined pursuant to § 1.151–2 of this chapter (Income Tax Regulations) applicable to the calendar year in which the taxable year of the taxpayer begins, or *(b)* be a child (son, stepson, daughter, stepdaughter, adopted son, or adopted daughter) of the employee who *(1)* will not have attained the age of 19 at the close of the calendar year or *(2)* is a student as defined in section 151.

(4) An employee is not entitled to claim a withholding exemption for an individual otherwise reasonably expected to be a dependent of the employee if such individual is not a citizen of the United States, unless such individual (i) is at any time during the calendar year a resident of the United States (including, in regard to wages paid after February 28, 1979, and individual treated as a resident under section 6013 (g) or (h)) Canada, Mexico, the Canal Zone, or the Republic of Panama, or (ii) is a child of the employee born to him, or legally adopted by him, in the Philippine Islands before January 1, 1956, and the child is a resident of the Republic of the Philippines, and the employee was a member of the Armed Forces of the United States at the time the child was born to him or legally adopted by him.

(e) *Additional withholding exemption to which an employee is entitled in respect of the standard deduction.* After November 30, 1986, an employee is entitled to one additional withholding exemption unless:

(1) The employee is married (as determined under section 143) and the employee's spouse is an employee receiving wages subject to withholding, or

(2) The employee has withholding exemption certificates in effect with respect to more than one employer.

These restrictions do not apply if the combined wages of the employee and the spouse (if any) from other than one employer is less than the amount specified in the instructions to Form W–4 or W–4A (Employee's Withholding Allowance Certificate).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6654, 28 FR 5252, May 28, 1963; T.D. 7065, 35 FR 16539, Oct. 23, 1970; T.D. 7114, 36 FR 9020, May 18, 1971; T.D. 7115, 36 FR 9234, May 21, 1971; T.D. 7670, 45 FR 6932, Jan. 31, 1980; T.D. 7915, 48 FR 44073, Sept. 27, 1983; T.D. 8164, 52 FR 45633, Dec. 1, 1987]

§ 31.3402(f)(2)–1 Withholding exemption certificates.

(a) *On commencement of employment.* On or before the date on which an individual commences employment with an employer, the individual shall furnish the employer with a signed withholding exemption certificate relating to his marital status and the number of withholding exemptions which he claims, which number shall in no event exceed the number to which he is entitled, or, if the statements described in § 31.3402(n)–1 are true with respect to an

individual, he may furnish his employer with a signed withholding exemption certificate which contains such statements. For form and contents of such certificates, see § 31.3402(f)(5)–1. The employer is required to request a withholding exemption certificate from each employee, but if the employee fails to furnish such certificate, such employee shall be considered as a single person claiming no withholding exemptions.

(b) *Change in status which affects calendar year.* (1) If, on any day during the calendar year, the number of withholding exemptions to which the employee is entitled is less than the number of withholding exemptions claimed by him on the withholding exemption certificate then in effect, the employee must within 10 days after the change occurs furnish the employer with a new withholding exemption certificate relating to the number of withholding exemptions which the employee then claims, which must in no event exceed the number to which he is entitled on such day. The number of withholding exemptions to which an employee is entitled decreases, for example, for any one of the following reasons:

(i) The employee's wife (or husband) for whom the employee has been claiming a withholding exemption *(a)* is divorced or legally separated from the employee, or *(b)* claims her (or his) own withholding exemption on a separate certificate.

(ii) In the case of an employee whose taxable year is not a calendar year, the employee's wife (or husband) for whom the employee has been claiming a withholding exemption dies in that portion of the calendar year which precedes the first day of the taxable year of the employee which begins in the calendar year in which the spouse dies.

(iii) The employee finds that no exemption for his taxable year which begins in, or with, the current calendar year will be allowable to him under section 151(e) in respect of an individual claimed as a dependent on the employee's withholding exemption certificate.

(iv) It becomes unreasonable for the employee to believe that his wages for an estimation year will not be more, or that the determinable additional amounts for each item under § 31.3402(m)–1 for an estimation year will not be less, than the corresponding figure used in connection with a claim by him under section 3402 (m) of a withholding allowance to such an extent that the employee would no longer be entitled to such withholding allowance.

(v) It becomes unreasonable for an employee who has in effect a withholding exemption certificate on which he claims a withholding allowance under section 3402(m), computed on the basis of the preceding taxable year, to believe that his wages and the determinable additional amounts for each item under § 31.3402(m)–1 in such preceding taxable year or in his present taxable year will entitle him to such withholding allowance in the present taxable year.

(2) If, on any day during the calendar year, the number of withholding exemptions to which the employee is entitled is more than the number of withholding exemptions claimed by him on the withholding exemption certificate then in effect, the employee may furnish the employer with a new withholding exemption certificate on which the employee must in no event claim more than the number of withholding exemptions to which he is entitled on such day.

(3) If, on any day during the calendar year, the statements described in § 31.3402(n)–1 are true with respect to an employee, such employee may furnish his employer with a withholding exemption certificate which contains such statements.

(4) If, on any day during the calendar year, it is not reasonable for an employee, who has furnished his employer with a withholding exemption certificate which contains the statements described in § 31.3402(n)–1, to anticipate that he will incur no liability for income tax imposed under subtitle A (as defined in § 31.3402(n)–1) for his current taxable year, the employee must within 10 days after such day furnish the employer with a new withholding exemption certificate which does not contain such statements. If, on any day during the calendar year, it is not reasonable for such an employee whose liability for income tax imposed under

subtitle A is determined on a basis other than the calendar year to so anticipate with respect to his taxable year following his current taxable year, the employee must furnish the employer with a new withholding exemption certificate which does not contain such statements within 10 days after such day or on or before the first day of the last month of his current taxable year, whichever is later.

(c) *Change in status which affects next calendar year.* (1) If, on any day during the calendar year, the number of exemptions to which the employee will be, or may reasonably be expected to be, entitled under sections 151 and 3402(m) for his taxable year which begins in, or with, the next calendar year is different from the number to which the employee is entitled on such day, the following rules shall be applicable:

(i) If such number is less than the number of withholding exemptions claimed by the employee on a withholding exemption certificate in effect in such day, the employee must, on or before December 1 of the year in which the change occurs, unless such change occurs in December, furnish his employer with a new withholding exemption certificate reflecting the decrease in the number of withholding exemptions. If the change occurs in December, the new certificate must be furnished within 10 days after the change occurs. The number of exemptions to which an employee is entitled for his taxable year which begins in, or with, the next calendar year decreases, for example, for any of the following reasons:

(a) The spouse or a dependent of the employee dies.

(b) The employee finds that is not reasonable to expect that an individual claimed as a dependent on the employee's withholding exemption certificate will qualify as a dependent of the employee for such taxable year.

(c) It becomes unreasonable for an employee who has in effect a withholding exemption certificate on which he claims a withholding allowance under section 3402(m) to believe that his wages and the determinable additional amounts for each item under § 31.3402(m)–1 for his taxable year which begins in, or with, the next calendar year will entitle him to such withholding allowance for such taxable year.

(ii) If such number is greater than the number of withholding exemptions claimed by the employee on a withholding exemption certificate in effect on such day, the employee may, on or before December 1 of the year in which such change occurs, unless such change occurs in December, furnish his employer with a new withholding exemption certificate reflecting the increase in the number of withholding exemptions. If the change occurs in December, the certificate may be furnished on or after the date on which the change occurs.

(2) If, on any day during the calendar year, it is not reasonable for an employee, who has furnished his employer with a withholding exemption certificate which contains the statements described in § 31.3402(n)–1 and whose liability for such tax is determined on a calendar-year basis, to anticipate that he will incur no liability for income tax imposed under subtitle A (as defined in § 31.3402(n)–1) for his taxable year which begins with the next calendar year, the employee must furnish his employer with a new withholding exemption certificate which does not contain such statements, on or before December 1 of the first-mentioned calendar year. If it first becomes unreasonable for the employee to so anticipate in December, the new certificate must be furnished within 10 days after the day on which it first becomes unreasonable for the employee to so anticipate.

(3) Before December 1 of each year, every employer should request each of his employees to file a new withholding exemption certificate for the ensuing calendar year, in the event of change in the employee's exemption status since the filing of his latest certificate.

(d) *Inclusion of account number on withholding exemption certificate.* Every individual to whom an account number has been assigned shall include such number of any withholding exemption certificate filed with an employer. For provisions relating to the obtaining of an account number, see § 31.6011 (b)–2.

(e) *Invalid withholding exemption certificates.* Any alteration of or unauthorized addition to a withholding exemption certificate shall cause such certificate to be invalid; see paragraph (b) of § 31.3402(f)(5)–1 for the definitions of alteration and unauthorized addition. Any withholding exemption certificate which the employee clearly indicates to be false by an oral statement or by a written statement (other than one made on the withholding exemption certificate itself) made by him to the employer on or before the date on which the employee furnishes such certificate is also invalid. For purposes of the preceding sentence, the term ''employer'' includes any individual authorized by the employer either to receive withholding exemption certificates, to make withholding computations, or to make payroll distributions. If an employer receives an invalid withholding exemption certificate, he shall consider it a nullity for purposes of computing withholding; he shall inform the employee who submitted the certificate that it is invalid, and shall request another withholding exemption certificate from the employee. If the employee who submitted the invalid certificate fails to comply with the employer's request, the employer shall withhold from the employee as from a single person claiming no exemptions (see § 31.3402 (f)(2)–1(a)); if, however, a prior certificate is in effect with respect to the employee, the employer shall continue to withhold in accordance with the prior certificate.

(f) *Applicability of withholding exemption certificate to qualified State individual income taxes.* The withholding exemption certificate shall be use for purposes of withholding with respect to qualified State individual income taxes as well as Federal tax. For provisions relating to the withholding exemption certificate with respect to such State taxes, see paragraph (d)(3)(i) of § 301.6361–1 of this chapter (Regulation on Procedure and Administration).

(g) *Submission of certain withholding certificates*—(1) *General rule.* With respect to withholding exemption certificates received after November 30, 1986, an employer shall submit, in accordance with paragraph (g)(3) of this section, a copy of any withholding exemption certificate, together with a copy of any written statement received from the employee in support of the claims made on the certificate, which is received from the employee during the reporting period (even if the certificate is not in effect at the end of the quarter) if the employee is employed by that employer on the last day of the reporting period and if—

(i) The total number of withholding exemptions (within the meaning of section 3402(f)(1) and the regulations thereunder) claimed on the certificate exceeds 10, or

(ii) The certificate indicates that the employee claims a status exempting the employee from withholding, and the exception provided by paragraph (g)(2) of this section does not apply.

(2) *Exception.* A copy of the certificate shall not be submitted under paragraph (g)(1)(ii) of this section if the employer reasonably expects, at the time the certificate is received, that the employee's wages (under chapter 24 of the Code) from that employer shall not then usually exceed $200 per week.

(3) *Rules for submission*—(i) *In general.* The reporting period is a calendar quarter. Copies required to be submitted under paragraph (g)(1) of this section shall be submitted at the time and place of filing Form 941 or 941E for the reporting period, or Form 941–M for the last month of the reporting period. Form 941, 941E or 941–M shall be used, in accordance with the instructions for the form, to transmit the copies.

(ii) *Option.* At the choice of the employer, copies required to be submitted under paragraph (g)(1) of this section may be submitted earlier and for shorter reporting periods than a calendar quarter. In such case, the employer shall submit the copies to the service center where the employer would file a Form 941 or 941E and shall include with the submission a statement showing the employer's name, address, employer identification number, and the number of copies of withholding exemption certificates submitted. However, in no event shall a copy be submitted later than the time for filing the report required to be submitted for the calendar quarter reporting period under subdivision (i) of this paragraph (g)(3).

(iii) *First report.* The first submission of copies shall include a copy of any certificate required to be submitted under paragraph (g)(1) of this section which is received by the employer on or after April 1, 1980.

(4) *Other withholding exemption certificates.* An employer shall also submit a copy of any currently effective withholding exemption certificate (or make the original certificate available for inspection), together with a copy of any written statement received from the employee in support of the claims made on the certificate, upon written request of the Internal Revenue Service. This request of the Service may relate either to one or more named employees or to one or more reasonably segregable units of the employer. In this regard, the Service may, by written notice, advise the employer that a copy of each new withholding exemption certificate received from one or more named employees, or from one or more reasonably segregable units of the employer, which is required, under this paragraph (g) to be submitted to the Service is to be submitted to the District Director. The employer shall then submit to the District Director a copy of each such new certificate of each such employee immediately after the employer receives the new certificate from the named employee.

(5) *Computation of withholding.* (i) Until receipt of written notice from the Internal Revenue Service that a certificate, a copy of which was submitted under this section, is defective, that certificate is effective and the employer shall withhold on the basis of the statements made in that certificate, unless that certificate must be disregarded under the provisions of paragraph (g)(5)(vi) of this section.

(ii) The Internal Revenue Service may find that a copy of a withholding exemption certificate submitted contains a materially incorrect statement or it may determine, after written request to the employee for verification of the statements on the certificate, that it lacks sufficient information to determine if the certificate is correct. If the Internal Revenue Service so finds or determines and notifies the employer in writing that the certificate is defective, the employer shall then consider the certificate to be defective for purposes of computing amounts of withholding.

(iii) If the Internal Revenue Service notifies the employer that the certificate is defective, the Internal Revenue Service will, based upon its findings, advise the employer that the employee either is not entitled to claim a status exempting the employee from withholding or is not entitled to claim a total number of withholding exemptions in excess of a number specified by the Internal Revenue Service in the notice, or both. The Internal Revenue Service will also specify the Internal Revenue Service office to be contacted for further information.

(iv) The Internal Revenue Service will provide the employer with a copy for the employee of each notice it furnishes to the employer under this paragraph (g)(5) in addition to the notice furnished to the employer for his own use. The Internal Revenue Service will also mail a similar notice to the employee at the address of the employee as shown on the certificate under review.

(v) The employer shall promptly furnish the employee who filed the defective certificate, if still in his employ, with a copy of the written notice of the Internal Revenue Service with respect to the certificate and may request another withholding exemption certificate from the employee. The employer shall withhold amounts from the employee on the basis of the maximum number specified in the written notice received from the Service.

(vi) If and when the employee does file any new certificate (after an earlier certificate of the employee was considered to be defective), the employer shall withhold on the basis of that new certificate (whenever filed) as currently effective only if the new certificate does not make a claim of exempt status or of a number of withholding exemptions which claim is inconsistent with the advice earlier furnished by the Internal Revenue Service in its written notice to the employer. If any new certificate does make a claim which is inconsistent with the advice

contained in the Service's written notice to the employer, then the employer shall disregard the new certificate, shall not submit that new certificate to the Service, and shall continue to withhold amounts from the employee on the basis of the maximum number specified in the written notice received from the Service.

(vii) If the employee makes a claim on any new certificate that is inconsistent with the advice in the Service's written notice to the employer, the employee may specify on such new certificate, or by a written statement attached to that certificate, any circumstances of the employee which have changed since the date of the Service's earlier written notice, or any other circumstances or reasons, as justification or support for the claims made by the employee on the new certificate. The employee may then submit that new certificate and written statement either to (A) the Internal Revenue Service office specified in the notice earlier furnished to the employer under this paragraph (g)(5), or to (B) the employer, who must then submit a copy of that new certificate and the employee's written statement (if any) to the Internal Revenue Service office specified in the notice earlier furnished to the employer. The employer shall continue to disregard that new certificate and shall continue to withhold amounts from the employee on the basis of the maximum number specified in the written notice received from the Service unless and until the Internal Revenue Service by written notice (under paragraph (g)(5)(iii) of this section) advises the employer to withhold on the basis of that new certificate and revokes its earlier written notice.

(6) *Definition of employer.* For purposes of this paragraph (g), the term ''employer'' includes any individual authorized by the employer to receive withholding exemption certificates, to make withholding computations, or to make payroll distributions.

(68A Stat. 731 (26 U.S.C. 6001); 68A Stat. 732 (26 U.S.C. 6011); 68A Stat. 917 (26 U.S.C. 7805))

[T.D. 6516, 25 FR 13105, Dec. 20, 1960, as amended by T.D. 6654, 28 FR 5252, May 28, 1963; T.D. 7048, 35 FR 10291, June 24, 1970; T.D. 7065, 35 FR 16539, Oct. 23, 1970; T.D. 7577, 43 FR 59359, Dec. 20, 1978; T.D. 7598, 44 FR 14552, Mar. 13, 1979; T.D. 7682, 45 FR 15526, Mar. 11, 1980; T.D. 7772, 46 FR 17548, Mar. 19, 1981; T.D. 7803, 47 FR 3547, Jan. 26, 1982; T.D. 7915, 48 FR 44073, Sept. 27, 1983; T.D. 8164, 52 FR 45633, Dec. 1, 1987]

§ 31.3402(f)(3)–1 When withholding exemption certificate takes effect.

(a) A withholding exemption certificate furnished the employer in any case in which no previous withholding exemption certificate is in effect with such employer, shall take effect as of the beginning of the first payroll period ending, or the first payment of wages made without regard to a payroll period, on or after the date on which such certificate is so furnished.

(b) A withholding exemption certificate furnished the employer in any case in which a previous withholding exemption certificate is in effect with such employer shall, except as hereinafter provided, take effect with respect to the first payment of wages made on or after the first status determination date which occurs at least 30 days after the date on which such certificate is so furnished. However, at the election of the employer, except as hereinafter provided, such certificate may be made effective with respect to any payment of wages made on or after the date on which such certificate is so furnished and before such status determination date.

(c) A withholding exemption certificate furnished the employer pursuant to section 3402(f)(2)(C) (see paragraph (c) of § 31.3402(f)(2)–1 or paragraph (b)(2)(ii) of § 31.3402(1)–1) which effects a change for the next calendar year, shall not take effect, and may not be made effective, with respect to the calendar year in which the certificate is

furnished. A withholding exemption certificate furnished the employer by an employee who determines his income tax liability on a basis other than a calendar- year basis, as required by paragraph (b)(4) of § 31.3402(f)(2)–1, which effects a change for the employee's next taxable year, shall not take effect, and may not be made effective, with respect to the taxable year of the employee in which the certificate is furnished.

(d) For purposes of this section, the term ''status determination date'' means January 1, May 1, July 1, and October 1 of each year.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 6516, 25 FR 13106, Dec. 20, 1960, as amended by T.D. 7048, 35 FR 10291, June 24, 1970; T.D. 7065, 35 FR 16539, Oct. 23, 1970; T.D. 7115, 36 FR 9234, May 21, 1971; T.D. 7915, 48 FR 44073, Sept. 27, 1983]

§ 31.3402(f)(4)–1 Period during which withholding exemption certificate remains in effect.

(a) *In general.* Except as provided in paragraphs (b) and (c) of this section, a withholding exemption certificate which takes effect under section 3402(f) of the Internal Revenue Code of 1954, or which on December 31, 1954, was in effect under section 1622(h) of the Internal Revenue Code of 1939, shall continue in effect with respect to the employee until another withholding exemption certificate takes effect under section 3402(f). Paragraphs (b) and (c) of this section are applicable only for withholding exemption certificates furnished by the employee to the employer before January 1, 1982. See § 31.3402(f)(4)–2 for the rules applicable to withholding exemption certificates furnished by the employee to the employer after December 31, 1981.

(b) *Withholding allowances under section 3402(m) for itemized deductions.* In no case shall the portion of a withholding exemption certificate relating to withholding allowances under section 3402(m) for itemized deductions be effective with respect to any payment of wages made to an employee—

(1) In the case of an employee whose liability for tax under subtitle A of the Code is determined on a calendar-year basis, after April 30 of the calendar year immediately following the calendar year which was his estimation year for purposes of determining the withholding allowance or allowances claimed on such exemption certificate, or

(2) In the case of an employee to whom paragraph (c)(1) of this section does not apply, after the last day of the fourth month immediately following his taxable year which was his estimation year for purposes of determining the withholding allowance or allowances claimed on such exemption certificate.

(c) *Statements under section 3402(n) eliminating requirement of withholding.* The statements described in § 31.3402(n)–1 made by an employee with respect to his preceding taxable year and current taxable year shall be deemed to have been made also with respect to his current taxable year and his taxable year immediately thereafter, respectively, until either a new withholding exemption certificate furnished by the employee takes effect or the existing certificate which contains such statements expires. In no case shall a withholding exemption certificate which contains such statements be effective with respect to any payment of wages made to an employee—

(1) In the case of an employee whose liability for tax under subtitle A is determined on a calendar-year basis, after April 30 of the calendar year immediately following the calendar year which was his original current taxable year for purposes of such statements, or

(2) In the case of an employee to whom paragraph (c)(1) of this section does not apply, after the last day of the fourth month immediately following his original current taxable year for purposes of such statements.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7048, 35 FR 10291, June 24, 1970, as amended by T.D. 7065, 35 FR 16539, Oct. 23, 1970; T.D. 7915, 48 FR 44073, Sept. 27, 1983]

§ 31.3402(f)(4)–2 Effective period of withholding exemption certificate.

(a) *In general.* Except as provided in paragraphs (b) and (c) of this section, a withholding exemption certificate that takes effect under section 3402(f) of the Internal Revenue Code of 1954, or that on December 31, 1954, was in effect under section 1622(h) of the Internal Revenue Code of 1939, shall continue in effect with respect to the employee until another withholding exemption certificate takes effect under section 3402(f). Paragraphs (b) and (c) of this section are applicable only for withholding exemption certificates furnished by the employee to the employer after December 31, 1981. See § 31.3402(f)(4)–1 for the rules applicable to withholding exemption certificates furnished by the employee to the employer before January 1, 1982.

(b) *Withholding allowances under section 3402(m).* See paragraphs (b) and (c) of § 31.3402(f)(2)–1 (relating to withholding exemption certificates) for information as to when an employee claiming withholding allowances under section 3402(m) and the regulations thereunder must file a new withholding exemption certificate with his employer.

(c) *Statements under section 3402(n) eliminating requirement of withholding.* The statements described in § 31.3402(n)–1 made by an employee with respect to his preceding taxable year and current taxable year shall be effective until either a new withholding exemption certificate furnished by the employee takes effect or the existing certificate that contains such statements expires. In no case shall a withholding exemption certificate that contains such statements be effective with respect to any payment of wages made to an employee:

(1) In the case of an employee whose liability for tax under subtitle A is determined on a calendar year basis, after February 15 of the calendar year following the estimation year, or

(2) In the case of an employee to whom paragraph (c)(1) of this section does not apply, after the 15th day of the 2nd calendar month following the last day of the estimation year.

(d) *Estimation year.* The estimation year is the taxable year including the day on which the employee files the withholding exemption certificate with his employer, except that if the employee files the withholding exemption certificate with his employer and specifies on the certificate that the certificate is not to take effect until a specified future date, the estimation year shall be the taxable year including that specified future date.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7915, 48 FR 44073, Sept. 27, 1983]

§ 31.3402(f)(5)–1 Form and contents of withholding exemption certificates.

(a) *Form W–4.* Form W–4 is the form prescribed for the withholding exemption certificate required to be filed under section 3402(f)(2). A withholding exemption certificate shall be prepared in accordance with the instructions and regulations applicable thereto, and shall set forth fully and clearly the data therein called for. A withholding exemption certificate that does not set forth fully and clearly the data therein called for is an invalid withholding exemption certificate under § 31.3402(f)(2)–1(e) (relating to withhholding exemption certificates). Blank copies of paper Forms W–4 will be supplied to employers upon request to the Internal Revenue Service. In lieu of the prescribed form, employers may prepare and use a form the provisions of which are identical with those of the prescribed form, but only if employers also provide employees with all the tables and instructions contained in the Form W–4 in effect at that time and only if employers comply with all revenue procedures relating to substitute forms in effect at that time.

(b) *Invalid Form W–4.* A Form W–4 does not meet the requirements of section 3402(f)(5) or this section and is invalid if it contains an alteration or unauthorized addition. For purposes of § 31.3402(f)(2)–1(e) and this paragraph—

(1) An alteration of a withholding exemption certificate is any deletion of the language of the jurat or other similar provision of such certificate by which the employee certifies or affirms the correctness of the completed certificate, or any material defacing of such certificate;

(2) An unauthorized addition to a withholding exemption certificate is any writing on such certificate other than the entries requested (e.g., name, address, and number of exemptions claimed).

(c) *Electronic Form W–4*—(1) *In general.* An employer may establish a system for its employees to file withholding exemption certificates electronically.

(2) *Requirements*—(i) *In general.* The electronic system must ensure that the information received is the information sent, and must document all occasions of employee access that result in the filing of a Form W–4. In addition, the design and operation of the electronic system, including access procedures, must make it reasonably certain that the person accessing the system and filing the Form W–4 is the employee identified in the form.

(ii) *Same information as paper Form W–4.* The electronic filing must provide the employer with exactly the same information as the paper Form W–4.

(iii) *Jurat and signature requirements.* The electronic filing must be signed by the employee under penalties of perjury.

(A) *Jurat.* The jurat (perjury statement) must contain the language that appears on the paper Form W–4. The electronic program must inform the employee that he or she must make the declaration contained in the jurat and that the declaration is made by signing the Form W–4. The instructions and the language of the jurat must immediately follow the employee's income tax withholding selections and immediately precede the employee's electronic signature.

(B) *Electronic signature.* The electronic signature must identify the employee filing the electronic Form W–4 and authenticate and verify the filing. For this purpose, the terms ''authenticate'' and ''verify'' have the same meanings as they do when applied to a written signature on a paper Form W–4. An electronic signature can be in any form that satisfies the foregoing requirements. The electronic signature must be the final entry in the employee's Form W–4 submission.

(iv) *Copies of electronic Forms W–4.* Upon request by the Internal Revenue Service, the employer must supply a hardcopy of the electronic Form W–4 and a statement that, to the best of the employer's knowledge, the electronic Form W–4 was filed by the named employee. The hardcopy of the electronic Form W–4 must provide exactly the same information as, but need not be a facsimile of, the paper Form W–4.

(3) *Effective date*—(i) *In general.* This paragraph applies to all withholding exemption certificates filed electronically by employees on or after January 2, 1997.

(ii) *Special rule for certain Forms W–4.* In the case of an electronic system that precludes the filing of Forms W–4 required on commencement of employment and Forms W–4 claiming more than 10 withholding exemptions or exemption from withholding, the requirements of paragraph (c)(2)(iii) of this section will be treated as satisfied if the Form W–4 is filed electronically before January 1, 1999.

[T.D. 7423, 41 FR 26217, June 25, 1976, as amended by T.D. 7915, 48 FR 44074, Sept. 27, 1983; T.D. 8706, 62 FR 24, Jan. 2, 1997]

§ 31.3402(f)(6)–1 Withholding exemptions for nonresident alien individuals.

A nonresident alien individual (other than, in regard to wages paid after February 28, 1979, a nonresident alien individual treated as a resident under section 6013(g) or (h)) subject to withholding under section 3402 is on any 1 day entitled under section 3402(f)(1) and § 31.3402(f)(1)–1 to the number of withholding exemptions corresponding to the number of personal exemptions to which he is entitled on such day by reason of the application of section 873(b)(3) or section 876, whichever applies. Thus, a nonresident alien individual who is not a resident of Canada or Mexico and who is not a resident of Puerto Rico during the entire taxable year, is allowed under section 3402(f)(1) only one withholding exemption.

[T.D. 6908, 31 FR 16776, Dec. 31, 1966, as amended by T.D. 7670, 45 FR 6932, Jan. 31, 1980]

§ 31.3402(g)–1 Supplemental wage payments.

(a) *In general.* (1) An employee's remuneration may consist of wages paid for a payroll period and supplemental

wages, such as bonuses, commissions, and overtime pay, paid for the same or a different period, or without regard to a particular period. When such supplemental wages are paid (whether or not at the same time as the regular wages) the amount of the tax required to be withheld under section 3402(a) (the percentage method) or under section 3402(c) (the wage bracket method) shall be determined in accordance with this paragraph or paragraph (b) of this section.

(2) The supplemental wages, if paid concurrently with wages for a payroll period, shall be aggregated with the wages paid for such payroll period. If not paid concurrently, the supplemental wages shall be aggregated with the wages paid or to be paid within the same calendar year for the last preceding payroll period or for the current payroll period. The amount of tax to be withheld shall be determined as if the aggregate of the supplemental wages and the regular wages constituted a single wage payment for the regular payroll period.

Example 1. A, a single person, is employed as a salesman at a monthly salary of $130 plus commissions on sales made during the month. The number of withholding exemptions claimed is one. During May 1966 A earns $300 in commissions, which together with the salary of $130 is paid on June 10, 1966. Under the wage bracket method the amount of the tax required to be withheld is shown in the table applicable to a monthly payroll period with respect to an employee who is not married. Under this table it will be found that the amount of tax required to be withheld is $58.40.

Example 2. B, a married person, is employed at a salary of $3,600 per annum paid semimonthly on the 15th day and the last day of each month, plus a bonus and commission determined at the end of each 3-month period. The bonus and commission for the 3-month period ending on September 30, 1966, amount to $250, which is paid on October 10, 1966. B has in effect a withholding exemption certificate on which he claimed four withholding exemptions and disclosed that he is married. Under the wage bracket method, the amount of tax required to be withheld on the aggregate of the bonus of $250 and the last preceding semimonthly wage payment of $150, or $400, is shown in the table applicable to a married person with a semimonthly payroll period to be $44.50. However, since tax in the amount of $3.50 was withheld on the semimonthly wage payment of $150, the amount to be withheld on October 10, 1966, is $41.00.

If, however, supplemental wages are paid and tax has been withheld from the employee's regular wages, the employer may determine the tax to be withheld—

(i) From supplemental wages paid prior to May 1, 1966, by using the rate in effect under section 3402(a) at the time the wages are paid, and

(ii) From supplemental wages paid after April 30, 1966, by using a flat percentage rate of 20 percent,

without allowance for exemption and without reference to any regular payment of wages.

(3) For provisions relating to the treatment of wages paid other than in cash to retail commission salesmen, see § 31.3402(j)–1.

(b) *Special rule where aggregate withholding exemption exceeds wages paid.* (1) If supplemental wages are paid to an employee during a calendar year for a period which involves two or more consecutive payroll periods, for which other wages also are paid during such calendar year, and the aggregate of such other wages is less than the aggregate of the amounts determined under the table provided in section 3402(b) (1) as the withholding exemptions applicable for such payroll periods, the amount of the tax required to be withheld on the supplemental wages shall be computed as follows:

Step 1. Determine an average wage for each of such payroll periods by dividing the sum of the supplemental wages and the wages paid for such payroll periods by the number of such payroll periods.

Step 2. Determine a tax for each payroll period as if the amount of the average wage constituted the wages paid for such payroll period.

Step 3. From the sum of the amounts of tax determined in Step 2 subtract the total amount of tax withheld, or to be withheld, from the wages, other than the supplemental wages, for such payroll periods. The remainder, if any shall constitute the amount of the tax to be withheld upon the supplemental wages.

Example. An employee has a weekly payroll period ending on Saturday of each week, the wages for which are paid on Friday of the succeeding week. On the 10th day of each month he is paid a bonus based upon production during the payroll periods for which wages were paid in the preceding month. The

employee is paid a weekly wage of $64 on each of the five Fridays occurring in July 1966. On August 10, 1966, the employee is paid a bonus of $125 based upon production during the five payroll periods covered by the wages paid in July. On the date of payment of the bonus, the employee, who is married and has three children, has a withholding exemption certificate in effect indicating that he is married and claiming five withholding exemptions. The amount of the tax to be withheld from the bonus paid on August 10, 1966, is computed as follows:

Wages paid in July 1966 for 5 payroll periods (5×$64)	$320.00
Bonus paid August 10, 1966	125.00
Aggregate of wages and bonus	445.00
Average wage per payroll period ($445÷5)	89.00
Computation of tax under percentage method: Withholding exemptions (5×$13.50)	67.50
Remainder subject to tax	21.50
Tax on average wage for 1 week under percentage method of withholding (married person with weekly payroll period) 14 percent of $17.50 (excess over $4))	2.45
Tax on average wage for 5 weeks	12.25
Less: Tax previously withheld on weekly wage payments of $64	None
Tax to be withheld on supplemental wages	12.25
Computation of tax under wage bracket method: Tax on $89 wage under weekly wage table for married person ($2.50 per week for 5 weeks)	12.50
Less: Tax previously withheld on weekly wage payments of $64	None
Tax to be withheld on supplemental wages	12.50

(2) The rules prescribed in this paragraph shall, at the election of the employer, be applied in lieu of the rules prescribed in paragraph (a) of this section except that this paragraph shall not be applicable in any case in which the payroll period of the employee is less than one week.

(c) *Vacation allowances.* Amounts of so-called ''vacation allowances'' shall be subject to withholding as though they were regular wage payments made for the period covered by the vacation. If the vacation allowance is paid in addition to the regular wage payment for such period, the rules applicable with respect to supplemental wage payments shall apply to such vacation allowance.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6860, 30 FR 13947, Nov. 4, 1965; T.D. 6882, 31 FR 5661, Apr. 12, 1966]

§ 31.3402(g)–2 Wages paid for payroll period of more than one year.

If wages are paid to an employee for a payroll period of more than one year, for the purpose of determining the amount of tax required to be deducted and withheld in respect of such wages—

(a) Under the percentage method, the amount of the tax shall be determined as if such payroll period constituted an annual payroll period, and

(b) Under the wage bracket method, the amount of the tax shall be determined as if such payroll period constituted a miscellaneous payroll period of 365 days.

§ 31.3402(g)–3 Wages paid through an agent, fiduciary, or other person on behalf of two or more employers.

(a) If a payment of wages is made to an employee by an employer through an agent, fiduciary, or other person who also has the control, receipt, custody, or disposal of, or pays the wages payable by another employer to such employee, the amount of the tax required to be withheld on each wage payment made through such agent, fiduciary, or person shall, whether the wages are paid separately on behalf of each employer or paid in a lump sum on behalf of all such employers, be determined upon the aggregate amount of such wage payment or payments in the same manner as if such aggregate amount had been paid by one employer. Hence, under either the percentage method or the wage bracket method the tax shall be determined upon the aggregate amount of the wage payment.

(b) In any such case, each employer shall be liable for the return and payment of a pro rata portion of the tax so determined, such portion to be determined in the ratio which the amount contributed by the particular employer bears to the aggregate of such wages.

(c) For example, three companies maintain a central management agency which carries on the administrative work of the several companies. The central agency organization consists of a staff of clerks, bookkeepers, stenographers, etc., who are the common employees of the three companies. The expenses of the central agency, including wages paid to the foregoing employees, are borne by the several companies in

certain agreed proportions. Company X pays 45 percent, Company Y pays 35 percent and Company Z pays 20 percent of such expenses. The amount of tax required to be withheld on the wages paid to persons employed in the central agency should be determined in accordance with the provisions of this section. In such event, Company X is liable as an employer for the return and payment of 45 percent of the tax required to be withheld, Company Y is liable for the return and payment of 35 percent of the tax and Company Z is liable for the return and payment of 20 percent of the tax. (See §31.3504–1, relating to acts to be performed by agents.)

§31.3402(h)(1)–1 Withholding on basis of average wages.

(a) *In general.* An employer may determine the amount of tax to be deducted and withheld upon a payment of wages to an employee on the basis of the employee's average estimated wages, with necessary adjustments, for any quarter. This paragraph applies only where the method desired to be used includes wages other than tips (whether or not tips are also included).

(b) *Withholding on the basis of average estimated tips*—(1) *In general.* Subject to certain limitations and conditions, an employer may, at his discretion, withhold the tax under section 3402 in respect of tips reported by an employee to the employer on an estimated basis. An employer who elects to make withholding of the tax on an estimated basis shall:

(i) In respect of each employee, make an estimate of the amount of tips that will be reported, pursuant to section 6053, by the employee to the employer in a calendar quarter.

(ii) Determine the amount which must be deducted and withheld upon each payment of wages (exclusive of tips) which are under the control of the employer to be made during the quarter by the employer to the employee. The total amount which must be deducted and withheld shall be determined by assuming that the estimated tips for the quarter represent the amount of wages to be paid to the employee in the form of tips in the quarter and that such tips will be ratably (in terms of pay periods) paid during the quarter.

(iii) Deduct and withhold from any payment of wages (exclusive of tips) which are under the control of the employer, or from funds referred to in section 3402(k) (see §§31.3402(k) and 31.3402(k)–1), such amount as may be necessary to adjust the amount of tax withheld on the estimated basis to conform to the amount required to be withheld in respect of tips reported by the employee to the employer during the calendar quarter in written statements furnished to the employer pursuant to section 6053(a). If an adjustment is required, the additional tax required to be withheld may be deducted upon any payment of wages (exclusive of tips) which are under the control of the employer during the quarter and within the first 30 days following the quarter or from funds turned over by the employee to the employer for such purpose within such period. For provisions relating to the repayment to an employee, or other disposition, of amounts deducted from an employee's remuneration in excess of the correct amount of tax, see §31.6413(a)–1.

(2) *Estimating tips employee will report*—(i) *Initial estimate.* The initial estimate of the amount of tips that will be reported by a particular employee in a calendar quarter shall be made on the basis of the facts and circumstances surrounding the employment of that employee. However, if a number of employees are employed under substantially the same circumstances and working conditions, the initial estimate established for one such employee may be used as the initial estimate for other employees in that group.

(ii) *Adjusting estimate.* If the quarterly estimate of tips in respect of a particular employee continues to differ substantially from the amount of tips reported by the employee and there are no unusual factors involved (for example, an extended absence from work due to illness) the employer shall make an appropriate adjustment of his estimate of the amount of tips that will be reported by the employee.

(iii) *Reasonableness of estimate.* The employer must be prepared, upon request of the district director, to disclose the factors upon which he relied in making the estimate, and his reasons for believing that the estimate is reasonable.

[T.D. 7053, 35 FR 11626, July 21, 1970]

§ 31.3402(h)(2)–1 Withholding on basis of annualized wages.

An employer may determine the amount of tax to be deducted and withheld upon a payment of wages to an employee by taking the following steps:

Step 1. Multiply the amount of the employee's wages for the payroll period by the number of such periods in the calendar year.

Step 2. Determine the amount of tax which would be required to be deducted and withheld upon the amount determined in Step 1 if that amount constituted the actual wages for the calendar year and the payroll period of the employee were an annual payroll period.

Step 3. Divide the amount of tax determined in Step 2 by the number of periods by which the employee's wages were multiplied in Step 1.

Example. On July 1, 1970, A, a single person who is on a weekly payroll period and claims one exemption, receives wages of $100 from X Co., his employer. X Co. multiplies the weekly wage of $100 by 52 weeks to determine an annual wage of $5,200. It then subtracts $650 for A's withholding exemption and arrives at a balance of $4,550. The applicable table in section 3402(a) for annual payroll periods indicates that the amount of tax to be withheld thereon is $376 plus $314.50 (17 percent of excess over $2,700), or a total of $690.50. The annual tax of $690.50, when divided by 52 to arrive at the portion thereof attributable to the weekly payroll period, equals $13.28. X Co. may, if it chooses, withhold $13.28 rather than the amount specified in section 3402 (a) or (c) for a weekly payroll period.

[T.D. 7053, 35 FR 11627, July 21, 1970]

§ 31.3402(h)(3)–1 Withholding on basis of cumulative wages.

(a) *In general.* In the case of an employee who has in effect a request that the amount of tax to be withheld from his wages be computed on the basis of his cumulative wages, and whose wages since the beginning of the current calendar year have been paid with respect to the same category of payroll period (e.g., weekly or semimonthly), the employer may determine the amount of tax to be deducted and withheld upon a payment of wages made to the employee after December 31, 1969, by taking the following steps:

Step 1. Add the amount of the wages to be paid the employee for the payroll period to the total amount of wages paid by the employer to the employee during the calendar year.

Step 2. Divide the aggregate amount of wages computed in Step 1 by the number of payroll periods to which that amount relates.

Step 3. Compute the total amount of tax that would have been required to be deducted and withheld under section 3402(a) if the average amount of wages (as computed in Step 2) had been paid to the employee for the number of payroll periods to which the aggregate amount of wages (computed in Step 1) relates.

Step 4. Determine the excess, if any, of the amount of tax computed in Step 3 over the total amount of tax already deducted and withheld by the employer from wages paid to the employee during the calendar year.

Example. On July 1, 1970, Y Co. employs B, a single person claiming one exemption. Y Co. pays B the following amounts of wages on the basis of a biweekly payroll period on the following pay days:

July 20	$1,000
August 3	300
August 17	300
August 31	300
September 14	300
September 28	300

On October 5, B requests that Y Co. withhold on the basis of his cumulative wages with respect to his wages to be paid on October 12 and thereafter. Y Co. adds the $300 in wages to be paid to B on October 12 to the payments of wages already made to B during the calendar year, and determines that the aggregate amount of wages is $2,800. The average amount of wages for the 7 biweekly payroll periods is $400. The total amount of tax required to be deducted and withheld for payments of $400 for each of 7 biweekly payroll periods is $485.87 under section 3402(a). Since the total amount of tax which has been deducted and withheld by Y Co. through September 28 is $484.86, Y Co. may, if it chooses, deduct and withhold $1.01 (the amount by which $485.87 exceeds the total amount already withheld by Y Co.) from the payment of wages to B on October 12 rather than the amount specified in section 3402 (a) or (c).

(b) *Employee's request and revocation of request.* An employee's request that his employer withhold on the basis of his cumulative wages and a notice of revocation of such request shall be in

writing and in such form as the employer may prescribe. An employee's request furnished to his employer pursuant to this section shall be effective, and may be acted upon by his employer, after the furnishing of such request and before a revocation thereof is effective. A revocation of such request may be made at any time by the employee furnishing his employer with a notice of revocation. The employer may give immediate effect to a revocation, but, in any event, a revocation shall be effective with respect to payments of wages made on or after the first ''status determination date'' (see section 3402(f)(3)(B)) which occurs at least 30 days after the date on which such notice is furnished.

(c) *Requests due to increases or decreases in allowances.* An employee may request pursuant to this section that his employer withhold on the basis of the employee's cumulative wages when the employee is entitled to claim an increased or decreased number of withholding allowances under §31.3402(m)–1 during the estimation year (as defined in §31.3402(m)–1(c)(1)).

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7053, 35 FR 11627, July 21, 1970, as amended by T.D. 7915, 48 FR 44074, Sept. 27, 1983]

§31.3402(h)(4)–1 Other methods.

(a) *Maximum permissible deviations.* An employer may use any other method of withholding under which the employer will deduct and withhold upon wages paid to an employee after December 31, 1969, for a payroll period substantially the same amount as would be required to be deducted and withheld by applying section 3402(a) with respect to the payroll period. For purposes of section 3402(h)(4) and this section, an amount is substantially the same as the amount required to be deducted and withheld under section 3402(a) if its deviation from the latter amount is not greater than the maximum permissible deviation prescribed in this paragraph. The maximum permissible deviation under this paragraph is determined by annualizing wages as provided in Step 1 of §31.3402(h)(2)–1 and applying the following table to the amount of tax required to be deducted and withheld under section 3402(a) with respect to such annualized wages, as determined under Step 2 of §31.3402(h)(2)–1:

If the tax required to be withheld under the annual percentage rate schedule is—	*The maximum permissible annual deviation is—*
$10 to $100	$10, plus 10 percent of excess over $10.
$100 to $1,000	$19, plus 3 percent of excess over $100.
$1,000 or over	$46, plus 1 percent of excess over $1,000.

In any case, an amount which is less than $10 more or less per year than the amount required to be deducted and withheld under section 3402(a) is substantially the same as the latter amount. If any method produces results which are not greater than the prescribed maximum deviations only with respect to some of his employees, the employer may use such method only with respect to such employees. An employer should thoroughly test any method which he contemplates using to ascertain whether it meets the tolerances prescribed by this paragraph. An employer may not use any method, one of the principal purposes of which is to consistently produce amounts to be deducted and withheld which are less (though substantially the same) than the amount required to be deducted and withheld by applying section 3402(a).

(b) *Combined FICA and income tax withholding.* In addition to the methods authorized by paragraph (a) of this section, an employer may determine the amount of tax to be deducted and withheld under section 3402 upon a payment of wages to an employee by using tables prescribed by the Commissioner which combine the amounts of tax to be deducted under sections 3102 and 3402. Such tables shall provide for the deduction of the sum of such amounts, computed on the basis of the midpoints of the wage brackets in the tables prescribed under section 3402(c). The portion of such sum which is to be treated as the tax deducted and withheld under section 3402 shall be the amount obtained by subtracting from such sum

the amount of tax required to be deducted by section 3102. Such tables may be used only with respect to payments which are wages under both sections 3121(a) and 3401(a).

(c) *Part-year employment method of withholding*—(1) *In general.* In addition to the methods authorized by other paragraphs of this section, in the case of part-year employment (as defined in subparagraph (4) of this paragraph) of an employee who determines his liability for tax under subtitle A of the Code on a calendar-year basis and who has in effect a request that the amount of tax to be withheld from his wages be computed according to the part-year employment method described in this paragraph, the employer may determine the amount of tax to be deducted and withheld upon a payment of wages made to the employee on or after January 5, 1973, by taking the following steps:

Step 1. Add the amount of wages to be paid to the employee for the current payroll period to the total amount of wages paid by the employer to the employee for all preceding payroll periods included in the current term of continuous employment (as defined in subparagraph (3) of this paragraph) of the employee by the employer;

Step 2. Divide the aggregate amount of wages computed in Step 1 by the total of the number of payroll periods to which that amount relates plus the equivalent number of payroll periods (as defined in subparagraph (2) of this paragraph) in the employee's term of continuous unemployment immediately preceding the current term of continuous employment, such term of continuous unemployment to be exclusive of any days prior to the beginning of the current calendar year;

Step 3. Determine the total amount of tax that would have been required to be deducted and withheld under section 3402 if the average amount of wages (as computed in Step 2) had been paid to the employee for the number of payroll periods determined in Step 2 (including the equivalent number of payroll periods); and

Step 4. Determine the excess, if any, of the amount of tax computed in Step 3 over the total amount of tax already deducted and withheld by the employer from wages paid to the employee for all payroll periods during the current term of continuous employment.

The use of the method described in this paragraph does not preclude the employee from claiming additional withholding allowances pursuant to section 3402(m) or the standard deduction allowance pursuant to section 3402(f)(1)(G).

(2) *Equivalent number of payroll periods.* For purposes of this paragraph, the equivalent number of payroll periods shall be determined by dividing the number of calendar days contained in the current payroll period into the number of calendar days between the later of (i) the day certified by the employee as his last day of employment prior to his current term of continuous employment during the calendar year in which such term commenced, or (ii) the last day of the calendar year immediately preceding the current calendar year, and the first day of the current term of continuous employment. For purposes of the preceding sentence, the term ''calendar days'' includes holidays, Saturdays, and Sundays. In determining the equivalent number of payroll periods, any fraction obtained in the division described in the first sentence of this subparagraph shall be disregarded. An employee paid for a miscellaneous payroll period shall be considered to have a daily payroll period for purposes of this subparagraph. In a case in which an employee is paid for a daily or miscellaneous payroll period and the employer elects under Circular E to compute the tax to be withheld as if the aggregate of the wages paid to the employee during the calendar week were paid for a weekly period, the employer shall determine the equivalent number of payroll periods for purposes of the computation of the tax to be withheld for the calendar week on the basis of a weekly payroll period (notwithstanding the fact that a determination of the equivalent number of payroll periods for purposes of the computation of the tax to be withheld upon wages paid for daily or miscellaneous payroll periods within such calendar week has been made on the basis of a daily or miscellaneous payroll period).

(3) *Term of continuous employment.* For purposes of this paragraph, a term of employment is continuous if it is either a single term of employment or two or more consecutive terms of employment with the same employer. A term of continuous employment begins on the first day on which any services

are performed by the employee for the employer for which compensation is paid or payable. Such term ends on the earlier of (i) the last day during the current term of continuous employment on which any services are performed by the employee for the employer, or (ii) if the employee performs no services for the employer for a period of more than 30 calendar days, the last day preceding such period on which any services are performed by the employee for the employer. For example, a professional athlete who signs a contract on December 31, 1973, to perform services from July 1 through December 31 for the calendar years 1974, 1975, and 1976 has a new term of employment beginning each July 1 and accordingly may qualify for use of the part-year withholding method in each of such years. Likewise, a term of continuous employment is not broken by a temporary layoff of no more than 30 days. On the other hand, when an employment relationship is actually terminated the term of continuous employment is ended even though a new employment relationship is established with the same employer within 30 days. A ''term of continuous employment'' includes all days on which an employee performs any services for an employer and includes days on which services are not performed because of illness or vacation, or because such days are holidays or are regular days off (such as Saturdays and Sundays, or days off in lieu of Saturdays and Sundays), or other days for which the employee is not scheduled to work. For example, an employee who is employed 2 days a week for the same employer from March 1 through December 31 has a term of continuous employment of 306 days.

(4) *Part-year employment.* For purposes of this paragraph, ''part-year employment'' means one or more terms of continuous employment with all employers which term or terms will not aggregate more than 245 days within a calendar year. For example, A graduates from college in May and was not employed from January through May. A accepts a permanent position with X Co., beginning June 1. Since the total duration of A's term of continuous employment will, during the current calendar year, not exceed 245 days it does qualify as part-year employment for purposes of this section.

If, however, A had also worked for Y Co. from December 15 of the previous year through February 5 of the current calendar year, the total duration of A's terms of continuous employment will, during the current calendar year, exceed 245 days (36 days (January 1 through February 5) plus 214 days (June 1 through December 31) equals 250 days). This year's employment does not therefore qualify as part-year employment for purposes of this section.

(5) *Employee's request.* (i) An employee's request that his employer withhold according to the part-year employment method shall be in writing and in such form as the employer may prescribe. Such request shall be made under the penalties of perjury and shall contain the following information—

(a) The last day of employment (if any) by any employer prior to the current term of continuous employment during the calendar year in which such term commenced.

(*b*) A statement that the employee reasonably anticipates that he will be employed for an aggregate of no more than 245 days in all terms of continuous employment during the current calendar year, and

(c) The employee uses a calendar-year accounting period.

An employee's request furnished to his employer pursuant to this section shall be effective, and may be acted upon by his employer, with respect to wages paid after the furnishing of such request, and shall cease to be effective with respect to any wages paid on or after the beginning of the payroll period during which the current calendar year will end.

(ii) If, on any day during the calendar year, any of the anticipations stated by the employee in his statement provided pursuant to subdivision (i)*(b)* of this subparagraph becomes unreasonable, the employee shall revoke the request described in this subparagraph before the end of the payroll period during which it becomes unreasonable. The revocation shall be effective as of the

beginning of the payroll period during which it is made.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7053, 35 FR 11627, July 21, 1970, as amended by T.D. 7251, 38 FR 867, Jan 5, 1973; T.D. 7915, 48 FR 44074, Sept. 27, 1983]

§ 31.3402(i)–1 Additional withholding.

(a) In addition to the tax required to be deducted and withheld in accordance with the provisions of section 3402, the employer and employee may agree that an additional amount shall be withheld from the employee's wages. The agreement shall be in writing and shall be in such form as the employer may prescribe. The agreement shall be effective for such period as the employer and employee mutually agree upon. However, unless the agreement provides for an earlier termination, either the employer or the employee, by furnishing a written notice to the other, may terminate the agreement effective with respect to the first payment of wages made on or after the first ''status determination date'' (see paragraph (d) of § 31.3402(f)(3)–1) which occurs at least 30 days after the date on which such notice if furnished.

(b) The amount deducted and withheld pursuant to an agreement between the employer and employee shall be considered as tax required to be deducted and withheld under section 3402. All provisions of law and regulations applicable with respect to the tax required to be deducted and withheld under section 3402 shall be applicable with respect to any amount deducted and withheld pursuant to the agreement.

(c) This section is applicable only to agreements made before October 1, 1981. Any such agreement shall remain in effect in accordance with paragraph (a). See § 31.3402 (i)–2 for rules relating to increases in withholding after September 30, 1981.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 6516, 25 FR 13108, Dec. 20, 1960, as amended by T.D. 7065, 35 FR 16540, Oct. 23, 1970; T.D. 7915, 48 FR 44074, Sept. 27, 1983]

§ 31.3402(i)–2 Increases or decreases in withholding.

(a) *Increases in withholding*—(1) *In general.* In addition to the tax required to be deducted and withheld in accordance with the provisions of section 3402, the employee may request, after September 30, 1981, that the employer deduct and withhold an additional amount from the employee's wages. The employer must comply with the employee's request, except that the employer shall comply with the employee's request only to the extent that the amount that the employee requests to be deducted and withheld under this section does not exceed the amount that remains after the employer has deducted and withheld all amounts otherwise required to be deducted and withheld by Federal law (other than by section 3402(i) and this section), State law, and local law (other than by State or local law that provides for voluntary withholding). The employer must comply with the employee's request in accordance with the time limitations of § 31.3402(f)(3)–1 (relating to when withholding exemption certificate takes effect). The employee must make his request on Form W–4 as provided in § 31.3402(f)(5)–1 (relating to form and contents of withholding exemption certificates), and this Form W–4 shall take effect and remain effective in accordance with section 3402(f) and the regulations thereunder.

(2) *Amount deducted considered to be tax.* The amount deducted and withheld pursuant to paragraph (a)(1) of this section shall be considered to be tax required to be deducted and withheld under section 3402. All provisions of law and regulations applicable with respect to the tax required to be deducted and withheld under section 3402 shall be applicable with respect to any amount deducted and withheld under paragraph (a)(1) of this section.

(b) *Decreases in withholding.* [Reserved]

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7915, 48 FR 44074, Sept. 27, 1983]

§ 31.3402(j)–1 Remuneration other than in cash for service performed by retail commission salesman.

(a) *In general.* (1) An employer, in computing the amount to be deducted and withheld as tax in accordance with section 3402, may, at his election, disregard any wages paid, after August 9, 1955, in a medium other than cash for services performed for him by an employee if (i) the noncash remuneration is paid for services performed by the employee as a retail commission salesman and (ii) the employer ordinarily pays the employee remuneration solely by way of cash commissions for services performed by him as a retail commission salesman.

(2) Section 3402(j) and this section are not applicable with respect to noncash wages paid to a retail commission salesman for services performed by him in a capacity other than as such a salesman. Such sections are not applicable with respect to noncash wages paid by an employer to an employee for services performed as a retail commission salesman if the employer ordinarily pays the employee remuneration other than by way of cash commissions for such services. Thus, noncash remuneration may not be disregarded in computing the amount to be deducted and withheld in a case where the employee, for services performed as a retail commission salesman, is paid both a salary and cash commissions on sales, or is ordinarily paid in something other than cash (stocks, bonds, or other forms of property) notwithstanding that the amount of remuneration paid to the employee is measured by sales.

(b) *Retail commission salesman.* For purposes of section 3402(j) and this section, the term ''retail commission salesman'' includes an employee who is engaged in the solicitation of orders at retail, that is, from the ultimate consumer, for merchandise or other products offered for sale by his employer. The term does not include an employee salesman engaged in the solicitation on behalf of his employer of orders from wholesalers, retailers, or others, for merchandise for resale. However, if the salesman solicits orders for more than one principal, he is not excluded from the term solely because he solicits orders from wholesalers or retailers on behalf of one or more principals. In such case the salesman may be a retail commission salesman with respect to services performed for one or more principals and not with respect to services performed for his other principals.

(c) *Noncash remuneration.* The term ''noncash remuneration'' includes remuneration paid in any medium other than cash, such as goods or commodities, stocks, bonds, or other forms of property. The term does not include checks or other monetary media of exchange.

(d) *Cross reference.* For provisions relating to records required to be kept and statements which must be furnished an employee with respect to wage payments, see sections 6001 and 6051 and the regulations thereunder in Subpart G of this part.

§ 31.3402(k)–1 Special rule for tips.

(a) *Withholding of income tax in respect of tips*—(1) *In general.* Subject to the limitations set forth in paragraph (a)(2) of this section, an employer is required to deduct and withhold from each of his employees tax in respect of those tips received by the employee which constitute wages. (For provisions relating to the treatment of tips as wages, see §§ 3401(a)(16) and 3401(f).) The employer shall make the withholding by deducting or causing to be deducted the amount of the tax from wages (exclusive of tips) which are under the control of the employer or other funds turned over by the employee to the employer (see paragraph (a)(3) of this section). For purposes of this section the terms ''wages (exclusive of tips) which are under the control of the employer'' means, with respect to a payment of wages, an amount equal to wages as defined in section 3401(a) except that tips and noncash remuneration which are wages are not included, less the sum of—

(i) The tax under section 3101 required to be collected by the employer in respect of wages as defined in section 3121(a) (exclusive of tips);

(ii) The tax under section 3402 required to be collected by the employer in respect of wages as defined in section 3401(a) (exclusive of tips); and

(iii) The amount of taxes imposed on the remuneration of an employee withheld by the employer pursuant to State and local law (including amounts withheld under an agreement between the employer and the employee pursuant to such law) except that the amount of taxes taken into account in this subdivision shall not include any amount attributable to tips.

(2) *Limitations.* An employer is required to deduct and withhold the tax on tips which constitute wages only in respect of those tips which are reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a). The employer is responsible for the collection of the tax on tips reported to him only to the extent that the emloyer can, during the period beginning at the time the written statement is submitted to him and ending at the close of the calendar year in which the statement was submitted, collect the tax by deducting it or causing it to be deducted as provided in subparagraph (1) of this paragraph.

(3) *Furnishing of funds to employer.* If the amount of the tax in respect of tips reported by the employee to the employer in a written statement furnished pursuant to section 6053(a) exceeds the wages (exclusive of tips) which are under the control of the employer from which the employer is required to withhold the tax in respect of such tips, the employee may furnish to the employer, within the period specified in subparagraph (2) of this paragraph, an amount of money equal to the amount of such excess.

(b) *Less than $20 of tips.* Notwithstanding the provisions of paragraph (a) of this section, if an employee furnishes to his employer a written statement—

(1) Covering a period of less than 1 month, and

(2) The statement is furnished to the employer prior to the close of the 10th day of the month following the month in which the tips were actually received by the employee, and

(3) The aggregate amount of tips reported in the statement and in all other statements previously furnished by the employee covering periods within the same month is less than $20, and such statements, collectively, do not cover the entire month,

the employer may deduct amounts equivalent to the tax on such tips from wages (exclusive of tips) which are under the control of the employer or other funds turned over by the employee to the employer. For provisions relating to the repayment to an employee, or other disposition, of amounts deducted from an employee's remuneration in excess of the correct amount of tax, see § 31.6413(a)–1. (As to the exclusion from wages of tips of less than $20, see § 31.3401(a)(16)–1.)

(c) *Priority of tax collection*—(1) *In general.* In the case of a payment of wages (exclusive of tips), the employer shall deduct or cause to be deducted in the following order:

(i) The tax under section 3101 and the tax under section 3402 with respect to such payment of wages.

(ii) Any tax under section 3101 which, at the time of payment of the wages, the employer is required to collect—

(a) In respect of tips reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a), or

(b) By reason of the employer's election to make collection of the tax under section 3101 in respect of tips on an estimated basis,

but which has not been collected by the employer and which cannot be deducted from funds turned over by the employee to the employer for such purpose. (See § 31.3102–3, relating to collection of, and liability for, employee tax on tips.)

(iii) Any tax under section 3402 which, at the time of the payment of the wages, the employer is required to collect—

(a) In respect of tips reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a), or

(b) By reason of the employer's election to make collection of the tax under section 3402 in respect of tips on an estimated basis,

but which has not been collected by the employer and which cannot be deducted from funds turned over by the employee to the employer for such purpose. For provisions relating to the

witholding of tax on the basis of average estimated tips, see paragraph (b) of § 31.3402(h)(1)–1.

(2) *Examples.* The application of paragraph (b)(1) of this section may be illustrated by the following examples (The amounts used in the following examples are intended for illustrative purposes and do not necessarily reflect currently effective rates or amounts.):

Example 1. W is a waiter employed by R restaurant. W's principal remuneration for his services is in the form of tips received from patrons of R; however, he also receives a salary from R of $40 per week, which is paid to him every Friday. W is a member of a labor union which has a contract with R pursuant to which R is to collect dues for the union by withholding from the wages of its employees at the rate of $1 per week. In addition to the taxes required to be withheld under the Internal Revenue Code, W's wages are subject to withholding of a state income tax imposed upon both his regular wage and his tips received and reported to R.

On Monday of a given week W furnishes a written statement to R pursuant to section 6053(a) in which he reports the receipt of $160 in tips. The $40 wage to be paid to W on Friday of the same week is subject to the following items of withholding:

	Taxes with respect to regular wage	Taxes with respect to tips	Total
Section 3101 (F.I.C.A.) ..	$1.76	$7.04	$8.80
Section 3402 (income tax at source)	5.65	28.30	33.95
State income tax	1.20	4.80	6.00
Union dues	.....	.....	1.00
Total	.....	.....	49.75

W does not turn over any funds to R. R should satisfy the taxes imposed by sections 3101 and 3402 out of W's $40 wage as follows: The taxes imposed with respect to the regular wage (a total of $74l) should be satisfied first. The taxes imposed with respect to tips are to be withheld only out of ''wages (exclusive of tips) which are under the control of the employer'' as that phrase is defined in §§ 31.3102–3(a)(1) and 31.3402(k)–1(a)(1). The amount of such wages under the control of employer in this example is $31.39, or $40, less the amounts applied in satisfaction of the Federal and State withholding taxes imposed with respect to the regular $40 wage ($8.61). This $31.39 is applied first in satisfaction of the tax under section 3101 with respect to tips ($7.04) in the balance of $24.35 is applied in partial satisfaction of the withholding of income tax at source under section 3402 with respect to tips. The amount of the tax with respect to tips under section 3402 which remains unsatisfied ($3.95) should be withheld from wages under the control of the employer the following week.

Example 2. During the week following the week dealt with in example 1, W furnishes a written statement to R pursuant to withholding:

	Taxes with respect to regular wage	Taxes with respect to tips	Total
Section 3101 (F.I.C.A.) ..	$1.76	$5.72	$7.48
Section 3402 (Income tax at source):			
Current week	5.65	22.30	27.95
Carryover from prior week	.....	3.95	3.95
State income tax	1.20	3.90	5.10
Union dues	.....	.....	1.00
Garnishment	.....	.....	10.00
Total	.....	.....	55.48

As in example 1, the amount of ''wages (exclusive of tips) which are under the control of the employer'' is $31.39. This amount is applied first in satisfaction of the tax under section 3101 with respect to tips ($5.72) and the balance is applied in partial satisfaction of the withholding of income tax at source under section 3402 with respect to tips (a total of $26.25), including that portion of the amount required to be withheld from the prior week's wages which remained unsatisfied. The amount of the tax with respect to tips under section 3402 which remains unsatisfied ($0.58) should be withheld from wages under the control of the employer the following week.

[T.D. 7001, 34 FR 1002, Jan. 23, 1969, as amended by T.D. 7053, 35 FR 11628, July 21, 1970]

§ 31.3402(l)–1 Determination and disclosure of marital status.

(a) *Determination of status by employer.* An employer in computing the tax to be deducted and withheld from an employee's wages paid after April 30, 1966, shall apply the applicable percentage method or wage bracket method withholding table (see section 3402 (a), (b), and (c) and the regulations thereunder) for the pertinent payroll period which relates to employees who are single persons, unless there is in effect with respect to such payment of wages a withholding exemption certificate furnished to the employer by the employee after March 15, 1966, indicating that the employee is married in which case the employer shall apply the applicable table relating to employees who are married persons.

(b) *Disclosure of status by employee.* (1) An employee shall be entitled to furnish the employer with a withholding exemption certificate indicating he is married only if, on the day of such furnishing, he is married (determined by application of the rules in paragraph (c) of this section). Thus, an employee who is contemplating marriage may not, prior to the actual marriage, furnish the employer with a withholding exemption certificate indicating that he is a married person.

(2) (i) If, on any day during the calendar year, the marital status (as determined by application of the rules in paragraph (c) of this section) of an employee who has in effect a withholding exemption certificate indicating that he is a married person, changes from married to single, the employee must within 10 days after the change occurs furnish the employer with a new withholding exemption certificate indicating that the employee is a single person.

(ii) If an employee who has in effect a withholding exemption certificate indicating that he is a married person, is considered married solely because of the application of subparagraph (2)(ii) of paragraph (c) of this section, and his spouse died during the taxable year which precedes by 2 years the current taxable year, the employee must, on or before December 1 of the current taxable year, furnish the employer with a new withholding exemption certificate indicating that he is a single person. Such certificate shall not, however become effective until the next calendar year (see paragraph (c) of § 31.3402(f)(3)–1).

(3) If, on any day during the calendar year, the marital status (as determined by application of the rules in paragraph (c) of this section) of an employee who has in effect a withholding exemption certificate indicating that he is a single person changes from single to married, the employee may furnish the employer with a new withholding exemption certificate indicating that the employee is a married person.

(c) *Determination of marital status.* For the purposes of section 3402(l)(2) and paragraph (b) of this section, the following rules shall be applied in determining whether an employee is a married person or a single person—

(1) An employee shall on any day be considered as a single person if—

(i) He is legally separated from his spouse under a decree of divorce or separate maintenance, or

(ii) Either he or his spouse is, or on any preceding day within the same calendar year was, a nonresident alien.

(2) An employee shall on any day be considered as a married person if—

(i) His spouse (other than a spouse referred to in paragraph (c)(1) of this section) died within the portion of his taxable year which precedes such day, or

(ii) His spouse died during one of the two taxable years immediately preceding the current taxable year and, on the basis of facts existing at the beginning of such day, he reasonably expects, at the close of his taxable year, to be a surviving spouse as defined in section 2 and the regulations thereunder.

[T.D. 7115, 36 FR 9234, May 21, 1971]

§ 31.3402(m)–1 Withholding allowances.

(a) *General rule.* An employee may claim, with respect to wages paid after December 31, 1981, a number of withholding allowances determined in accordance with this section. In order to receive the benefit of such allowances, the employee must have in effect with his employer a withholding exemption certificate claiming such allowances.

(b) *Items that may be taken into account.* The following items may be taken into account in determining the number of withholding allowances an employee may claim:

(1) Estimated itemized deductions allowable under chapter 1,

(2) The estimated tax credits allowable under Subpart A of Part IV of Subchapter A of Chapter 1, except:

(i) For the credit for tax withheld on wages under section 31(a) (relating to wage withholding),

(ii) For the credit for tax withheld at source on nonresident aliens and foreign corporations and on tax-free covenant bonds under section 32,

(iii) That the employee may claim the credit for certain uses of gasoline and special fuels under section 39 only to the extent the employee has not filed for a quarterly tax refund of the credit on Form 843,

(iv) That the employee may claim the credit for earned income under section 43 only to the extent the employee has not filed for advance payments of the credit on Form W–5, and

(v) For the credit for overpayment of tax under section 45,

(3) The estimated trade and business deductions of employees described in section 62 (2) and allowed by Part VI of Subchapter B of Chapter 1,

(4) The estimated deduction for payments to pension, profit-sharing, annuity, and bond purchase plans of self-employed individuals described in section 62(7) and allowed by section 404 and section 405(c),

(5) The estimated deduction for penalties forfeited because of premature withdrawal of funds from time savings accounts or deposits described in section 62(12) and allowed by section 165,

(6) The estimated direct charitable deduction under section 170(i),

(7) The estimated deduction for net operating loss carryovers under section 172,

(8) The estimated deduction for alimony, etc., payments under section 215,

(9) The estimated deduction for moving expenses under section 217 but only to the extent that the amount of such deduction is not excluded from the definition of wages by section 3401(a)(15),

(10) The estimated deduction for certain retirement savings under section 219 but only to the extent that the amount of such deduction is not excluded from the definition of wages by section 3401(a)(12)(D),

(11) The estimated deduction for two-earner married couples under section 221,

(12) The estimated net losses from schedules C (Profit or (Loss) From Business or Profession), D (Capital Gains and Losses), E (Supplemental Income Schedule), and F (Farm Income and Expenses) of Form 1040 and from the last line of Part II of Form 4797 (Supplemental Schedule of Gains and Losses),

(13) The estimated amount of decrease of tax due attributable to income averaging under sections 1301 through 1305.

The employee must first use these items ((1) through (13) of this paragraph (b)) to eliminate any payment of estimated tax (as defined in section 6015(d)). Only amounts of these items remaining after the employee has done this may be taken into account in determining the number of withholding allowances the employee may claim.

(c) *Definitions*—(1) *Estimated.* The term ''estimated'' as used in this section to modify the terms ''deduction'', ''deductions'', ''credits'', ''losses'', and ''amount of decrease'' means with respect to an employee the aggregate dollar amount of a particular item that the employee reasonably expects will be allowable to him for the estimation year under the section of the Code specified for each item. In no event shall that amount exceed the sum of:

(i) The amount shown for that particular item on the income tax return that the employee has filed for the taxable year preceding the estimation year (or, if such return has not yet been filed, then the income tax return that the employee filed for the taxable year preceding such year), which amount the employee also reasonably expects to show on the income tax return for the estimation year, plus

(ii) The determinable additional amounts for each item for the estimation year.

The determinable additional amounts are amounts that are not included in

paragraph (c)(1)(i) of this section and that are demonstrably attributable to indentifiable events during the estimation year or the preceding year. Amounts are demonstrably attributable to identifiable events if they relate to payments already made during the estimation year, to binding obligations to make payments (including the payment of taxes) during the year, and to other transactions or occurrences, the implementation of which has begun and is verifiable at the time the employee files a withholding exemption certificate claiming withholding allowances relating thereto. The estimation year is the taxable year including the day on which the employee files the withholding exemption certificate with his employer, except that if the employee files the withholding exemption certificate with his employer and specifies on the certificate that the certificate is not to take effect until a specified future date, the estimation year shall be the taxable year including that specified future date. It is not reasonable for an employee to include in his or her withholding computation for the estimation year any amount that is shown for a particular item on the income tax return that the employee has filed for the taxable year preceding the estimation year (or, if such return has not yet been filed, then the income tax return that the employee filed for the taxable year preceding such year) and that has been disallowed by the Service as part of a proposed adjustment described in § 601.103(b) (relating to examination and determination of tax liability) and § 601.105(b) (relating to examination of returns).

(2) *Amount of decrease of tax due.* The term ''amount of decrease of tax due'' as used in paragraph (b)(13) of this section means:

(i) The amount of tax that the taxpayer would owe on his taxable income without using Schedule G (Form 1040), minus

(ii) The amount of tax that the taxpayer would owe on his taxable income using Schedule G (Form 1040).

(3) *Itemized deductions.* The term ''itemized deductions'' as used in paragraph (b)(1) of this section has the same meaning as ascribed thereto by section 63(f) and the regulations thereunder.

(d) *Computing allowances.* (1) The employee shall compute the number of allowances he may claim for the items specified in paragraph (b) of this section in accordance with the tables and instructions on Form W–4.

(2) If the employee:

(i) Pays or accrues amounts demonstrably attributable to identifiable events (as defined in paragraph (c)(1) of this section) that are:

(A) Interest attributable to ownership of real property and deductible under section 163(a), or

(B) Taxes deductible under section 164(a)(1), or

(C) Interest or taxes deductible under section 216(a), and

(ii) Is obligated to pay or accrue such amounts for at least 2 years subsequent to the estimation year,

then the employee may compute the portion of estimated itemized deductions attributable to such amounts for purposes of paragraph (b)(1) of this section by multiplying the total of such amounts to be paid or accrued in the estimation year by 12 and by then dividing that result by the number of months from the 1st month in the estimation year in which the employee pays or accrues such amounts through the last month of the estimation year. If such amounts decrease during the term of obligation, the employee must, at the beginning of each subsequent calendar year, recompute the number of allowances being claimed as required by paragraph (c)(1) of this section. If the employee uses the computation described in this subparagraph (2), the employee may not request that his employer withhold on the basis of the employee's cumulative wages as provided in § 31.3402 (h)(3)–1.

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

Example 1. Employee A has an estimated net loss from a partnership of $2,000 which would be reported on Schedule E. Employee A is not required to make any payments of estimated tax. Employee A may take her $2,000 partnership loss into consideration in determining the number of withholding allowances to which she is entitled in accordance with the tables and instructions on Form W–4.

Example 2. Employee B has an estimated net loss from a business of $3,000 which would be reported on Schedule C. Employee B would also otherwise be required to make payments of estimated tax on income of $3,000. Employee B may not take his business loss into consideration in determining the number of withholding allowances to which he is entitled in accordance with the tables and instructions on Form W–4.

Example 3. Employee C has an estimated net loss from a farm of $5,000 which would be reported on Schedule F. Employee C would also otherwise be required to make payments of estimated tax on income of $4,000. Employee C may only take her farm loss into consideration to the extent of $1,000 ($5,000–4,000) in determining the number of withholding allowances to which she is entitled in accordance with the tables and instructions on Form W–4.

(f) *Special rules*—(1) *Married individuals.* (i) Except as provided in subdivision (ii) of this subparagraph, a husband and wife shall determine the number of withholding allowances to which they are entitled under section 3402(m) on the basis of their combined wages and allowable items. The withholding allowances to which a husband and wife are entitled may be claimed by the husband, by the wife, or they may be allocated between them. However, they may not both have withholding exemption certificates in effect claiming the same withholding allowance.

(ii) If a husband and wife filed separate income tax returns for the taxable year preceding the estimation year and reasonably expect to file separate returns for the estimation year, the husband and wife shall determine the number of withholding exemptions to which they are entitled under section 3402(m) on the basis of their individual wages and allowable items, and they shall be considered to be single for purposes of the tables on Form W–4.

(2) *Only one certificate to be in effect.* An employee who is entitled to one or more withholding allowances under section 3402(m) and who has, at the same time, two or more employers, may claim such withholding allowance or allowances with only one of his employers.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7915, 48 FR 44075, Sept. 27, 1983]

§ 31.3402(n)–1 Employees incurring no income tax liability.

Notwithstanding any other provision of this subpart, an employer shall not deduct and withhold any tax under chapter 24 upon a payment of wages made to an employee after April 30, 1970, if there is in effect with respect to the payment a withholding exemption certificate furnished to the employer by the employee which contains statements that—

(a) The employee incurred no liability for income tax imposed under subtitle A of the Code for his preceding taxable year; and

(b) The employee anticipates that he will incur no liability for income tax imposed by subtitle A for his current taxable year.

For purposes of section 3402(n) and this section, an employee is not considered to incur liability for income tax imposed under subtitle A if the amount of such tax is equal to or less than the total amount of credits against such tax which are allowable to him under part iv of subchapter A of chapter 1 of the Code, other than those allowable under section 31 or 39. For purposes of section 3402(n) and this section, ''liability for income tax imposed under subtitle A'' shall include liability for a qualified State individual income tax which is treated pursuant to section 6361(a) as if it were imposed by chapter 1 of the Code. An employee is not considered to incur liability for such a State income tax if the amount of such tax does not exceed the total amount of the credit against such tax which is allowable to him under section 6362(b)(2) (B) or (C) or section 6362(c)(4). For purposes of this section, an employee who files a joint return under

section 6013 is considered to incur liability for any tax shown on such return. An employee who is entitled to file a joint return under such section shall not certify that he anticipates that he will incur no liability for income tax imposed by subtitle A for his current taxable year if such statement would not be true in the event that he files a joint return for such year, unless he filed a separate return for his preceding taxable year and anticipates that he will file a separate return for his current taxable year.

For rules relating to invalid withholding exemption certificates, see § 31.3402(f)(2)–1(e), and for rules relating to submission to the Internal Revenue Service of withholding exemption certificates claiming a complete exemption from withholding, see § 31.3402(f)(2)–1(g).

Example 1. Employee A, an unmarried, calendar-year basis taxpayer, files his income tax return for 1970 on April 15, 1971. A has adjusted gross income of $1,200 and is not liable for any tax. He had $180 of income tax withheld during 1970. A anticipates that his gross income for 1971 will be approximately the same amount, and that he will not incur income tax liability for that year. On April 20, 1971, A commences employment and furnishes his employer an exemption certificate stating that he incurred no liability for income tax imposed under subtitle A for 1970, and that he anticipates that he will incur no liability for income tax imposed under subtitle A for 1971. A's employer shall not deduct and withhold on payments of wages made to A on or after April 20, 1971. Under paragraph (c) of § 31.3402(f)(4)–1, unless A files a new exemption certificate with his employer, his employer is required to deduct and withhold upon payments of wages to A made on or after May 1, 1972. (Under § 31.3402(f)(3)–1(b), if A had been employed by his employer prior to April 20, 1971, and had furnished his employer a withholding exemption certificate not containing the statements described in § 31.3402(n)–1 prior to furnishing the withholding exemption certificate containing such statements on April 20, 1971, his employer would not be required to give effect to the new certificate with respect to payments of wages made by him prior to July 1, 1971 (the first status determination date which occurs at least 30 days after April 20, 1971). However his employer could, if he chose, make the new certificate effective with respect to any payment of wages made on or after April 20 and before July 1, 1971.)

Example 2. Assume the facts are the same as in example 1 except that for 1970 A has taxable income of $8,000, income tax liability of $1,630, and income tax withheld of $1,700. Although A received a refund of $70 due to income tax withholding of $1,700, he may not state on his exemption certificate that he incurred no liability for income tax imposed by subtitle A for 1970.

(86 Stat. 944, 26 U.S.C. 6364; and 68A Stat. 917, 26 U.S.C. 7805, 68A Stat. 731, 26 U.S.C. 6001; 68A Stat. 732, 26 U.S.C. 6011)

[T.D. 7048, 35 FR 10292, June 24, 1970, as amended by T.D. 7577, 43 FR 59359, Dec. 20, 1978; T.D. 7598, 44 FR 14553, Mar. 13, 1979; T.D. 7682, 45 FR 15527, Mar. 11, 1980; T.D. 7803, 47 FR 3547, Jan. 26, 1982]

§ 31.3402(o)–1 Extension of withholding to supplemental unemployment compensation benefits.

(a) *In general.* Withholding of income tax is required under section 3402(o) with respect to payments of supplemental unemployment compensation benefits made after December 31, 1970, which are treated under paragraph (b)(14) of § 31.3401(a)–1 as if they were wages.

(b) *Withholding exemption certificates.* For purposes of section 3402(f) (2) and (3) and the regulations thereunder (relating to withholding exemption certificates), in the case of supplemental unemployment compensation benefits an employment relationship shall be considered to commence with either the date on which such benefits begin to accrue or January 1, 1971, whichever is later, and the withholding exemption certificate furnished the employer with respect to such commencement of employment shall be considered the first certificate furnished the employer. The withholding exemption certificate furnished by the employee to his former employer (with whom his employment has been involuntarily terminated, within the meaning of paragraph (b)(14)(ii) of § 31.3401(a)–1) shall be treated as meeting the requirements of section 3402(f)(2)(A) and the regulations thereunder if such former employer furnishes such certificate to the employee's current employer, as defined in paragraph (g) of § 31.340(d)–1, or if such former employer is the agent of such current employer with respect to the employee's withholding exemption certificate. However, the preceding sentence shall not be applicable if such

employee furnishes a new withholding exemption certificate to such current employer (or his agent), provided that such withholding exemption certificate meets the requirements of section 3402(f)(2)(A) and the regulations thereunder. See the definitions of payroll period in paragraph (c) of § 31.3401(b)–1 and of employee in paragraph (g) of § 31.3401(c)–1.

[T.D. 7068, 35 FR 17329, Nov. 11, 1970, as amended by T.D. 7803, 47 FR 3546, Jan. 26, 1982]

§ 31.3402(o)–2 Extension of withholding to annuity payments if requested by payee.

(a) *In general.* Under section 3402(o) of the Internal Revenue Code of 1954 and this section, the payee (as defined in paragraph (g)(2) of this section) of an annuity (as defined in paragraph (g)(1) of this section) may request the payor (as defined in paragraph (g)(3) of this section) of the annuity to withhold income tax with respect to payments of the annuity made after December 31, 1970. If such a request is made, the payor shall deduct and withhold as requested.

(b) *Manner of making request.* A payee who wishes a payor to deduct and withhold income tax from annuity payments shall file a request with the payor to deduct and withhold a specific whole dollar amount from each annuity payment. Such specific dollar amount requested shall be at least $5 per month and shall not reduce the net amount of any annuity payment received by the payee below $10. The request shall be made on Form W–4P (annuitant's withholding exemption certificate and request) in accordance with the instructions applicable thereto, and shall set forth fully and clearly the data therein called for. In lieu of Form W–4P, payors may prepare and use a form the provisions of which are identical with those of Form W–4P.

For the requirements relating to Form W–4P with respect to qualified State individual income taxes, see paragraph (d)(3)(i) of § 301.6361–1 of this chapter (Regulations on Procedure and Administration).

(c) *When request takes effect.* Upon receipt of a request under this section the payor of the annuity with respect to which such request was made shall deduct and withhold the amount specified in such request from each annuity payment commencing with the first annuity payment made on or after the date which occurs—

(1) In a case in which no previous request is in effect, 3 calendar months after the date on which such request is furnished to such payor, and

(2) In a case in which a previous request is in effect, the first status determination date (see section 3402(f)(3)(B) and paragraph (d) of § 31.3402(f)(3)–1 of this chapter) which occurs at least 30 days after the date on which such request is so furnished.

However, the payor may, at his election, commence to deduct and withhold such specified amount with respect to an annuity payment which is made prior to the annuity payment described in the preceding sentence with respect to which the payor must commence to deduct and withhold.

(d) *Duration and termination of request.* A request under this section shall continue in effect until terminated. The payee may terminate the request by furnishing the payor a signed written notice of termination. Such notice of termination shall, except as hereinafter provided, take effect with respect to the first payment of an amount in respect of which the request is in effect which is made on or after the first status determination date (see section 3402(f)(3)(B) and paragraph (d) of § 31.3402(f)(3)–1 of this chapter) which occurs at least 30 days after the date on which such notice is so furnished. However, at the election of such payor, such notice may be made effective with respect to any payment of an amount in respect of which the request is in effect which is made on or after the date on which such notice is so furnished and before such status determination date.

(e) *Special rules.* For purposes of chapter 24 of subtitle C of the Internal Revenue Code of 1954 (relating to collection of income tax at source on wages) and of subtitle F of such Code (relating to procedure and administration), and the regulations thereunder—

(1) An amount which is requested to be withheld pursuant to this section

shall be deemed a tax required to be deducted and withheld under section 3402.

(2) An amount deducted and withheld pursuant to this section shall be deemed an amount deducted and withheld under section 3402.

(3) The term ''wages'' includes the gross amount of an annuity payment with respect to which there is in effect a request for withholding under this section. However, references to the definition of wages in section 3401(a) which are made in section 6014 (relating to election by the taxpayor not to compute the tax on his annual return) and section 6015(a) (relating to declaration of estimated tax by individuals) shall not be deemed to include any portion of such an annuity payment.

(4) The term ''employer'' includes a payor with respect to whom a request for withholding is in effect under this section.

(5) The term ''employee'' includes a payee with respect to whom a request for withholding is in effect under this section.

(6) The term ''payroll period'' includes the period of accrual with respect to which payments of an annuity which is subject to withholding under this section are ordinarily made.

(f) *Returns of income tax withheld and statements for payees.* (1) Form W–2P is to be used in lieu of Form W–2, which is required to be furnished by an employer to an employee under § 31.6051–1 of this chapter and to the Social Security Administration under paragraph (a) of § 31.6051–2 of this chapter, with respect to an annuity subject to withholding under this section. If an amount is required to be deducted and withheld under this section from any or all of the payments made to a payee under an annuity contract during a calendar year, all payments with respect to that annuity contract are required to be reported on Form W–2P, in lieu of Form 1099, as prescribed in §§ 1.6041–1, 1.6041–2, and 1.6047–1 of this chapter; any other annuity payments made by the same payor to the same payee may, at the option of the payor, be reported on Form W–2P.

(2) Each statement on Form W–2P shall show the following:

(i) The gross amount of annuity payments made during the calendar year, whether or not income tax withholding under this section was in effect with respect to all such payments,

(ii) The total amount deducted and withheld as tax under section 3402 of this section, and

(iii) The information required to be shown by Form W–2P and the instructions applicable thereto.

For the requirements relating to Form W–2P with respect to qualified State individual income taxes, see paragraph (d)(3)(ii) of § 301.6361–1 of this chapter (Regulations on Procedure and Administration).

(3) The provisions of § 1.9101–1 of this chapter (relating to permission to submit information required by certain returns and statements on magnetic tape) shall be applicable to the information required to be furnished on Form W–2P.

(4) The provisions of § 31.6109–1 of this chapter (relating to supplying of identifying numbers) shall be applicable to Form W–2P and to any payee of an annuity to whom a statement on Form W–2P is required to be furnished.

(g) *Definitions.* For purposes of this section—

(1) The term ''annuity'' means periodic payments which are payable over a period greater than 1 year and which are treated under section 72 as amounts received as an annuity, whether or not such periodic payments are variable in amount. Also, periodic payments to an individual who is retired before the normal retirement age for reasons of disability, to which the provisions of section 105(d) apply, shall be deemed to be an annuity for purposes of this section. A lump-sum payment (including a total distribution under section 72(n)) is not an annuity.

(2) The term ''payee'' means an individual who is a citizen or resident of the United States and who receives an annuity payment.

(3) The term ''payor'' means a person making an annuity payment except that, if the person making the payment is acting soley as an agent for another person, the term ''payor'' shall mean such other person and not the person actually making the payment. For example, if a bank makes an annuity payment only as agent for an employees' trust, the trust shall be deemed to

be the ''payor.'' Notwithstanding the preceding two sentences, any person who, under section 3401(a) (5) or (8), would not be required to deduct and withhold the tax under section 3402 if the annuity payment were remuneration for services shall not be considered a ''payor.''

(Sec. 7805, 68A Stat. 917; 26 U.S.C. 7805; 86 Stat. 944, 26 U.S.C. 6364; 68A Stat. 747, 26 U.S.C. 6051)

[T.D. 7056, 35 FR 13436, Aug. 22, 1970, as amended by T.D. 7577, 43 FR 59360, Dec. 20, 1978: T.D. 7580, 43 FR 60160, Dec. 26, 1978. Redesignated by T.D. 7803, 47 FR 3546, Jan. 26, 1982]

§31.3402(o)–3 Extension of withholding to sick pay.

(a) *In general.* Under section 3402(o) of the Internal Revenue Code of 1954 and this section, the payee (as defined in paragraph (h)(2) of this section) of sick pay (as defined in paragraph (h)(1) of this section) may request the payor (as defined in paragraph (h)(3) of this section) of the sick pay to withhold income tax with respect to payments of sick pay made on or after May 1, 1981. If such a request is made, the payor must deduct and withhold as requested.

(b) *Manner of making request.* A payee who wishes a payor to deduct and withhold income tax from sick pay shall file a written request with the payor to deduct and withhold a specific whole dollar amount (subject to the limitations of paragraph (c) of this section) from each sick pay payment. The request shall be made on Form W–4S in accordance with the instructions applicable thereto, and shall set forth fully and clearly the data therein called for. In lieu of Form W–4S, payors may prepare and use a form the provisions of which are identical to those of Form W–4S. The payee must include his social security account number in the request.

(c) *Amount requested to be withheld.* The payee shall request that the payor withhold a specific whole dollar amount. The specific whole dollar amount shall be at least $20 per weekly payment of sick pay. If the payee is paid sick pay computed on a daily basis, the specific whole dollar amount shall be at least $4 per daily payment of sick pay. If the payee is paid sick pay on a biweekly basis, the specific whole dollar amount shall be at least $40 per 2 week payment of sick pay. If the payee is paid sick pay on a semat least $4 per day, assuming a 5 day work week of 8 hours per day (40 hours total) in each 7 day calendar week. In the case of a payment which is greater or less than a full payment, the amount withheld is to bear the same relation to the specific whole dollar amount requested to be withheld as such payment bears to a full payment. For example, assume an individual receives sick pay of $100 per week and requests that $25 per week be withheld for taxes. After 4 full weeks of absence, the individual returns to work on a Wednesday (having been absent on sick leave Monday and Tuesday). For the week the individual returns to work, the individual would be entitled to $40 of sick pay, $10 of which would be withheld for taxes. The payor may, at his option, permit the payee to request that the payor withhold a specific percentage from each payment. The specific percentage shall be at least 10 percent. If the payor so opts, the payor must also accept requests under the whole dollar method. If the amount requested to be withheld under either the whole dollar method or the optional percentage method reduces the net amount of a sick pay payment received by the payee to below $10, no income tax shall be withheld from that payment by the payor.

(d) *When request takes effect.* The payor must deduct and withhold the amount specified in the request with respect to payments made more than 7 days after the date on which the request is received by the payor. At the election of the payor, the request may take effect before this deadline.

(e) *Duration and termination of request.* A request under this section shall continue in effect until changed or terminated. The payee may change the request by filing a new written request that meets all of the requirements of paragraphs (b) and (c) of this section. The new request shall take effect as specified in paragraph (d) of this section and the old request shall be deemed terminated when the new request takes effect. The payee may terminate the request by furnishing the

payor a signed written notice of termination containing both a request to terminate withholding and all the information contained in the request to withhold. This written notice of termination shall take effect with respect to payments made more than 7 days after the date on which the notice of termination is received by the payor. At the election of the payor, the request may take effect before this deadline.

(f) *Special rules.* For purposes of chapter 24 on subtitle C of the Internal Revenue Code of 1954 (relating to collection of income tax at source on wages) and of subtitle F of the Code (relating to procedure and administration), and the regulations thereunder—

(1) An amount which is requested to be withheld pursuant to this section shall be deemed a tax required to be deducted and withheld under section 3402.

(2) An amount deducted and withheld pursuant to this section shall be deemed an amount deducted and withheld under section 3402.

(3) The term ''wages'' includes the gross amount of a sick pay payment with respect to which there is in effect a request for withholding under this section. However, references to the definition of wages in section 3401(a) which are made in section 6014 (relating to election by the taxpayer not to compute the tax on his annual return) and section 6015(a) (relating to declaration of estimated tax by individuals) shall not be deemed to include any portion of such a sick pay payment.

(4) The term ''employer'' includes a payor with respect to whom a request for withholding is in effect under this section.

(5) The term ''employee'' includes a payee with respect to whom a request for withholding is in effect under this section.

(6) The term ''payroll period'' includes the period of accrual with respect to which payments of sick pay which are subject to withholding under this section are ordinarily made.

(g) *Statements required to be furnished to payees.* See section 6051(f) and the regulations thereunder for requirements relating to statements required to be furnished to payees.

(h) *Definitions.* (1) (i) The term ''sick pay'' means any payment made to an individual which does not constitute wages (determined without regard to section 3402(o) and this section), which is paid to an employee pursuant to a plan to which the employer is a party, and which constitutes remuneration or a payment in lieu of remuneration for any period during which the employee is temporarily absent from work on account of personal injuries or sickness. The term ''personal injuries or sickness'' shall have the same meaning as ascribed thereto by section 105(a) and the regulations thereunder. The term ''sick pay'' does not include any amounts either excludable from gross income under section 104(a) (1), (2), (4) or (5) or section 105(b) or (c) or paid under section 3402(o)(1)(B). The term ''sick pay'' does not include amounts paid under a plan if all amounts paid under the plan are paid to individuals who are described in the first sentence of section 105(d)(4) (relating to the definition of permanent and total disability) and the regulations thereunder. Amounts paid under any other plan shall be deemed to be paid for a period during which the employee is temporarily absent from work. For sick pay paid in 1981 only, however, the payor may opt not to follow the rules of the two preceding sentences but to follow instead the rule that an employee is temporarily absent if his absence is not described in section 105(d)(4) (relating to the definition of permanent and total disability) and the regulations thereunder. An employer is not a party to the plan if the plan is a contract between only employees and a third party payor or the employer makes no contributions to provide sick pay benefits under the plan, even if the employer withholds amounts from the employees' salaries and pays the amounts over to the third party payor.

(ii) This paragraph (h)(1) may be illustrated by the following examples:

Example 1. Employee A works for P Company and Employee B works for Q Company. P Company has contracted with R Insurance Company for R to pay P's employees the equivalent of their normal wages when they are temporarily absent from work because of sickness or personal injury. Q Company has neither entered into such a contract, nor will it make such payments directly from it own funds. B consequently goes to S Insurance

Company and purchases directly an insurance policy which will pay him the equivalent of his normal wages when he is unable to work because of sickness or personal injury. Both A and B are subsequently temporarily absent from work on account of sickness or personal injuries. A receives payments from R and B receives payments from S. Neither the payments made by R to A nor the payments made by S to B constitute wages (determined without regard to section 3402(o) and this section). A may request that R withhold income taxes under section 3402(o) and this section from the payments he receives because the payments are sick pay as defined in section 3402(o) and this section. B may not request that S withhold income taxes under section 3402(o) and this section from the payments he receives because the payments are not paid pursuant to a plan to which Q Company is a party and thus are not sick pay as defined in section 3402(o) and this section.

Example 2. Employees C and D both work for T Company , which has contracted with U Insurance Company for U to pay T's employees for all sickness or injury claims Employee C is sick and out from work for a month. U pays C the equivalent of C's regular pay. Employee D loses his arm in an accident and U pays D $10,000. C may request that U withhold income taxes under section 3402(o) and this section from the payments he receives because the payments constitute remuneration or a payment in lieu of remuneration for any period during which the employee is temporarily absent from work on account of sickness or personal injuries. D may not request that U withhold income taxes from the payments he receives because the payments do not constitute remuneration or a payment in lieu of remuneration for any period during which the employee is temporarily absent from work on account of sickness or personal injuries.

(2) The term ''payee'' means an individual who is a citizen or resident of the United States and who receives a sick pay payment.

(3) (i) The term ''payor'' means any person making a sick pay payment who is not the employer (as defined in section 3401 and in § 31.3401(d)–1 (except paragraph (f) thereof)) of the payee. If however the person making the payment is acting solely as an agent for another person, the term ''payor'' shall mean the other person and not the person actually making the payment.

(ii) This paragraph (h)(3) may be illustrated by the following examples:

Example 1. X Company contracts with Y Insurance Company for Y to pay X's employees the equivalent of their normal wages when they are temporarily absent from work because of sickness or personal injury. Y computes the amount to be paid and determines the date payment is to be made for each of X's employees. Y then instructs Z Bank to issue a check for that amount on that date. Y reimburses Z for the amount of the check plus Z's administrative costs. Under these circumstances, Z is the agent of Y and Y is the payor under section 3402(o) and this section.

Example 2. V Company contracts with W Company for W to pay V's employees the equivalent of their normal wages when they are temporarily absent from work on account of sickness or personal injury. Under the contractual arrangement, V advises W of the wages normally paid to each of V's employees. V tells W when an employee of V is temporarily absent from work on account of sickness or personal injury, and W computes the amount to be paid the employee and makes payments of sick pay to the employee during the period of the employee's absence. V subsequently reimburses W for the amount of those payments and pays W a fee for W's services. Under these circumstances, W is acting solely as the agent of V, and a payee may not request under section 3402(o) and these regulations that W withhold income taxes from his payments. However, see section 3401 and the regulations thereunder for the obligation of V to withhold income taxes from the payments that W makes as the agent of V, which are not excluded from income under section 105 and the regulations thereunder and which are wages under section 3401 and the regulations thereunder. See also § 31.3402(g)–1 (relating to supplemental wage payments) for the conditions under which a flat percentage rate of withholding may be used.

Example 3. Assume the same facts as in Example 2, except that the consideration for W's services is a set insurance premium rather than reimbursement for costs plus a fee. Under these circumstances W is the payor and is not acting solely as the agent of V. An employee of V to whom W makes payments under the agreement may request under section 3402(o) and the regulations thereunder that W withhold income taxes from those payments.

(i) *Special rules for sick pay paid pursuant to certain collective-bargaining agreements.* (1) Special rules (enumerated in subparagraph (2)) apply to sick pay where all of the following tests are met.

(i) The sick pay must be paid pursuant to a collective-bargaining agreement between employee representatives and one or more employers.

(ii) The agreement must contain a provision that section 3402(o)(5) is to apply to sick pay paid pursuant to the agreement.

(iii) The agreement must contain a provision for determining the amount to be deducted and withheld from each payment of sick pay.

(iv) The social security number of the payee must be furnished to the payor. The agreement may provide that the employer will furnish this or the payee may furnish his social security number directly to the payor.

(v) The payor must be furnished with information that is necessary for the payor to determine whether the payment is pursuant to the agreement and to determine the amount to be deducted and withheld. The agreement may provide that the employer will furnish this information directly to the payor.

(2) The following special rules apply to sick pay where all of the tests of subparagraph (1) are met.

(i) The requirement of section 3402(o)(1)(c) and this section that a request for withholding be in effect does not apply.

(ii) The amount to be deducted and withheld from the sick pay shall be determined according to the provisions of the agreement and not according to this section. This rule shall not however apply—

(A) To payments enumerated in section 3402(n) (relating to employees incurring no income tax liability) and the regulations thereunder, or

(B) To payments made to a payee more than 7 days after the date that the payor receives a statement from the payee that the payee expects to claim an exclusion from gross income under section 105(d). Such statement must include adequate verification of disability. A certificate from a qualified physician attesting that the employee is permanently and totally disabled (within the meaning of section 105(d)) shall be deemed to constitute adequate verification. If the payor receives such a statement, the payor shall not withhold any income tax from the payments made to the payee, regardless of the provisions of the collective bargaining agreement. This exception from withholding does not affect the requirements of § 31.6051–3.

(Secs. 3402(o), 7805, Internal Revenue Code of 1954 (94 Stat. 3495, (26 U.S.C. 3402(o)); 68A Stat. 917 (26 U.S.C. 7805)))

[T.D. 7813, 47 FR 11277, Mar. 16, 1982, as amended by T.D. 7915, 48 FR 44076, Sept. 27, 1983]

§ 31.3402(p)–1 Voluntary withholding agreements.

(a) *In general.* An employee and his employer may enter into an agreement under section 3402(b) to provide for the withholding of income tax upon payments of amounts described in paragraph (b)(1) of § 31.3401(a)–3, made after December 31, 1970. An agreement may be entered into under this section only with respect to amounts which are includible in the gross income of the employee under section 61, and must be applicable to all such amounts paid by the employer to the employee. The amount to be withheld pursuant to an agreement under section 3402(p) shall be determined under the rules contained in section 3402 and the regulations thereunder. See § 31.3405(c)–1, Q&A–3 concerning agreements to have more than 20-percent Federal income tax withheld from eligible rollover distributions within the meaning of section 402.

(b) *Form and duration of agreement.* (1)(i) Except as provided in subdivision (ii) of this subparagraph, an employee who desires to enter into an agreement under section 3402(p) shall furnish his employer with Form W–4 (withholding exemption certificate) executed in accordance with the provisions of section 3402(f) and the regulations thereunder. The furnishing of such Form W–4 shall constitute a request for withholding.

(ii) In the case of an employee who desires to enter into an agreement under section 3402(p) with his employer, if the employee performs services (in addition to those to be the subject of the agreement) the remuneration for which is subject to mandatory income tax withholding by such employer, or if the employee wishes to specify that the agreement terminate on a specific date, the employee shall furnish the employer with a request for withholding which shall be signed by the employee, and shall contain—

(a) The name, address, and social security number of the employee making the request,

(b) The name and address of the employer,

(c) A statement that the employee desires withholding of Federal income tax, and applicable, of qualified State individual income tax (see paragraph (d)(3)(i) of §301.6361–1 of this chapter (Regulations on Procedures and Administration)), and

(d) If the employee desires that the agreement terminate on a specific date, the date of termination of the agreement.

If accepted by the employer as provided in subdivision (iii) of this subparagraph, the request shall be attached to, and constitute part of, the employee's Form W–4. An employee who furnishes his employer a request for withholding under this subdivision shall also furnish such employer with Form W–4 if such employee does not already have a Form W–4 in effect with such employer.

(iii) No request for withholding under section 3402(p) shall be effective as an agreement between an employer and an employee until the employer accepts the request by commencing to withhold from the amounts with respect to which the request was made.

(2) An agreement under section 3402 (p) shall be effective for such period as the employer and employee mutually agree upon. However, either the employer or the employee may terminate the agreement prior to the end of such period by furnishing a signed written notice to the other. Unless the employer and employee agree to an earlier termination date, the notice shall be effective with respect to the first payment of an amount in respect of which the agreement is in effect which is made on or after the first ''status determination date'' (January 1, May 1, July 1, and October 1 of each year) that occurs at least 30 days after the date on which the notice is furnished. If the employee executes a new Form W–4, the request upon which an agreement under section 3402 (p) is based shall be attached to, and constitute a part of, such new Form W–4.

(86 Stat. 944, 26 U.S.C. 6364; 68A Stat. 917, 26 U.S.C. 7805)

[T.D. 7096, 36 FR 5216, Mar. 18, 1971, as amended by T.D. 7577, 43 FR 59359, Dec. 20, 1978; T.D. 8619, 60 FR 49215, Sept. 22, 1995]

§31.3402(q)–1 Extension of withholding to certain gambling winnings.

(a)(1) *General rule.* Every person, including the Government of the United States, a State, or a political subdivision thereof, or any instrumentality of any of the foregoing making any payment of ''winnings subject to withholding'' (defined in paragraph (b) of the section) shall deduct and withhold a tax in an amount equal to 20 percent of the payment. The tax shall be deducted and withheld upon payment of the winnings by the person making such payment (''payer''). See paragraph (c)(5)(ii) of this section for a special rule relating to the time for making deposits of withheld amounts and filing the return with respect to those amounts. Any person receiving a payment of winnings subject to withholding must furnish the payer a statement as required in paragraph (e) of this section. Payers of winnings subject to withholding must file a return as required in paragraph (f) of this section. With respect to reporting requirements for certain payments of gambling winnings not subject to withholding, see section 6041 and the regulations thereunder.

(2) *Exceptions.* The tax imposed under section 3402(q)(1) and this section shall not apply (i) with respect to a payment of winnings which is made to a nonresident alien individual or foreign corporation under the circumstances described in paragraph (c)(4) of this section or (ii) with respect to a payment of winnings from a slot machine play, or a keno or bingo game.

(b) *Winnings subject to withholding.* Winnings subject to withholding means any payment from—

(1) A wager placed in a State-conducted lottery (defined in paragraph (c)(2) of this section) but only if the proceeds from the wager exceed $5,000;

(2) A wager placed in a sweepstakes, wagering pool, or lottery other than a State-conducted lottery but only if the

proceeds from the wager exceed $1,000; or

(3) Any other wagering transaction (as defined in paragraph (c)(3) of this section) but only if the proceeds from the wager (i) exceed $1,000 and (ii) are at least 300 times as large as the amount of the wager.

If proceeds from the wager qualify as winnings subject to withholding, then the total proceeds from the wager, and not merely amounts in excess of $1,000 (or $5,000 in the case of winnings from a State-conducted lottery), are subject to withholding.

(c) *Definitions; special rules*—(1) *Rules for determining amount of proceeds from a wager.* (i) The amount of ''proceeds from a wager'' is the amount paid after January 2, 1977, with respect to the wager, less the amount of the wager. However, for any wagering transaction in a parimutuel pool with respect to horse races, dog races, or jai alai, only amounts paid after April 30, 1977, are taken into account.

(ii) Amounts paid after December 31, 1983, with respect to identical wagers are treated as paid with respect to a single wager for purposes of calculating the amount of proceeds from a wager. For example, amounts paid on two bets placed in a parimutuel pool on a particular horse to win a particular race are treated as paid with respect to the same wager. However, those two bets would not be identical were one ''to win'' and the other ''to place'', or if the bets were placed in different parimutuel pools, *e.g.*, a pool conducted by the racetrack and a separate pool conducted by an off-track betting establishment in which the wagers are not pooled with those placed at the track. Tickets purchased in a lottery generally are not identical wagers, because the designation of each ticket as a winner generally would not be based on the occurrence of the same event, *e.g.*, the drawing of a particular number. If the recipient makes the statement which may be required pursuant to § 1.6011–3, indicating whether or not the recipient (and any other persons entitled to a portion of the winnings) is entitled to winnings from identical wagers and indicating the amount of such winnings, if any, then the payer may rely upon such statement in determining the total amount of proceeds from the wager under paragraph (c)(1) of this section attributable to identical wagers.

(iii) In determining the amount paid with respect to a wager, proceeds which are not money shall be taken into account at the fair market value.

(iv) Periodic payments, including installment payments or payments which are to be made periodically for the life of a person, are aggregated for purposes of determining the proceeds from a wager. The aggregate amount of periodic payments to be made for a person's life shall be based on that person's life expectancy. See §§ 1.72–5 and 1.72–9 for rules used in computing the expected return on annuities. For purposes of determining the amount subject to withholding, the first periodic payment shall be reduced by the amount of the wager.

(2) *Wager placed in a State-conducted lottery.* The term ''wager placed in a State-conducted lottery'' means a wager placed in a lottery conducted by an agency of a State acting under authority of State law provided that the wager is placed with the State agency conducting such lottery or with its authorized employees or agents. This term includes wagers placed in State-conducted lotteries in which the amount of winnings is determined by a parimutuel system.

(3) *Other wagering transaction.* The term ''other wagering transaction'' means any wagering transaction other than one in a lottery, sweepstakes, or wagering pool. This term includes a wagering transaction in a parimutuel pool with respect to horse races, dog races, or jai alai.

(4) *Certain payments to nonresident aliens or foreign corporations.* A payment of winnings subject to withholding made to a nonresident alien individual or a foreign corporation is not subject to the tax imposed by section 3402(q) and this section if such payment is subject to withholding of tax under section 1441(a) (relating to withholding on nonresident aliens) or 1442(a) (relating to withholding on foreign corporations) and the payer complies with the requirements of those sections. For purposes of this section, a payment is treated as being subject to tax under

section 1441(a) or 1442(a) notwithstanding that the rate of such tax is reduced (even to zero) as may be provided by an applicable treaty with another country. However, a reduced or zero rate of withholding of tax shall not be applied by the payer in lieu of the rate imposed by sections 1441 and 1442 unless the person receiving the winnings has completed, signed, and furnished the payer Form 1001 as required by § 1.1441–6. See sections 1441 and 1442 and the regulations thereunder for rules regarding the withholding of tax on nonresident aliens and foreign corporations.

(5) *Gambling winnings treated as payments by employer to employee.* (i) Except as provided in subdivision (ii), for purposes of sections 3403 and 3404 and the regulations thereunder and for purposes of so much of subtitle F (except section 7205) and the regulations thereunder as relate to chapter 24, payments to any person of winnings subject to withholding under this section shall be treated as if they are wages paid by an employer to an employee.

(ii) Solely for purposes of applying the deposit rules under 6302(c) and the return requirement of section 6011, the withholding from winnings shall be deemed to have been made no earlier than at the time the winner's identity is known to the payer. Thus, for example, winnings from a State-conducted lottery are subject to withholding when actually or constructively paid, whichever is earlier; however, the time for depositing the withheld taxes and filing a return with respect thereto shall be determined by reference to the date on which the winner's identity is known to the State, if such date is later than the date on which the winnings are actively or constructively paid. If a payer's obligation to pay winnings terminates other than by payment, all liabilities and requirements resulting from the requirement that the payer deduct and withhold with respect to such winnings shall also terminate.

(d) *Examples.* The provisions of this section may be illustrated by the following examples:

Example 1. A purchases a lottery ticket for $1 in the State W lottery from an authorized agent of State W. On February 1, 1977, the drawing is held and A wins $5,001. Since the proceeds of the wager ($5,001—$1) are not greater than $5,000, State W is not required to withhold or deduct any amount from A's winnings.

Example 2. Assume the same facts as in example 1 except that A purchases two $1 tickets and that A wins $5,002 when one of the tickets is drawn. State W must deduct and withhold tax at a rate of 20% from $5,001 ($5,002 less the $1 wager), or $1,000.20.

Example 3. On January 1, 1984, B makes two $2 bets in a parimutuel pool for a horse race. Each bet is on the same horse to win a particular race. B wins a total of $1,300 on those bets. B cashes the tickets at different cashier windows indicating on the statement demanded by each cashier the amount of winnings from identical wagers. Although the payment by each cashier ($650) is less than the $1,000 floor for the withholding requirement on payments of winnings from horse race parimutuel pools, each cashier is required to deduct and withhold tax from B's winnings equal to $129.60 (($650 − $2) × 20 percent = $129.60) based on the information B submitted indicating that the aggregated proceeds from the identical wagers ($1,300 − $4=$1,296) exceed $1,000 and the amount is at least 300 times as great as the amount wagered ($4×300=$1,200). Had B refused to make the statements, the payer would have no basis provided by the payee upon which to rely in determining whether the payment is subject to withholding. Under these circumstances, the payer would be required to deduct and withhold tax from the payment.

Example 4. C purchases a lottery ticket for $1. On June 1, 1979, the lottery drawing is held and C wins the grand prize of $50,000, payable $500 monthly. The payer must deduct and withhold tax at a rate of 20% from each payment of winnings. Therefore, $99.80 must be withheld from the first monthly payment to B ($500 − $1)×20%=$99.80) and $100 ($500×20%) must be withheld from each monthly payment thereafter.

Example 5. Assume the same facts as in example 4, except that C wins an automobille rather than the grand prize. The fair market value of the automobile on the date on which it is made available to C is $10,000. the payer must deduct and withhold a tax of $2,000 (($10,001 − $1)×20%). This may be accomplished, for example, if C pays $2,000 to the payer. Alternatively, if the payer, as part of the prize, pays all taxes required to be duducted and withheld, the payer must deduct and withhold tax not only on the fair market value of the automobile less the wager, but also on the taxes it pays that are required to be deducted and withheld. This results in a pyramiding of taxes requiring the use of an algebraic formula. Under this formula, the payer must deduct and withhold

a tax of 25 percent of the fair market value of the automobile less the wager ($2,500) and, in addition, the payer must indicate on Form W–2G the amount of such winnings as $12,501 ($10,001+25%($10,001−$1)).

Example 6. D purchases a ticket for $1 in the State Y lottery from an authorized agent of State Y On January 1, 1976, a drawing is held and D wins $100 a month for the rest of D's life. It is actuarially determined that, on January 3, 1977, D's life expectancy is 5 years. Based on that determination, the proceeds from the wager paid to D on or after January 3, 1977, will exceed $5,000. Therefore, State Y must deduct and withhold $20 from each monthly payment made on or after January 3, 1977. (None of such payments is reduced by the amount of the wager because the amount of the wager was offset by the first payment of winnings which was made before January 3, 1977)).

Example 7. Assume the same facts as in example 6 except that State Y purchases in its own name, as owner, an annuity of $100 a month for D's life from E Corporation, in order to fund its own obligation to make the payments. Although State Y remains liable for the withholding of tax, E Corporation as paying agent for State Y, making payments directly to D, should deduct and withhold from each monthly payment in the manner described in example 6.

Example 8. E purchases a sweepstakes ticket for $1 in a sweepstakes conducted by W. E purchases the ticket on behalf of himself and on behalf of F and G, who have contributed equal amounts toward the purchase of the ticket and who have agreed to share equally in any prizes won. The ticket which E purchases wins $1,002. Since the proceeds of the wager ($1,002—$1) are greater than $1,000 W is required to withhold and deduct 20 percent of such proceeds.

Example 9. On February 1, 1977, a drawing is held in the State X lottery in which a winning ticket is selected. The person holding the winning ticket is entitled to proceeds of $100,000 payable either as a lump sum upon demand or $10,000 a year for 10 years. Under State law, the winning ticket must be presented to an authorized agent of State X before February 1, 1978. Until the ticket is presented, State X does not know the identity of the winner. On December 1, 1977, H, the winner, presents the winning ticket to an authorized agent of the State X lottery. The winnings are constructively paid to H on February 1, 1977. Since H, has the option of receiving the entire proceeds upon demand, State X is required to deduct and withhold $20,000 ($100,000×20%) from the proceeds of H's winnings on February 1, 1977; but for purposes of determining the time at which the deposit and inclusion on Form 941 of these taxes is to be made, the withholding shall be deemed to have beem made on December 1, 1977.

Example 10. J purchases a subscription to N magazine, at the regular subscription price. All new subscribers are automatically eligible for a special drawing. The drawing is held and J wins $50,000. Since J has not paid any more than the regular subscription price, J has not placed a wager or entered a wagering transaction. Therefore, N is not required to deduct and withhold J's winnings.

Example 11. C makes two $2 bets in the same parimutuel pool for a horse race. One bet is an ''exacta'' in which C bets on horse M to win and horse N to ''place''. The other bet is a ''trifecta''. C bets on horse M to win, horse N to ''place'' and horse O to ''show''. C wins both bets and is paid $600 with respect to the ''exacta'' and $900 with respect to the ''trifecta''. The bets are not identical wagers, however, and on these facts neither payment is subject to withholding.

(e) *Statement by recipient.* Each person who is to receive a payment of winnings subject to withholding shall furnish the payer a statement on Form W–2G or 5754 (whichever is applicable) made under the penalties of perjury containing—

(1) The name, address, and taxpayer identification number of the winner accompanied by a declaration that no other person is entitled to any portion of such payment, or

(2) The name, address, and taxpayer identification number of the recipient and of every person entitled to any portion of such payment.

If more than one payment of winnings subject to withholding is to be made with respect to a single wager, for example in the case of an annuity, the recipient is required by paragraph (e) of this section to furnish the payer a statement with respect to the first such payment only, provided that such other payments are taken into account in a return required by paragraph (f) of this section.

(f) *Return of payer*—(1) *In general.* Every person making payment of winnings for which a statement is required under paragraph (e) of this section shall file a return on Form W–2G with the Internal Revenue Service Center serving the district in which is located the principal place of business of the person making the return on or before February 28 of the calendar year following the calendar year in which

the payment of winnings is made. The return required by this paragraph (f) of the section, need not include the statement by the recipient required by paragraph (e) of this section and, therefore, need not be signed by the recipient, provided such statement is retained as long as the contents thereof may become material in the administration of any internal revenue law. For payments to more than one winner, a separate Form W–2G, which in no event need be signed by the winner, shall be filed with respect to each such winner. Each Form W–2G shall contain the following:

(i) The name, address, and employer identification number of the payer;

(ii) The name, address, and social security account number of the winner;

(iii) The date, amount of the payment, and amount withheld;

(iv) The type of wagering transaction;

(v) Except with respect to winnings from a wager placed in a State-conducted lottery, a specific description of two types of identification, *e.g.*, driver's license number and issuing State, social security account number of voter registration number and jurisdiction, furnished the payer for verification of the recipient's name, address, and social security account number; and

(vi) With respect to amounts paid after December 31, 1983, the amount of winnings from identical wagers.

The return of the payer need not contain the information required by subdivision (v) of this paragraph (f)(1) provided such information is obtained with respect to the recipient of such winnings and retained as long as the contents thereof may become material in the administration of any internal revenue law.

(2) *Transmittal form.* Persons making payments of winnings subject to withholding shall use Form W–3G to transmit Forms W–2G to the Internal Revenue Service Centers.

(Secs. 6011 and 7805 of the Internal Revenue Code of 1954 (68A Stat. 732, 917; 26 U.S.C. 6011, 7805)

[T.D. 7787, 46 FR 46908, Sept. 23, 1981, as amended by T.D. 7919, 48 FR 46298, Oct. 12, 1983; 48 FR 55728, Dec. 15, 1983; T.D. 7943, 49 FR 5345, Feb. 13, 1984; 49 FR 8437, Mar. 7, 1984]

§ 31.3402(r)–1 Withholding on distributions of Indian gaming profits to tribal members.

(a) (1) *General rule.* Section 3402(r)(1) requires every person, including an Indian tribe, making a payment to a member of an Indian tribe from the net revenues of any class II or class III gaming activity, as defined in 25 U.S.C. 2703, conducted or licensed by such tribe to deduct and withhold from such payment a tax in an amount equal to such payment's proportionate share of the annualized tax, as that term is defined in section 3402(r)(3).

(2) *Withholding tables.* Except as provided in paragraph (a)(4) of this section, the amount of a payment's proportionate share of the annualized tax shall be determined under the applicable table provided by the Commissioner.

(3) *Annualized amount of payment.* Section 3402(r)(5) provides that payments shall be placed on an annualized basis under regulations prescribed by the Secretary. A payment may be placed on an annualized basis by multiplying the amount of the payment by the total number of payments to be made in a calendar year. For example, a monthly payment may be annualized by multiplying the amount of the payment by 12. Similarly, a quarterly payment may be annualized by multiplying the amount of the payment by 4.

(4) *Alternate withholding procedures*—(i) *In general.* Any procedure for determining the amount to be deducted and withheld under section 3402(r) may be used, provided that the amount of tax deducted and withheld is substantially the same as it would be using the tables provided by the Commissioner under paragraph (a)(2) of this section. At the election of an Indian tribe, the amount to be deducted and withheld under section 3402(r) shall be determined in accordance with this alternate procedure.

(ii) *Method of election.* It is sufficient for purposes of making an election under this paragraph (a)(4) that an Indian tribe evidence the election in any reasonable way, including use of a particular method. Thus, no written election is required.

(5) *Additional withholding permitted.* Consistent with the provisions of section 3402(p), a tribal member and a tribe may enter into an agreement to provide for the deduction and withholding of additional amounts from payments in order to satisfy the anticipated tax liability of the tribal member. The agreement may be made in a manner similar to that described in § 31.3402(p)–1 (with respect to voluntary withholding agreements between employees and employers).

(b) Effective date. This section applies to payments made after December 31, 1994.

[T.D. 8634, 60 FR 65238, Dec. 19, 1995]

§ 31.3403–1 Liability for tax.

Every employer required to deduct and withhold the tax under section 3402 from the wages of an employee is liable for the payment of such tax whether or not it is collected from the employee by the employer. If, for example, the employer deducts less than the correct amount of tax, or if he fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax. See, however, § 31.3402(d)–1. The employer is relieved of liability to any other person for the amount of any such tax withheld and paid to the district director or deposited with a duly designated depositary of the United States.

§ 31.3404–1 Return and payment by governmental employer.

If the United States, or a State, Territory, Puerto Rico, or a political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, is an employer required to deduct and withhold tax under Chapter 24, the return of the amount deducted and withheld as such tax may be made by the officer or employee having control of the payment of the wages or other officer or employee appropriately designated for that purpose. (For provisions relating to the execution and filing of returns, see Subpart G of the regulations in this part.)

§ 31.3405(c)–1 Withholding on eligible rollover distributions; questions and answers.

The following questions and answers relate to withholding on eligible rollover distributions under section 3405(c) of the Internal Revenue Code of 1986, as added by section 522(b) of the Unemployment Compensation Amendments of 1992 (Public Law 102– 318, 106 Stat. 290) (UCA). For additional UCA guidance under sections 401(a)(31), 402(c), 402(f), and 403(b)(8) and (10), see §§ 1.401(a)(31)–1, 1.402(c)–2, 1.402(f)–1, and 1.403(b)–2 of this chapter, respectively.

LIST OF QUESTIONS

Q–1: What are the withholding requirements under section 3405 for distributions from qualified plans and section 403(b) annuities?

Q–2: May a distributee elect under section 3405(c) not to have Federal income tax withheld from an eligible rollover distribution?

Q–3: May a distributee be permitted to elect to have more than 20-percent Federal income tax withheld from an eligible rollover distribution?

Q–4: Who has responsibility for complying with section 3405(c) relating to the 20-percent income tax withholding on eligible rollover distributions?

Q–5: May the plan administrator shift the withholding responsibility to the payor and, if so, how?

Q–6: How does the 20-percent withholding requirement under section 3405(c) apply if a distributee elects to have a portion of an eligible rollover distribution paid to an eligible retirement plan in a direct rollover and to have the remainder of that distribution paid to the distributee?

Q–7: Will the plan administrator be subject to liability for tax, interest, or penalties for failure to withhold 20 percent from an eligible rollover distribution that, because of erroneous information provided by a distributee, is not paid to an eligible retirement plan even though the distributee elected a direct rollover?

Q–8: Is an eligible rollover distribution that is paid to a qualified defined benefit plan subject to 20-percent withholding?

Q–9: If property other than cash, employer securities, or plan loans is distributed, how is the 20-percent income tax withholding required under section 3405(c) accomplished?

Q–10: What assumptions may a plan administrator make regarding whether a benefit is an eligible rollover distribution for purposes of determining the amount of a distribution that is subject to 20-percent mandatory withholding?