

ORIGINAL

IN THE SUPREME COURT OF OHIO

**CLAUDIA BERNARD**

Appellant, Case No.: 2012-0717

-vs-

**UNEMPLOYMENT COMPENSATION  
REVIEW COMMISSION**

and

**WAKEMAN TRUST**

Appellees.

On Appeal From The Miami  
County Court of Appeals  
Second Appellate District

Court Of Appeals  
Case No.: 11 CA 00016

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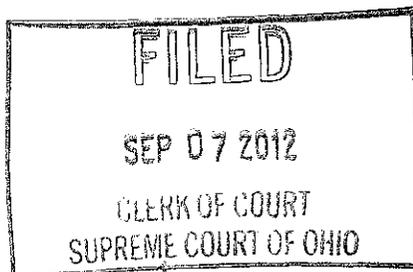
**BRIEF OF APPELLANT CLAUDIA BERNARD**

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**STATEMENT OF ISSUES**

- I. WHETHER COURTS MUST INTERPRET STATUTES AND REGULATIONS WITH DEFERENCE TO THE AFFECTED PARTY AND AGAINST THE STATE AGENCY CHARGED WITH ENFORCEMENT OF THE STATUTORY/REGULATORY SCHEME.**

## STANDARD OF REVIEW

This Court must reverse the Commission's decision if it finds that the decision was "unlawful, unreasonable, or against the manifest weight of the evidence." *Geretz v. ODJFS*, 114 Ohio St.3d 89, 2007-Ohio-2941, 868 N.E.2d 669, ¶ 10 (citing *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Servs.* (1995) (emphasis added). Upon appeal to a court of common pleas, "the court shall hear the appeal on the certified record provided by the commission." *Atkins v. ODJFS*, 10th Dist. No. 08AP-182, 2008-Ohio-4109, ¶13. The Ohio Revised Code requires that the Unemployment Compensation Act be *liberally construed in favor of awarding benefits*. O.R.C. § 4141.46; *Haynes v. Board of Review*, 8th Dist. No. 51633, 1987 Ohio App. LEXIS 7175, \*9 – 10 (Feb. 5, 1987), *a copy is attached as Exhibit A* (emphasis added).

## STATEMENT OF THE CASE

Appellant, Claudia Bernard (“Bernard”), was employed by The Barry and Patricia Wakeman Educational Foundation (“Wakeman”) during the base period of January 1, 2009 through December 31, 2009. On January 10, 2010 Bernard applied for unemployment compensation benefits. On April 8, 2010 the Ohio Department of Jobs and Family Services issued a redetermination disallowing benefits to Bernard. The claim was disallowed on the basis that Bernard received insufficient wages during the base period.

Bernard filed an appeal of the Redetermination on April 15, 2010 and the Ohio Department of Jobs and Family Services transferred the matter to the Ohio Unemployment Compensation Review Commission (“UCRC”). The matter was heard before Hearing Officer, Phillip Wright, Jr., on October 25, 2010. The Hearing Officer issued a decision on December 3, 2010 affirming the disallowance of Bernard’s claim. The Hearing Officer specifically noted that Bernard was paid insufficient wages to qualify for benefits. To reach this decision, the Hearing Officer refused to include the \$900 per month that Bernard directed from her salary to her Medical Savings Account. It is only by excluding these funds that the Hearing Officer was able to affirm the disallowance of the claim pursuant to O.R.C. § 4141.01(R)(1).

Bernard sought a review of the Hearing Officer’s decision, which was denied on January 15, 2011. Bernard timely filed an appeal of the Hearing Officer’s decision on or about July 28, 2011 in the Miami County Court of Common Pleas. After briefing, the trial court affirmed the decision of the Hearing Officer and Bernard appealed to the Second District Court of Appeals, for Miami County. The Court of Appeals again ruled in favor of the UCRC and Bernard filed her notice of appeal to this Court on June 4, 2012.

## STATEMENT OF FACTS

Bernard's employment with Wakeman was terminated in January, 2010 and she subsequently applied for unemployment benefits. Bernard's application for benefits was denied and she appealed the Unemployment Compensation Administrative Hearing Officer's decision dated December 3, 2010. The denial of Bernard's benefits was based upon the position taken by ODJFS and sustained by the UCRC that she did not earn an average weekly wage of at least \$213.00 for the base period in question. This decision was based upon the determination that Bernard's contributions to her medical flexible spending account ("MFSA") were not wages pursuant to O.R.C. § 4141.01(H)(1)(a).

In making the decision, the Hearing Officer failed to consider evidence of \$900 per month in wages paid to Bernard in the form of voluntary payroll contributions to a MFSA.<sup>1</sup> Such an account is actually structured as a deduction from gross wages -- that is, the dollar amounts start out as wages or salary and are allowed to be placed in a tax-free account for the benefit of the employee, as a deduction from gross compensation.

During the hearing before the Hearing Officer, Wakeman did not contest the application for benefits. Counsel for the employer also confirmed on behalf of the employer in his letter to the agency dated April 2009 that "...Ms. Bernard also received other compensation pursuant to an Health FSA-125 account, in the amount of \$10,800.00." The argument by counsel for employer at the Hearing also did not contest that the FSA payments were "compensation":

"Transcript p. 23:

line

11: ...there was the 1099 compensation, there was the  
12 W2 compensation and the FSA uh, uh, uh, the flexible spending account  
13 in the amount of \$10,800.00 and then the last number was a gift

---

<sup>1</sup> For purposes of this appeal it is not disputed that the flexible spending plan was a qualified plan under 26 USC § 125.

14 according to Mrs. Wakeman's observation, not a bonus. I don't know  
15 that that last number impacts this anyway. Uh but our goal is to  
16 present it the way that it was and allow the board to determine what  
17 it's requirements are for allowing worker's (sic) compensation. Uh that's  
18 not a decision that the employer is able to make. The employer can  
19 only present what the employer paid uh and and how it was paid and what  
20 it was for and we have done that.”

The decision of the Hearing Officer denied unemployment benefits to Bernard based upon interpretation of O.R.C. § 4141.01 that MFSA contributions are not wages and not included in the base period calculation. Thus, instead of including Bernard's \$900 per month MFSA contribution, these wages were excluded causing Bernard's salary to fall below the minimum contribution. This miscalculation of Bernard's wages as falling below \$213 per week allowed the hearing officer to deny benefits to Bernard. Had her MFSA contributions been included into the base period calculation, then it is undisputed that Bernard would have qualified for unemployment compensation benefits.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

### **Proposition of Law No.: 1: Courts Must Interpret Statutes and Regulations With Deference to The Affected Party and Against The State Agency Charged With Enforcement of the Statutory/Regulatory Scheme**

The Court of Appeals committed error in failing to interpret the unemployment compensation statutes, O.R.C. §§4141.01 through 4141.46, favorably toward Bernard. The UCRC and the Court below applied an unreasonable interpretation to the statutes interpreting whether Bernard's MFSA contributions are wages/remuneration for purposes of calculating wages received during the base period. The Court of Appeals erred when it interpreted the statute deferentially in favor of the agency. Thus, the Court of Appeals upheld the wrongful denial of benefits to Bernard.

The Unemployment Compensation system must give the benefit of the doubt to the employee in a situation where interpretation is ambiguous or unclear. ORC § 4141.46: Liberal construction of statutes. Judge Fain's dissent, from the Court of Appeals' decision, states the correct rationale:

“Fain, J. Dissent:

{¶ 15} ...[T]he proper interpretation of the statutory definition of remuneration as it applies to the flexible spending account in this case is anything but clear and unambiguous.

{¶ 16} The principle that a court should give deference to an administrative agency's interpretation of the legislative enactment that it is charged to administer is a general principle of statutory interpretation employed by courts. *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 287, 2001-Ohio-190, 750 N.E.2d 130. This principle finds statutory support in R.C. 1.49(F).

{¶ 17} The principle that Ohio's Unemployment Compensation Law shall be construed liberally in favor of the applicant is a specific rule of construction set forth in the Unemployment Compensation Law, itself, at R.C. 4141.46. *Vespremi v. Giles*, 68 Ohio App.2d 91, 93, 427 N.E.2d 30 (1st Dist. 1980).

{¶ 18} It is another principle of statutory construction that a special or local provision shall prevail as an exception to a general provision, where the two provisions are in conflict. This principle is codified at R.C. 1.51.

{¶ 19} Given the specific legislative commandment, in R.C. 4141.46, that the Ohio Unemployment Compensation Law should be liberally construed in favor of

applicants for compensation, ... the statute [should be construed] in Bernard's favor and find her eligible to receive benefits. She earned the moneys that were paid into a flexible spending account for her benefit, through her labor in her employer's behalf. ...interpreting those moneys as remuneration for purposes of determining her eligibility does not unduly stretch the bounds of the requisite liberal construction of the statute; in my view, that interpretation lies within a reasonable, liberal construction of the statute in her favor."

The majority opinion by the Court of Appeals dissects the language of O.R.C. §4141.01, 26 USCS §125 and 26 USCS § 3306, but comes to the wrong conclusion. This set of statutes lay out a set of definitions that the Court of Appeals relied upon to determine that the UCRC was reasonable in its interpretation leading to the exclusion of benefits from Bernard. However, the interpretation is not reasonable and is contrary to Ohio law and specific rules of statutory construction.

With regard to statutory construction O.R.C. § 1.51 provides "If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, *the special or local provision prevails as an exception to the general provision*, unless the general provision is the later adoption and the manifest intent is that the general provision prevails." (emphasis added) As Judge Fain noted in his dissent, the rule that deference be given to agency interpretations of a statute is a general rule; whereas, the O.R.C. § 4141.46 is specific to interpretation of the unemployment compensation statutes. In discussing O.R.C. §§ 4141.01 through 4141.46, the court in *Braselton v. Ohio Dept. of Job & Family Servs*, Montgomery App., Case No.: 21828, 2008-Ohio-751, ¶ 14 stated "[a]ll of the above statutory and code provisions 'shall be liberally construed' in favor of the applicant for benefits." (citations omitted).

As part of the definitions relied upon by the Court of Appeals, 26 USCS § 125(f) provides: For purposes of this section-- (1) In general. The term "qualified benefit" means any

benefit which, with the application of subsection (a), is not includible in the gross income of the employee by reason of an express provision of this chapter [26 USCS §§ 1 et seq.] (other than section 106(b), 117, 127, or 132 [26 USCS § 106(b), 117, 127, or 132]).” Similarly the Court of Appeals cited 26 USCS §3306(b) Wages. For purposes of this chapter [26 USCS §§ 3301 et seq.], the term “wages” means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include – [] (5) any payment made to, or on behalf of, an employee or his beneficiary [] (G) under a cafeteria plan (within the meaning of section 125 [26 USCS § 125]) *if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 [26 USCS § 125] applied for purposes of this section) section 125 [26 USCS § 125] would not treat any wages as constructively received....*” (emphasis added).<sup>2</sup> It is undisputed that Bernard paid into a cafeteria plan as described in 26 USCS § 125.

The Court of Appeals erred when the Court deferred to the administrative agency in determining that the aforementioned statutes exclude from the definition of wages Bernard’s MFSA contributions. However, this is a misinterpretation of the statute. The plain language of 26 USCS § 3606(b)(5)(G) is written such that to exclude the salary deduction from the wages the payment made to Bernard “would not be treated as wages without regard to such plan *and* it is reasonable to believe that [] section 125 would not treat any wages as constructively received.” (emphasis added). This is a two-pronged test for excluding contributions from the definition of wages. First, remuneration is only excluded from wages where the remuneration would not be treated as wages without regard to the plan. Second, remuneration is excluded from wages when it is reasonable to believe that [] section 125 would not treat any wages as constructively

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<sup>2</sup> The Court of Appeals also referenced 26 USCS § 3121(a)(5)(G), which has similar language. The Court of Appeals relied on this language to argue that MFSA contributions are excluded from remuneration for purposes of Federal Unemployment Tax.

received.” Bernard concedes that 26 USCS § 125 would not treat her MFSA payments as constructively received. However, the amount received by Bernard (that she voluntarily contributed to her MFSA) would be treated as wages, but for the plan. This is the part of the 26 USCS §§3606 and 3121 that the Court of Appeals failed to address. In order to exclude Bernard’s MFSA contributions from the definition of wages, the amount contributed could not be treated as wages even if there were not cafeteria plan. This is simply not the case.

It is clear that if no plan were in place, then the \$900 per month that Bernard contributed to her MFSA would have been treated as wages. It is error for the Court of Appeals to interpret the statute in favor of the UCRC when there is a conflict in interpretations. Where such conflicts exist, the agency and the Court of Appeals must interpret the statute liberally in favor of Bernard. Thus, the decision of the Court of Appeals should be overturned and the UCRC should interpret the statutes at issue in favor of Bernard and other similarly situated employees.

In addition to the foregoing, public policy dictates in favor of coverage for Bernard. The Court of Appeals’ interpretation of the statutes at issue places Ohio employees in a no-win situation. The U.S. Congress, in its benevolence, has conferred a benefit on employees wherein they are able to make tax-free contributions to a medical flexible spending account. The purpose of this scheme is to allow employees to set aside funds for payment of medical expenses without having to include the amount as income for purposes of federal taxation.

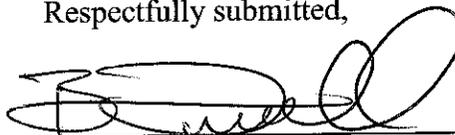
The UCRC and the Court of Appeals places Ohio employees in the unenviable position of choosing between taking advantage of the tax benefits of an MFSA while knowing that such contributions may deny them the benefits of unemployment compensation should they find themselves unemployed through no fault of their own. This cannot be what Congress (or even a thinking person) could have planned. Ohio employees should not have to bet on whether they

will lose their job just so they can take advantage of a federal program designed to aid employees with medical expenses. It takes little imagination to see how the UCRC and Court of Appeals' interpretation denying unemployment benefits is most likely to hurt the most vulnerable (lowest paid and least healthy) of Ohio's employed population. Public policy should not and cannot weigh in favor of a scheme that places Ohio's population in the lose-lose situation of deciding to take advantage of an MFSA or someday receiving unemployment benefits.

**CONCLUSION**

For the reasons stated above, this Court must overturn the decision of the Court of Appeals and determine that its interpretation of the relevant statutes is in error. This Court must determine that Bernard and other similarly situated Ohio employees should not suffer a denial of unemployment benefits simply because she elected to fund a MFSA from moneys otherwise treated as "wages", due to serious health requirements.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the following via regular U.S. mail, postage pre-paid, on this 7, day of September, 2012:

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Brandon Cogswell

## **APPENDIX A**

IN THE SUPREME COURT OF OHIO

CLAUDIA BERNARD

Appellant,

-vs-

UNEMPLOYMENT COMPENSATION  
REVIEW COMMISSION

and

WAKEMAN TRUST

Appellees.

12-0717

On Appeal From The Miami  
County Court of Appeals  
Second Appellate District

Court Of Appeals  
Case No.: 11 CA 00016

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NOTICE OF APPEAL OF APPELLANT CLAUDIA BERNARD

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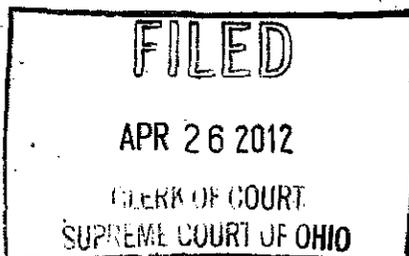


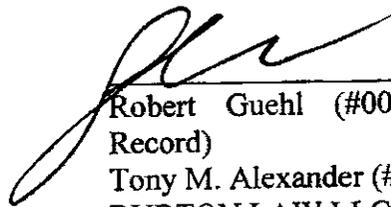
EXHIBIT A

**NOTICE OF APPEAL OF APPELLANT CLAUDIA BERNARD**

Appellant, Claudia Bernard, gives notice of appeal to The Supreme Court of Ohio from the judgment of the Miami County Court of Appeals, Second District Court of Appeals, entered in Court of Appeals Case No.: 11CA00016 on March 12, 2012.

This case raises issues of public or great general interest.

Respectfully submitted,



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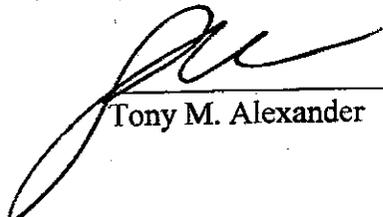
Attorneys for Appellant Claudia Bernard

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the following via regular U.S. mail, postage pre-paid on this 26<sup>th</sup>, day of April, 2012:

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Tony M. Alexander

12 MAR 12 PM 2:07

JAN A. MOTTINGER  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MIAMI COUNTY

CLAUDIA BERNARD

Plaintiff-Appellant

v.

UNEMPLOYMENT COMPENSATION  
REVIEW COMMISSION, et al.

Defendant-Appellees

Appellate Case No. 2011-CA-16

Trial Court Case No. 11-72

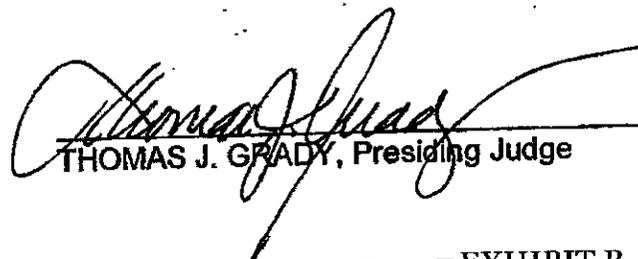
(Civil Appeal from  
Common Pleas Court)

FINAL ENTRY

Pursuant to the opinion of this court rendered on the 9th day  
of March, 2011, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App. R. 30(A), it is hereby ordered that the Clerk of the Miami  
County Court of Appeals shall immediately serve notice of this judgment upon all parties and  
make a note in the docket of the mailing.



THOMAS J. GRADY, Presiding Judge

EXHIBIT B

---

MIKE FAIN, Judge

*Michael T. Hall*  
MICHAEL T. HALL, Judge

---

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Hon. Robert J. Lindeman  
Miami County Common Pleas Court  
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**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MIAMI COUNTY**

CLAUDIA BERNARD	:	
	:	Appellate Case No. 2011-CA-16
Plaintiff-Appellant	:	
	:	Trial Court Case No. 11-72
v.	:	
	:	
UNEMPLOYMENT COMPENSATION	:	(Civil Appeal from
REVIEW COMMISSION, et al.	:	Common Pleas Court)
	:	
Defendant-Appellants	:	

.....  
OPINION

Rendered on the 9<sup>th</sup> day of March, 2011.

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EXHIBIT C

HALL, J.

{¶ 1} The issue presented here is whether the amount of pretax pay that an employee elects to place in a flexible spending account (FSA) for qualifying medical expenses constitutes “remuneration” under Ohio’s unemployment compensation law. It is the Ohio Department of Job and Family Services’s (ODJFS) position that it does not. Because the ODJFS is the agency charged with implementing and administering this law and because its interpretation is reasonable, we defer to it and affirm.

I.

{¶ 2} Appellant Claudia Bernard worked as a caretaker for The Barry and Patricia Wakeman Educational Foundation until she was discharged in late 2009. In January 2010, Bernard applied to the ODJFS for unemployment benefits based on her employment with the Foundation during 2009. The ODJFS denied Bernard’s application on the basis she was not eligible. Bernard appealed, and the ODJFS affirmed its decision.

{¶ 3} Bernard then appealed the ODJFS’s decision to the Unemployment Compensation Review Commission (UCRC), which is independent of the ODJFS and reviews its unemployment compensation decisions. After a hearing, a UCRC hearing officer affirmed the ODJFS’s decision. For a benefits application to be valid, Ohio’s unemployment compensation law requires that the applicant be currently unemployed, that the applicant was employed during at least 20 weeks within the applicant’s base period, and that the applicant’s average weekly wage during those weeks was at least 27.5% of the statewide average weekly wage during the same period. *See* R.C. 4141.01(R)(1). The hearing officer determined that

Bernard's average weekly wage during her base period (January 1, 2009 to December 31, 2009) did not meet the statutorily required minimum. Bernard's average weekly wage needed to be at least \$213, but the officer determined that it was only \$125. "Average weekly wage" is defined by the unemployment compensation law as "the amount obtained by dividing an individual's total remuneration for all qualifying weeks during the base period by the number of such qualifying weeks." R.C. 4141.01(O)(2). The law's definition of "remuneration" is "all compensation for personal services, including commissions and bonuses and the cash value of all compensation in any medium other than cash." R.C. 4141.01(H)(1). The hearing officer found that, in 2009, Bernard received \$17,320 in compensation. Of that amount, she received \$6,520 in cash, and she elected to place \$900 each month (\$10,800 total) in a flexible spending account for medical expenses, under a cafeteria plan set up for her by the Foundation.

{¶ 4} Cafeteria plans "are benefit plans under which all participants are employees who can choose from among cash and certain qualified benefits." Pub. 15-A, Employer's Supplemental Tax Guide (Revised January 2001). Such plans are governed by section 125 of the Internal Revenue Code. "Flexible spending accounts (FSAs) are employer-established benefit plans that reimburse employees for specified expenses as they are incurred. \* \* \* FSAs and cafeteria plans are closely related, but not all cafeteria plans have FSAs and not all FSAs are part of cafeteria plans. FSA reimbursements funded through salary reduction agreements (the most common arrangement) are exempt from income and employment taxes under cafeteria plan provisions because employees have a choice between cash (their regular salary) and a nontaxable benefit." Report for Congress by the Congressional Review Service, Tax

Benefits for Health Insurance and Expenses: Overview of Current Law and Legislation, at 6 (Feb. 3, 2010). The plan set up for Bernard by the Foundation was intended to qualify as a section 125 cafeteria plan. Bernard paid for this benefit with pretax pay—the Foundation contributed nothing. So instead of receiving \$900 each month in cash, this amount was put into the FSA. The benefit to Bernard of this arrangement was that she did not need to pay federal income or employment taxes on FSA amounts, nor did she pay taxes on the payments that she received from the FSA as reimbursements for qualified medical expenses.

{¶ 5} The hearing officer determined that Bernard's total remuneration in 2009 was the \$6,520 in cash compensation. The officer determined that the amount that went into the FSA was not "remuneration." The Ohio unemployment compensation law expressly excludes from the definition of remuneration "payments as provided in divisions (b)(2) to (b)(16) of section 3306 of the 'Federal Unemployment Tax Act,' 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, as amended." R.C. 4141.01(H)(1)(a). Division (b) of section 3306 defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." But, certain remuneration is expressly excluded from the definition. It is some of these (those in (b)(2) to (b)(16)) to which the Ohio law is referring. Pertinent among them is the one described in division (b)(5)(G), which excludes "any payment made to, or on behalf of, an employee or his beneficiary \* \* \* under a cafeteria plan (within the meaning of section 125) if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 applied for purposes of this section) section 125 would not treat any wages as constructively received."

{¶ 6} With the amount that went into Bernard’s FSA, her average weekly wage in 2009 was roughly \$333, well over the required statutory minimum of \$213. But without that amount, the average drops to \$125, rendering her application invalid. So Bernard asked for review of her application by the full UCRC, but the UCRC declined to do so. Having exhausted her administrative remedies, Bernard appealed the hearing officer’s decision to the Miami County Court of Common Pleas, arguing that the FSA amounts are “remuneration” under Ohio’s unemployment compensation law. In July 2011, after a hearing, the trial court affirmed the hearing officer’s decision.

{¶ 7} Bernard’s appeal of the decision is now before this Court. The primary issue raised in the sole assignment of error is one of statutory construction: whether the amount that went into her FSA is “remuneration.” We review not the trial court’s decision but the UCRC’s. *See Tzangeos, Plakas, & Mannos v. Ohio Bur. of Emp. Serv.*, 73 Ohio St.3d 694, 697, 1995-Ohio-206, citing R.C. 4141.282(H). We may reverse its decision “only if it is unlawful, unreasonable, or against the manifest weight of the evidence.” *Id.* Here, though, because no material facts are disputed by the parties and the issue presented is a question of law, our review focuses on the lawfulness of the UCRC’s interpretation of the Ohio unemployment compensation law. *See Fegatelli v. Ohio Bur. of Emp. Serv.*, 146 Ohio App.3d 275, 277 (2001).

## II.

{¶ 8} Appellant’s argument concerns section 3306(b)(5)(G) of the Federal Unemployment Tax Act (FUTA). Specifically, the argument centers on the first qualification

to payments made under a cafeteria plan—“if such payment would not be treated as wages without regard to such plan.” Appellant asserts that if the \$900 had not gone into the FSA each month, it would have gone into her pocket as “wages,” that is, “remuneration for employment,” 26 U.S.C. 3306(b). This is not necessarily true. Division (b)(5)(G) describes payments “made to, or on behalf of, an employee or his beneficiary,” section (b)(5), “*under* a cafeteria plan,” (emphasis added) section (b)(5)(G). In other words, these are payments made *from* a cafeteria plan to an employee (or on behalf of the employee to his beneficiary) not payments *to* a cafeteria plan. This becomes clear when other subdivisions under division (b)(5) are considered that describe payments made not only “under” but “under or to.” *See, e.g.,* Section 3306(b)(5)(B); 3306(b)(5)(D) (“under or to an annuity contract”); *see, also,* Section 3306(b)(5)(C) (describing payments, similar to division (b)(5)(G), “under a simplified employee pension”). While it is true that if Bernard had not elected to put \$900 each month into the FSA, she would have received it as cash compensation, it is not technically correct to say that the payments Bernard received from the FSA were compensation. The payments that Bernard received from the FSA were to reimburse her for medical expenses.

{¶ 9} Still, it may reasonably be argued that reimbursements were, in essence, compensation—after all, it was Bernard’s pay that went into the FSA each month. The question, then, is whether the exclusion of such amounts from the definition of “remuneration” was what the legislature intended. *See Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, at ¶12 (“When analyzing a statute, our primary goal is to apply the legislative intent manifested in the words of the statute.”). When discerning the legislative intent of a law found within a legislative scheme, a court may rely on the expertise of the state

agency to which the legislature has delegated the scheme's enforcement. *Elyria Foundry Co. v. Pub. Util. Comm.*, 118 Ohio St.3d 269, 2008-Ohio-2230, at ¶13. Furthermore, a reviewing court should "give due deference to the director's 'reasonable interpretation of the legislative scheme' governing his agency." *Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d 274, 2005-Ohio-4982, at ¶8, quoting *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 287 (2001); *McLean*, at 92 ("It is well-settled that courts, when interpreting statutes, must give due deference to an administrative interpretation formulated by an agency."), quoted in *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, at ¶26. The legislature has placed the responsibility to oversee and administer Ohio's unemployment compensation system with the ODJFS. See 2010 Ohio Atty.Gen.Ops. No. 2010-029. And its interpretation of "remuneration" under this legislative scheme is reasonable.

{¶ 10} The Internal Revenue Service (IRS) interprets section 3306(b)(5)(G) as excluding the amounts that an employee elects to place in an FSA for medical expenses under an employer's section 125 cafeteria plan. Neither the employer nor the employee pays FUTA taxes on such amounts—in fact, these amounts are subject to no employment taxes or income taxes. In Private Letter Rulings, the IRS has analyzed the federal tax consequences of an employer's providing a medical reimbursement benefit to employees through a section 125 cafeteria plan under which each employee would elect to reduce her salary to pay for the benefit. The IRS has concluded that generally, in addition to not being subject to federal income tax, none of the amounts by which an employee elects to reduce her compensation to pay for the medical expense reimbursement benefit, or the amounts available under the plan,

are “wages” for purposes of FUTA taxes. PLR 90-34-078 (Aug. 24, 1990); PLR 89-17-081 (April 28, 1989) (concluding that, “with respect to the federal employment taxes, provided the benefits under the Plan meet the requirements of [certain] sections \* \* \* of the Code, amounts paid to, or on behalf of, a participant or the participant’s dependents or beneficiaries under the Plan are not ‘wages’ for purposes of either section 3121 [the Federal Insurance Contribution Act (FICA)] or section 3306 of the Code.” The IRS has expressed the same view in a Chief Counsel Advice memorandum: “Generally, qualified benefits under a cafeteria plan are not subject to FICA, FUTA, Medicare tax, or income tax withholding.” C.C.A. 2001-17-038 (April 27, 2001). “Employers may also offer flexible spending accounts to employees under a cafeteria plan that provides coverage under which specified, incurred expenses may be reimbursed. These include health flexible spending accounts for expenses not reimbursed under any other health plan.” *Id.* The memo explains that “employer contributions to the cafeteria plan are usually made pursuant to salary reduction agreements between the employer and the employee in which the employee agrees to contribute a portion of his or her salary on a pre-tax basis to pay for the qualified benefits. Salary reduction contributions are not actually or constructively received by the participant. Therefore, those contributions are not considered wages for federal income tax purposes.” *Id.* Citing section 3121(a)(5)(G) and 3306(b)(5)(G), the memo also says that “those sums generally are not subject to FICA and FUTA.” *Id.* Finally, two IRS tax guides say the same. *See* Pub. 15-A, Employer’s Supplemental Tax Guide (Revised January 2001) (“Generally, qualified benefits under a cafeteria plan are not subject to social security, Medicare, and FUTA taxes, or income tax withholding.”); IRS Pub. 969 (January 14, 2011) (“You contribute to your FSA by electing an amount to be voluntarily

withheld from your pay by your employer. This is sometimes called a salary reduction agreement. \* \* \* You do not pay federal income tax or employment taxes on the salary you contribute \* \* \* to the FSA.”).

{¶ 11} According to the IRS, then, an employee’s contributions to an FSA are not subject to federal unemployment compensation taxes. Nor are they subject to Ohio unemployment compensation taxes. Under the Ohio unemployment compensation law, an employer’s tax liability is based on its average annual payroll. *See* R.C. 4141.25. The law defines “annual payroll,” in part, as “the total amount of wages subject to contributions.” R.C. 4141.01(J). And it defines “wages,” in part, as “remuneration paid to an employee \* \* \* with respect to employment.” R.C. 4141.01(G)(1). As discussed above, Ohio excludes from the definition of “remuneration” payments under section 3306(b)(2)-(16). *See* R.C. 4141.01(H)(1)(a). Therefore, since section 3306(b)(5)(G) excludes an employee’s FSA contributions from unemployment compensation taxes, they are also excluded from Ohio unemployment compensation taxes. This means that neither the federal or the state unemployment compensation system sets aside money to compensate unemployed individuals for their FSA contributions. It makes logical sense that if money placed in the cafeteria plan is not subject to unemployment tax, then that amount should not be considered for calculating whether the employee is eligible for unemployment benefits.

{¶ 12} Because the ODJFS’s interpretation of Ohio’s unemployment compensation law is reasonable, we defer to it. We hold that the UCRC’s decision, and the decision of the trial court which is based on the same interpretation, is not unlawful or unreasonable.

{¶ 13} The sole assignment of error is overruled.

{¶ 14} The UCRC’s decision is affirmed.

.....

GRADY, P.J., concurs.

FAIN, J., dissenting:

{¶ 15} Judge Hall’s opinion for the court lays out the intricacies of the interpretation of the statute with reference to the circumstances of this case with admirable skill, and I cannot usefully add to that exposition. It is apparent, though, that the proper interpretation of the statutory definition of remuneration as it applies to the flexible spending account in this case is anything but clear and unambiguous.

{¶ 16} The principle that a court should give deference to an administrative agency’s interpretation of the legislative enactment that it is charged to administer is a general principle of statutory interpretation employed by courts. *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 287, 2001-Ohio-190, 750 N.E.2d 130. This principle finds statutory support in R.C. 1.49(F).

{¶ 17} The principle that Ohio’s Unemployment Compensation Law shall be construed liberally in favor of the applicant is a specific rule of construction set forth in the Unemployment Compensation Law, itself, at R.C. 4141.46. *Vespremi v. Giles*, 68 Ohio App.2d 91, 93, 427 N.E.2d 30 (1<sup>st</sup> Dist. 1980).

{¶ 18} It is another principle of statutory construction that a special or local provision shall prevail as an exception to a general provision, where the two provisions are in conflict. This principle is codified at R.C. 1.51.

{¶ 19} Given the specific legislative commandment, in R.C. 4141.46, that the Ohio Unemployment Compensation Law should be liberally construed in favor of applicants for compensation, I would construe the statute in Bernard's favor and find her eligible to receive benefits. She earned the moneys that were paid into a flexible spending account for her benefit, through her labor in her employer's behalf. To me, interpreting those moneys as remuneration for purposes of determining her eligibility does not unduly stretch the bounds of the requisite liberal construction of the statute; in my view, that interpretation lies within a reasonable, liberal construction of the statute in her favor.

{¶ 20} I would reverse the judgment of the trial court and remand with appropriate instructions.

.....

Copies mailed to:

Robert L. Guehl  
Michael DeWine  
Robin A. Jarvis  
W. Roger Fry  
William H. Fry  
Hon. Robert J. Lindeman



State of Ohio  
Unemployment Compensation Review Commission  
P.O. Box 182299  
Columbus, Ohio 43218-2299

Docket No: H2010-111-0088

**DECISION**

**In re claim of:**  
Claudia J. Bernard - APPELLANT

**Claimant Representative:**  
Guehl Law Office

**Employer:**  
The Barry and Patricia Wakeman Educational  
Foundation  
UCO No.: 1492069002

**Employer Representative:**  
Rendigs Fry Kiely & Dennis

**CASE HISTORY**

The claimant, Claudia J. Bernard, filed an Application for Determination of Benefit Rights for a benefit year beginning January 10, 2010.

On April 8, 2010, the Director issued a Redetermination in which he held that the Ohio Department of Job and Family Services has **DISALLOWED** the claimant's application for unemployment compensation benefits dated January 12, 2010. The claimant did not have at least twenty qualifying weeks of employment that was subject to an unemployment compensation law or did not earn an average weekly wage of at least \$213 before taxes during the base period January 1, 2009 to December 31, 2009, as required by Section 4141.01(R)(1) of the Ohio Revised Code.

On April 15, 2010, the claimant filed an appeal from the Redetermination.

On April 20, 2010, the Ohio Department of Job and Family Services transferred jurisdiction to the Unemployment Compensation Review Commission.

On October 25, 2010, a hearing was held before Hearing Officer Phillip Wright Jr. by telephone. The claimant appeared and testified. Robert Guehl, Esq. represented the claimant. Roger Fry, Esq. represented the employer with no witnesses.

**FINDINGS OF FACT**

During the base period January 1, 2009 through December 31, 2009, the claimant was employed by The Barry and Patricia Wakeman Educational Foundation. The claimant received a tax form 1099 for her compensation from the employer from January 1, 2009 through April 30, 2009. She received a form W-2 for

her compensation from the employer from May 1, 2009 through December 31, 2009. The claimant was an employee for the employer at all times during the base period because the employer had the right to direct and control the claimant's activities and duties during that time. The claimant was not totally unemployed in any weeks during the base period in question. The claimant's total wages for the base period in question were \$6,520.00. As a benefit of employment, the claimant received \$900.00 per month, for each month during the base period in question, in a flexible spending account for medical expenses. The flexible spending account payments are not considered wages.

### ISSUE

Did the claimant file a valid application on January 12, 2010?

### LAW

An individual does not qualify for a valid application for determination of benefit rights if the individual did not work in 20 qualifying weeks of covered employment in the individual's base period and if the individual does not average at least \$213.00 for all qualifying weeks. 4141.01 (R) O.R.C.

### REASONING

The claimant worked in at least 20 qualifying weeks of covered employment during the base period in question. However, her average weekly wage for the base period in question is \$125.00. The flexible spending account payments are not considered wages. Unfortunately, the claimant did not earn an average weekly wage of at least \$213.00 for the base period in question, and therefore, she did not file a valid application.

### DECISION

The Director's Redetermination, issued April 8, 2010, is affirmed. The claimant did not earn an average weekly wage of at least \$213.00 for the base period in question, and therefore, she did not file a valid application.

This decision rules on only those issues set forth above.

Phillip Wright Jr., Hearing Officer

PW

OJI Determination #: 219804351

## APPEAL RIGHTS

This decision was mailed on December 3, 2010.

A Request for Review before the U.C. Review Commission may be filed by any interested party within twenty-one calendar days after this decision is mailed. Said twenty-one day period is calculated to end on December 27, 2010.

The Request for Review must be in writing and signed by the appealing party or an authorized representative. The request should set forth the reasons why the appellant disagrees with the Hearing Officer's decision. You may file your Request for Review by mailing it to the U.C. Review Commission, P.O. Box 182299, Columbus, Ohio 43218-2299, or by faxing it to (614) 387-3694.

This decision was sent to the following:

Claudia J. Bernard  
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**ORC Ann. 1.51**

Current through Legislation passed by the 129th Ohio General Assembly and filed with the Secretary of State through File 143 Annotations current through August 6, 2012

**Page's Ohio Revised Code Annotated > OHIO REVISED CODE GENERAL PROVISIONS > CHAPTER 1. > CONSTRUCTION**

**§ 1.51. Special or local provision prevails over general; exception**

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

**History**

134 v H 607. Eff 1-3-72.

**ORC Ann. 4141.01**

Current through Legislation passed by the 129th Ohio General Assembly and filed with the Secretary of State through File 143 Annotations current through August 6, 2012

**Page's Ohio Revised Code Annotated > TITLE 41. > CHAPTER 4141.**

**Notice**

 This section has more than one version with varying effective dates. To view a complete list of the versions of this section see Table of Contents.

**§ 4141.01. Definitions [Effective September 24, 2012]**

As used in this chapter, unless the context otherwise requires:

- (A) (1) "Employer" means the state, its instrumentalities, its political subdivisions and their instrumentalities, Indian tribes, and any individual or type of organization including any partnership, limited liability company, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee, or the successor thereof, or the legal representative of a deceased person who subsequent to December 31, 1971, or in the case of political subdivisions or their instrumentalities, subsequent to December 31, 1973:
- (a) Had in employment at least one individual, or in the case of a nonprofit organization, subsequent to December 31, 1973, had not less than four individuals in employment for some portion of a day in each of twenty different calendar weeks, in either the current or the preceding calendar year whether or not the same individual was in employment in each such day; or
  - (b) Except for a nonprofit organization, had paid for service in employment wages of fifteen hundred dollars or more in any calendar quarter in either the current or preceding calendar year; or
  - (c) Had paid, subsequent to December 31, 1977, for employment in domestic service in a local college club, or local chapter of a college fraternity or sorority, cash remuneration of one thousand dollars or more in any calendar quarter in the current calendar year or the preceding calendar year, or had paid subsequent to December 31, 1977, for employment in domestic service in a private home cash remuneration of one thousand dollars in any calendar quarter in the current calendar year or the preceding calendar year:
    - (i) For the purposes of divisions (A)(1)(a) and (b) of this section, there shall not be taken into account any wages paid to, or employment of, an individual performing domestic service as described in this division.
    - (ii) An employer under this division shall not be an employer with respect to wages paid for any services other than domestic service unless the employer is also found to be an employer under division (A)(1)(a), (b), or (d) of this section.

- (d) As a farm operator or a crew leader subsequent to December 31, 1977, had in employment individuals in agricultural labor; and
- (i) During any calendar quarter in the current calendar year or the preceding calendar year, paid cash remuneration of twenty thousand dollars or more for the agricultural labor; or
  - (ii) Had at least ten individuals in employment in agricultural labor, not including agricultural workers who are aliens admitted to the United States to perform agricultural labor pursuant to sections 1184(c) and 1101(a)(15)(H) of the "Immigration and Nationality Act," 66 Stat. 163, 189, 8 *U.S.C.A. 1101*(a)(15)(H)(ii)(a), 1184(c), for some portion of a day in each of the twenty different calendar weeks, in either the current or preceding calendar year whether or not the same individual was in employment in each day; or
- (e) Is not otherwise an employer as defined under division (A)(1)(a) or (b) of this section; and
- (i) For which, within either the current or preceding calendar year, service, except for domestic service in a private home not covered under division (A)(1)(c) of this section, is or was performed with respect to which such employer is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment fund;
  - (ii) Which, as a condition for approval of this chapter for full tax credit against the tax imposed by the "Federal Unemployment Tax Act," 84 Stat. 713, 26 *U.S.C.A. 3301* to 3311, is required, pursuant to such act to be an employer under this chapter; or
  - (iii) Who became an employer by election under division (A)(4) or (5) of this section and for the duration of such election; or
- (f) In the case of the state, its instrumentalities, its political subdivisions, and their instrumentalities, and Indian tribes, had in employment, as defined in divisions (B)(2)(a) and (B)(2)(l) of this section, at least one individual;
- (g) For the purposes of division (A)(1)(a) of this section, if any week includes both the thirty-first day of December and the first day of January, the days of that week before the first day of January shall be considered one calendar week and the days beginning the first day of January another week.
- (2) Each individual employed to perform or to assist in performing the work of any agent or employee of an employer is employed by such employer for all the purposes of this chapter, whether such individual was hired or paid directly by such employer or by such agent or employee, provided the employer had actual or constructive knowledge of the work. All individuals performing services for an employer of any person in this state who maintains two or more establishments within this state are employed by a single employer for the purposes of this chapter.
  - (3) An employer subject to this chapter within any calendar year is subject to this chapter during the whole of such year and during the next succeeding calendar year.
  - (4) An employer not otherwise subject to this chapter who files with the director of job and family services a written election to become an employer subject

to this chapter for not less than two calendar years shall, with the written approval of such election by the director, become an employer subject to this chapter to the same extent as all other employers as of the date stated in such approval, and shall cease to be subject to this chapter as of the first day of January of any calendar year subsequent to such two calendar years only if at least thirty days prior to such first day of January the employer has filed with the director a written notice to that effect.

- (5) Any employer for whom services that do not constitute employment are performed may file with the director a written election that all such services performed by individuals in the employer's employ in one or more distinct establishments or places of business shall be deemed to constitute employment for all the purposes of this chapter, for not less than two calendar years. Upon written approval of the election by the director, such services shall be deemed to constitute employment subject to this chapter from and after the date stated in such approval. Such services shall cease to be employment subject to this chapter as of the first day of January of any calendar year subsequent to such two calendar years only if at least thirty days prior to such first day of January such employer has filed with the director a written notice to that effect.

(B)

- (1) "Employment" means service performed by an individual for remuneration under any contract of hire, written or oral, express or implied, including service performed in interstate commerce and service performed by an officer of a corporation, without regard to whether such service is executive, managerial, or manual in nature, and without regard to whether such officer is a stockholder or a member of the board of directors of the corporation, unless it is shown to the satisfaction of the director that such individual has been and will continue to be free from direction or control over the performance of such service, both under a contract of service and in fact. The director shall adopt rules to define "direction or control."
- (2) "Employment" includes:
- (a) Service performed after December 31, 1977, by an individual in the employ of the state or any of its instrumentalities, or any political subdivision thereof or any of its instrumentalities or any instrumentality of more than one of the foregoing or any instrumentality of any of the foregoing and one or more other states or political subdivisions and without regard to divisions (A)(1)(a) and (b) of this section, provided that such service is excluded from employment as defined in the "Federal Unemployment Tax Act," 53 Stat. 183, 26 U.S.C.A. 3301, 3306(c)(7) and is not excluded under division (B)(3) of this section; or the services of employees covered by voluntary election, as provided under divisions (A)(4) and (5) of this section;
- (b) Service performed after December 31, 1971, by an individual in the employ of a religious, charitable, educational, or other organization which is excluded from the term "employment" as defined in the "Federal Unemployment Tax Act," 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, solely by reason of section 26 U.S.C.A. 3306(c)(8) of that act and is not excluded under division (B)(3) of this section;
- (c) Domestic service performed after December 31, 1977, for an employer, as pro-

- vided in division (A)(1)(c) of this section;
- (d) Agricultural labor performed after December 31, 1977, for a farm operator or a crew leader, as provided in division (A)(1)(d) of this section;
  - (e) Service not covered under division (B)(1) of this section which is performed after December 31, 1971:
    - (i) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, laundry, or dry-cleaning services, for the individual's employer or principal;
    - (ii) As a traveling or city salesperson, other than as an agent-driver or commission-driver, engaged on a full-time basis in the solicitation on behalf of and in the transmission to the salesperson's employer or principal except for sideline 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, provided that for the purposes of division (B)(2)(e)(ii) of this section, the services shall be deemed employment if the contract of service contemplates that substantially all of the services are to be performed personally by the individual and that the individual does not have a substantial investment in facilities used in connection with the performance of the services other than in facilities for transportation, and the services are not in the nature of a single transaction that is not a part of a continuing relationship with the person for whom the services are performed.
  - (f) An individual's entire service performed within or both within and without the state if:
    - (i) The service is localized in this state.
    - (ii) The service is not localized in any state, but some of the service is performed in this state and either the base of operations, or if there is no base of operations then the place from which such service is directed or controlled, is in this state or the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed but the individual's residence is in this state.
  - (g) Service not covered under division (B)(2)(f)(ii) of this section and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state, the Virgin Islands, Canada, or of the United States, if the individual performing such service is a resident of this state and the director approves the election of the employer for whom such services are performed; or, if the individual is not a resident of this state but the place from which the service is directed or controlled is in this state, the entire services of such individual shall be deemed to be employment subject to this chapter, provided service is deemed to be localized within this state if the service is performed entirely within this state or if the service is performed both within and without this state but the service performed without this state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or con-

- sists of isolated transactions;
- (h) Service of an individual who is a citizen of the United States, performed outside the United States except in Canada after December 31, 1971, or the Virgin Islands, after December 31, 1971, and before the first day of January of the year following that in which the United States secretary of labor approves the Virgin Islands law for the first time, in the employ of an American employer, other than service which is "employment" under divisions (B)(2)(f) and (g) of this section or similar provisions of another state's law, if:
    - (i) The employer's principal place of business in the United States is located in this state;
    - (ii) The employer has no place of business in the United States, but the employer is an individual who is a resident of this state; or the employer is a corporation which is organized under the laws of this state, or the employer is a partnership or a trust and the number of partners or trustees who are residents of this state is greater than the number who are residents of any other state; or
    - (iii) None of the criteria of divisions (B)(2)(f)(i) and (ii) of this section is met but the employer has elected coverage in this state or the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under this chapter.
  - (i) For the purposes of division (B)(2)(h) of this section, the term "American employer" means an employer who is an individual who is a resident of the United States; or a partnership, if two-thirds or more of the partners are residents of the United States; or a trust, if all of the trustees are residents of the United States; or a corporation organized under the laws of the United States or of any state, provided the term "United States" includes the states, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.
  - (j) Notwithstanding any other provisions of divisions (B)(1) and (2) of this section, service, except for domestic service in a private home not covered under division (A)(1)(c) of this section, with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund, or service, except for domestic service in a private home not covered under division (A)(1)(c) of this section, which, as a condition for full tax credit against the tax imposed by the "Federal Unemployment Tax Act," 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, is required to be covered under this chapter.
  - (k) Construction services performed by any individual under a construction contract, as defined in section 4141.39 of the Revised Code, if the director determines that the employer for whom services are performed has the right to direct or control the performance of the services and that the individuals who perform the services receive remuneration for the services performed. The director shall presume that the employer for whom services are performed has the right to direct or control the performance of the services if ten or more of the following criteria apply:
    - (i) The employer directs or controls the manner or method by which instruc-

- tions are given to the individual performing services;
- (ii) The employer requires particular training for the individual performing services;
  - (iii) Services performed by the individual are integrated into the regular functioning of the employer;
  - (iv) The employer requires that services be provided by a particular individual;
  - (v) The employer hires, supervises, or pays the wages of the individual performing services;
  - (vi) A continuing relationship between the employer and the individual performing services exists which contemplates continuing or recurring work, even if not full-time work;
  - (vii) The employer requires the individual to perform services during established hours;
  - (viii) The employer requires that the individual performing services be devoted on a full-time basis to the business of the employer;
  - (ix) The employer requires the individual to perform services on the employer's premises;
  - (x) The employer requires the individual performing services to follow the order of work established by the employer;
  - (xi) The employer requires the individual performing services to make oral or written reports of progress;
  - (xii) The employer makes payment to the individual for services on a regular basis, such as hourly, weekly, or monthly;
  - (xiii) The employer pays expenses for the individual performing services;
  - (xiv) The employer furnishes the tools and materials for use by the individual to perform services;
  - (xv) The individual performing services has not invested in the facilities used to perform services;
  - (xvi) The individual performing services does not realize a profit or suffer a loss as a result of the performance of the services;
  - (xvii) The individual performing services is not performing services for more than two employers simultaneously;
  - (xviii) The individual performing services does not make the services available to the general public;
  - (xix) The employer has a right to discharge the individual performing services;
  - (xx) The individual performing services has the right to end the individual's relationship with the employer without incurring liability pursuant to an employment contract or agreement.
- (l) Service performed by an individual in the employ of an Indian tribe as de-

defined by section 4(e) of the "Indian Self-Determination and Education Assistance Act," 88 Stat. 2204 (1975), 25 U.S.C.A. 450b(e), including any subdivision, subsidiary, or business enterprise wholly owned by an Indian tribe provided that the service is excluded from employment as defined in the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301 and 3306(c)(7) and is not excluded under division (B)(3) of this section.

- (3) "Employment" does not include the following services if they are found not subject to the "Federal Unemployment Tax Act," 84 Stat. 713 (1970), 26 U.S.C.A. 3301 to 3311, and if the services are not required to be included under division (B)(2)(j) of this section:
- (a) Service performed after December 31, 1977, in agricultural labor, except as provided in division (A)(1)(d) of this section;
  - (b) Domestic service performed after December 31, 1977, in a private home, local college club, or local chapter of a college fraternity or sorority except as provided in division (A)(1)(c) of this section;
  - (c) Service performed after December 31, 1977, for this state or a political subdivision as described in division (B)(2)(a) of this section when performed:
    - (i) As a publicly elected official;
    - (ii) As a member of a legislative body, or a member of the judiciary;
    - (iii) As a military member of the Ohio national guard;
    - (iv) As an employee, not in the classified service as defined in section 124.11 of the Revised Code, serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency;
    - (v) In a position which, under or pursuant to law, is designated as a major non-tenured policymaking or advisory position, not in the classified service of the state, or a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week.
  - (d) In the employ of any governmental unit or instrumentality of the United States;
  - (e) Service performed after December 31, 1971:
    - (i) Service in the employ of an educational institution or institution of higher education, including those operated by the state or a political subdivision, if such service is performed by a student who is enrolled and is regularly attending classes at the educational institution or institution of higher education; or
    - (ii) By an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at the institution, which combines academic instruction with work experience, if the service is an integral part of the program, and the institution has so certified to the employer, provided that this subdivision shall not apply to service performed in a program established for or on behalf of an employer or group of employers.

- (f) Service performed by an individual in the employ of the individual's son, daughter, or spouse and service performed by a child under the age of eighteen in the employ of the child's father or mother;
- (g) Service performed for one or more principals by an individual who is compensated on a commission basis, who in the performance of the work is master of the individual's own time and efforts, and whose remuneration is wholly dependent on the amount of effort the individual chooses to expend, and which service is not subject to the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301 to 3311. Service performed after December 31, 1971:
  - (i) By an individual for an employer as an insurance agent or as an insurance solicitor, if all this service is performed for remuneration solely by way of commission;
  - (ii) As a home worker performing work, according to specifications furnished by the employer for whom the services are performed, on materials or goods furnished by such employer which are required to be returned to the employer or to a person designated for that purpose.
- (h) Service performed after December 31, 1971:
  - (i) In the employ of a church or convention or association of churches, or in an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
  - (ii) By a duly ordained, commissioned, or licensed minister of a church in the exercise of the individual's ministry or by a member of a religious order in the exercise of duties required by such order; or
  - (iii) In a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market, by an individual receiving such rehabilitation or remunerative work.
- (i) Service performed after June 30, 1939, with respect to which unemployment compensation is payable under the "Railroad Unemployment Insurance Act," 52 Stat. 1094 (1938), 45 U.S.C. 351;
- (j) Service performed by an individual in the employ of any organization exempt from income tax under section 501 of the "Internal Revenue Code of 1954," if the remuneration for such service does not exceed fifty dollars in any calendar quarter, or if such service is in connection with the collection of dues or premiums for a fraternal beneficial society, order, or association and is performed away from the home office or is ritualistic service in connection with any such society, order, or association;
- (k) Casual labor not in the course of an employer's trade or business; incidental service performed by an officer, appraiser, or member of a finance committee of a bank, building and loan association, savings and loan association, or savings association when the remuneration for such incidental service exclusive of the amount paid or allotted for directors' fees does not exceed sixty dollars

per calendar quarter is casual labor;

- (l) Service performed in the employ of a voluntary employees' beneficial association providing for the payment of life, sickness, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries, if admission to a membership in such association is limited to individuals who are officers or employees of a municipal or public corporation, of a political subdivision of the state, or of the United States and no part of the net earnings of such association inures, other than through such payments, to the benefit of any private shareholder or individual;
- (m) Service performed by an individual in the employ of a foreign government, including service as a consular or other officer or employee or of a nondiplomatic representative;
- (n) Service performed in the employ of an instrumentality wholly owned by a foreign government if the service is of a character similar to that performed in foreign countries by employees of the United States or of an instrumentality thereof and if the director finds that the secretary of state of the United States has certified to the secretary of the treasury of the United States that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States and of instrumentalities thereof;
- (o) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress;
- (p) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law, and service performed as an intern in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to state law;
- (q) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;
- (r) Service performed in the employ of the United States or an instrumentality of the United States immune under the Constitution of the United States from the contributions imposed by this chapter, except that to the extent that congress permits states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation act, this chapter shall be applicable to such instrumentalities and to services performed for such instrumentalities in the same manner, to the same extent, and on the same terms as to all other employers, individuals, and services, provided that if this state is not certified for any year by the proper agency of the United States under section 3304 of the "Internal Revenue Code of 1954," the payments required of such instrumentalities with respect to such year shall be refunded by the director from the fund in the same manner and within the same period as is provided in division (E) of section 4141.09 of the Revised Code with respect to contributions erroneously collected;

- (s) Service performed by an individual as a member of a band or orchestra, provided such service does not represent the principal occupation of such individual, and which service is not subject to or required to be covered for full tax credit against the tax imposed by the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301 to 3311.
- (t) Service performed in the employ of a day camp whose camping season does not exceed twelve weeks in any calendar year, and which service is not subject to the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301 to 3311. Service performed after December 31, 1971:
  - (i) In the employ of a hospital, if the service is performed by a patient of the hospital, as defined in division (W) of this section;
  - (ii) For a prison or other correctional institution by an inmate of the prison or correctional institution;
  - (iii) Service performed after December 31, 1977, by an inmate of a custodial institution operated by the state, a political subdivision, or a nonprofit organization.
- (u) Service that is performed by a nonresident alien individual for the period the individual temporarily is present in the United States as a nonimmigrant under division (F), (J), (M), or (Q) of section 101(a)(15) of the "Immigration and Nationality Act," 66 Stat. 163, 8 U.S.C.A. 1101, as amended, that is excluded under section 3306(c)(19) of the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301 to 3311.
- (v) Notwithstanding any other provisions of division (B)(3) of this section, services that are excluded under divisions (B)(3)(g), (j), (k), and (l) of this section shall not be excluded from employment when performed for a nonprofit organization, as defined in division (X) of this section, or for this state or its instrumentalities, or for a political subdivision or its instrumentalities or for Indian tribes;
- (w) Service that is performed by an individual working as an election official or election worker if the amount of remuneration received by the individual during the calendar year for services as an election official or election worker is less than one thousand dollars;
- (x) Service performed for an elementary or secondary school that is operated primarily for religious purposes, that is described in subsection 501(c)(3) and exempt from federal income taxation under subsection 501(a) of the Internal Revenue Code, 26 U.S.C.A. 501;
- (y) Service performed by a person committed to a penal institution.
- (z) Service performed for an Indian tribe as described in division (B)(2)(l) of this section when performed in any of the following manners:
  - (i) As a publicly elected official;
  - (ii) As a member of an Indian tribal council;
  - (iii) As a member of a legislative or judiciary body;
  - (iv) In a position which, pursuant to Indian tribal law, is designated as a major nontenured policymaking or advisory position, or a policymaking or ad-

visory position where the performance of the duties ordinarily does not require more than eight hours of time per week;

- (v) As an employee serving on a temporary basis in the case of a fire, storm, snow, earthquake, flood, or similar emergency.
  - (aa) Service performed after December 31, 1971, for a nonprofit organization, this state or its instrumentalities, a political subdivision or its instrumentalities, or an Indian tribe as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision, thereof, by an individual receiving the work-relief or work-training.
  - (bb) Participation in a learn to earn program as defined in section 4141.293 of the Revised Code.
- (4) If the services performed during one half or more of any pay period by an employee for the person employing that employee constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one half of any such pay period by an employee for the person employing that employee do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in division (B)(4) of this section, "pay period" means a period, of not more than thirty-one consecutive days, for which payment of remuneration is ordinarily made to the employee by the person employing that employee. Division (B)(4) of this section does not apply to services performed in a pay period by an employee for the person employing that employee, if any of such service is excepted by division (B)(3)(o) of this section.
- (C) "Benefits" means money payments payable to an individual who has established benefit rights, as provided in this chapter, for loss of remuneration due to the individual's unemployment.
  - (D) "Benefit rights" means the weekly benefit amount and the maximum benefit amount that may become payable to an individual within the individual's benefit year as determined by the director.
  - (E) "Claim for benefits" means a claim for waiting period or benefits for a designated week.
  - (F) "Additional claim" means the first claim for benefits filed following any separation from employment during a benefit year; "continued claim" means any claim other than the first claim for benefits and other than an additional claim.
  - (G)
    - (1) "Wages" means remuneration paid to an employee by each of the employee's employers with respect to employment; except that wages shall not include that part of remuneration paid during any calendar year to an individual by an employer or such employer's predecessor in interest in the same business or enterprise, which in any calendar year is in excess of eight thousand two hundred fifty dollars on and after January 1, 1992; eight thousand five hundred dollars on and after January 1, 1993; eight thousand seven hundred fifty dollars on and after January 1, 1994; and nine thousand dollars on and after January 1, 1995. Remuneration in excess of such amounts shall be deemed wages subject to contribution to the same extent

that such remuneration is defined as wages under the "Federal Unemployment Tax Act," 84 Stat. 714 (1970), 26 U.S.C.A. 3301 to 3311, as amended. The remuneration paid an employee by an employer with respect to employment in another state, upon which contributions were required and paid by such employer under the unemployment compensation act of such other state, shall be included as a part of remuneration in computing the amount specified in this division.

(2) Notwithstanding division (G)(1) of this section, if, as of the computation date for any calendar year, the director determines that the level of the unemployment compensation fund is sixty per cent or more below the minimum safe level as defined in section 4141.25 of the Revised Code, then, effective the first day of January of the following calendar year, wages subject to this chapter shall not include that part of remuneration paid during any calendar year to an individual by an employer or such employer's predecessor in interest in the same business or enterprise which is in excess of nine thousand dollars. The increase in the dollar amount of wages subject to this chapter under this division shall remain in effect from the date of the director's determination pursuant to division (G)(2) of this section and thereafter notwithstanding the fact that the level in the fund may subsequently become less than sixty per cent below the minimum safe level.

(H) (1) "Remuneration" means all compensation for personal services, including commissions and bonuses and the cash value of all compensation in any medium other than cash, except that in the case of agricultural or domestic service, "remuneration" includes only cash remuneration. Gratuities customarily received by an individual in the course of the individual's employment from persons other than the individual's employer and which are accounted for by such individual to the individual's employer are taxable wages.

The reasonable cash value of compensation paid in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the director, provided that "remuneration" does not include:

- (a) Payments as provided in divisions (b)(2) to (b)(16) of section 3306 of the "Federal Unemployment Tax Act," 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, as amended;
- (b) The payment by an employer, without deduction from the remuneration of the individual in the employer's employ, of the tax imposed upon an individual in the employer's employ under section 3101 of the "Internal Revenue Code of 1954," with respect to services performed after October 1, 1941.

(2) "Cash remuneration" means all remuneration paid in cash, including commissions and bonuses, but not including the cash value of all compensation in any medium other than cash.

- (I) "Interested party" means the director and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under section 4141.28 of the Revised Code.
- (J) "Annual payroll" means the total amount of wages subject to contributions during a twelve-month period ending with the last day of the second calendar quarter of any calendar year.
- (K) "Average annual payroll" means the average of the last three annual payrolls of an employer, provided that if, as of any computation date, the employer has had less than three annual payrolls in such three-year period, such average

shall be based on the annual payrolls which the employer has had as of such date.

(L)

(1) "Contributions" means the money payments to the state unemployment compensation fund required of employers by section 4141.25 of the Revised Code and of the state and any of its political subdivisions electing to pay contributions under section 4141.242 of the Revised Code. Employers paying contributions shall be described as "contributory employers."

(2) "Payments in lieu of contributions" means the money payments to the state unemployment compensation fund required of reimbursing employers under sections 4141.241 and 4141.242 of the Revised Code.

(M) An individual is "totally unemployed" in any week during which the individual performs no services and with respect to such week no remuneration is payable to the individual.

(N) An individual is "partially unemployed" in any week if, due to involuntary loss of work, the total remuneration payable to the individual for such week is less than the individual's weekly benefit amount.

(O) "Week" means the calendar week ending at midnight Saturday unless an equivalent week of seven consecutive calendar days is prescribed by the director.

(1) "Qualifying week" means any calendar week in an individual's base period with respect to which the individual earns or is paid remuneration in employment subject to this chapter. A calendar week with respect to which an individual earns remuneration but for which payment was not made within the base period, when necessary to qualify for benefit rights, may be considered to be a qualifying week. The number of qualifying weeks which may be established in a calendar quarter shall not exceed the number of calendar weeks in the quarter.

(2) "Average weekly wage" means the amount obtained by dividing an individual's total remuneration for all qualifying weeks during the base period by the number of such qualifying weeks, provided that if the computation results in an amount that is not a multiple of one dollar, such amount shall be rounded to the next lower multiple of one dollar.

(P) "Weekly benefit amount" means the amount of benefits an individual would be entitled to receive for one week of total unemployment.

(Q)

(1) "Base period" means the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year, except as provided in division (Q)(2) of this section.

(2) If an individual does not have sufficient qualifying weeks and wages in the base period to qualify for benefit rights, the individual's base period shall be the four most recently completed calendar quarters preceding the first day of the individual's benefit year. Such base period shall be known as the "alternate base period." If information as to weeks and wages for the most recent quarter of the alternate base period is not available to the director from the regular quarterly reports of wage information, which are sys-

tematically accessible, the director may, consistent with the provisions of section 4141.28 of the Revised Code, base the determination of eligibility for benefits on the affidavit of the claimant with respect to weeks and wages for that calendar quarter. The claimant shall furnish payroll documentation, where available, in support of the affidavit. The determination based upon the alternate base period as it relates to the claimant's benefit rights, shall be amended when the quarterly report of wage information from the employer is timely received and that information causes a change in the determination. As provided in division (B) of section 4141.28 of the Revised Code, any benefits paid and charged to an employer's account, based upon a claimant's affidavit, shall be adjusted effective as of the beginning of the claimant's benefit year. No calendar quarter in a base period or alternate base period shall be used to establish a subsequent benefit year.

- (3) The "base period" of a combined wage claim, as described in division (H) of section 4141.43 of the Revised Code, shall be the base period prescribed by the law of the state in which the claim is allowed.
- (4) For purposes of determining the weeks that comprise a completed calendar quarter under this division, only those weeks ending at midnight Saturday within the calendar quarter shall be utilized.

(R)

- (1) "Benefit year" with respect to an individual means the fifty-two week period beginning with the first day of that week with respect to which the individual first files a valid application for determination of benefit rights, and thereafter the fifty-two week period beginning with the first day of that week with respect to which the individual next files a valid application for determination of benefit rights after the termination of the individual's last preceding benefit year, except that the application shall not be considered valid unless the individual has had employment in six weeks that is subject to this chapter or the unemployment compensation act of another state, or the United States, and has, since the beginning of the individual's previous benefit year, in the employment earned three times the average weekly wage determined for the previous benefit year. The "benefit year" of a combined wage claim, as described in division (H) of section 4141.43 of the Revised Code, shall be the benefit year prescribed by the law of the state in which the claim is allowed. Any application for determination of benefit rights made in accordance with section 4141.28 of the Revised Code is valid if the individual filing such application is unemployed, has been employed by an employer or employers subject to this chapter in at least twenty qualifying weeks within the individual's base period, and has earned or been paid remuneration at an average weekly wage of not less than twenty-seven and one-half per cent of the statewide average weekly wage for such weeks. For purposes of determining whether an individual has had sufficient employment since the beginning of the individual's previous benefit year to file a valid application, "employment" means the performance of services for which remuneration is payable.
- (2) Effective for benefit years beginning on and after December 26, 2004, any application for determination of benefit rights made in accordance

with section 4141.28 of the Revised Code is valid if the individual satisfies the criteria described in division (R)(1) of this section, and if the reason for the individual's separation from employment is not disqualifying pursuant to division (D)(2) of section 4141.29 or section 4141.291 of the Revised Code. A disqualification imposed pursuant to division (D)(2) of section 4141.29 or section 4141.291 of the Revised Code must be removed as provided in those sections as a requirement of establishing a valid application for benefit years beginning on and after December 26, 2004.

- (3) The statewide average weekly wage shall be calculated by the director once a year based on the twelve-month period ending the thirtieth day of June, as set forth in division (B)(3) of section 4141.30 of the Revised Code, rounded down to the nearest dollar. Increases or decreases in the amount of remuneration required to have been earned or paid in order for individuals to have filed valid applications shall become effective on Sunday of the calendar week in which the first day of January occurs that follows the twelve-month period ending the thirtieth day of June upon which the calculation of the statewide average weekly wage was based.
  - (4) As used in this division, an individual is "unemployed" if, with respect to the calendar week in which such application is filed, the individual is "partially unemployed" or "totally unemployed" as defined in this section or if, prior to filing the application, the individual was separated from the individual's most recent work for any reason which terminated the individual's employee-employer relationship, or was laid off indefinitely or for a definite period of seven or more days.
- (S) "Calendar quarter" means the period of three consecutive calendar months ending on the thirty-first day of March, the thirtieth day of June, the thirtieth day of September, and the thirty-first day of December, or the equivalent thereof as the director prescribes by rule.
- (T) "Computation date" means the first day of the third calendar quarter of any calendar year.
- (U) "Contribution period" means the calendar year beginning on the first day of January of any year.
- (V) "Agricultural labor," for the purpose of this division, means any service performed prior to January 1, 1972, which was agricultural labor as defined in this division prior to that date, and service performed after December 31, 1971:
- (1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;
  - (2) In the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by hurricane, if the major part of such service is performed on a farm;
  - (3) In connection with the production or harvesting of any commodity de-

defined as an agricultural commodity in section 15 (g) of the "Agricultural Marketing Act," 46 Stat. 1550 (1931), *12 U.S.C. 1141j*, as amended, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

- (4) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if the operator produced more than one half of the commodity with respect to which such service is performed;
- (5) In the employ of a group of operators of farms, or a cooperative organization of which the operators are members, in the performance of service described in division (V)(4) of this section, but only if the operators produced more than one-half of the commodity with respect to which the service is performed;
- (6) Divisions (V)(4) and (5) of this section shall not be deemed to be applicable with respect to service performed:
  - (a) In connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or
  - (b) On a farm operated for profit if the service is not in the course of the employer's trade or business.

As used in division (V) of this section, "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities and orchards.

- (W) "Hospital" means an institution which has been registered or licensed by the Ohio department of health as a hospital.
- (X) "Nonprofit organization" means an organization, or group of organizations, described in section 501(c)(3) of the "Internal Revenue Code of 1954," and exempt from income tax under section 501(a) of that code.
- (Y) "Institution of higher education" means a public or nonprofit educational institution, including an educational institution operated by an Indian tribe, which:
  - (1) Admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent;
  - (2) Is legally authorized in this state or by the Indian tribe to provide a program of education beyond high school; and
  - (3) Provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for full credit toward such a degree, a program of post-graduate or post-doctoral studies, or a program of training to prepare students for gainful employment in a recognized occupation.

For the purposes of this division, all colleges and universities in this state are institutions of higher education.

- (Z) For the purposes of this chapter, "states" includes the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.
- (AA) "Alien" means, for the purposes of division (A)(1)(d) of this section, an individual who is an alien admitted to the United States to perform service in agricultural labor pursuant to sections 214 (c) and 101 (a)(15)(H) of the "Immigration and Nationality Act," 66 Stat. 163, 8 U.S.C.A. 1101.
- (BB) (1) "Crew leader" means an individual who furnishes individuals to perform agricultural labor for any other employer or farm operator, and:
- (a) Pays, either on the individual's own behalf or on behalf of the other employer or farm operator, the individuals so furnished by the individual for the service in agricultural labor performed by them;
  - (b) Has not entered into a written agreement with the other employer or farm operator under which the agricultural worker is designated as in the employ of the other employer or farm operator.
- (2) For the purposes of this chapter, any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other employer or farm operator shall be treated as an employee of the crew leader if:
- (a) The crew leader holds a valid certificate of registration under the "Farm Labor Contractor Registration Act of 1963," 90 Stat. 2668, 7 U.S.C. 2041; or
  - (b) Substantially all the members of the crew operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment, which is provided by the crew leader; and
  - (c) If the individual is not in the employment of the other employer or farm operator within the meaning of division (B)(1) of this section.
- (3) For the purposes of this division, any individual who is furnished by a crew leader to perform service in agricultural labor for any other employer or farm operator and who is not treated as in the employment of the crew leader under division (BB)(2) of this section shall be treated as the employee of the other employer or farm operator and not of the crew leader. The other employer or farm operator shall be treated as having paid cash remuneration to the individual in an amount equal to the amount of cash remuneration paid to the individual by the crew leader, either on the crew leader's own behalf or on behalf of the other employer or farm operator, for the service in agricultural labor performed for the other employer or farm operator.
- (CC) "Educational institution" means an institution other than an institution of higher education as defined in division (Y) of this section, including an educational institution operated by an Indian tribe, which:
- (1) Offers participants, trainees, or students an organized course of study or training designed to transfer to them knowledge, skills, information, doctrines, attitudes, or abilities from, by, or under the guidance of an instructor or teacher; and
  - (2) Is approved, chartered, or issued a permit to operate as a school by the

state board of education, other government agency, or Indian tribe that is authorized within the state to approve, charter, or issue a permit for the operation of a school.

For the purposes of this division, the courses of study or training which the institution offers may be academic, technical, trade, or preparation for gainful employment in a recognized occupation.

(DD) "Cost savings day" means any unpaid day off from work in which employees continue to accrue employee benefits which have a determinable value including, but not limited to, vacation, pension contribution, sick time, and life and health insurance.

## History

GC § 1345-1; 116 v PtII, 286; 117 v 289; 118 v 259; 118 v 721; 119 v 821; 120 v 666; 121 v 73; 121 v 635; 121 v 703; 122 v 695; 123 v 178; 123 v 559; 124 v 488; Bureau of Code Revision, 10-1-53; 125 v 689; 126 v 337 (Eff 10-10-55); 128 v 1308 (Eff 10-16-59); 130 v 941 (Eff 10-20-63); 132 v S 237 (Eff 12-31-67); 133 v H 1 (Eff 3-18-69); 134 v S 77 (Eff 10-29-71); 134 v H 495 (Eff 3-23-73); 135 v S 1 (Eff 1-1-74); 135 v S 52 (Eff 1-6-74); 136 v S 173 (Eff 12-2-75); 137 v H 762 (Eff 1-1-78); 138 v H 1021 (Eff 10-19-80); 139 v H 1055 (Eff 12-17-82); 140 v H 404 (Eff 7-10-83); 140 v S 141 (Eff 9-20-84); 141 v H 557 (Eff 8-1-85); 141 v H 766 (Eff 12-17-86); 142 v H 231 (Eff 1-1-88); 142 v H 231, § 10 (Eff 10-1-88); 142 v H 872 (Eff 10-15-88); 143 v H 431 (Eff 10-24-89); 143 v H 826 (Eff 6-26-90); 143 v H 446 (Eff 9-25-90); 146 v H 275 (Eff 11-24-95); 146 v H 245 (Eff 9-17-96); 147 v S 130 (Eff 9-18-97); 147 v H 478 (Eff 11-26-97); 148 v H 471 (Eff 7-1-2000); 148 v H 509 (Eff 9-21-2000); 149 v S 99, Eff 10-31-2001; 150 v S 92, § 1, eff. 12-23-03; 151 v S 81, § 1, eff. 9-5-05; 153 v H 1, § 101.01, eff. 7-17-09; 2012 SB 316, § 101.01, eff. Sept. 24, 2012.

## Annotations

## Notes

### Section Notes

#### EFFECT OF AMENDMENTS

The 2012 amendment added (B)(3)(bb); and made stylistic changes.

Page's Ohio Revised Code Annotated:

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**ORC Ann. 4141.46**

Current through Legislation passed by the 129th Ohio General Assembly and filed with the Secretary of State through File 143 Annotations current through August 6, 2012

Page's Ohio Revised Code Annotated > TITLE 41. > CHAPTER 4141. > MISCELLANEOUS

**§ 4141.46. Liberal construction**

Sections 4141.01 to 4141.46, inclusive, of the Revised Code shall be liberally construed.

**History**

GC § 1345-33; 123 v 178(197), § 2; Bureau of Code Revision. Eff 10-1-53.

**26 USCS § 125**

Current through PL 112-173, approved 8/16/12

**United States Code Service - Titles 1 through 51 > TITLE 26. > SUBTITLE A. > CHAPTER 1. > SUBCHAPTER B. > PART III.**

**§ 125. Cafeteria plans.**

- (a) In General. Except as provided in subsection (b), no amount shall be included in the gross income of a participant in a cafeteria plan solely because, under the plan, the participant may choose among the benefits of the plan.
- (b) Exception for highly compensated participants and key employees.
  - (1) Highly compensated participants. In the case of a highly compensated participant, subsection (a) shall not apply to any benefit attributable to a plan year for which the plan discriminates in favor of--
    - (A) highly compensated individuals as to eligibility to participate, or
    - (B) highly compensated participants as to contributions and benefits.
  - (2) Key employees. In the case of a key employee (within the meaning of section 416(i)(1) [*26 USCS § 416(i)(1)*]), subsection (a) shall not apply to any benefit attributable to a plan for which the statutory nontaxable benefits provided to key employees exceed 25 percent of the aggregate of such benefits provided for all employees under the plan. For purposes of the preceding sentence, statutory nontaxable benefits shall be determined without regard to the second sentence of subsection (f).
  - (3) Year of inclusion. For purposes of determining the taxable year of inclusion, any benefit described in paragraph (1) or (2) shall be treated as received or accrued in the taxable year of the participant or key employee in which the plan year ends.
- (c) Discrimination as to benefits or contributions. For purposes of subparagraph (B) of subsection (b)(1), a cafeteria plan does not discriminate where qualified benefits and total benefits (or employer contributions allocable to qualified benefits and employer contributions for total benefits) do not discriminate in favor of highly compensated participants.
- (d) Cafeteria plan defined. For purposes of this section
  - (1) In general. The term "cafeteria plan" means a written plan under which--
    - (A) all participants are employees, and
    - (B) the participants may choose among 2 or more benefits consisting of cash and qualified benefits.
  - (2) Deferred compensation plans excluded.
    - (A) In general. The term "cafeteria plan" does not include any plan which provides for deferred compensation.
    - (B) Exception for cash and deferred arrangements. Subparagraph (A) shall not apply

to a profit-sharing or stock bonus plan or rural cooperative plan (within the meaning of section 401(k)(7) [26 USCS § 401(k)(7)]) which includes a qualified cash or deferred arrangement (as defined in section 401(k)(2) [26 USCS § 401(k)(2)]) to the extent of amounts which a covered employee may elect to have the employer pay as contributions to a trust under such plan on behalf of the employee.

- (C) Exception for certain plans maintained by educational institutions. Subparagraph (A) shall not apply to a plan maintained by an educational organization described in section 170(b)(1)(A)(ii) [26 USCS § 170(b)(1)(A)(ii)] to the extent of amounts which a covered employee may elect to have the employer pay as contributions for post-retirement group life insurance if--
- (i) all contributions for such insurance must be made before retirement, and
  - (ii) such life insurance does not have a cash surrender value at any time. For purposes of section 79 [26 USCS § 79], any life insurance described in the preceding sentence shall be treated as group-term life insurance.
- (D) Exception for health savings accounts. Subparagraph (A) shall not apply to a plan to the extent of amounts which a covered employee may elect to have the employer pay as contributions to a health savings account established on behalf of the employee.
- (e) Highly compensated participant and individual defined. For purposes of this section--
- (1) Highly compensated participant. The term "highly compensated participant" means a participant who is--
    - (A) an officer,
    - (B) a shareholder owning more than 5 percent of the voting power or value of all classes of stock of the employer,
    - (C) highly compensated, or
    - (D) a spouse or dependent (within the meaning of section 152 [26 USCS § 152], determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof) of an individual described in subparagraph (A), (B), or (C).
  - (2) Highly compensated individual. The term "highly compensated individual" means an individual who is described in subparagraphs (A), (B), (C), or (D) of paragraph (1).
- (f) Qualified benefits defined. For purposes of this section--
- (1) In general. The term "qualified benefit" means any benefit which, with the application of subsection (a), is not includible in the gross income of the employee by reason of an express provision of this chapter [26 USCS §§ 1 et seq.] (other than section 106(b), 117, 127, or 132 [26 USCS § 106(b), 117, 127, or 132]). Such term includes any group term life insurance which is includible in gross income only because it exceeds the dollar limitation of section 79 [26 USCS § 79] and such term includes any other benefit permitted under regulations.
  - (2) Long-term care insurance not qualified. The term "qualified benefit" shall not include any product which is advertised, marketed, or offered as long-term care insurance.
  - (3) Certain exchange-participating qualified health plans not qualified [Caution: This paragraph applies to taxable years beginning after December 31, 2013, as provided by §

1515(c) of Act March 23, 2010, *P.L. 111-148*, which appears as a note to this section.].

(A) In general. The term "qualified benefit" shall not include any qualified health plan (as defined in section 1301(a) of the Patient Protection and Affordable Care Act [*42 USCS § 18021(a)*]) offered through an Exchange established under section 1311 of such Act [*42 USCS § 18031*].

(B) Exception for exchange-eligible employers. Subparagraph (A) shall not apply with respect to any employee if such employee's employer is a qualified employer (as defined in section 1312(f)(2) of the Patient Protection and Affordable Care Act [*42 USCS § 18032(f)(2)*]) offering the employee the opportunity to enroll through such an Exchange in a qualified health plan in a group market.

(g) Special rules.

(1) Collectively bargained plan not considered discriminatory. For purposes of this section, a plan shall not be treated as discriminatory if the plan is maintained under an agreement which the Secretary finds to be a collective bargaining agreement between employee representatives and one or more employers.

(2) Health benefits. For purposes of subparagraph (B) of subsection (b)(1), a cafeteria plan which provides health benefits shall not be treated as discriminatory if--

(A) contributions under the plan on behalf of each participant include an amount which--

(i) equals 100 percent of the cost of the health benefit coverage under the plan of the majority of the highly compensated participants similarly situated, or

(ii) equals or exceeds 75 percent of the cost of the health benefit coverage of the participant (similarly situated) having the highest cost health benefit coverage under the plan, and

(B) contributions or benefits under the plan in excess of those described in subparagraph (A) bear a uniform relationship to compensation.

(3) Certain participation eligibility rules not treated as discriminatory. For purposes of subparagraph (A) of subsection (b)(1), a classification shall not be treated as discriminatory if the plan--

(A) benefits a group of employees described in section 410(b)(2)(A)(i) [*26 USCS § 410(b)(2)(A)(i)*], and

(B) meets the requirements of clauses (i) and (ii):

(i) No employee is required to complete more than 3 years of employment with the employer or employers maintaining the plan as a condition of participation in the plan, and the employment requirement for each employee is the same.

(ii) Any employee who has satisfied the employment requirement of clause (i) and who is otherwise entitled to participate in the plan commences participation no later than the first day of the first plan year beginning after the date the employment requirement was satisfied unless the employee was separated from service before the first day of that plan year.

(4) Certain controlled groups, etc. All employees who are treated as employed by a single

employer under subsection (b), (c) or (m) of section 414 [26 USCS § 414] shall be treated as employed by a single employer for purposes of this section.

- (h) Special rule for unused benefits in health flexible spending arrangements of individuals called to active duty.
- (1) In general. For purposes of this title, a plan or other arrangement shall not fail to be treated as a cafeteria plan or health flexible spending arrangement merely because such arrangement provides for qualified reservist distributions.
  - (2) Qualified reservist distribution. For purposes of this subsection, the term "qualified reservist distribution" means, any distribution to an individual of all or a portion of the balance in the employee's account under such arrangement if--
    - (A) such individual was (by reason of being a member of a reserve component (as defined in *section 101 of title 37, United States Code*)) ordered or called to active duty for a period in excess of 179 days or for an indefinite period, and
    - (B) such distribution is made during the period beginning on the date of such order or call and ending on the last date that reimbursements could otherwise be made under such arrangement for the plan year which includes the date of such order or call.
- (i) Limitation on health flexible spending arrangements [Caution: This subsection applies to taxable years beginning after December 31, 2012, as provided by § 10902(b) of Act March 23, 2010, *P.L. 111-148*, as amended, which appears as a note to this section.].
- (1) In general. For purposes of this section, if a benefit is provided under a cafeteria plan through employer contributions to a health flexible spending arrangement, such benefit shall not be treated as a qualified benefit unless the cafeteria plan provides that an employee may not elect for any taxable year to have salary reduction contributions in excess of \$ 2,500 made to such arrangement.
  - (2) Adjustment for inflation. In the case of any taxable year beginning after December 31, 2013, the dollar amount in paragraph (1) shall be increased by an amount equal to--
    - (A) such amount, multiplied by
    - (B) the cost-of-living adjustment determined under section 1(f)(3) [26 USCS § 1(f)(3)] for the calendar year in which such taxable year begins by substituting "calendar year 2012" for "calendar year 1992" in subparagraph (B) thereof. If any increase determined under this paragraph is not a multiple of \$ 50, such increase shall be rounded to the next lowest multiple of \$ 50.
- (j) Simple cafeteria plans for small businesses.
- (1) In general. An eligible employer maintaining a simple cafeteria plan with respect to which the requirements of this subsection are met for any year shall be treated as meeting any applicable nondiscrimination requirement during such year.
  - (2) Simple cafeteria plan. For purposes of this subsection, the term "simple cafeteria plan" means a cafeteria plan--
    - (A) which is established and maintained by an eligible employer, and
    - (B) with respect to which the contribution requirements of paragraph (3), and the eligibility and participation requirements of paragraph (4), are met.
  - (3) Contribution requirements.

- (A) In general. The requirements of this paragraph are met if, under the plan the employer is required, without regard to whether a qualified employee makes any salary reduction contribution, to make a contribution to provide qualified benefits under the plan on behalf of each qualified employee in an amount equal to--
- (i) a uniform percentage (not less than 2 percent) of the employee's compensation for the plan year, or
  - (ii) an amount which is not less than the lesser of--
    - (I) 6 percent of the employee's compensation for the plan year, or
    - (II) twice the amount of the salary reduction contributions of each qualified employee.
- (B) Matching contributions on behalf of highly compensated and key employees. The requirements of subparagraph (A)(ii) shall not be treated as met if, under the plan, the rate of contributions with respect to any salary reduction contribution of a highly compensated or key employee at any rate of contribution is greater than that with respect to an employee who is not a highly compensated or key employee.
- (C) Additional contributions. Subject to subparagraph (B), nothing in this paragraph shall be treated as prohibiting an employer from making contributions to provide qualified benefits under the plan in addition to contributions required under subparagraph (A).
- (D) Definitions. For purposes of this paragraph--
- (i) Salary reduction contribution. The term "salary reduction contribution" means, with respect to a cafeteria plan, any amount which is contributed to the plan at the election of the employee and which is not includible in gross income by reason of this section.
  - (ii) Qualified employee. The term "qualified employee" means, with respect to a cafeteria plan, any employee who is not a highly compensated or key employee and who is eligible to participate in the plan.
  - (iii) Highly compensated employee. The term "highly compensated employee" has the meaning given such term by section 414(q) [26 USCS § 414(q)].
  - (iv) Key employee. The term "key employee" has the meaning given such term by section 416(i) [26 USCS § 416(i)].
- (4) Minimum eligibility and participation requirements.
- (A) In general. The requirements of this paragraph shall be treated as met with respect to any year if, under the plan--
- (i) all employees who had at least 1,000 hours of service for the preceding plan year are eligible to participate, and
  - (ii) each employee eligible to participate in the plan may, subject to terms and conditions applicable to all participants, elect any benefit available under the plan.
- (B) Certain employees may be excluded. For purposes of subparagraph (A)(i), an employer may elect to exclude under the plan employees--
- (i) who have not attained the age of 21 before the close of a plan year,

- (ii) who have less than 1 year of service with the employer as of any day during the plan year,
  - (iii) who are covered under an agreement which the Secretary of Labor finds to be a collective bargaining agreement if there is evidence that the benefits covered under the cafeteria plan were the subject of good faith bargaining between employee representatives and the employer, or
  - (iv) who are described in section 410(b)(3)(C) [26 USCS § 410(b)(3)(C)] (relating to nonresident aliens working outside the United States). A plan may provide a shorter period of service or younger age for purposes of clause (i) or (ii).
- (5) Eligible employer. For purposes of this subsection--
- (A) In general. The term "eligible employer" means, with respect to any year, any employer if such employer employed an average of 100 or fewer employees on business days during either of the 2 preceding years. For purposes of this subparagraph, a year may only be taken into account if the employer was in existence throughout the year.
  - (B) Employers not in existence during preceding year. If an employer was not in existence throughout the preceding year, the determination under subparagraph (A) shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current year.
  - (C) Growing employers retain treatment as small employer.
    - (i) In general. If--
      - (I) an employer was an eligible employer for any year (a "qualified year"), and
      - (II) such employer establishes a simple cafeteria plan for its employees for such year, then, notwithstanding the fact the employer fails to meet the requirements of subparagraph (A) for any subsequent year, such employer shall be treated as an eligible employer for such subsequent year with respect to employees (whether or not employees during a qualified year) of any trade or business which was covered by the plan during any qualified year.
    - (ii) Exception. This subparagraph shall cease to apply if the employer employs an average of 200 or more employees on business days during any year preceding any such subsequent year.
  - (D) Special rules.
    - (i) Predecessors. Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.
    - (ii) Aggregation rules. All persons treated as a single employer under subsection (a) or (b) of section 52 [26 USCS § 52], or subsection (n) or (o) of section 414 [26 USCS § 414], shall be treated as one person.
- (6) Applicable nondiscrimination requirement. For purposes of this subsection, the term "applicable nondiscrimination requirement" means any requirement under subsection (b) of this section, section 79(d) [26 USCS § 79(d)], section 105(h) [26 USCS § 105(h)], or paragraph (2), (3), (4), or (8) of section 129(d) [26 USCS § 129(d)].

- (7) Compensation. The term "compensation" has the meaning given such term by section 414(s) [26 USCS § 414(s)].
- (k) Cross reference. For reporting and recordkeeping requirements, see section 6039D [26 USCS § 6039D].
- (l) Regulations. The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section.

## History

(Added Nov. 6, 1978, P.L. 95-600, Title I, § 134(a), 92 Stat. 2783; April 1, 1980, P.L. 96-222, Title I, § 101(a)(6)(A), 94 Stat. 196; Dec. 28, 1980, P.L. 96-605, Title II, §§ 201(b)(2), 226(a), 94 Stat. 3527, 3529; Dec. 28, 1980, P.L. 96-613, § 5(b)(2), 94 Stat. 3581; July 18, 1984, P.L. 98-369, Div A, Title V, § 531(b)(1)-(4)(A), 98 Stat. 881, 882; Oct. 31, 1984, P.L. 98-611, § 1(d)(3)(A), 98 Stat. 3177; Oct. 31, 1984, P.L. 98-612, § 1(b)(3)(B), 98 Stat. 3181; Oct. 22, 1986, P.L. 99-514, Title XI, § 1151(d)(1), Title XVIII, § 1853(b)(1), 100 Stat. 2504, 2870; Nov. 10, 1988, P.L. 100-647, Title I, §§ 1011B(a)(11)-(13), 1018(t)(6), Title IV, § 4002(b)(2), Title VI, § 6051(b), 102 Stat. 3484, 3485, 3589, 3643, 3696; Nov. 8, 1989, P.L. 101-140, Title II, § 203(a)(1), (3), (b)(2), 103 Stat. 830, 831; Dec. 19, 1989, P.L. 101-239, Title VII, § 7814(b), 103 Stat. 2413; Nov. 5, 1990, P.L. 101-508, Title XI, § 11801(c)(3), 104 Stat. 1388-523; Aug. 21, 1996, P.L. 104-191, Title III, §§ 301(d), 321(c)(1), 110 Stat. 2051, 2058; Dec. 8, 2003, P.L. 108-173, Title XII, § 1201(i), 117 Stat. 2479; Oct. 4, 2004, P.L. 108-311, Title II, § 207(11), 118 Stat. 1177; Dec. 29, 2007, P.L. 110-172, § 11(a)(12), 121 Stat. 2485; June 17, 2008, P.L. 110-245, Title I, § 114(a), 122 Stat. 1636; March 23, 2010, P.L. 111-148, Title I, Subtitle F, Part II, § 1515(a), (b), Title IX, Subtitle A, § 9005(a), Subtitle B, § 9022(a), Title X, Subtitle H, § 10902(a), 124 Stat. 258, 854, 874, 1016; March 30, 2010, P.L. 111-152, Title I, Subtitle E, § 1403(b), 124 Stat. 1063.)

**26 USCS § 3306**

Current through PL 112-173, approved 8/16/12

United States Code Service - Titles 1 through 51 > TITLE 26. > SUBTITLE C. > CHAPTER 23.

**§ 3306. Definitions.**

- (a) Employer. For purposes of this chapter [26 USCS §§ 3301 et seq.]--
- (1) In general. The term "employer" means, with respect to any calendar year, any person who--
    - (A) during any calendar quarter in the calendar year or the preceding calendar year paid wages of \$ 1,500 or more, or
    - (B) on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least one individual in employment for some portion of the day. For purposes of this paragraph, there shall not be taken into account any wages paid to, or employment of, an employee performing domestic services referred to in paragraph (3).
  - (2) Agricultural labor. In the case of agricultural labor, the term "employer" means, with respect to any calendar year, any person who--
    - (A) during any calendar quarter in the calendar year or the preceding calendar year paid wages of \$ 20,000 or more for agricultural labor, or
    - (B) on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least 10 individuals in employment in agricultural labor for some portion of the day.
  - (3) Domestic service. In the case of domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, the term "employer" means, with respect to any calendar year, any person who during any calendar quarter in the calendar year or the preceding calendar year paid wages in cash of \$ 1,000 or more for such service.
  - (4) Special rule. A person treated as an employer under paragraph (3) shall not be treated as an employer with respect to wages paid for any service other than domestic service referred to in paragraph (3) unless such person is treated as an employer under paragraph (1) or (2) with respect to such other service.
- (b) Wages. For purposes of this chapter [26 USCS §§ 3301 et seq.], the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include--
- (1) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to \$ 7,000 with respect to employment has been paid to an individual by an employer during any calendar year, is paid to such individual by such employer during such calendar year. If

an employer (hereinafter referred to as successor employer) 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 immediately after the acquisition 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 the purpose of determining whether the successor employer has paid remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment equal to \$ 7,000 to such individual during such calendar year, any remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph 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 employer;

- (2) 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--
  - (A) sickness or accident disability (but, in the case of payments made to an employee or any of his dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workmen's compensation law), or
  - (B) medical or hospitalization expenses in connection with sickness or accident disability, or
  - (C) death;
- (3) Repealed.
- (4) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of 6 calendar months following the last calendar month in which the employee worked for such employer;
- (5) any payment made to, or on behalf of, an employee or his beneficiary--
  - (A) from or to a trust described in section 401(a) [26 USCS § 401(a)] which is exempt from tax under section 501(a) [26 USCS § 501(a)] at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust, or
  - (B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a) [26 USCS § 403(a)],
  - (C) under a simplified employee pension (as defined in section 408(k)(1) [26 USCS § 408(k)(1)]), other than any contributions described in section 408(k)(6) [26 USCS § 408(k)(6)],
  - (D) under or to an annuity contract described in section 403(b) [26 USCS § 403(b)], other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement (whether evidenced by a written instrument or otherwise),
  - (E) under or to an exempt governmental deferred compensation plan (as defined in sec-

tion 3121(v)(3) [26 USCS § 3121(v)(3)],

- (F) to supplement pension benefits under a plan or trust described in any of the foregoing provisions of this paragraph to take into account some portion or all of the increase in the cost of living (as determined by the Secretary of Labor) since retirement but only if such supplemental payments are under a plan which is treated as a welfare plan under section 3(2)(B)(ii) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1002(2)(B)(ii)];
- (G) under a cafeteria plan (within the meaning of section 125 [26 USCS § 125]) if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 [26 USCS § 125] applied for purposes of this section) section 125 [26 USCS § 125] would not treat any wages as constructively received, or
- (H) under an arrangement to which section 408(p) [26 USCS § 408(p)] applies, other than any elective contributions under paragraph (2)(A)(i) thereof,;
- (6) the payment by an employer (without deduction from the remuneration of the employee)--
  - (A) of the tax imposed upon an employee under section 3101 [26 USCS § 3101], or
  - (B) of any payment required from an employee under a State unemployment compensation law, with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;
- (7) remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business;
- (8) Repealed.
- (9) remuneration paid to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 [26 USCS § 217] (determined without regard to section 274(n) [26 USCS § 274(n)]);
- (10) any payment or series of payments by an employer to an employee or any of his dependents which is paid--
  - (A) upon or after the termination of an employee's employment relationship because of (i) death, or (ii) retirement for disability, and
  - (B) under a plan established by the employer which makes provision for his employees generally or a class or classes of his employees (or for such employees or class or classes of employees and their dependents), other than any such payment or series of payments which would have been paid if the employee's employment relationship had not been so terminated;
- (11) remuneration for agricultural labor paid in any medium other than cash;
- (12) any contribution, payment, or service, provided by an employer which may be excluded from the gross income of an employee, his spouse, or his dependents, under the provisions of section 120 [26 USCS § 120] (relating to amounts received under qualified group legal services plans);
- (13) any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the em-

- employee will be able to exclude such payment or benefit from income under section 127, 129, 134(b)(4), or 134(b)(5) [26 USCS § 127, 129, 134(b)(4), or 134(b)(5)];
- (14) the value of any meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119 [26 USCS § 119];
- (15) any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died;
- (16) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132 [26 USCS § 74(c), 108(f)(4), 117, or 132];
- (17) any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b) [26 USCS § 106(b)];
- (18) any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d) [26 USCS § 106(d)];
- (19) remuneration on account of--
- (A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b) [26 USCS § 423(b)]), or
- (B) any disposition by the individual of such stock; or
- (20) any benefit or payment which is excludable from the gross income of the employee under section 139B(b) [26 USCS § 139B(b)].

Nothing in the regulations prescribed for purposes of chapter 24 [26 USCS §§ 3401 et seq.] (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter.

Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in wages solely by reason of the parenthetical matter contained in subparagraph (A) of paragraph (2) shall be treated for purposes of this chapter and chapter 22 [26 USCS §§ 3301 et seq. and 3201 et seq.] as the employer with respect to such wages.

- (c) Employment. For purposes of this chapter [26 USCS §§ 3301 et seq.], the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, and (B) any service, of whatever nature, performed after 1971 out-

side the United States (except in a contiguous country with which the United States has an agreement relating to unemployment compensation) by a citizen of the United States as an employee of an American employer (as defined in subsection (j)(3)), except

- (1) agricultural labor (as defined in subsection (k)) unless--
  - (A) such labor is performed for a person who--
    - (i) during any calendar quarter in the calendar year or the preceding calendar year paid remuneration in cash of \$ 20,000 or more to individuals employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)), or
    - (ii) on each of some 20 days during the calendar year or the preceding calendar year, each day being in a different calendar week, employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)) for some portion of the day (whether or not at the same moment of time) 10 or more individuals; and
  - (B) such labor is not agricultural labor performed by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act [§ USCS §§ 1184(c) and 1101(a)(15)(H)];
- (2) domestic service in a private home, local college club, or local chapter of a college fraternity or sorority unless performed for a person who paid cash remuneration of \$ 1,000 or more to individuals employed in such domestic service in any calendar quarter in the calendar year or the preceding calendar year;
- (3) service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is \$ 50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if--
  - (A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business, or
  - (B) such individual was regularly employed (as determined under subparagraph (A)) by such employer in the performance of such service during the preceding calendar quarter;
- (4) service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft, if the employee is employed on and in connection with such vessel or aircraft when outside the United States;
- (5) service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother;
- (6) service performed in the employ of the United States Government or of an instrumentality of the United States which is--
  - (A) wholly or partially owned by the United States, or

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- (B) exempt from the tax imposed by section 3301 [26 USCS § 3301] by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;
- (7) service performed in the employ of a State, or any political subdivision thereof, or in the employ of an Indian tribe, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions or Indian tribes; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301 [26 USCS § 3301];
- (8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) [26 USCS § 501(c)(3)] which is exempt from income tax under section 501(a) [26 USCS § 501(a)];
- (9) service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act (45 U.S.C. 351);
- (10)
- (A) service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) [26 USCS § 501(a)] (other than an organization described in section 401(a) [26 USCS § 401(a)]) or under section 521 [26 USCS § 521], if the remuneration for such service is less than \$ 50, or
- (B) service performed in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college, or university, or (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance, or
- (C) service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers, or
- (D) service performed in the employ of a hospital, if such service is performed by a patient of such hospital;
- (11) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);
- (12) service performed in the employ of an instrumentality wholly owned by a foreign government--
- (A) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

- (B) if the Secretary of State shall certify 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 similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;
- (13) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law; and service performed as an intern in the employ of a hospital by an individual who has completed a 4 years' course in a medical school chartered or approved pursuant to State law;
- (14) service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission;
- (15)
- (A) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;
- (B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;
- (16) service performed in the employ of an international organization;
- (17) service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except--
- (A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and
- (B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States);
- (18) service described in section 3121(b)(20) [26 USCS § 3121(b)(20)];
- (19) service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended (8 U.S.C. 1101(a)(15)(F), (J), (M), or (Q)), and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q) as the case may be;
- (20) service performed by a full time student (as defined in subsection (q)) in the employ of an organized camp
- (A) if such camp--

- (i) did not operate for more than 7 months in the calendar year and did not operate for more than 7 months in the preceding calendar year, or
  - (ii) had average gross receipts for any 6 months in the preceding calendar year which were not more than  $33 \frac{1}{3}$  percent of its average gross receipts for the other 6 months in the preceding calendar year; and
- (B) if such full time student performed services in the employ of such camp for less than 13 calendar weeks in such calendar year; or
- (21) service performed by a person committed to a penal institution.
- (d) Included and excluded service. For purposes of this chapter [26 USCS §§ 3301 et seq.], if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this subsection, the term "pay period" means a period (of not more than 31 consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. This subsection shall not be applicable with respect to services performed in a pay period by an employee for the person employing him, where any of such service is excepted by subsection (c)(9).
- (e) State agency. For purposes of this chapter [26 USCS §§ 3301 et seq.], the term "State agency" means any State officer, board, or other authority, designated under a State law to administer the unemployment fund in such State.
- (f) Unemployment fund. For purposes of this chapter [26 USCS §§ 3301 et seq.], the term "unemployment fund" means a special fund, established under a State law and administered by a State agency, for the payment of compensation. Any sums standing to the account of the State agency in the Unemployment Trust Fund established by section 904 of the Social Security Act, as amended (42 U.S.C. 1104), shall be deemed to be a part of the unemployment fund of the State, and no sums paid out of the Unemployment Trust Fund to such State agency shall cease to be a part of the unemployment fund of the State until expended by such State agency. An unemployment fund shall be deemed to be maintained during a taxable year only if throughout such year, or such portion of the year as the unemployment fund was in existence, no part of the moneys of such fund was expended for any purpose other than the payment of compensation (exclusive of expenses of administration) and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b) [26 USCS § 3305(b)]; except that--
- (1) an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payments of cash benefits to individuals with respect to their disability, exclusive of expenses of administration;
  - (2) the amounts specified by section 903(c)(2) or 903(d)(4) of the Social Security Act [42 USCS § 1103(c)(2) or 1103(d)(4)] may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices,
  - (3) nothing in this subsection shall be construed to prohibit deducting any amount from unemployment compensation otherwise payable to an individual and using the amount so deducted to pay for health insurance, or the withholding of Federal, State, or local individual income tax, if the individual elected to have such deduction made and such de-

duction was made under a program approved by the Secretary of Labor;

- (4) amounts may be deducted from unemployment benefits and used to repay overpayments as provided in section 303(g) of the Social Security Act [42 USCS § 503(g)];
  - (5) amounts may be withdrawn for the payment of short-time compensation under a short-time compensation program (as defined in subsection (v)); and
  - (6) amounts may be withdrawn for the payment of allowances under a self-employment assistance program (as defined in subsection (t)).
- (g) Contributions. For purposes of this chapter [26 USCS §§ 3301 et seq.], the term "contributions" means payments required by a State law to be made into an unemployment fund by any person on account of having individuals in his employ, to the extent that such payments are made by him without being deducted or deductible from the remuneration of individuals in his employ.
- (h) Compensation. For purposes of this chapter [26 USCS §§ 3301 et seq.], the term "compensation" means cash benefits payable to individuals with respect to their unemployment.
- (i) Employee. For purposes of this chapter [26 USCS §§ 3301 et seq.], the term "employee" has the meaning assigned to such term by section 3121(d) [26 USCS § 3121(d)], except that paragraph (4) and subparagraphs (B) and (C) of paragraph (3) shall not apply.
- (j) State, United States, and American employer. For purposes of this chapter [26 USCS §§ 3301 et seq.]--
- (1) State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.
  - (2) United States. The term "United States" when used in a geographical sense includes the States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.
  - (3) American employer. The term "American employer" means a person who is--
    - (A) an individual who is a resident of the United States,
    - (B) a partnership, if two-thirds or more of the partners are residents of the United States,
    - (C) a trust, if all of the trustees are residents of the United States, or
    - (D) a corporation organized under the laws of the United States or of any State.

An individual who is a citizen of the Commonwealth of Puerto Rico or the Virgin Islands (but not otherwise a citizen of the United States) shall be considered, for purposes of this section, as a citizen of the United States.

- (k) Agricultural labor. For purposes of this chapter [26 USCS §§ 3301 et seq.], the term "agricultural labor" has the meaning assigned to such term by subsection (g) of section 3121 [26 USCS § 3121], except that for purposes of this chapter [26 USCS §§ 3301 et seq.] subparagraph (B) of paragraph (4) of such subsection (g) shall be treated as reading: "(B) in the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in the performance of service described in subparagraph (A), but only if such operators produced more than one-half of the commodity with respect to which such service is performed;".
- (l) [Repealed]

- (m) American vessel and aircraft. For purposes of this chapter [26 USCS §§ 3301 et seq.], the term "American vessel" means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew 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; and the term "American aircraft" means an aircraft registered under the laws of the United States.
- (n) Vessels operated by general agents of United States. Notwithstanding the provisions of subsection (c)(6), service performed by officers and members of the crew of a vessel which would otherwise be included as employment under subsection (c) shall not be excluded by reason of the fact that it is performed on or in connection with an American vessel--
- (1) owned by or bareboat chartered to the United States and
  - (2) whose business is conducted by a general agent of the Secretary of Commerce.

For purposes of this chapter [26 USCS §§ 3301 et seq.], each such general agent shall be 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, and the officers and members of the crew of such an American vessel 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 the United States. Each such general agent who in his capacity as such is an employer within the meaning of subsection (a) shall be subject to all the requirements imposed upon an employer under this chapter [26 USCS §§ 3301 et seq.] with respect to service which constitutes employment by reason of this subsection.

- (o) Special rule in case of certain agricultural workers.
- (1) Crew leaders who are registered or provide specialized agricultural labor. For purposes of this chapter [26 USCS §§ 3301 et seq.], any individual who is a member of a crew furnished by a crew leader to perform agricultural labor for any other person shall be treated as an employee of such crew leader--
    - (A) if--
      - (i) such crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act; or
      - (ii) substantially all the members of such crew operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment, which is provided by such crew leader; and
    - (B) if such individual is not an employee of such other person within the meaning of subsection (i).
  - (2) Other crew leaders. For purposes of this chapter [26 USCS §§ 3301 et seq.], in the case of any individual who is furnished by a crew leader to perform agricultural labor for any other person and who is not treated as an employee of such crew leader under paragraph (1)--
    - (A) such other person and not the crew leader shall be treated as the employer of such individual; and
    - (B) such other person shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual by the crew leader (either on his behalf or on behalf of such other person) for

the agricultural labor performed for such other person.

- (3) Crew leader. For purposes of this subsection, the term "crew leader" means an individual who--
- (A) furnishes individuals to perform agricultural labor for any other person,
  - (B) pays (either on his behalf or on behalf of such other person) the individuals so furnished by him for the agricultural labor performed by them, and
  - (C) has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person.
- (p) Concurrent employment by two or more employers. For purposes of sections 3301, 3302, and 3306(b)(1), if two or more related corporations concurrently employ the same individual and compensate such individual through a common paymaster which is one of such corporations, each such corporation shall be considered to have paid as remuneration to such individual only the amounts actually disbursed by it to such individual and shall not be considered to have paid as remuneration to such individual amounts actually disbursed to such individual by another of such corporations.
- (q) Full time student. For purposes of subsection (c)(20), an individual shall be treated as a full time student for any period
- (1) during which the individual is enrolled as a full time student at an educational institution, or
  - (2) which is between academic years or terms if--
    - (A) the individual was enrolled as a full time student at an educational institution for the immediately preceding academic year or term, and
    - (B) there is a reasonable assurance that the individual will be so enrolled for the immediately succeeding academic year or term after the period described in subparagraph (A).
- (r) Treatment of certain deferred compensation and salary reduction arrangements.
- (1) Certain employer contributions treated as wages. Nothing in any paragraph of subsection (b) (other than paragraph (1)) shall exclude from the term "wages" --
    - (A) any employer contribution under a qualified cash or deferred arrangement (as defined in section 401(k) [26 USCS § 401(k)]) to the extent not included in gross income by reason of section 402(e)(3) [26 USCS § 402(e)(3)], or
    - (B) any amount treated as an employer contribution under section 414(h)(2) [26 USCS § 414(h)(2)] where the pickup referred to in such section is pursuant to a salary reduction agreement (whether evidenced by a written instrument or otherwise).
  - (2) Treatment of certain nonqualified deferred compensation plans.
    - (A) In general. Any amount deferred under a nonqualified deferred compensation plan shall be taken into account for purposes of this chapter [26 USCS §§ 3301 et seq.] as of the later of--
      - (i) when the services are performed, or
      - (ii) when there is no substantial risk of forfeiture of the rights to such amount.

- (B) Taxed only once. Any amount taken into account as wages by reason of subparagraph (A) (and the income attributable thereto) shall not thereafter be treated as wages for purposes of this chapter [26 USCS §§ 3301 et seq.].
- (C) Nonqualified deferred compensation plan. For purposes of this paragraph, the term "nonqualified deferred compensation plan" means any plan or other arrangement for deferral of compensation other than a plan described in subsection (b)(5).
- (s) Tips treated as wages. For purposes of this chapter [26 USCS §§ 3301 et seq.], the term "wages" includes tips which are--
- (1) received while performing services which constitute employment, and
  - (2) included in a written statement furnished to the employer pursuant to section 6053(a) [26 USCS § 6053(a)].
- (t) Self-employment assistance program. For the purposes of this chapter [26 USCS §§ 3301 et seq.], the term "self-employment assistance program" means a program under which--
- (1) individuals who meet the requirements described in paragraph (3) are eligible to receive an allowance in lieu of regular unemployment compensation under the State law for the purpose of assisting such individuals in establishing a business and becoming self-employed;
  - (2) the allowance payable to individuals pursuant to paragraph (1) is payable in the same amount, at the same interval, on the same terms, and subject to the same conditions, as regular unemployment compensation under the State law, except that--
    - (A) State requirements relating to availability for work, active search for work, and refusal to accept work are not applicable to such individuals;
    - (B) State requirements relating to disqualifying income are not applicable to income earned from self-employment by such individuals; and
    - (C) such individuals are considered to be unemployed for the purposes of Federal and State laws applicable to unemployment compensation, as long as such individuals meet the requirements applicable under this subsection;
  - (3) individuals may receive the allowance described in paragraph (1) if such individuals--
    - (A) are eligible to receive regular unemployment compensation under the State law, or would be eligible to receive such compensation except for the requirements described in subparagraph (A) or (B) of paragraph (2);
    - (B) are identified pursuant to a State worker profiling system as individuals likely to exhaust regular unemployment compensation; and
    - (C) are participating in self-employment assistance activities which--
      - (i) include entrepreneurial training, business counseling, and technical assistance; and
      - (ii) are approved by the State agency; and
    - (D) are actively engaged on a full-time basis in activities (which may include training) relating to the establishment of a business and becoming self-employed;
  - (4) the aggregate number of individuals receiving the allowance under the program does not at any time exceed 5 percent of the number of individuals receiving regular unemployment compensation under the State law at such time;

- (5) the program does not result in any cost to the Unemployment Trust Fund (established by section 904(a) of the Social Security Act [42 USCS § 1104(a)]) in excess of the cost that would be incurred by such State and charged to such Fund if the State had not participated in such program; and
  - (6) the program meets such other requirements as the Secretary of Labor determines to be appropriate.
- (u) Indian tribe. For purposes of this chapter [26 USCS §§ 3301 et seq.], the term "Indian tribe" has the meaning given to such term by section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)), and includes any subdivision, subsidiary, or business enterprise wholly owned by such an Indian tribe.
- (v) Short-time compensation program. For purposes of this part, the term "short-time compensation program" means a program under which--
- (1) the participation of an employer is voluntary;
  - (2) an employer reduces the number of hours worked by employees in lieu of layoffs;
  - (3) such employees whose workweeks have been reduced by at least 10 percent, and by not more than the percentage, if any, that is determined by the State to be appropriate (but in no case more than 60 percent), are not disqualified from unemployment compensation;
  - (4) the amount of unemployment compensation payable to any such employee is a pro rata portion of the unemployment compensation which would otherwise be payable to the employee if such employee were unemployed;
  - (5) such employees meet the availability for work and work search test requirements while collecting short-time compensation benefits, by being available for their workweek as required by the State agency;
  - (6) eligible employees may participate, as appropriate, in training (including employer-sponsored training or worker training funded under the Workforce Investment Act of 1998) to enhance job skills if such program has been approved by the State agency;
  - (7) the State agency shall require employers to certify that if the employer provides health benefits and retirement benefits under a defined benefit plan (as defined in section 414(j) [26 USCS § 414(j)]) or contributions under a defined contribution plan (as defined in section 414(i) [26 USCS § 414(i)]) to any employee whose workweek is reduced under the program that such benefits will continue to be provided to employees participating in the short-time compensation program under the same terms and conditions as though the workweek of such employee had not been reduced or to the same extent as other employees not participating in the short-time compensation program;
  - (8) the State agency shall require an employer to submit a written plan describing the manner in which the requirements of this subsection will be implemented (including a plan for giving advance notice, where feasible, to an employee whose workweek is to be reduced) together with an estimate of the number of layoffs that would have occurred absent the ability to participate in short-time compensation and such other information as the Secretary of Labor determines is appropriate;
  - (9) the terms of the employer's written plan and implementation shall be consistent with employer obligations under applicable Federal and State laws; and

- (10) upon request by the State and approval by the Secretary of Labor, only such other provisions are included in the State law that are determined to be appropriate for purposes of a short-time compensation program.

## History

(Aug. 16, 1954, ch 736, 68A Stat. 447; Sept. 1, 1954, ch 1212, §§ 1, 4(c), 68 Stat. 1130, 1135; June 25, 1959, P.L. 86-70, § 22(a), 73 Stat. 146; July 12, 1960, P.L. 86-624, § 18(d), 74 Stat. 416; Sept. 13, 1960, P.L. 86-778, Title V, §§ 531(c), 532-534, 543(a), 74 Stat. 983, 984, 986; Sept. 21, 1961, P.L. 87-256, § 110(f), 75 Stat. 537; Oct. 10, 1962, P.L. 87-792, § 7(k), 76 Stat. 830; Oct. 13, 1964, P.L. 88-650, § 4(c), 78 Stat. 1077; Jan. 2, 1968, P.L. 90-248, Title V, § 504(b), 81 Stat. 935; Aug. 7, 1969, P.L. 91-53, § 1, 83 Stat. 91; Aug. 10, 1970, P.L. 91-373, Title I, §§ 101(a), 102(a), 103(a), 105(a), (b), 106(a), Title III, § 302, 84 Stat. 696, 697, 699, 700, 713; Oct. 4, 1976, P.L. 94-455, Title XIX, §§ 1903(a)(16), 1906(b)(13)(C), 90 Stat. 1810, 1834; Oct. 20, 1976, P.L. 94-566, Title I, §§ 111 (a), (b), 112(a), 113(a), 114(a), 116(b), Title II, § 211(a), 90 Stat. 2667-2669, 2672, 2676; Dec. 20, 1977, P.L. 95-216, Title III, § 314(b), 91 Stat. 1536; Oct. 17, 1978, P.L. 95-472, § 3(a), 92 Stat. 1333; Nov. 6, 1978, P.L. 95-600, Title I, § 164(b)(2), 92 Stat. 2813; Oct. 10, 1979, P.L. 96-84, § 4(a), (b), 93 Stat. 654; April 1, 1980, P.L. 96-222, Title I, § 101(a)(10)(B)(ii), 94 Stat. 201; Dec. 5, 1980, P.L. 96-499, Title XI, § 1141(b), 94 Stat. 2694; Aug. 13, 1981, P.L. 97-34, Title I, § 124(e)(2)(A), Title VIII, § 822(a), 95 Stat. 200, 351; Sept. 3, 1982, P.L. 97-248, Title II, §§ 271(a), 276(a)(1), (b)(1), (2), 277, 96 Stat. 554, 558, 559; April 20, 1983, P.L. 98-21, Title III, §§ 324(b)(1)-(4)(B), 327(c), 328(c), 97 Stat. 123, 124, 127, 128; Oct. 24, 1983, P.L. 98-135, Title II, §§ 201(a), 202, 97 Stat. 860; July 18, 1984, P.L. 98-369, Div A, Title IV, § 491(d)(37), Title V, § 531(d)(3), Div B, Title VI, § 2661(o)(4), 98 Stat. 851, 884, 1159; April 7, 1986, P.L. 99-272, Title XII, § 12401(b)(2), Title XIII, § 13303(a), 100 Stat. 297, 327; Oct. 21, 1986, P.L. 99-509, Title IX, § 9002(b)(2)(B), 100 Stat. 1971; Oct. 22, 1986, P.L. 99-514, Title I, § 122(e)(3), Title XI, §§ 1108(g)(8), 1151(d)(2)(B), Title XVIII, §§ 1884(3), 1899A(44), (45), 100 Stat. 2112, 2435, 2505, 2919, 2961; Oct. 31, 1986, P.L. 99-595, 100 Stat. 3348; Nov. 10, 1988, P.L. 100-647, Title I, §§ 1001(d)(2)(C)(iii), (g)(4)(B)(ii), 1011B(a) (22)(C), (23)(A), 1018(u)(50), Title VIII, § 8016(a)(3)(B), 102 Stat. 3351, 3352, 3486, 3593, 3792; Nov. 8, 1989, P.L. 101-140, Title II, § 203(a)(2), 103 Stat. 830; July 3, 1992, P.L. 102-318, Title III, § 303(a), Title IV, § 401(a)(2), Title V, § 521(b)(35), 106 Stat. 297, 298, 312; Dec. 8, 1993, P.L. 103-182, Title V, § 507(a), (b)(2), 107 Stat. 2153, 2154; Aug. 15, 1994, P.L. 103-296, Title III, § 320(a)(1)(E), 108 Stat. 1535; Dec. 8, 1994, P.L. 103-465, Title VII, § 702(c)(2), 108 Stat. 4997; Aug. 20, 1996, P.L. 104-188, Title I, §§ 1203(a), 1421(b)(8)(C), 1704(t)(10), 110 Stat. 1773, 1798, 1888; Aug. 21, 1996, P.L. 104-191, Title III, § 301(c)(2)(B), 110 Stat. 2049; Aug. 5, 1997, P.L. 105-33, Title V, § 5406(a), 111 Stat. 605; Dec. 21, 2000, P.L. 106-554, § 1(a)(7) (Title I, § 166(a), (d)), 114 Stat. 2763, 2763A-627; March 9, 2002, P.L. 107-147, § 209(d)(1), 116 Stat. 33; Nov. 11, 2003, P.L. 108-121, Title I, § 106(b)(3), 117 Stat. 1339; Dec. 8, 2003, P.L. 108-173, Title XII, § 1201(d)(2)(B), 117 Stat. 2477; Oct. 22, 2004, P.L. 108-357, Title II, Subtitle F, § 251(a)(3), Title III, Subtitle B, § 320(b)(3), 118 Stat. 1458, 1473; Oct. 28, 2004, P.L. 108-375, Div A, Title V, Subtitle L, § 585(b)(2)(C), 118 Stat. 1932; June 17, 2008, P.L. 110-245, Title I, § 115(b), 122 Stat. 1636.)  
(As amended Feb. 22, 2012, P.L. 112-96, Title II, Subtitle D, § 2161(a)(1), (b)(1)(B), 126 Stat. 171, 172.)

**26 USCS § 3121**

Current through PL 112-173, approved 8/16/12

**United States Code Service - Titles 1 through 51 > TITLE 26. > SUBTITLE C. > CHAPTER 21. > SUBCHAPTER C.**

**§ 3121. Definitions.**

- (a) Wages. For purposes of this chapter [26 USCS §§ 3101 et seq.], the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include--
- (1) in the case of the taxes imposed by sections 3101(a) and 3111(a) [26 USCS §§ 3101(a) and 3111(a)] that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to the contribution and benefit base (as determined under section 230 of the Social Security Act [42 USCS § 430]) with respect to employment has been paid to an individual by an employer during the calendar year with respect to which such contribution and benefit base is effective, is paid to such individual by such employer during such calendar year. If an employer (hereinafter referred to as successor employer) 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 immediately after the acquisition 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 the purpose of determining whether the successor employer has paid remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment equal to the contribution and benefit base (as determined under section 230 of the Social Security Act [42 USCS § 430]) such contribution and benefit base to such individual during such calendar year, any remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph 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 employer;
  - (2) 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--
    - (A) sickness or accident disability (but, in the case of payments made to an employee or any of his dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workmen's compensation law), or
    - (B) medical or hospitalization expenses in connection with sickness or accident disability, or

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- (C) death, except that this paragraph does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee;
- (3) [Repealed]
- (4) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of 6 calendar months following the last calendar month in which the employee worked for such employer;
- (5) any payment made to, or on behalf of, an employee or his beneficiary--
- (A) from or to a trust described in section 401(a) [26 USCS § 401(a)] which is exempt from tax under section 501(a) [26 USCS § 501(a)] at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust,
- (B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a) [26 USCS § 403(a)],
- (C) under a simplified employee pension (as defined in section 408(k)(1) [26 USCS § 408(k)(1)]), other than any contributions described in section 408(k)(6) [26 USCS § 408(k)(6)],
- (D) under or to an annuity contract described in section 403(b) [26 USCS § 403(b)], other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement (whether evidenced by a written instrument or otherwise),
- (E) under or to an exempt governmental deferred compensation plan (as defined in subsection (v)(3)),
- (F) to supplement pension benefits under a plan or trust described in any of the foregoing provisions of this paragraph to take into account some portion or all of the increase in the cost of living (as determined by the Secretary of Labor) since retirement but only if such supplemental payments are under a plan which is treated as a welfare plan under section 3(2)(B)(ii) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1002(2)(B)(ii)],
- (G) under a cafeteria plan (within the meaning of section 125) if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 applied for purposes of this section) section 125 would not treat any wages as constructively received,
- (H) under an arrangement to which section 408(p) [26 USCS § 408(p)] applies, other than any elective contributions under paragraph (2)(A)(i) thereof, or
- (I) under a plan described in section 457(e)(11)(A)(ii) [26 USCS § 457(e)(11)(A)(ii)] and maintained by an eligible employer (as defined in section 457(e)(1) [26 USCS § 457(e)(1)]);
- (6) the payment by an employer (without deduction from the remuneration of the employee)--
- (A) of the tax imposed upon an employee under section 3101 [26 USCS § 3101], or
- (B) of any payment required from an employee under a State unemployment compen-

sation law,with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;

(7)

- (A) remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business or for domestic service in a private home of the employer;
- (B) cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer (including domestic service on a farm operated for profit), if the cash remuneration paid in such year by the employer to the employee for such service is less than the applicable dollar threshold (as defined in subsection (x)) for such year;
- (C) cash remuneration paid by an employer in any calendar year to an employee for service not in the course of the employer's trade or business, if the cash remuneration paid in such year by the employer to the employee for such service is less than \$ 100. As used in this subparagraph, the term "service not in the course of the employer's trade or business" does not include domestic service in a private home of the employer and does not include service described in subsection (g)(5);

(8)

- (A) remuneration paid in any medium other than cash for agricultural labor;
- (B) cash remuneration paid by an employer in any calendar year to an employee for agricultural labor unless--
  - (i) the cash remuneration paid in such year by the employer to the employee for such labor is \$ 150 or more, or
  - (ii) the employer's expenditures for agricultural labor in such year equal or exceed \$ 2,500,except that clause (ii) shall not apply in determining whether remuneration paid to an employee constitutes "wages" under this section if such employee (I) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (II) commutes daily from his permanent residence to the farm on which he is so employed, and (III) has been employed in agriculture less than 13 weeks during the preceding calendar year;

(9) [Repealed]

- (10) remuneration paid by an employer in any calendar year to an employee for service described in subsection (d)(3)(C) (relating to home workers), if the cash remuneration paid in such year by the employer to the employee for such service is less than \$ 100;
- (11) remuneration paid to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 [26 USCS § 217] (determined without regard to section 274(n) [26 USCS § 274(n)]);

(12)

- (A) tips paid in any medium other than cash;
- (B) cash tips received by an employee in any calendar month in the course of his em-

- ployment by an employer unless the amount of such cash tips is \$ 20 or more;
- (13) any payment or series of payments by an employer to an employee or any of his dependents which is paid--
    - (A) upon or after the termination of an employee's employment relationship because of (i) death, or (ii) retirement for disability, and
    - (B) under a plan established by the employer which makes provision for his employees generally or a class or classes of his employees (or for such employees or class or classes of employees and their dependents), other than any such payment or series of payments which would have been paid if the employee's employment relationship had not been so terminated;
  - (14) any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died;
  - (15) any payment made by an employer to an employee, if at the time such payment is made such employee is entitled to disability insurance benefits under section 223(a) of the Social Security Act [42 USCS § 423(a)] and such entitlement commenced prior to the calendar year in which such payment is made, and if such employee did not perform any services for such employer during the period for which such payment is made;
  - (16) remuneration paid by an organization exempt from income tax under section 501(a) [26 USCS § 501(a)] (other than an organization described in section 401(a) [26 USCS § 401(a)]) or under section 521 [26 USCS § 521] in any calendar year to an employee for service rendered in the employ of such organization, if the remuneration paid in such year by the organization to the employee for such service is less than \$ 100;
  - (17) any contribution, payment, or service provided by an employer which may be excluded from the gross income of an employee, his spouse, or his dependents, under the provisions of section 120 [26 USCS § 120] (relating to amounts received under qualified group legal services plans);
  - (18) any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127, 129, 134(b)(4), or 134(b)(5) [26 USCS § 127, 129, 134(b)(4), or 134(b)(5)];
  - (19) the value of any meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119 [26 USCS § 119];
  - (20) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117 or 132 [26 USCS § 74(c), 108(f)(4), 117 or 132];
  - (21) in the case of a member of an Indian tribe, any remuneration on which no tax is imposed by this chapter [26 USCS §§ 3101 et seq.] by reason of section 7873 [26 USCS § 7873] (relating to income derived by Indians from exercise of fishing rights);
  - (22) remuneration on account of--
    - (A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b) [26 USCS § 422(b)]) or under an employee stock purchase plan (as defined in section 423(b) [26 USCS § 423(b)]), or

- (B) any disposition by the individual of such stock; or
- (23) any benefit or payment which is excludable from the gross income of the employee under section 139B(b) [26 USCS § 139B(b)].

Nothing in the regulations prescribed for purposes of chapter 24 [26 USCS §§ 3401 et seq.] (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter [26 USCS §§ 3101 et seq.].

Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in wages solely by reason of the parenthetical matter contained in subparagraph (A) of paragraph (2) shall be treated for purposes of this chapter and chapter 22 [26 USCS §§ 3101 et seq. and 3201 et seq.] as the employer with respect to such wages.

- (b) Employment. For purposes of this chapter [26 USCS §§ 3101 et seq.], the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the Social Security Act [42 USCS § 433]; except that such term shall not include--
- (1) service performed by foreign agricultural workers lawfully admitted to the United States from the Bahamas, Jamaica, and the other British West Indies, or from any other foreign country or possession thereof, on a temporary basis to perform agricultural labor;
  - (2) domestic service performed in a local college club, or local chapter of a college fraternity or sorority, by a student who is enrolled and is regularly attending classes at a school, college, or university;
  - (3)
    - (A) service performed by a child under the age of 18 in the employ of his father or mother;
    - (B) service not in the course of the employer's trade or business, or domestic service in a private home of the employer, performed by an individual under the age of 21 in the employ of his father or mother, or performed by an individual in the employ of his spouse or son or daughter; except that the provisions of this subparagraph shall not be applicable to such domestic service performed by an individual in the employ of his son or daughter if--
      - (i) the employer is a surviving spouse or a divorced individual and has not remarried, or has a spouse living in the home who has a mental or physical condition which results in such spouse's being incapable of caring for a son, daughter, stepson, or stepdaughter (referred to in clause (ii)) for at least 4 continuous

- weeks in the calendar quarter in which the service is rendered, and
- (ii) a son, daughter, stepson, or stepdaughter of such employer is living in the home, and
  - (iii) the son, daughter, stepson, or stepdaughter (referred to in clause (ii)) has not attained age 18 or has a mental or physical condition which requires the personal care and supervision of an adult for at least 4 continuous weeks in the calendar quarter in which the service is rendered;
- (4) service performed by an individual on or in connection with a vessel not an American vessel, or on or in connection with an aircraft not an American aircraft, if (A) the individual is employed on and in connection with such vessel or aircraft, when outside the United States and (B)(i) such individual is not a citizen of the United States or (ii) the employer is not an American employer;
- (5) service performed in the employ of the United States or any instrumentality of the United States, if such service--
- (A) would be excluded from the term "employment" for purposes of this title if the provisions of paragraphs (5) and (6) of this subsection as in effect in January 1983 had remained in effect, and
  - (B) is performed by an individual who--
    - (i) has been continuously performing service described in subparagraph (A) since December 31, 1983, and for purposes of this clause--
      - (I) if an individual performing service described in subparagraph (A) returns to the performance of such service after being separated therefrom for a period of less than 366 consecutive days, regardless of whether the period began before, on, or after December 31, 1983, then such service shall be considered continuous,
      - (II) if an individual performing service described in subparagraph (A) returns to the performance of such service after being detailed or transferred to an international organization as described under section 3343 of subchapter III of chapter 33 of title 5, United States Code, or under section 3581 of chapter 35 of such title, then the service performed for that organization shall be considered service described in subparagraph (A),
      - (III) if an individual performing service described in subparagraph (A) is reemployed or reinstated after being separated from such service for the purpose of accepting employment with the American Institute in Taiwan as provided under section 3310 of chapter 48 of title 22, United States Code, then the service performed for that Institute shall be considered service described in subparagraph (A),
      - (IV) if an individual performing service described in subparagraph (A) returns to the performance of such service after performing service as a member of a uniformed service (including, for purposes of this clause, service in the National Guard and temporary service in the Coast Guard Reserve) and after exercising restoration or reemployment rights as provided under chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], then the service so performed as a member of a uniformed service shall be considered service described in subparagraph (A), and

- (V) if an individual performing service described in subparagraph (A) returns to the performance of such service after employment (by a tribal organization) to which section 105(e)(2) of the Indian Self-Determination Act applies, then the service performed for that tribal organization shall be considered service described in subparagraph (A); or
- (ii) is receiving an annuity from the Civil Service Retirement and Disability Fund, or benefits (for service as an employee) under another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed service); except that this paragraph shall not apply with respect to any such service performed on or after any date on which such individual performs-- (C) service performed as the President or Vice President of the United States, (D) service performed-- (i) in a position placed in the Executive Schedule under sections 5312 through 5317 of title 5, United States Code, (ii) as a noncareer appointee in the Senior Executive Service or a noncareer member of the Senior Foreign Service, or (iii) in a position to which the individual is appointed by the President (or his designee) or the Vice President under section 105(a)(1), 106(a)(1), or 107(a)(1) or (b)(1) of title 3, United States Code, if the maximum rate of basic pay for such position is at or above the rate for level V of the Executive Schedule, (E) service performed as the Chief Justice of the United States, an Associate Justice of the Supreme Court, a judge of a United States court of appeals, a judge of a United States district court (including the district court of a territory), a judge of the United States Claims Court [United States Court of Federal Claims], a judge of the United States Court of International Trade, a judge of the United States Tax Court, a United States magistrate, or a referee in bankruptcy or United States bankruptcy judge, (F) service performed as a Member, Delegate, or Resident Commissioner of or to the Congress, (G) any other service in the legislative branch of the Federal Government if such service-- (i) is performed by an individual who was not subject to subchapter III of chapter 83 of title 5, United States Code [*5 USCS §§ 8331 et seq.*], or to another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed services), on December 31, 1983, or (ii) is performed by an individual who has, at any time after December 31, 1983, received a lump-sum payment under *section 8342(a) of title 5, United States Code*, or under the corresponding provision of the law establishing the other retirement system described in clause (i), or (iii) is performed by an individual after such individual has otherwise ceased to be subject to subchapter III of chapter 83 of title 5, United States Code [*5 USCS §§ 8331 et seq.*] (without having an application pending for coverage under such subchapter), while performing service in the legislative branch (determined without regard to the provisions of subparagraph (B) relating to continuity of employment), for any period of time after December 31, 1983, and for purposes of this subparagraph (G) an individual is subject to such subchapter III or to any such other retirement system at any time only if (a) such individual's pay is subject to deductions, contributions, or similar payments (concurrent with the service being performed at that time) under section 8334(a) of such title 5 or the corresponding provision of the law establishing such other system, or (in a case to which section 8332(k)(1) of such title applies) such individual is making payments of amounts equivalent to such deductions, contributions, or similar payments while on leave without pay, or (b)

such individual is receiving an annuity from the Civil Service Retirement and Disability Fund, or is receiving benefits (for service as an employee) under another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed services), or (H) service performed by an individual (i) on or after the effective date of an election by such individual, under section 301 of the Federal Employees' Retirement System Act of 1986 [5 USCS § 8331 note], section 307 of the Central Intelligence Agency Retirement Act (50 U.S.C. 2157), or the Federal Employees' Retirement System Open Enrollment Act of 1997 [5 USCS § 8331 note] to become subject to the Federal Employees' Retirement System provided in chapter 84 of title 5, United States Code [5 USCS §§ 8401 et seq.], or (ii) on or after the effective date of an election by such individual, under regulations issued under section 860 of the Foreign Service Act of 1980 [22 USCS § 4071i], to become subject to the Foreign Service Pension System provided in subchapter II of chapter 8 of title I of such Act [22 USCS §§ 4071 et seq.];

- (6) service performed in the employ of the United States or any instrumentality of the United States if such service is performed
- (A) in a penal institution of the United States by an inmate thereof;
  - (B) by any individual as an employee included under section 5351(2) of title 5, United States Code (relating to certain interns, student nurses, and other student employees of hospitals of the Federal Government), other than as a medical or dental intern or a medical or dental resident in training; or
  - (C) by any individual as an employee serving on a temporary basis in case of fire, storm, earthquake, flood, or other similar emergency;
- (7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned thereby, except that this paragraph shall not apply in the case of--
- (A) service which, under subsection (j), constitutes covered transportation service,
  - (B) service in the employ of the Government of Guam or the Government of American Samoa or any political subdivision thereof, or of any instrumentality of any one or more of the foregoing which is wholly owned thereby, performed by an officer or employee thereof (including a member of the legislature of any such Government or political subdivision), and, for purposes of this title with respect to the taxes imposed by this chapter [26 USCS §§ 3101 et seq.]--
    - (i) any person whose service as such an officer or employee 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
    - (ii) the remuneration for service described in clause (i) (including fees paid to a public official) shall be deemed to have been paid by the Government of Guam or the Government of American Samoa or by a political subdivision thereof or an instrumentality of any one or more of the foregoing which is wholly owned thereby, whichever is appropriate,
  - (C) service performed 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 sys-

tem established by a law of the United States (other than the Federal Employees Retirement System provided in chapter 84 of title 5, United States Code [5 USCS §§ 8401 et seq.]); except that the provisions of this subparagraph shall not be applicable to service performed--

- (i) in a hospital or penal institution by a patient or inmate thereof;
  - (ii) by any individual as an employee included under section 5351(2) of title 5, United States Code (relating to certain interns, student nurses, and other student employees of hospitals of the District of Columbia Government), other than as a medical or dental intern or as a medical or dental resident in training;
  - (iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or other similar emergency; or
  - (iv) by a member of a board, committee, or council of the District of Columbia, paid on a per diem, meeting, or other fee basis,
- (D) service performed in the employ of the Government of Guam (or any instrumentality which is wholly owned by such Government) 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; except that (i) the provisions of this subparagraph shall not be applicable to 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, and (ii) for purposes of this subparagraph, clauses (i) and (ii) of subparagraph (B) shall apply,
- (E) service included under an agreement entered into pursuant to section 218 of the Social Security Act [42 USCS § 418], or
- (F) service in the employ of a State (other than the District of Columbia, Guam, or American Samoa), of any political subdivision thereof, or of any instrumentality of any one or more of the foregoing which is wholly owned thereby, by an individual who is not a member of a retirement system of such State, political subdivision, or instrumentality, except that the provisions of this subparagraph shall not be applicable to service performed--
- (i) by an individual who is employed to relieve such individual from unemployment;
  - (ii) in a hospital, home, or other institution by a patient or inmate thereof;
  - (iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency;
  - (iv) by an election official or election worker if the remuneration paid in a calendar year for such service is less than \$ 1,000 with respect to service performed during any calendar year commencing on or after January 1, 1995, ending on or before December 31, 1999, and the adjusted amount determined under section 218(c)(8)(B) of the Social Security Act [42 USCS § 418(c)(8)(B)] for any calendar year commencing on or after January 1, 2000, with respect to service performed during such calendar year; or
  - (v) by an employee in a position compensated solely on a fee basis which is treated pursuant to section 1402(c)(2)(E) as a trade or business for purposes of inclusion of such fees in net earnings from self-employment; for purposes of this subparagraph, except as provided in regulations prescribed by the Secre-

tary, the term "retirement system" has the meaning given such term by section 218(b)(4) of the Social Security Act [42 USCS § 418(b)(4)];

- (8)
- (A) service 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, except that this subparagraph shall not apply to service performed by a member of such an order in the exercise of such duties, if an election of coverage under subsection (r) is in effect with respect to such order, or with respect to the autonomous subdivision thereof to which such member belongs;
  - (B) service performed in the employ of a church or qualified church-controlled organization if such church or organization has in effect an election under subsection (w), other than service in an unrelated trade or business (within the meaning of section 513(a) [26 USCS § 513(a)]);
- (9) service performed by an individual as an employee or employee representative as defined in section 3231 [26 USCS § 3231];
- (10) service performed in the employ of--
- (A) a school, college, or university, or
  - (B) an organization described in section 509(a)(3) [26 USCS § 509(a)(3)] if the organization is organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university and is operated, supervised, or controlled by or in connection with such school, college, or university, unless it is a school, college, or university of a State or a political subdivision thereof and the services performed in its employ by a student referred to in section 218(c)(5) of the Social Security Act [42 USCS § 418(c)(5)] are covered under the agreement between the Commissioner of Social Security and such State entered into pursuant to section 218 of such Act; if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university;
- (11) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);
- (12) service performed in the employ of an instrumentality wholly owned by a foreign government--
- (A) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and
  - (B) if the Secretary of State shall certify 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 similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;
- (13) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law;
- (14)

- (A) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;
  - (B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;
- (15) service performed in the employ of an international organization, except service which constitutes "employment" under subsection (y);
- (16) service performed by an individual under an arrangement with the owner or tenant of land pursuant to which--
- (A) such individual undertakes to produce agricultural or horticultural commodities (including livestock, bees, poultry, and fur-bearing animals and wildlife) on such land,
  - (B) 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
  - (C) the amount of such individual's share depends on the amount of the agricultural or horticultural commodities produced;
- (17) service in the employ of any organization which is performed (A) in any year 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, as amended, as a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization, and (B) after June 30, 1956;
- (18) service performed in Guam 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(a)(15)(H)(ii));
- (19) service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be;
- (20) service (other than service described in paragraph (3)(A)) performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under an arrangement with the owner or operator of such boat pursuant to which--
- (A) such individual does not receive any cash remuneration other than as provided in subparagraph (B) and other than cash remuneration--
    - (i) which does not exceed \$ 100 per trip;
    - (ii) which is contingent on a minimum catch; and

- (iii) which is paid solely for additional duties (such as mate, engineer, or cook) for which additional cash remuneration is traditional in the industry,
  - (B) such individual receives a share of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life or a share of the proceeds from the sale of such catch, and
  - (C) the amount of such individual's share depends on the amount of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life, but only if the operating crew of such boat (or each boat from which the individual receives a share in the case of a fishing operation involving more than one boat) is normally made up of fewer than 10 individuals; or
- (21) domestic service in a private home of the employer which--
- (A) is performed in any year by an individual under the age of 18 during any portion of such year; and
  - (B) is not the principal occupation of such employee.

For purposes of paragraph (20), the operating crew of a boat shall be treated as normally made up of fewer than 10 individuals if the average size of the operating crew on trips made during the preceding 4 calendar quarters consisted of fewer than 10 individuals.

- (c) Included and excluded service. For purposes of this chapter [26 USCS §§ 3101 et seq.], if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this subsection, the term "pay period" means a period (of not more than 31 consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. This subsection shall not be applicable with respect to services performed in a pay period by an employee for the person employing him, where any of such service is excepted by subsection (b)(9).
- (d) Employee. For purposes of this chapter [26 USCS §§ 3101 et seq.], the term "employee" means--
  - (1) any officer of a corporation; or
  - (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or
  - (3) any individual (other than an individual who is an employee under paragraph (1) or (2)) who performs services for remuneration for any person--
    - (A) 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;
    - (B) as a full-time life insurance salesman;
    - (C) 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

- (D) 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; if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employee" under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed; or
- (4) any individual who performs services that are included under an agreement entered into pursuant to section 218 of the Social Security Act [42 USCS § 418].
- (e) State, United States, and citizen. For purposes of this chapter [26 USCS §§ 3101 et seq.]--
- (1) State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.
  - (2) United States. The term "United States" when used in a geographical sense includes the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

An individual who is a citizen of the Commonwealth of Puerto Rico (but not otherwise a citizen of the United States) shall be considered, for purposes of this section, as a citizen of the United States.

- (f) American vessel and aircraft. For purposes of this chapter [26 USCS §§ 3101 et seq.], the term "American vessel" means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew 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; and the term "American aircraft" means an aircraft registered under the laws of the United States.
- (g) Agricultural labor. For purposes of this chapter [26 USCS §§ 3101 et seq.], the term "agricultural labor" includes all service performed--
- (1) on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;
  - (2) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;
  - (3) in connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended

(12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(4)

(A) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(B) in the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in subparagraph (A), but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this subparagraph, 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 year in which such service is performed;

(C) the provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(5) on a farm operated for profit if such service is not in the course of the employer's trade or business.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(h) American employer. For purposes of this chapter [26 USCS §§ 3101 et seq.], 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.

(i) Computation of wages in certain cases.

(1) Domestic service. For purposes of this chapter [26 USCS §§ 3101 et seq.], in the case of domestic service described in subsection (a)(7)(B), any payment of cash remuneration for such service which is more or less than a whole-dollar amount shall, under such conditions and to such extent as may be prescribed by regulations made under this chapter [26 USCS §§ 3101 et seq.], be computed to the nearest dollar. 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. The amount of any payment of cash remuneration so com-

puted to the nearest dollar shall, in lieu of the amount actually paid, be deemed to constitute the amount of cash remuneration for purposes of subsection (a)(7)(B).

- (2) Service in the uniformed services. For purposes of this chapter [26 USCS §§ 3101 et seq.], in the case of an individual performing service, as a member of a uniformed service, to which the provisions of subsection (m)(1) are applicable, the term "wages" shall, subject to the provisions of subsection (a)(1) of this section, include as such individual's remuneration for such service only (A) his basic pay as described in chapter 3 and section 1009 of title 37, United States Code [37 USCS §§ 201 et seq. and 1009], in the case of an individual performing service to which subparagraph (A) of such subsection (m)(1) applies, or (B) his compensation for such service as determined under section 206(a) of title 37, United States Code, in the case of an individual performing service to which subparagraph (B) of such subsection (m)(1) applies.
  - (3) Peace Corps volunteer service. For purposes of this chapter [26 USCS §§ 3101 et seq.], in the case of an individual performing service, as a volunteer or volunteer leader within the meaning of the Peace Corps Act, to which the provisions of section 3121(p) [26 USCS § 3121(p)] are applicable, the term "wages" shall, subject to the provisions of subsection (a)(1) of this section, include as such individual's remuneration for such service only amounts paid pursuant to section 5(c) or 6(1) of the Peace Corps Act.
  - (4) Service performed by certain members of religious orders. For purposes of this chapter [26 USCS §§ 3101 et seq.], in any case where an individual is a member of a religious order (as defined in subsection (r)(2)) performing service in the exercise of duties required by such order, and an election of coverage under subsection (r) is in effect with respect to such order or with respect to the autonomous subdivision thereof to which such member belongs, the term "wages" shall, subject to the provisions of subsection (a)(1), 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 thereof or by any other person or organization pursuant to an agreement with such order or subdivision, except that the amount included as such individual's remuneration under this paragraph shall not be less than \$ 100 a month.
  - (5) Service performed by certain retired justices and judges. For purposes of this chapter [26 USCS §§ 3101 et seq.], in the case of an individual performing service under the provisions of section 294 of title 28, United States Code (relating to assignment of retired justices and judges to active duty), the term "wages" shall not include any payment under section 371(b) of such title 28 which is received during the period of such service.
- (j) Covered transportation service. For purposes of this chapter [26 USCS §§ 3101 et seq.]--
- (1) Existing transportation systems--General rule. Except as provided in paragraph (2), all service performed in the employ of a State or political subdivision in connection with its operation of a public transportation system shall constitute covered transportation service if any part of the transportation system was acquired from private ownership after 1936 and prior to 1951.
  - (2) Existing transportation systems--Cases in which no transportation employees, or only certain employees, are covered. Service performed in the employ of a State or political subdivision in connection with the operation of its public transportation system shall not constitute covered transportation service if--

- (A) any part of the transportation system was acquired from private ownership after 1936 and prior to 1951, and 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, by reason of a provision of the State constitution dealing specifically with retirement systems of the State or political subdivisions thereof, cannot be diminished or impaired; or
- (B) no part of the transportation system operated by the State or political subdivision on December 31, 1950, was acquired from private ownership after 1936 and prior to 1951; except that if such State or political subdivision makes an acquisition after 1950 from private ownership of any part of its transportation system, then, in the case of any employee who-- (C) became an employee of such State or political subdivision in connection with and at the time of its acquisition after 1950 of such part, and (D) prior to such acquisition rendered service in employment (including as employment service covered by an agreement under section 218 of the Social Security Act [42 USCS § 418]) in connection with the operation of such part of the transportation system acquired by the State or political subdivision, the service of such employee in connection with the operation of the transportation system shall constitute covered transportation service, commencing with the first day of the third calendar quarter following the calendar quarter in which the acquisition of such part took place, unless on such first day such service of such employee is covered by a general retirement system which does not, with respect to such employee, contain special provisions applicable only to employees described in subparagraph (C).
- (3) 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 shall constitute covered transportation service if the transportation system was not operated by the State or political subdivision prior to 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.
- (4) Definitions. For purposes of this subsection--
- (A) 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 shall not include such a fund or system which covers only service performed in positions connected with the operation of its public transportation system.
- (B) A transportation system or a part thereof shall be considered to have been acquired by a State or political subdivision from private ownership if prior to the acquisition service performed by employees in connection with the operation of the system or part thereof acquired constituted employment under this chapter [26 USCS §§ 3101 et seq.] or subchapter A of chapter 9 of the Internal Revenue Code of 1939 or was covered by an agreement made pursuant to section 218 of the Social Security Act [42 USCS § 418] and some of such employees became employees of the State or political subdivision in connection with and at the time of such acquisition.
- (C) The term "political subdivision" includes an instrumentality of--

- (i) a State,
  - (ii) one or more political subdivisions of a State, or
  - (iii) a State and one or more of its political subdivisions.
- (k) [Repealed]
- (l) Agreements entered into by American employers with respect to foreign affiliates.
- (1) Agreement with respect to certain employees of foreign affiliate. The Secretary shall, at the American employer's request, enter into an agreement (in such manner and form as may be prescribed by the Secretary) with any American employer (as defined in subsection (h)) who desires to have the insurance system established by title II of the Social Security Act [42 USCS §§ 401 et seq.] extended to service performed outside the United States in the employ of any 1 or more of such employer's foreign affiliates (as defined in paragraph (6)) by all employees who are citizens or residents of the United States, except that the agreement shall not apply to any service performed by, or remuneration paid to, an employee if such service or remuneration would be excluded from the term "employment" or "wages", as defined in this section, had the service been performed in the United States. Such agreement may be amended at any time so as to be made applicable, in the same manner and under the same conditions, with respect to any other foreign affiliate of such American employer. Such agreement shall be applicable with respect to citizens or residents of the United States who, on or after the effective date of the agreement, are employees of and perform services outside the United States for any foreign affiliate specified in the agreement. Such agreement shall provide--
- (A) that the American employer shall pay to the Secretary, at such time or times as the Secretary may by regulations prescribe, amounts equivalent to the sum of the taxes which would be imposed by sections 3101 and 3111 [26 USCS §§ 3101 and 3111] (including amounts equivalent to the interest, additions to the taxes, additional amounts, and penalties which would be applicable) with respect to the remuneration which would be wages if the services covered by the agreement constituted employment as defined in this section; and
  - (B) that the American employer will comply with such regulations relating to payments and reports as the Secretary may prescribe to carry out the purposes of this subsection.
- (2) Effective period of agreement. An agreement entered into pursuant to paragraph (1) shall be in effect for the period beginning with the first day of the calendar quarter in which such agreement is entered into or the first day of the succeeding calendar quarter, as may be specified in the agreement; except that in case such agreement is amended to include the services performed for any other affiliate and such amendment is executed after the first month following the first calendar quarter for which the agreement is in effect, the agreement shall be in effect with respect to service performed for such other affiliate only after the calendar quarter in which such amendment is executed. Notwithstanding any other provision of this subsection, the period for which any such agreement is effective with respect to any foreign entity shall terminate at the end of any calendar quarter in which the foreign entity, at any time in such quarter, ceases to be a foreign affiliate as defined in paragraph (6).
- (3) No termination of agreement. No agreement under this subsection may be terminated, either in its entirety or with respect to any foreign affiliate, on or after June 15, 1989.

- (4) Deposits in trust funds. For purposes of section 201 of the Social Security Act [42 USCS § 401], relating to appropriations to the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund, such remuneration--
- (A) paid for services covered by an agreement entered into pursuant to paragraph (1) as would be wages if the services constituted employment, and
  - (B) as is reported to the Secretary pursuant to the provisions of such agreement or of the regulations issued under this subsection, shall be considered wages subject to the taxes imposed by this chapter [26 USCS §§ 3101 et seq.].
- (5) Overpayments and underpayments.
- (A) If more or less than the correct amount due under an agreement entered into pursuant to this subsection is paid with respect to any payment of remuneration, proper adjustments with respect to the amounts due under such agreement shall be made, without interest, in such manner and at such times as may be required by regulations prescribed by the Secretary.
  - (B) If an overpayment cannot be adjusted under subparagraph (A), the amount thereof shall be paid by the Secretary, through the Fiscal Service of the Treasury Department, but only if a claim for such overpayment is filed with the Secretary within two years from the time such overpayment was made.
- (6) Foreign affiliate defined. For purposes of this subsection and section 210(a) of the Social Security Act [42 USCS § 410(a)]--
- (A) In general. A foreign affiliate of an American employer is any foreign entity in which such American employer has not less than a 10-percent interest.
  - (B) Determination of 10-percent interest. For purposes of subparagraph (A), an American employer has a 10-percent interest in any entity if such employer has such an interest directly (or through one or more entities)--
    - (i) in the case of a corporation, in the voting stock thereof, and
    - (ii) in the case of any other entity, in the profits thereof.
- (7) American employer as separate entity. Each American employer which enters into an agreement pursuant to paragraph (1) of this subsection shall, for purposes of this subsection and section 6413(c)(2)(C) [26 USCS § 6413(c)(2)(C)], relating to special refunds in the case of employees of certain foreign entities, be considered an employer in its capacity as a party to such agreement separate and distinct from its identity as a person employing individuals on its own account.
- (8) Regulations. Regulations of the Secretary to carry out the purposes of this subsection shall be designed to make the requirements imposed on American employers with respect to services covered by an agreement entered into pursuant to this subsection the same, so far as practicable, as those imposed upon employers pursuant to this title with respect to the taxes imposed by this chapter [26 USCS §§ 3101 et seq.].
- (m) Service in the uniformed services. For purposes of this chapter [26 USCS §§ 3101 et seq.]--
- (1) Inclusion of service. The term "employment" shall, notwithstanding the provisions of subsection (b) of this section, include--
    - (A) service performed by an individual as a member of a uniformed service on active

duty, but such term shall not include any such service which is performed while on leave without pay, and

- (B) service performed by an individual as a member of a uniformed service on inactive duty training.
- (2) Active duty. The term "active duty" means "active duty" as described in paragraph (21) of section 101 of title 38, United States Code, except that it shall also include "active duty for training" as described in paragraph (22) of such section.
- (3) Inactive duty training. The term "inactive duty training" means "inactive duty training" as described in paragraph (23) of such section 101.
- (n) Member of a uniformed service. For purposes of this chapter [26 USCS §§ 3101 et seq.], the term "member of a uniformed service" means any person appointed, enlisted, or inducted in a component of the Army, Navy, Air Force, Marine Corps, or Coast Guard (including a reserve component as defined in section 101(27) of title 38, United States Code), or in one of those services without specification of component, or as a commissioned officer of the Coast and Geodetic Survey, the National Oceanic and Atmospheric Administration Corps, or the Regular or Reserve Corps of the Public Health Service, and any person serving in the Army or Air Force under call or conscription. The term includes--
- (1) a retired member of any of those services;
  - (2) a member of the Fleet Reserve or Fleet Marine Corps Reserve;
  - (3) a cadet at the United States Military Academy, a midshipman at the United States Naval Academy, and a cadet at the United States Coast Guard Academy or United States Air Force Academy;
  - (4) a member of the Reserve Officers' Training Corps, the Naval Reserve Officers' Training Corps, or the Air Force Reserve Officers' Training Corps, when ordered to annual training duty for fourteen days or more, and while performing authorized travel to and from that duty; and
  - (5) any person while en route to or from, or at, a place for final acceptance or for entry upon active duty in the military, naval, or air service--
    - (A) who has been provisionally accepted for such duty; or
    - (B) who, under the Military Selective Service Act, has been selected for active military, naval, or air service; and has been ordered or directed to proceed to such place.

The term does not include a temporary member of the Coast Guard Reserve.

- (o) Crew leader. For purposes of this chapter [26 USCS §§ 3101 et seq.], 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; and such individuals furnished by the crew leader to perform agricultural labor for another person shall be deemed to be the employees of such crew leader. For purposes of this chapter and chapter 2 [26 USCS §§ 3101 et seq. and 1401 et seq.], a crew leader shall, with respect to service performed in furnishing individuals to perform agricultural labor for another person

and service performed as a member of the crew, be deemed not to be an employee of such other person.

- (p) Peace Corps volunteer service. For purposes of this chapter [26 USCS §§ 3101 et seq.], the term "employment" shall, notwithstanding the provisions of subsection (b) of this section, include service performed by an individual as a volunteer or volunteer leader within the meaning of the Peace Corps Act.
- (q) Tips included for both employee and employer taxes. For purposes of this chapter [26 USCS §§ 3101 et seq.], tips received by an employee in the course of his employment shall be considered remuneration for such employment (and deemed to have been paid by the employer for purposes of subsections (a) and (b) of section 3111 [26 USCS § 3111]). Such remuneration shall be deemed to be paid at the time a written statement including such tips is furnished to the employer pursuant to section 6053(a) [26 USCS § 6053(a)] or (if no statement including such tips is so furnished) at the time received; except that, in determining the employer's liability in connection with the taxes imposed by section 3111 [26 USCS § 3111] with respect to such tips in any case where no statement including such tips was so furnished (or to the extent that the statement so furnished was inaccurate or incomplete), such remuneration shall be deemed for purposes of subtitle F [26 USCS §§ 6001 et seq.] to be paid on the date on which notice and demand for such taxes is made to the employer by the Secretary.
- (r) Election of coverage by religious orders.
- (1) Certificate of election by order. A religious order whose members are required to take a vow of poverty, or any autonomous subdivision of such order, may file a certificate (in such form and manner, and with such official, as may be prescribed by regulations under this chapter [26 USCS §§ 3101 et seq.]) electing to have the insurance system established by title II of the Social Security Act [42 USCS §§ 401 et seq.] extended to services performed by its members in the exercise of duties required by such order or such subdivision thereof. Such certificate of election shall provide that--
    - (A) such election of coverage by such order or subdivision shall be irrevocable;
    - (B) 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;
    - (C) all services performed by a member of such an 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
    - (D) the wages of each member, upon which such order or subdivision shall pay the taxes imposed by sections 3101 and 3111 [26 USCS §§ 3101 and 3111], will be determined as provided in subsection (i)(4).
  - (2) Definition of member. For purposes of this subsection, a member of a religious order means any individual who is subject to a vow of poverty as a member of such order and 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.
  - (3) Effective date for election.
    - (A) A certificate of election of coverage shall be in effect, for purposes of subsection

(b)(8) and for purposes of section 210(a)(8) of the Social Security Act [42 USCS § 410(a)(8)], for the period beginning with whichever of the following may be designated by the order or subdivision thereof:

- (i) the first day of the calendar quarter in which the certificate is filed,
- (ii) the first day of the calendar quarter succeeding such quarter, 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 twentieth calendar quarter preceding the quarter in which such certificate is filed. Whenever a date is designated under clause (iii), 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.

(B) If a certificate of election filed pursuant to this subsection is effective for one or more calendar quarters prior to the quarter in which such certificate is filed, then--

- (i) for purposes of computing interest and for purposes of section 6651 [26 USCS § 6651] (relating to addition to tax for failure to file tax return), 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; and
- (ii) the statutory period for the assessment of such tax shall not expire before the expiration of 3 years from such due date.

(s) Concurrent employment by two or more employers. For purposes of sections 3102, 3111, and 3121(a)(1) [26 USCS §§ 3102, 3111, and 3121(a)(1)], if two or more related corporations concurrently employ the same individual and compensate such individual through a common paymaster which is one of such corporations, each such corporation shall be considered to have paid as remuneration to such individual only the amounts actually disbursed by it to such individual and shall not be considered to have paid as remuneration to such individual amounts actually disbursed to such individual by another of such corporations.

(t) [Repealed]

(u) Application of hospital insurance tax to federal, state, and local employment.

(1) Federal employment. For purposes of the taxes imposed by sections 3101(b) and 3111(b) [26 USCS §§ 3101(b) and 3111(b)], subsection (b) shall be applied without regard to paragraph (5) thereof.

(2) State and local employment. For purposes of the taxes imposed by sections 3101(b) and 3111(b) [26 USCS §§ 3101(b) and 3111(b)]--

(A) In general. Except as provided in subparagraphs (B) and (C), subsection (b) shall be applied without regard to paragraph (7) thereof.

(B) Exception for certain services. Service shall not be treated as employment by reason of subparagraph (A) if--

- (i) the service is included under an agreement under section 218 of the Social Security Act [42 USCS § 418], or

- (ii) the service is performed--
  - (I) by an individual who is employed by a State or political subdivision thereof to relieve him from unemployment,
  - (II) in a hospital, home, or other institution by a patient or inmate thereof as an employee of a State or political subdivision thereof or of the District of Columbia,
  - (III) by an individual, as an employee of a State or political subdivision thereof or of the District of Columbia, serving on a temporary basis in case of fire, storm, snow, earthquake, flood or other similar emergency,
  - (IV) by any individual as an employee included under *section 5351(2) of title 5, United States Code* (relating to certain interns, student nurses, and other student employees of hospitals of the District of Columbia Government), other than as a medical or dental intern or a medical or dental resident in training,
  - (V) by an election official or election worker if the remuneration paid in a calendar year for such service is less than \$ 1,000 with respect to service performed during any calendar year commencing on or after January 1, 1995, ending on or before December 31, 1999, and the adjusted amount determined under section 218(c)(8)(B) of the Social Security Act [*42 USCS § 418(c)(8)(B)*] for any calendar year commencing on or after January 1, 2000, with respect to service performed during such calendar year, or
  - (VI) by an individual in a position described in section 1402(c)(2)(E) [*26 USCS § 1402(c)(2)(E)*]. As used in this subparagraph, the terms "State" and "political subdivision" have the meanings given those terms in section 218(b) of the Social Security Act [*42 USCS § 418(b)*].
- (C) Exception for current employment which continues. Service performed for an employer shall not be treated as employment by reason of subparagraph (A) if--
  - (i) such service would be excluded from the term "employment" for purposes of this chapter [*26 USCS §§ 3101 et seq.*] if subparagraph (A) did not apply;
  - (ii) such service is performed by an individual--
    - (I) who was performing substantial and regular service for remuneration for that employer before April 1, 1986,
    - (II) who is a bona fide employee of that employer on March 31, 1986, and
    - (III) whose employment relationship with that employer was not entered into for purposes of meeting the requirements of this subparagraph; and
  - (iii) the employment relationship with that employer has not been terminated after March 31, 1986.
- (D) Treatment of agencies and instrumentalities. For purposes of subparagraph (C), under regulations--
  - (i) All agencies and instrumentalities of a State (as defined in section 218(b) of the Social Security Act [*42 USCS § 418(b)*]) or of the District of Columbia shall be treated as a single employer.
  - (ii) All agencies and instrumentalities of a political subdivision of a State (as so de-

fined) shall be treated as a single employer and shall not be treated as described in clause (i).

- (3) Medicare qualified government employment. For purposes of this chapter [26 USCS §§ 3101 et seq.], the term "medicare qualified government employment" means service which--
- (A) is employment (as defined in subsection (b)) with the application of paragraphs (1) and (2), but
  - (B) would not be employment (as so defined) without the application of such paragraphs.
- (v) Treatment of certain deferred compensation and salary reduction arrangements.
- (1) Certain employer contributions treated as wages. Nothing in any paragraph of subsection (a) (other than paragraph (1)) shall exclude from the term "wages" --
- (A) any employer contribution under a qualified cash or deferred arrangement (as defined in section 401(k) [26 USCS § 401(k)]) to the extent not included in gross income by reason of section 402(e)(3) [26 USCS § 402(e)(3)] or consisting of designated Roth contributions (as defined in section 402A(c) [26 USCS § 402A(c)]), or
  - (B) any amount treated as an employer contribution under section 414(h)(2) [26 USCS § 414(h)(2)] where the pickup referred to in such section is pursuant to a salary reduction agreement (whether evidenced by a written instrument or otherwise).
- (2) Treatment of certain nonqualified deferred compensation plans.
- (A) In general. Any amount deferred under a nonqualified deferred compensation plan shall be taken into account for purposes of this chapter [26 USCS §§ 3101 et seq.] as of the later of--
    - (i) when the services are performed, or
    - (ii) when there is no substantial risk of forfeiture of the rights to such amount. The preceding sentence shall not apply to any excess parachute payment (as defined in section 280G(b) [26 USCS § 280G(b)]) or to any specified stock compensation (as defined in section 4985 [26 USCS § 4985]) on which tax is imposed by section 4985 [26 USCS § 4985].
  - (B) Taxed only once. Any amount taken into account as wages by reason of subparagraph (A) (and the income attributable thereto) shall not thereafter be treated as wages for purposes of this chapter [26 USCS §§ 3101 et seq.].
  - (C) Nonqualified deferred compensation plan. For purposes of this paragraph, the term "nonqualified deferred compensation plan" means any plan or other arrangement for deferral of compensation other than a plan described in subsection (a)(5).
- (3) Exempt governmental deferred compensation plan. For purposes of subsection (a)(5), the term "exempt governmental deferred compensation plan" means any plan providing for deferral of compensation established and maintained for its employees by the United States, by a State or political subdivision thereof, or by an agency or instrumentality of any of the foregoing. Such term shall not include--
- (A) any plan to which section 83, 402(b), 403(c), 457(a), or 457(f)(1) [26 USCS § 83, 402(b), 403(c), 457(a), or 457(f)(1)] applies,
  - (B) any annuity contract described in section 403(b) [26 USCS § 403(b)], and

(C) the Thrift Savings Fund (within the meaning of subchapter III of chapter 84 of title 5, United States Code [5 USCS §§ 8431 et seq.]).

(w) Exemption of churches and qualified church-controlled organizations.

- (1) General rule. Any church or qualified church-controlled organization (as defined in paragraph (3)) may make an election within the time period described in paragraph (2), in accordance with such procedures as the Secretary determines to be appropriate, that services performed in the employ of such church or organization shall be excluded from employment for purposes of title II of the Social Security Act [42 USCS §§ 401 et seq.] and this chapter [26 USCS §§ 3101 et seq.]. An election may be made under this subsection only if the church or qualified church-controlled organization states that such church or organization is opposed for religious reasons to the payment of the tax imposed under section 3111 [26 USCS § 3111].
- (2) Timing and duration of election. An election under this subsection must be made prior to the first date, more than 90 days after July 18, 1984, on which a quarterly employment tax return for the tax imposed under section 3111 [26 USCS § 3111] is due, or would be due but for the election, from such church or organization. An election under this subsection shall apply to current and future employees, and shall apply to service performed after December 31, 1983. The election may be revoked by the church or organization under regulations prescribed by the Secretary. The election shall be revoked by the Secretary if such church or organization fails to furnish the information required under section 6051 [26 USCS § 6051] to the Secretary for a period of 2 years or more with respect to remuneration paid for such services by such church or organization, and, upon request by the Secretary, fails to furnish all such previously unfurnished information for the period covered by the election. Any revocation under the preceding sentence shall apply retroactively to the beginning of the 2-year period for which the information was not furnished.
- (3) Definitions.
  - (A) For purposes of this subsection, the term "church" means a church, a convention or association of churches, or an elementary or secondary school which is controlled, operated, or principally supported by a church or by a convention or association of churches.
  - (B) For purposes of this subsection, the term "qualified church-controlled organization" means any church-controlled tax-exempt organization described in section 501(c)(3) [26 USCS § 501(c)(3)], other than an organization which--
    - (i) offers goods, services, or facilities for sale, other than on an incidental basis, to the general public, other than goods, services, or facilities which are sold at a nominal charge which is substantially less than the cost of providing such goods, services, or facilities; and
    - (ii) normally receives more than 25 percent of its support from either (I) governmental sources, or (II) receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in activities which are not unrelated trades or businesses, or both.
- (x) Applicable dollar threshold. For purposes of subsection (a)(7)(B), the term "applicable dollar threshold" means \$ 1,000. In the case of calendar years after 1995, the Commissioner of Social Security shall adjust such \$ 1,000 amount at the same time and in the same manner as under section 215(a)(1)(B)(ii) of the Social Security Act [42 USCS § 415(a)(1)(B)(ii)]

with respect to the amounts referred to in section 215(a)(1)(B)(i) of such Act [42 USCS § 415(a)(1)(B)(i)], except that, for purposes of this paragraph, 1993 shall be substituted for the calendar year referred to in section 215(a)(1)(B)(ii)(II) of such Act [42 USCS § 415(a)(1)(B)(ii)(II)]. If any amount as adjusted under the preceding sentence is not a multiple of \$ 100, such amount shall be rounded to the next lowest multiple of \$ 100.

(y) Service in the employ of international organizations by certain transferred Federal employees.

(1) In general. For purposes of this chapter [26 USCS §§ 3101 et seq.], service performed in the employ of an international organization by an individual pursuant to a transfer of such individual to such international organization pursuant to section 3582 of title 5, United States Code, shall constitute "employment" if--

(A) immediately before such transfer, such individual performed service with a Federal agency which constituted "employment" under subsection (b) for purposes of the taxes imposed by sections 3101(a) and 3111(a) [26 USCS §§ 3101(a) and 3111(a)], and

(B) such individual would be entitled, upon separation from such international organization and proper application, to reemployment with such Federal agency under such section 3582 [26 USCS § 3582].

(2) Definitions. For purposes of this subsection--

(A) Federal agency. The term "Federal agency" means an agency, as defined in section 3581(1) of title 5, United States Code.

(B) International organization. The term "international organization" has the meaning provided such term by section 3581(3) of title 5, United States Code.

(z) Treatment of certain foreign persons as American employers.

(1) In general. If any employee of a foreign person is performing services in connection with a contract between the United States Government (or any instrumentality thereof) and any member of any domestically controlled group of entities which includes such foreign person, such foreign person shall be treated for purposes of this chapter as an American employer with respect to such services performed by such employee.

(2) Domestically controlled group of entities. For purposes of this subsection--

(A) In general. The term "domestically controlled group of entities" means a controlled group of entities the common parent of which is a domestic corporation.

(B) Controlled group of entities. The term "controlled group of entities" means a controlled group of corporations as defined in section 1563(a)(1) [26 USCS § 1563(a)(1)], except that--

(i) "more than 50 percent" shall be substituted for "at least 80 percent" each place it appears therein, and

(ii) the determination shall be made without regard to subsections (a)(4) and (b)(2) of section 1563 [26 USCS § 1563]. A partnership or any other entity (other than a corporation) shall be treated as a member of a controlled group of entities if such entity is controlled (within the meaning of section 954(d)(3) [26 USCS § 954(d)(3)]) by members of such group (including any entity treated as a member of such group by reason of this sentence).

- (3) Liability of common parent. In the case of a foreign person who is a member of any domestically controlled group of entities, the common parent of such group shall be jointly and severally liable for any tax under this chapter for which such foreign person is liable by reason of this subsection, and for any penalty imposed on such person by this title with respect to any failure to pay such tax or to file any return or statement with respect to such tax or wages subject to such tax. No deduction shall be allowed under this title for any liability imposed by the preceding sentence.
- (4) Provisions preventing double taxation.
- (A) Agreements. Paragraph (1) shall not apply to any services which are covered by an agreement under subsection (l).
- (B) Equivalent foreign taxation. Paragraph (1) shall not apply to any services if the employer establishes to the satisfaction of the Secretary that the remuneration paid by such employer for such services is subject to a tax imposed by a foreign country which is substantially equivalent to the taxes imposed by this chapter.
- (5) Cross reference. For relief from taxes in cases covered by certain international agreements, see sections 3101(c) and 3111(c) [26 USCS §§ 3101(c) and 3111(c)].

## History

(Aug. 16, 1954, ch 736, 68A Stat. 417; Sept. 1, 1954, ch 1206, Title II, §§ 204(a), (b), 205(a)-(e), 206(a), 207, 209, 68 Stat. 1091-1094; Aug. 1, 1956, ch 836, Title I, §§ 103(j), 121(d), Title II, § 201(b)-(d), (e)(1), (h)(1), (2), (j)-(l), 70 Stat. 824, 839-841, 843; Aug. 1, 1956, ch 837, Title IV, §§ 410, 411(a), 70 Stat. 878; Aug. 28, 1958, P.L. 85-840, Title IV, §§ 402(b), 404(a), 405(a), (b), 72 Stat. 1042, 1044-1046; Sept. 2, 1958, P.L. 85-866, Title I, § 69, 72 Stat. 1659; June 25, 1959, P.L. 86-70, § 22(a), 73 Stat. 146; Aug. 18, 1959, P.L. 86-168, Title I, § 104(h), Title II, § 202(a), 73 Stat. 387, 389; July 12, 1960, P.L. 86-624, § 18(c), 74 Stat. 416; Sept. 13, 1960, P.L. 86-778, Title I, §§ 103(n)-(p), 104(b), 105(a), 74 Stat. 938, 939, 942; Sept. 21, 1961, P.L. 87-256, § 110(e)(1), 75 Stat. 536; Sept. 22, 1961, P.L. 87-293, Title II, § 202(a)(1), (2), 75 Stat. 626; Feb. 26, 1964, P.L. 88-272, Title II, § 220(c)(2), 78 Stat. 62; Oct. 13, 1964, P.L. 88-650, § 4(b), 78 Stat. 1077; July 30, 1965, P.L. 89-97, Title III, §§ 311(b)(4), (5), 313(c)(3), (4), 316(a)(1), (b), 317(b), 320(b)(2), 79 Stat. 381, 383, 386, 388, 393; Jan. 2, 1968, P.L. 90-248, Title I, §§ 108(b)(2), 123(b), Title IV, § 403(i), Title V, § 504(a), 81 Stat. 835, 845, 932, 934; Dec. 30, 1969, P.L. 91-172, Title IX, § 943(c)(1)-(3), 83 Stat. 728; March 17, 1971, P.L. 92-5, Title II, § 203(b)(2), 85 Stat. 11; July 1, 1972, P.L. 92-336, Title II, § 203(b)(2), 86 Stat. 419; Oct. 30, 1972, P.L. 92-603, Title I, §§ 104(i), 122(b), 123(a)(2), (b), (c)(2), 128(b), 129(a)(2), 138(b), 86 Stat. 1341, 1354, 1356, 1358, 1359, 1365; July 9, 1973, P.L. 93-66, Title II, § 203(b)(2), (d), 87 Stat. 153; Dec. 31, 1973, P.L. 93-233, § 5(b)(2), (d), 87 Stat. 954; Oct. 4, 1976, P.L. 94-455, Title XII, § 1207(e)(1)(A), Title XIX, §§ 1903(a)(3), 1906(b)(13)(A), (C), 90 Stat. 1706, 1807, 1834; Oct. 19, 1976, P.L. 94-563, § 1(b), (c), 90 Stat. 2655; Dec. 20, 1977, P.L. 95-216, Title III, §§ 312(a), (b), (d), (f), (g), 314(a), 315(a), 356(a)-(d), 91 Stat. 1532-1536, 1555; Oct. 17, 1978, P.L. 95-472, § 3(b), 92 Stat. 1333; Nov. 6, 1978, P.L. 95-600, Title I, § 164(b)(3), 92 Stat. 2814; April 1, 1980, P.L. 96-222, Title I, § 101(a)(10)(B)(i), 94 Stat. 201; Dec. 5, 1980, P.L. 96-499, Title XI, § 1141(a)(1), 94 Stat. 2693; Aug. 13, 1981, P.L. 97-34, Title I, § 124(e)(2)(A), 95 Stat. 200; Dec. 29, 1981, P.L. 97-123, § 3(b), 95 Stat. 1662; Sept. 3, 1982, P.L. 97-248, Title II, § 278(a)(1), 96 Stat. 559; April 20, 1983, P.L. 98-21, Title I, §§ 101(b), (c)(2), 102(b), Title III, §§ 321(a), (e)(1), 322(a)(2), 323(a)(1), 324(a), 327(a)(1), (b)(1), 328(a),

97 Stat. 69, 70, 118, 119, 121, 122, 126-128; July 18, 1984, P.L. 98-369, Div A, Title I, § 67(c), Title IV, § 491(d)(36), Title V, § 531(d)(1)(A), Div B, Title VI, §§ 2601(b), 2603(a)(2), (b), 2661(o)(3), 2663(i), (j)(5)(C), 98 Stat. 587, 851, 884, 1124, 1128, 1159, 1169, 1171; Dec. 26, 1985, P.L. 99-221, § 3(b), 99 Stat. 1735; April 7, 1986, P.L. 99-272, Title XII, § 12112(b), Title XIII, §§ 13205(a)(1), 13303(c)(2), 100 Stat. 288, 313, 327; June 6, 1986, P.L. 99-335, Title III, § 304(b), 100 Stat. 606; Oct. 21, 1986, P.L. 99-509, Title IX, § 9002(b)(1)(A), (2)(A), 100 Stat. 1971; Oct. 22, 1986, P.L. 99-514, Title I, § 122(e)(1), Title XI, §§ 1108(g)(7), 1147(b), 1151(d)(2)(A), Title XVIII, §§ 1882(c), 1883(a)(11)(B), 1895(b)(18)(A), 1899A(38)-(40), 100 Stat. 2112, 2435, 2494, 2505, 2915, 2916, 2935, 2960; Dec. 22, 1987, P.L. 100-203, Title IX, §§ 9001(b), 9002(b), 9003(a)(2), 9004(b), 9005(b), 9006(a), (b)(2), 9023(d), 101 Stat. 1330-286-1330-289, 1330-296; Nov. 10, 1988, P.L. 100-647, Title I, §§ 1001(d)(2)(C)(i), (g)(4)(B)(i), 1011(e)(8), 1011B(a)(22)(A), (23)(A), 1018(r)(2)(A), (u)(35), Title III, § 3043(c)(2), Title VIII, §§ 8015(b)(2), (c)(2), 8016(a)(3)(A), (4)(A), (C), 8017(b), 102 Stat. 3351, 3352, 3461, 3485, 3486, 3586, 3592, 3642, 3791-3793; Nov. 8, 1989, P.L. 101-140, Title II, § 203(a)(2), 103 Stat. 830; Dec. 19, 1989, P.L. 101-239, Title X, § 10201(a), (b)(3), 103 Stat. 2472; Nov. 5, 1990, P.L. 101-508, Title XI, §§ 11331(a), 11332(b), 104 Stat. 1388-467, 1388-469; Dec. 1, 1990, P.L. 101-650, Title III, § 321, 104 Stat. 5117; July 3, 1992, P.L. 102-318, Title V, § 521(b)(34), 106 Stat. 312; Aug. 10, 1993, P.L. 103-66, Title XIII, § 13207(a), 107 Stat. 467; Dec. 3, 1993, P.L. 103-178, Title II, § 204(c), 107 Stat. 2033; Aug. 15, 1994, P.L. 103-296, Title I, § 108(h)(2), Title III, §§ 303(a)(2), (b)(2), 319(a)(1), (5), 320(a)(1)(C), 108 Stat. 1487, 1519, 1533-1535; Oct. 22, 1994, P.L. 103-387, § 2(a)(1)(A)-(C), 108 Stat. 4071; Aug. 20, 1996, P.L. 104-188, Title I, §§ 1116(a)(1)(A), (B), 1421(b)(8)(A), 1458(b)(1), 110 Stat. 1762, 1798, 1819; Aug. 5, 1997, *P.L. 105-33, Title XI, § 11246(b)(2)(A)*; Oct. 10, 1997, *P.L. 105-61, Title VI, § 642(d)(2), 111 Stat. 1319*; July 22, 1998, *P.L. 105-206, Title VI, § 6023(13), 112 Stat. 825*; Oct. 21, 1998, *P.L. 105-277, Div A, § 101(h) (Title VIII, § 802(a)(2)), 112 Stat. 2681-480, 2681-532*; Dec. 21, 2000, *P.L. 106-554, § 1(a)(7) (Title III, § 319(15)), 114 Stat. 2763, 2763A-647*; Nov. 11, 2003, *P.L. 108-121, Title I, § 106(b)(2), 117 Stat. 1339*; March 2, 2004, *P.L. 108-203, Title IV, Subtitle C, § 423(a), (c), 118 Stat. 536*; Oct. 22, 2004, *P.L. 108-357, Title II, Subtitle F, § 251(a)(1)(A), Title III, Subtitle B, § 320(b)(1), Title VIII, Subtitle A, § 802(c)(1), 118 Stat. 1459, 1473, 1568*; Oct. 28, 2004, *P.L. 108-375, Div A, Title V, Subtitle L, § 585(b)(2)(B), 118 Stat. 1932*; Aug. 17, 2006, *P.L. 109-280, Title VIII, Subtitle E, § 854(c)(8), 120 Stat. 1018*; Dec. 29, 2007, *P.L. 110-172, § 8(a)(2), 121 Stat. 2483*; June 17, 2008, *P.L. 110-245, Title I, § 115(a)(1), Title III, § 302(a), 122 Stat. 1636, 1647*; Dec. 23, 2008, *P.L. 110-458, Title I, Subtitle A, § 108(k)(1), 122 Stat. 5110.*)

<b>Annotations</b>
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<b>Notes</b>
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### References in text:

The "Peace Corps Act", referred to in this section, is Act Sept. 22, 1961, P.L. 87-293, which appears generally as 22 USCS §§ 2501 et seq. For full classification of such Act, consult USCS Tables volumes.

The "Internal Revenue Code of 1939", referred to in this section, is Act Feb. 10, 1939, ch 2, 53 Stat. 1, as amended. Prior to the enactment of the Internal Revenue Code of 1986 (formerly the Internal Revenue Code of 1954), the 1939 Code was classified to 26 USCS §§ 1 et seq.

"Section 105(e)(2) of the Indian Self-Determination Act", referred to in this section, was renun-