

**Internal Revenue Service, Treasury**

**§ 31.3121(b)(7)-1**

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

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

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

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

(a) *In general.* Except as provided in other paragraphs of this section, services performed in the employ of any State, any political subdivision of a State, or any instrumentality of one or more States or political subdivisions thereof which is wholly owned by one or more States or political subdivisions are excepted from employment. For the definition of the term "State", as used in this section, see § 31.3121(e)-1.

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

(c) *Government of American Samoa.* The exception from employment under

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

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

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

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

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

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

(e) *Government of Guam.* The exception from employment under section 3121(b)(7) does not apply to services performed after 1972 in the employ of

**§ 31.3121(b)(7)-2**

**26 CFR Ch. I (4-1-07 Edition)**

the Government of Guam or any instrumentality which is wholly owned thereby, by an employee properly classified as a temporary or intermittent employee, if such service is not covered by a retirement system established by a law of Guam. The preceding sentence shall not apply to the services performed by an elected official or a member of the legislature or in a hospital or penal institution by a patient or inmate thereof. For purposes of this paragraph—

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

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

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

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

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

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

- (a) Table of contents.
- (b) Introduction.
- (c) General rule.

(1) Inclusion in employment of service by employees who are not members of a retirement system.

(2) Treatment of individuals employed in more than one position.

(d) Definition of qualified participant.

(1) General rule.

(2) Special rule for part time, seasonal and temporary employees.

(3) Alternative lookback rule.

(4) Treatment of former participants.

(e) Definition of retirement system.

(1) Requirement that system provide retirement-type benefits.

(2) Requirement that system provide minimum level of benefits.

(f) Transition rules.

(1) Application of qualified participant rules during 1991.

(2) Additional transition rules for plans in existence on November 5, 1990.

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

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

(2) *Treatment of individuals employed in more than one position.* Under section 3121(b)(7)(F), whether an employee is a member of a retirement system is determined on an entity-by-entity rather than a position-by-position basis. Thus, if an employee is a member of a retirement system with respect to service he