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OPINION	:	No. 79-1215
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of	:	<u>February 26, 1980</u>
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SUBJECT: SICK LEAVE BENEFITS—Chapter 1202, Statutes of 1979, authorizes the state to make payments to its employees on account of sickness so as to permit the state to exclude sick leave benefits from wages in computing the payments due for Social Security Act coverage of state employees. Benefits paid for vacation leave because of sickness of a state employee could also be considered as approved leaves on account of sickness and such benefits could be excluded from employee's wages in computing the payments due for Social Security Act coverage.

The Honorable Mary Ann Graves, Director of Finance, has requested an opinion on the following questions:

1. Does Chapter 1202, Statutes of 1979, authorize the state to make payments to its employees on account of sickness so as to permit the state to exclude sick leave benefits from wages in computing the payments due for Social Security Act coverage of state employees pursuant to the agreement of such coverage between the state and federal governments?

2. Would control language proposed to be added to the annual Budget Act satisfy the requirements of the Social Security Administration so as to permit the state to approve sick leave benefits from wages in computing the payments due for Social Security Act coverage of state employees pursuant to the agreement between the state and federal governments?

3. Would benefit payments for vacation leave taken because of sickness of a state employee be considered as approved leave “on account of sickness” so as to permit such benefits to be excluded from the employee’s wages in computing the payments due for Social Security Act coverage?

CONCLUSIONS

1. Chapter 1202, Statutes of 1979, authorizes the state to make payments to its employees on account of sickness so as to permit the state to exclude sick leave benefits from wages in computing the payments due for Social Security Act coverage of state employees pursuant to the agreement of such coverage between the state and federal governments.

2. The control language proposed to be added to the annual Budget Act in conjunction with Chapter 1202, Statutes of 1979, would satisfy the requirements of the Social Security Administration so as to permit the state to exclude sick leave benefits from wages in computing the payments due for Social Security Act coverage of state employees pursuant to the agreement of such coverage between the state and federal governments.

3. In light of Chapter 1202, Statutes 1979 and the control language proposed to be added to the annual Budget Act, benefits paid for vacation leave because of sickness of a state employee could be considered as approved leaves on account of sickness so as to permit such benefits to be excluded from the employee’s wages in computing the payments due for Social Security Act coverage. It may be necessary, however, to make some administrative and accounting changes to insure that such payments are separately identified and charged as compensation on account of sickness.

ANALYSIS

In 62 Ops. Cal. Atty. Gen. 308 (No. 79–420), we examined the question of whether sick leave benefits provided state employees may be considered payments “on account of sickness” and thus excluded from wages in computing the payments due for Social Security Act coverage of state employee’s pursuant to the agreement for such coverage between the

state and federal governments.¹ In our analysis we note that although employment by a state does not count for purposes of accruing benefits under the Social Security Act (42 U.S.C. § 410(a) (7)) or for purposes of imposing Social Security taxes on employees (26 U.S.C. §§ 3101, 3121(b)) or employers (26 U.S.C. §§ 3111, 3121(b)), section 218 of the Social Security Act provides for agreements between the state and the Secretary of Health, Education and Welfare for the purpose of extending the Social Security Act Insurance system to services performed by individual employees of the state. (42 U.S.C. § 418(a).) California has entered into such an agreement. (Gov. Code, § 22200 *et seq.*)

The opinion further noted that although the definitions of wages for purposes of imposing taxes under the Social Security Act (26 U.S.C. § 3121(a)) and for purposes of determining benefits payable under the act (42 U.S.C. § 409) was substantially the same and both excluded from wages payments “ . . . under a plan or system established by an employer which makes provision for his employees generally . . . *on account of . . . sickness . . .* ,” the Secretary of the Treasury, who administers the tax provisions, and the Secretary of Health, Education and Welfare, who administers the benefit payment provisions and the payments made by a state pursuant to section 218 agreements have developed different criteria for what constitute payments “on account of sickness” to qualify for exclusion from wages. Thus, we concluded that although California’s plan or system of sick leave payments for state employees would undoubtedly qualify those payments for exclusion from wages for Social Security tax purposes if the state were a private employer, payments under that system did not qualify for section 218 agreement purposes under the more restrictive requirements as developed by the Secretary of Health, Education and Welfare and the Social Security Administration.²

As will be discussed below, rulings and other materials from the Social Security Administration indicate that there are three aspects or requirements that must be satisfied in order to have sick leave payments to state employees qualify for exclusion from wages under section 218 agreements. (1) There must be a plan or system containing legislative authorization to make payments to an employee “on account of sickness”; (2) there must be an appropriation or account from which such authorized payments are made; and (3) there must be adequate accounting or segregation and identity of payments made on

¹ That opinion also examined and concluded that disability benefits made to state employees under current California statutes for Worker’s Compensation, Industrial Disability Leave and Nonindustrial Disability Insurance were payments “on account of sickness or accident disability” and thus excludable from wages in making Social Security Act coverage payments.

² For more detailed analysis of the pertinent provisions of the Social Security Act, the different interpretations by the Secretaries of Treasury and Health, Education and Welfare, and the California sick leave payment system for state employees, reference is made to Opinion 79-420 (62 Ops. Cal. Atty. Gen. 308).

account of sickness. The questions presented deal with each of these three factors, and whether recent legislation and proposed Budget Act language will allow California to meet the requirements in this regard.

Subsequent to Opinion No. 79-420, and because of it, the legislature enacted Chapter 1202, Statutes of 1979 which was designed to change California's sick leave payment system to authorize such payments to be excluded from wages for purposes of section 218 payments. The first question asks us to examine that statute to determine whether that objective has been accomplished. It is our conclusion that it has.³ The key to the interpretation of the Secretary of Health, Education and Welfare on sick leave payments by states is contained in a 1972 Social Security Ruling. (Soc. Sec. Rul. 72-56.) There, the Social Security Administration examined a sick leave payment system of a state where the employees continue to receive their salary while absent from work due to illness. The payments were made from the regular salary account of the state from funds appropriated for salary purposes. The ruling stated that "[i]n addition, there is no statute or other legal authorization for the State to make payments to employees solely on *account of sickness*, as distinguished from authorization to continue salary payments during periods of illness."

Relying heavily on the literal words "on account of sickness," the Administrator determined:

"In order for sick payments to be excluded from 'wages' they must be made on account of sickness; if the same payments would have been made if the employee had not been sick, they could not be considered made 'on account of sickness.' . . .

³ Section 5 of Chapter 1202 adds Government Code section 22017 authorizing the state and any public agency to establish a separate object or subobject of appropriation for compensation to employees who are on approved leaves of absence on account of sickness. Section 8 of Chapter 1202, however, provides that section 5 will not become operative if Assembly Bill 521 of the 1979-80 Regular Session is chaptered. In fact Assembly Bill 521 was chaptered as Chapter 491, Statutes of 1979. That statute also added a new Government Code section 22017 in identical language to that of section 5 of Chapter 1202. This Government Code provision is designed to authorize the state and all public agencies to adopt an appropriate statute, salary ordinance or statement to qualify sick leave payments to employees to be excluded from wages for purposes of the state's section 218 agreement which covers over 2,500 counties, cities and districts that have elected to join the Public Employees Retirement System.

In Opinion No. 79-420 we expressed no opinion as to whether the sick leave and accident disability payments payable to employees of the local agencies covered by the section 218 agreement qualified for exclusion from wages. Likewise, in this opinion we examine only sick leave payments payable to state employees under the statutes as amended by Chapters 1202 and 491, Statutes of 1979.

“The legal authority for a governmental entity to make payments on account of sickness can only be established if by legislative enactment, provision is made for ‘sick pay’ from funds appropriated especially for that purpose and separate from salary appropriations. Therefore, payments made by a governmental entity to an employee on sick leave are excluded from ‘wages’ only if there is legal authority for the employer to make payments specifically on account of sickness as distinguished from authorization to merely continue salary payments during periods of absence due to illness.”

A similar determination by the Secretary as to the sick leave plan in effect at the University of New Mexico was upheld in *State of New Mexico v. Weinberger* (10th Cir. 1975) 517 F.2d 4989, cert. den. 423 U.S. 1051.

As we noted in Opinion No. 79–420, the Legislature has provided what is clearly a plan or system for sick leave for state employees. (Gov. Code, § 18100 *et seq.*) We concluded, however, that the system was one which continues salaries of state employees during excused absences for sickness, and employees would not receive payment solely on account of sickness. There was no legislative authority for the state to make sick leave payments “on account of sickness” as interpreted by the Secretary, one of the prerequisites for excluding such payments from wages. Thus, payments for sick leave for state employees could not be excluded from wages in calculating payments to be made under the section 218 agreement.

Chapter 1202 attempts, successfully we believe, to change California’s system to overcome this defect. Sections 1 and 2 of that statute add two new sections to the chapter of the Government Code establishing the sick leave system for state employees:

“18108. For the purposes of Sections 18100.1, 18100.5, 18101, 18101.5, 18102, 18102.5, 18103, 18104.5, 18105, 18106, and 18107, sick leave benefits provided to state employees pursuant to the state sick leave system shall be construed to mean compensation paid to employees on approved leaves of absence *on account of sickness*.

“18109. Notwithstanding any other provision of law to the contrary, whenever sick leave benefits are provided to state employees pursuant to the state sick leave system, such benefits shall be construed to mean compensation paid to employees on approved leaves of absence *on account of sickness*.” (Emphasis added.)

Section 3 amended the definition of “employee benefit” in the State Civil Service Act (Gov. Code, § 18500 *et seq.*) as follows:

“18548.1. ‘Employee benefit’ means compensation for service rendered within or in addition to salary to provide for either:

“(a) Amounts paid because of death, accident, retirement, illness. or unemployment: or

“(b) Health insurance; or

“(c) Payment for any other time not worked.

“Compensation for illness shall be deemed to be paid in lieu of salary.”
(Underscoring is the amendment made by section 3 of Chapter 1202.)

Finally, section 4 of Chapter 1202 added a new section 20862.6 to the Government Code to modify a provision in Government Code section 20862.5 allowing retirement credits for unused sick leave under certain circumstances:

“For the purposes of Section 20862.5, sick leave benefits provided to state Employees pursuant to the state sick leave system shall be construed to mean compensation paid to employees on approved leaves of absence on account of sickness.”

As noted, Chapter 491, Statutes of 1979 (See fn. 3, *supra*) added a new section to the Government Code provision relating to Federal Old Age and Survivors Insurance (Social Security Coverage) for the Public Employee Retirement System (Gov. Code, § 22000 *et seq.*):

“22017. Notwithstanding any other provision of law, the state and any public agency may establish a separate object of appropriation or a subobject of appropriation within salaries and employee benefits for the payment of compensation to employees who are on approved leaves or absence on account of sickness. The amount of compensation to be paid to employees under this object or subobject shall be that established by statute, salary ordinance or statement, except that no compensation shall be paid when an employee is on authorized leave without pay even though such leave may be on account of sickness.”

We conclude that these statutes constitute authorization by the Legislature to make payments to state employees ‘. . . specifically on account of sickness as distinguished from authorization to merely continue salary payments during periods of absence due to illness.’ (Soc. Sec. Rul. 72–56, *supra*.) Thus, in our judgment the California plan or system for sick

leave payments to state employees now meets the first requirement to qualify such payments to be excluded from wages in connection with the section 218 agreement

The next step is to have an appropriation or accounting for such payment. That step is involved in the second question presented. In Informational Release No. 18, dated January 19, 1979, to the Handbook for State Social Security Administrators, the Social Security Administration has set forth several indicia of whether, once given the authority⁴ to make sick leave payments on account of sickness, such payments were in fact made under that authority:

“3. What Constitutes Evidence That Payments Were Made Under Such Authority—
Such evidence might take the following forms.

- a. An ordinance, regulation, or resolution by a governing body providing specifically for payments *on account of sickness*, or
- b. A separate appropriation solely for sick payments; or
- c. A separate sick pay account. The sick pay account may be used either to make payments directly to the employee or to reimburse the regular salary account for sick payments made from that account.”

To meet these criteria, it is proposed to add a phrase to two regular sections of control language contained in the annual Budget Act adopted by the Legislature and approved by the Governor. The just would be to section 26 relating to the scope of a support appropriation, which in pertinent part would read:

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“Whenever herein an appropriation is made in accordance with a schedule set forth after such appropriation, the expenditures from such item for each category or project included in the schedule shall be limited to the amount specified for such category or project, except as otherwise provided in this act. Each such schedule is a restriction or limitation upon the expenditure of the respective appropriation made by this act, does nor itself

⁴ Informational Release No. 18 also notes that in determining whether the legal authority for a state to make payments on account of sickness, “[t]he opinion of the State attorney general on whether or not a state or any of its political subdivisions has legal authority to make payments on account of sickness is desirable.” In light of our conclusion as to the first two questions, we assume this opinion will serve that purpose.

appropriate any money, and is not itself an item of appropriation.

“As used in this act in reference to such schedules ‘category’ or ‘project’ means a class of expenditures such as, but not limited to.

“(a) ‘Personnel services which shall include all expenditures for payment of officers and employees of the state; including salaries and wages, workers’ compensation, *compensation paid to employees on approved leaves of absence on account of sickness*, unemployment compensation benefits, insurance premiums for workers’ compensation coverage, industrial disability’ leave and payments, nonindustrial disability benefits and payments, the state’s contributions to the Public Employees Retirement Fund, the Teachers’ Retirement Fund, the University of California Retirement Fund to provide for that portion of retirement costs to be provided for Hastings College of Law in item 358 of this Budget Act, the Old Age and Survivors’ Insurance Revolving Fund, the State Employees’ Contingency Reserve Fund, and the state’s cost of health benefits plans; but do not include compensation of independent contractors rendering personal services to the state under contract;

“” (Underscoring denotes proposed language.)

The second change would be to section 26.5 which indicates what charges are to be made against an appropriation from which salaries and wages are paid, and which would read in pair:

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“Whenever herein an appropriation is made for support or other expenses for an institution, department, board, bureau, commission, officer, employee, or other agency, there shall be charged to such appropriation from which salaries and wages are paid: worker’s compensation, *compensation paid to employees on approved leaves of absence on account of sickness*, unemployment compensation benefits, industrial disability leave and payments, nonindustrial disability benefits and payments, the state’s contribution to the Public Employees’ Retirement Fund as provided by Sections 20751 and 20752 of the Government Code, the states contribution to the Teachers Retirement Fund as provided by Sections 23000 and 23400 of the Education Code, the State’s contribution to the Old Age and Survivors’ Insurance Revolving Fund as provided by Sections 20782 and 20783 of the Government Code, the state’s contribution to the State Employees’

Contingency Reserve Fund and the state's contribution for the cost of health benefits plans as provided by Sections 22828 and 22829 of the Government Code.

“” (Underscoring denotes proposed language)

The question then is whether the proposed additional control language would satisfy the criteria contained in Informational Bulletin No. 18. In our judgment it does. The Budget Act, of course, constitutes the basic appropriation for each fiscal year for the state. (Cal. Const., art. IV. § 12.) The proposed language clearly indicates that the several appropriations for the support of the various state departments, agencies, institutions and the like include an appropriation for compensation for state employees “on account of sickness.” In our opinion, under the legislative authorization and appropriation system and practice this completes the necessary work of the Legislature to create a plan or system, with appropriations, for payments to state employees on approved leaves of absence on account of sickness. It leaves, however, the requirement of segregation of accounts, which leads us to the third question.

Informational Release No. 18 of the Social Security Administration, *supra*, also contains this comment:

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“b. Procedure When Plan Provides Both for Payments which are and are not excluded from wages:

“Frequently sick leave plans permit the use of sick leave for absences not due to the illness or disability of the employee. For example, sick leave may sometimes be used to attend a funeral or when a member of the employee's family is ill. While such occasions may justify the use of sick leave, payments for such absences are not excluded from wages under section 209(b).

“NOTE: WHERE AN EMPLOYER'S PLAN OR SYSTEM PROVIDES BOTH FOR PAYMENTS WHICH ARE EXCLUDED FROM WAGES AND PAYMENTS NOT SO EXCLUDED, THE EMPLOYER MUST BE ABLE TO IDENTIFY THE EXCLUDED PAYMENTS. OTHERWISE, ALL THE PAYMENTS MUST BE REPORTED AS WAGES.”

California's sick leave system, of course, includes some such items which qualify for approved sick leave absences for state purposes such as illness or death of a member of the employee's family. (Cal. Admin. Code, tit. 2, § 401.) In the view of the Social Security Administration, however, payments for such purposes will not qualify as payments on account of sickness within the meaning of the section 218 agreement. Thus, it is essential that adequate records and accounting be kept to segregate and identify qualifying payments on account of sickness. We are informed by the Department of Finance that the necessary administrative work has begun to accomplish this and to insure that adequate records are maintained.

The third question asks whether compensation paid to state employees for vacation leaves taken because of sickness could qualify for exclusion from wages under the section 218 agreement. The Director of the Department of Finance notes that state employees may take vacation leaves if their accrued sick leave balances are insufficient to cover the absence periods. We know of no provision in the Social Security Act, the federal regulations covering the section 218 agreement (20 C.F.R. Part 404, Subpart M (1979) or in the state system that requires that benefits paid to employees on account of sickness be labeled sick leave payments or anything else. The key for federal purposes is that the payments be made "on account of sickness." In addition, the new state Government Code sections 18108 and 18109 require an approved leave of absence. Indeed, the language proposed to be added to the Budget Act, *supra*, is "compensation paid to employees on approved leave of absence on account of sickness." Thus, there is nothing to prohibit the use of vacation leave for absences on account of sickness. The requirement of identity, however, as outlined above, does require that if payments for such sick leave are to qualify for the section 218 exclusion, they must be identifiable as payments on account of sickness. It appears to be irrelevant that as between the state and the employee the absence will be charged against the employee's vacation credit so long as it is an approved leave of absence on account of sickness and identifiable as such. In this regard, as the administrative review and changes are being made to implement a qualifying system, we suggest that the rules and regulations of the State Personnel Board relating to sick leave and vacation also be reviewed to insure, if desired, that vacation credit may be expended for sick leave, i.e. "on account of sickness" with the request approved absence.
