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OPINION	:	No. 79-420
of	:	June 8, 1979
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SUBJECT: STATE EMPLOYEES' SICK LEAVE AND DISABILITY BENEFITS—Sick leave benefits provided state employees are to be included with wages in computing the payments due for Social Security Act coverage of state employees. Disability benefits are not to be included with wages in computing such payments.

The Honorable Richard T. Silberman, Director of the Department of Finance, has requested an opinion on the following questions:

1. May sick leave benefits provided state employees under present California law be considered payments 'on account of sickness, or accident disability" and thus excluded from wages in computing the payments due for Social Security Act coverage of state employees pursuant to the agreement for such coverage between the state and federal governments?

2. May disability benefits provided state employees under present California law be considered payments "on account of sickness or accident disability" and thus excluded from wages in computing the payments due for Social Security Act coverage of state employees pursuant to the agreement for such coverage between the state and federal governments?

CONCLUSIONS

1. Under current California law, sick leave benefits provided state employees may not be considered payments "on account of sickness or accident disability" and thus excluded from wages in computing the payments due for Social Security Act coverage of state employees pursuant to the agreement for such coverage between the state and federal governments.

2. Payments made to state employees under current California statutes for Worker's Compensation, Industrial Disability Leave and Nonindustrial Disability Insurance constitute payments "on account of sickness or accident disability" and thus are to be excluded from wages in computing the payments due for Social Security Act coverage of state employees pursuant to the agreement for such coverage between the state and federal governments.

ANALYSIS

Employment by a state or one of its political subdivisions 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 Act does provide, however, that states may enter into agreements with the Secretary of Health, Education and Welfare for the purpose of extending the social security insurance system to services performed by individual employees of that state or any of its political subdivisions. (42 U.S.C. § 418(a).) California has entered into such an agreement on behalf of itself and over 2,500 counties, cities, and districts that have elected to join the system. (Gov. Code, § 22000 *et seq*.) This agreement and its amendments are administered by the Board of Administration of the Public Employees Retirement System. (Gov. Code, § 22000 *et seq*.)

Section 218 further provides, in part:

> ". . . . . .
>
> "(e) (1) Each agreement [with a state] under this Section shall provide—
>
> "(A) That the State will pay to the Secretary of the Treasury, at such time or times as the Secretary of Health, Education and Welfare may by regulations prescribe, amounts equivalent to the sum of the taxes which would be imposed by sections . . . [3103 & 3111] of Title 26, Internal Revenue Code of . . . [1954], if the services of employees covered by the agreement constituted employment as defined in section . . . [3121(b)] of

Title 26 . . . .

“. . . . . .

“(i) Regulations of the Secretary to carry out the purposes of this section shall be designed to make the requirements imposed on States pursuant to this section the same, so far as practicable, as those imposed on employers pursuant to this subchapter and subchapter . . . [A or B] of Title 26, Internal Revenue Code of . . . [1954]

“. . . . . .”

Thus, although state and local governmental employees are not covered by the basic Social Security Act, section 218 agreements are designed to provide such coverage, and to impose on the state and its local subdivisions electing to join the agreement the same tax burden, so far as practicable, as is imposed on private employers and employees by the social security tax provisions of the Internal Revenue Code.

The referenced social security taxes are imposed on employees as a percentage of wages received with respect to employment (26 U.S.C. § 3101) and on employers as a percentage of wages paid by the employer with respect to employment (26 U.S.C. § 3111). For purposes of those taxes, wages are defined, in part, as:

“. . . [A]ll remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; *except that such term shall not include—*

“. . . . . .

“(2) the amount of any 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 *on account of—*

“. . . . . .

(B) *sickness or accident disability*

“. . . . . .

“(4) any payment on account of 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;

". . . ." (26 U.S.C. § 3121(a); emphasis added.)

The definition of wages contained in section 209 of the Act (42 U.S.C. § 409), which is relevant for determining the amount of benefits payable under the Act, is substantially the same, and contains an exclusion from wages for payments under a plan or system on account of sickness or accident disability or for such payments made after six months after the last month the employee worked for the employer irrespective of the existence of a plan or a system. (42 U.S.C. § 409(b), (d).)

The questions presented relate to whether the system of sick leave payments and accident disability payments made by the State of California to its employees qualifies for exclusion from wages for purposes of the state's section 218 agreement. A study by the Department of Finance indicates that if sick leave payments are excludable, the state's and covered employees' social security payments would be several million dollars less per year.[1]

As administered by the Secretary of the Treasury, payments for earned leaves made to an employee for periods of absence from work due to illness, if pursuant to a plan or system, are excludable from wages under section 3121(a) (2) of the Internal Revenue Code. (Rev. Rul. 65–275.) As will be discussed below, the state system of sick leave for employees is such a plan or system which would undoubtedly qualify those payments for exclusion from wages for social security tax purposes if the state were a private employer.

The Secretary of Health, Education and Welfare, however, has developed a more restrictive requirement for exclusion of sick payments, and under the section 218 agreement provision, it is that Secretary, and not the Secretary of the Treasury, who sets the requirements for payments to be made by the states. The regulations adopted by the Secretary of Health, Education and Welfare for implementing the Social Security Act key on and generally follow the definition of wages and its exclusions contained in 42 U.S.C. § 409. (20 CFR § 404.1027.)

A 1972 Social Security Ruling dealt with the point of sick leave payments by a state. (Soc. Sec. Rul. 72–56.) There, the Social Security Administration examined a sick leave

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[1] This opinion only examines the sick leave and accident disability payments payable to state employees, and not those of the many local agencies covered by the section 218 agreement. The basic criteria established by the Social Security Administration and the analysis herein, however, would be applicable to an examination of the system and authority of each of those agencies.

payment 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 cannot be considered made on account of sickness.'. . .
>
> "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."

The State of New Mexico challenged a similar determination by the Secretary of Health, Education and Welfare as to the sick leave plan in effect at the *University of Mexico. In State of New Mexico v. Weinberger* (10th Cir. 1975) 517 F. 2d 989, cert. den. 423 U.S. 1051, the Circuit Court upheld the Secretary's determination that sick leave payments under that plan were not excludable from "wages" under 42 United States Code section 409, and further upheld the Secretary's developing a different rule under that section for state agreements than the rule applied by the Secretary of the Treasury for private employers and employees. (517 F. 2d at 992.) The court decided that the Secretary's interpretation under 42 United States Code section 409(b), that sick leave payments must be paid solely on account of sickness, as opposed to a mere continuation of wages during periods of absence due to illness, was based on a theory that payments made solely on account of sickness would constitute an improper "donation" of state funds unless the state has express legal authority to appropriate funds for such use.[2] This feature involving a

[2] This concern that payments by a state to an employee solely on account of sickness might constitute an improper donation does not appear to be a problem in California. Sick leave has been held not to violate the gift of public funds provisions of the Constitution. (Cal. Const., art. XXI, §

possible gift of public funds, the court held, was a sufficient difference from the position of private employers to make it not practicable for private and public employers to be treated the same. (517 F. 2d at 993.)

The Social Security Administration has been consistent in its strict interpretation of the 42 United States Code section 409(b), (d) definitions of exclusions from wages. (See *Graves v. Gardner* (S.D.N.Y. 1968) 280 F. Supp. 666, 667.) In an information release of January 19, 1979 for its Handbook for State Social Security Administrators, the Administration has set forth the criteria it examines to determine whether payments made to employees who are absent due to illness or accident disability are excludable from wages. To be excluded, such payments must be under a plan or system, or if more than six months after the last month in which the employee worked, paid irrespective of a plan, "on account of sickness" and pursuant to either an express statutory authorization to make such payments or the absence of any statutory restriction on the employer's ability to do so. The release explains that there must be legal authority to pay on account of sickness. It then suggests that evidence of payments made under such authority might be found in an ordinance, regulation or resolution providing specifically for payments *on account of sickness*, or a separate appropriation solely for sick payments, or a separate sick pay account to pay the employee directly or to reimburse the regular salary account.[3] (See also The Handbook for Social Security Administrators, § 413.) The distinction that the Administration makes is whether the payments are made on *account of sickness* (excludable) or are a continuation of a salary *in spite of sickness* (non-excludable). (Letter, May 19, 1977 from Social Security Administrator to Executive Officer, State Employees' Retirement System.)

Given these criteria of the Social Security Administration, it is then necessary to examine the state's system for sick leave and accident disability payments and measure

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6; *Newmarker v. Regents of Univ. of Calif.* (1958) 160 Cal. App. 2d 640, 648; *cf. Adams v. City and County of San Francisco* (1949) 94 Cal. App. 2d 586, 596–597.) We do not perceive that using a system whereby employees are paid solely on account of sickness from a fund other than a salary appropriation, as opposed to a sick leave mechanism that continues salaries during absences for illness, would make such payments unconstitutional gifts of public funds. In either event, they would constitute compensation to the employee for services, even if not payable except on the contingency of sickness. This conclusion, however, does not detract from the expressed requirement of a constitutional or statutory authorization of a plan of the type required by the Secretary in order to meet his 42 United States Code section 409 criteria.

[3] The release and other materials from the Social Security Administration also emphasize that to qualify, the payments must be due to illness or disability of the employee, and that payments for leave to attend a funeral or the illness of a family member will not qualify. Further, if payments of the latter type are made, the employer must be able to identify payments qualifying for an exclusion, or else all payments must be reported as wages.

them against those criteria.

1. Sick Leave

The Legislature has provided what is clearly a plan or system for sick leave for state employees. (Gov. Code, § 18100 *et seq*.) The question remains, however, whether the payments to employees provided for by that system are on account of sickness or in spite of it. We conclude that it is the latter.

Government Code section 18100(a) provides in part:

> '(a) Following completion of one month of continuous service,... each state officer and employee who is employed full time shall be allowed one day credit *for sick leave with pay.* Thereafter, for each additional calendar month of service . . . one day of credit *for sick leave with pay* shall be allowed. . . ." (Emphasis added.)

Section 18101 allows sick leave to be accumulated. Section 18102 allows an employee who is receiving worker's compensation payments to use accumulated sick leave to supplant those payments provided the total does not exceed the employee's full salary or wage. Section 18103 authorizes the State Personnel Board to provide by rule for sick leave *without pay* for those employees who have used all sick leave to which they are entitled. Finally, section 20862.5 relating to the Public Employees' Retirement System, of which state employees are a part, allows credit as service upon retirement, of unused sick leave credits. This is consistent with treating sick leave as authorized absence with pay as opposed to payments solely on account of sickness.

The regulations adopted by the State Personnel Board relating to sick leave are consistent with the above statutory scheme. Section 401 of title 2 of the California Administrative Code defines "sick leave" to mean:

> ". . . the necessary *absence from duty* of an employee because of:
>
> "(a) Illness or injury.
>
> "(b) Exposure to contagious disease.
>
> "(c) Dental, eye, and other physical or medical examination or treatment by a licensed practitioner.
>
> "(d) Required attendance, none to exceed five days in any calendar

year, upon the employee's . . . [relatives).

"(e) The death of a . . . [relative)." (Emphasis added.)

Section 402 provides for each monthly pay period of continuous service ". . . each full-time employee in the state civil service shall be allowed one day of credit *for sick leave with pay*." (Emphasis added.)

The Board of Control rules relating to payroll claims provide in part: ". . . For the purpose of computing the number of days or hours worked, time during which an employee is excused from working because of holidays, sick leave, vacation, compensating time off, *or other leave with pay* shall be considered as time worked by the employee." (Cal. Admin. Code, tit. 2, § 652; emphasis added.) In 2 Ops. Cal. Atty. Gen. 185 (1943) we concluded that vacation and sick leave are considered as permissible absence from normal work with pay.

Finally, we note that payments for sick leave, as with vacation, are appropriated by the Legislature for each department or similar unit as part of salary and wages. Departmental accounting credits actual sick leave payments to the appropriate salaries and wages account. As noted below, this is in contrast to the accounting for accident disability payments. Thus, the requirement of the Social Security Administration of a separate fund or appropriation for sickness payments is not met[4]

All of the above statutes and implementing regulations show a plan which continues salaries of state employees during excused absences for sickness. None of it is consistent with a system whereby employees would receive payments solely on account of sickness, as interpreted by the Social Security Administration.

The only statute that could possibly indicate that the state plan for sick payments might qualify under Social Security Administration requirements is Government Code section 18548.1. This section defines "employee benefits" to mean:

". . . compensation for service rendered *within or in addition to salary* to provide for either:

[4] We express no opinion on the question of whether if the lack of separate appropriation were the only alleged defect in determining whether the state's plan qualified to exclude sick payments from wages, such a requirement (which appears to be an accounting problem only) is legally sufficient grounds for the Social Security Administration to deny such an exclusion. In light of our conclusion that the state plan as currently constituted does not provide for payments solely on account of sickness, we need not address this question.

"(a) Amounts paid because of death, accident, retirement, *illness*, or unemployment; . . . ." (Emphasis added.)

It is suggested that the ambiguous phrase "within or in addition to salary" may well be a legislative authorization to pay employees for sickness outside regular salary mechanisms. We think not.

Section 18548.1 was added in 1974 as part of the Berryhill Total Compensation Act (Stats. 1974, ch. 374, § 22). That act expressed an intent of the Legislature ". . . that recommendations on the total compensation of state employees be based on the principal of equivalency with the value of total compensation that prevails in private industry and other public agencies with the objective of providing a balanced and integrated compensation program with respect to both salaries and benefits. . . ." (*Id*. § 1.) In addition to providing a system of additional employee and retirement benefits, the Act also contained a mechanism, since repealed, for the Public Employees' Retirement System to evaluate the total compensation paid to state employees, which evaluation was to be reported to the State Personnel Board, which in turn was to make recommendations to the Legislature. (Gov. Code, §§ 18548–18548.2; former §§ 18850.1, 18850.2. This evaluation and reporting function was repealed by Stats. 1977, ch. 1159, §§ 9, 10.) In no way does the definition contained in section 18548.1 constitute an express or implied authorization by the Legislature to provide payments to employees on account of sickness, nor does it purport to repeal or override the existing sick leave provisions and system outlined above.

Finally, we note that the Public Employees' Retirement System, which administers the section 218 agreement for California, has consistently, at least since 1965, construed the state employees' sick leave plan as not qualifying for exclusion of the payments from wages because the plan provides for sick leave payments in spite of, not on account of, sickness. 'While not determinative, the interpretation of a statute by an officer administering it as a specialist is entitled to 'great weight.'" (*State Comp. Ins. Fund v. McConnell* (1956) 46 Cal. 2d 330, 340–341.) Also, by an opinion of March 2, 1967, the Bureau of Retirement and Survivor's Insurance of the Social Security Administration reviewed the State of California sick pay system and concluded that sick leave payments made to state employees are continuations of salary payments and therefore are wages for social security purposes.

Our review of the statutory system and its implementation and interpretation leads us to the same conclusion. We are of the opinion, therefore, that California's system for sick leave payments for state employees constitutes payments in spite of sickness which are a continuation of salary during an excused absence for sickness, and therefore the plan does not provide for payments on account of sickness as required by 42 United States Code section 409(b) as interpreted and administered by the Secretary of Health, Education and

Welfare. Consequently, we conclude that there does not currently exist an express legislative authorization to provide payments to state employees on account of sickness, and thus payments for sick leave for state employers may not be excluded from wages in calculating payments to be made under the section 218 agreement.

2. Accident Disability

In contrast to the state's sick leave system, its system for payment to state employees for accident disability[5] presents a different picture. Accident disability payments may be made to state employees from one or more of three sources. The first is the regular Worker's Compensation system made applicable to state employees through either division 4 (commencing with § 3201) or division 4.5 (commencing with § 6100) of the Labor Code. The second source is the Industrial Disability Leave provisions of Government Code section 18120 *et seq*., and finally there are the Nonindustrial Disability Insurance provisions of Government Code section 18135 *et seq*.

We have no hesitancy in concluding that as to Worker's Compensation, the state has created a plan or system whereby covered state employees are given payments on account of accident disability and not as a continuation of salary during absences because of accident disability. Indeed, one of the primary purposes of Worker's Compensation is to provide compensation including lost wages to an injured worker on account of a qualifying disability. (*Cf. Davison v. Industrial Acc. Com.* (1966) 241 Cal. App. 2d 15, 18; *Moore S. Corp. v. Industrial Acc. Com.* (1921) 185 Cal. 200, 203.) Also, as noted earlier, Government Code section 18102 gives state employees an option to take sick leave or vacation to supplement worker's compensation payments, not to exceed in total the employee's full salary or wages. Worker's Compensation payments for state employees are paid by the State Compensation Insurance Fund, and the responsible state agency either pays insurance premiums to the Fund or reimburses the Fund. In any event, the payments are not made from appropriated salaries and wages, but are charged against staff benefits. (See State Administrative Manual §§ 8780–8780.2.) We thus conclude that the Legislature has provided a plan or system for payments to state employees on account of accident disability through the worker's compensation mechanism, and such payments should be excluded from wages for purposes of the Social Security Act. From the employer's perspective, the payments should be excludable whether provided through insurance premiums or reimbursed payments. (Cf. Rev. Rul. 7 1–84.)

[5] Throughout this portion of the opinion, our discussion will presume that any payments to state employees for disability are in fact for "accident" disability as specified in 42 United States Code section 409 (b), (d). We do not examine the question of what constitutes accident disability.

The Industrial Disability Leave provisions are more troubling. These provisions, added as part of the Berryhill Total Compensation Act, *supra*, talk in terms of Industrial Disability "Leave" (see, e.g., Gov. Code, §§ 18121, 18122), and in that sense might be compared to the sick leave system. A further analysis, however, leads to a contrary conclusion. Government Code section 18121 defines "Industrial Disability Leave" to mean temporary disability as defined in divisions 4 and 4.5 of the Labor Code, the Worker's Compensation system. Section 18122 then provides:

> "(a) When a state officer or employee is temporarily disabled by illness or injury arising out of and in the course of state employment, he shall become entitled, regardless of his period of service, to receive industrial disability leave and payments, in lieu of worker's compensation temporary disability payments and payments under Section 18102, [sick leave] for a period not exceeding 52 weeks within two years from the first day of disability. . . ."

The payments are thus keyed to the employee's gross base salary ("full pay") or a percentage thereof. The State Personnel Board rules implementing the Government Code provisions refer to Industrial Disability Leave benefits. (Cal. Admin. Code, tit. 2, §§ 410–413.) Payments for the benefits are not part of the appropriations for salaries and wages and are chargeable to staff benefits. (See Controller's Payroll Procedures Manual, § 45.00.) This manual notes that no deductions of social security are to be made from Industrial Disability Leave payments because they are staff benefits rather than salaries and wages. (*Id*. § 45.154; see also State Administrative Manual §§ 0483.11–0483.12.) We conclude from this material that payments pursuant to the Industrial Disability Leave provisions are made on account of accident disability and are not merely a continuation of salary during an absence, and that therefore the Government Code sections involved constitute an express authorization by the Legislature to make payments to state employees on account of accident disability.

An analysis of the Nonindustrial Disability Insurance provisions leads to the same conclusion. Those sections of the Government Code provide a mechanism for making payments to a state employee who is disabled, but ineligible for worker's compensation or industrial disability leave. (Gov. Code, §§ 18136, 18139.) The payments are smaller and for a shorter period than the Industrial Disability Leave system, but are calculated based on gross pay. (Gov. Code, § 18136.) The provisions, however, are in terms of benefits. (Gov. Code, §§ 18136, 18137, 18135.5.) As with Industrial Disability Leave, the payments come from and are chargeable to staff benefits, and are not appropriated for salaries. (Controller's Payroll Procedures Manual § 37.00; see also State Administrative Manual § 8539.) We thus conclude that these provisions also constitute a plan or system and authorization for payments to state employees on account of accident disability.

It is our understanding that the Public Employees' Retirement System as administrator of the state's section 218 social security agreement, treats payments made under any of the three systems described above as excludable from wages for purposes of the payments to be made to the Secretary of the Treasury under the section 218 agreement. We concur with that practice. In our opinion, the Legislature has by each of the three systems established a plan or system, and expressly authorized payments to state employees on account of accident disability.

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