

Official Opinion No. 80-22, Exclusion of sick pay from Social Security taxes

March 31, 1980

The Honorable Vern Larson  
State Auditor  
State Capitol  
Pierre, South Dakota 57501

Official Opinion No. 80-22

**Exclusion of sick pay from Social Security taxes**

Dear Mr. Larson:

You have requested an official opinion from this office in regard to the following factual situation:

**FACTS:**

Section 209(b) of the Social Security Act excludes all payments 'on account of sickness or accident disability' under a plan or system established by the employer.

Payments made by a state or local government employer can be excluded under that subsection only if it has legal authority to pay 'on account of sickness' and provides evidence that shows the payments were made under that authority.

Social Security Administration regulation holds that 'legal authority' for excluding these payments may take the form of either express statutory authority to make payments 'on account of sickness or accident disability' or the clear absence of any restriction on the employer's authority to do so. The rule applies to public as distinguished from private employment.

Several political subdivisions covered under the Federal-State Social Security Agreement may be interested in establishing a sick pay exclusion plan or system. The state must provide acceptable supporting evidence to the SSA as required to establish the exclusion.

Based on the above facts, you have asked the following questions:

QUESTIONS:

1. Does 'legal authority' exist under present South Dakota law to exclude payments made 'on account of sickness or accident disability' to governmental employees with regard to social security contribution liability and reporting?
2. If 'legal authority' exists for a political subdivision to exclude payments made 'on account of sickness or accident disability,' can the state support its guarantee or compliance and liability under the Federal-State Social Security Agreement without examination of the plan or system established by the local jurisdiction?

IN RE QUESTION NO. 1:

I believe it is significant to note the distinction between the statutory provisions regarding sick leave for state employees, and authority for the handling of this matter by various local units of government such as counties, municipalities, and school districts. Since different statutory provisions are involved, it is necessary to consider these elements separately.

In regard to state employees, SDCL 3-6-7 states that employees of the State shall be entitled to 14 days of absence for sickness without loss of pay. Thus, the sick leave for state employees is really more of a system whereby a salary is continued to be paid, while the employee is sick, than it is a system whereby a state employee is specially reimbursed on account of sickness. In reviewing the regulations of the federal government, 20 C.F.R. 404.1027(e) (SSR 79-31), together with the Attorney General's opinions from the states of California, Louisiana and Kentucky concerning the matter, it appears to me that the state sick leave policy is not a payment to the state employee 'on account of sickness' within the purview of the exclusion of § 209(b) of the Social Security Act.

It appears to me, however, that the situation is somewhat different with respect to municipal employees. Under SDCL 9-14-28, and SDCL 9-14-30, the municipality is given broad authority to determine the salary and compensation of its employees. Included within this power is the ability for the municipality to either self insure or purchase insurance covering such matters as the sickness, accident, hospitalization and surgical insurance for their respective officers and employees. This authority, in my opinion, would be sufficient for a municipality to establish a sick leave policy which would reimburse employees 'on account of sickness' within the manner in which that requirement is interpreted by the above-cited federal regulations.

With respect to county government, it appears to me that SDCL 7-8-20, 7-7-20, and 7-7-19 also provide sufficient flexibility for county governments to arrange for a system whereby county officers and employees could be paid 'on account of sickness' within the meaning of that phrase discussed in the above-cited federal regulations. Further, it is my view that the school districts would also be capable of establishing this type of sick leave policy (SDCL 13-8-39).

In regard to the portion of your first question dealing with accident disability, it is my view that legal authority does exist under law in South Dakota for governmental subdivisions, and the State, to make payments to employees 'on account of accident disability.' Consequently, these payments would be excludable under the above-cited federal regulations.

IN RE QUESTION NO. 2:

As discussed above, legal authority has been delegated to political subdivisions to make provision for payment to their employees 'on account of sickness or accident disability.' Consequently, there is authority on the local level to establish plans which would in effect 'exclude' payments for sickness or accident disability from social security contribution. The State's guarantee of compliance under the Federal-State Social Security Agreement does not mean that the State Social Security Administrator has thereby been delegated any authority to mandate that such local political subdivision sick leave plans be approved by the state office. I do believe the state office has an interest in knowing what is being done in this respect on the local level, but I do not believe this interest is one of a veto or prior approval as a prerequisite to the local plan being valid. There are, after all, numerous remedies available to the State such as withholding funds from the political subdivision to make up any deficiency which might be a possible liability of the State under the Federal-State Social Security Agreement. Thus, the State is not without recourse against the political subdivisions and can in my view live up to its obligations under the Federal-State Social Security Agreement without exercising a veto function over local political subdivision plans.

Respectfully submitted,

Mark V. Meierhenry  
Attorney General