

initial eligibility to participate in such plan or arrangement (or pursuant to a similar arrangement involving a one-time irrevocable election).

A contribution that is made as a condition of employment and that reduces an employee's compensation generally constitutes an employee contribution includible in wages for FICA tax purposes. See section 1015 of the Employee Retirement Income Security Act of 1974 (Public Law 93-406 (88 Stat. 829)) relating to amounts designated as employee contributions under section 414(h) of the Code; see also H.R. Rep. No. 93-807, at 145, 93d Cong., 2d Sess. (1974) wherein Congress stated that "[u]nder present law, contributions which are designated as employee contributions are generally treated as employee contributions for purposes of the Federal tax law." Code section 414(h)(1) merely codified the existing administrative and judicial treatment of amounts designated as employee contributions. See, for example, *Howell v. United States*, 775 F.2d 887 (7th Cir. 1985) holding that mandatory contributions to a state retirement plan of amounts designated as employee contributions and withheld from the employee's salary are employee contributions includible in the employee's gross income. Thus, as with employer contributions made pursuant to cash or deferred elections and one-time irrevocable elections, employer contributions that are made as a condition of employment and in lieu of mandatory employee contributions and that reduce an employee's compensation are amounts otherwise includible in wages for FICA tax purposes.

Whether a contribution that reduces an employee's compensation is required by statute, contract, or otherwise, an employee implicitly agrees to the contribution as a condition of employment. The acceptance of employment and the subsequent performance of services manifests the employee's agreement to the contribution. See H.R. Conf. Rep. No. 98-861, at 1415, 98th Cong., 2d Sess. (1984) relating to the amendment of section 3121(v)(1)(B), wherein Congress stated that "[t]he conferees intend that the term salary reduction agreement also includes any salary reduction arrangement, regardless of whether there is approval or choice of participation by individual employees or whether such approval or choice is mandated by State statute." In *Public Employees' Retirement Board v. Shalala*, 153 F.3d 1160, at 1166 (10th Cir. 1998), the court noted that "an employee's decision to go to work or

continue to work \* \* \* constitutes conduct manifesting assent to a salary reduction." Accordingly, the court held that a designated employee contribution picked up by an employer with a corresponding reduction in the employee's gross salary constitutes a contribution made pursuant to a salary reduction agreement. Similarly, this temporary regulation explicitly provides that the term "salary reduction agreement" includes a plan or arrangement whereby a payment will be made if the employee agrees as a condition of employment (whether such condition is set by statute, contract, or otherwise) to make a contribution that reduces the employee's compensation.

### Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) and (d) of the Administrative Procedure Act (5 U.S.C. chapter 5) do not apply to this regulation. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section in the preamble to the notice of proposed rule making published in the Proposed Rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, this temporary regulation will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

### Drafting Information

The principal author of this regulation is Neil D. Shepherd, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in its development.

### List of Subjects in 26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

### Amendments to the Regulations

■ Accordingly, 26 CFR part 31 is amended as follows:

### PART 31—EMPLOYMENT TAXES

■ **Paragraph 1.** The authority citation for part 31 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

■ **Par. 2.** Section 31.3121(a)(5)-2T is added to read as follows:

### § 31.3121(a)(5)-2T Payments under or to an annuity contract described in section 403(b) (temporary).

(a) *Salary reduction agreement defined.* For purposes of section 3121(a)(5)(D), the term *salary reduction agreement* means a plan or arrangement (whether evidenced by a written instrument or otherwise) whereby payment will be made by an employer, on behalf of an employee or his or her beneficiary, under or to an annuity contract described in section 403(b)—

(1) If the employee elects to reduce his or her compensation pursuant to a cash or deferred election as defined at § 1.401(k)-1(a)(3) of this chapter;

(2) If the employee elects to reduce his or her compensation pursuant to a one-time irrevocable election made at or before the time of initial eligibility to participate in such plan or arrangement (or pursuant to a similar arrangement involving a one-time irrevocable election); or

(3) If the employee agrees as a condition of employment (whether such condition is set by statute, contract, or otherwise) to make a contribution that reduces his or her compensation.

(b) *Effective date.*

(1) This section is applicable November 16, 2004.

(2) The applicability of this section expires on or before November 15, 2007.

Approved: November 1, 2004.

**Nancy Jardini,**

*Acting Deputy Commissioner for Services and Enforcement.*

**Gregory Jenner,**

*Acting Assistant Secretary of the Treasury.*

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 117

[CGD07-04-136]

### Drawbridge Operation Regulations; Broward County Bridges, Atlantic Intracoastal Waterway, Broward County, FL

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of temporary deviation from regulations; request for comments.

**SUMMARY:** The Commander, Seventh Coast Guard District, has approved a temporary deviation from the

regulations governing the operation of the Broward County bridges across the Atlantic Intracoastal Waterway, Broward County, Florida. This temporary deviation allows the Coast Guard to test an operating schedule with the bridges opening twice an hour. It will allow the Coast Guard to gather data to determine if this schedule meets the reasonable needs of navigation while accommodating an increase in vehicle traffic throughout the county and whether it should be proposed as a permanent change.

**DATES:** This deviation is effective from 6 a.m. on December 1, 2004, until 8 p.m. on February 28, 2005. Comments must reach the Coast Guard on or before March 15, 2005.

**ADDRESSES:** You may mail comments and related material to Commander (obr), Seventh Coast Guard District, 909 SE. 1st Avenue, Room 432, Miami, FL 33131. Comments and material received from the public, as well as comments indicated in this preamble as being available in the docket, are part of docket [CGD07-04-136] and are available for inspection or copying at Commander (obr), Seventh Coast Guard District, 909 SE. 1st Avenue, Room 432, Miami, FL 33131 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mr. Barry Dragon, Project Manager, Seventh Coast Guard District, Bridge Branch at (305) 415-6743.

**SUPPLEMENTARY INFORMATION:**

**Request for Comments**

We encourage you to comment on this test schedule by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this notice [CGD07-04-136], indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

**Discussion of the Test Schedule**

This test schedule has been requested by various public officials within the County of Broward to ease vehicular traffic, which has overburdened roadways, and to standardize bridge openings for vessel traffic. This test will allow the bridges in Broward County to operate on a standardized schedule,

which will meet the reasonable needs of navigation and improve the vehicular traffic. The schedules will be staggered in order to facilitate the movement of vessels from bridge to bridge along the Atlantic Intracoastal Waterway.

The existing regulations governing the operation of the County bridges are published in 33 CFR 117.5 and 117.261. This temporary deviation includes all bridges across the Atlantic Intracoastal Waterway in Broward County. During the deviation period, from 6 a.m. on December 1, 2004, until 8 p.m. on February 28, 2005, the bridges will operate as follows:

*Open on the Hour and Half Hour:* Atlantic Boulevard, mile 1056.0, Commercial Boulevard, mile 1059.0, East Sunrise Boulevard, mile 1062.6, SE. 17th Street Causeway, mile 1065.9, Dania Beach Boulevard, mile 1069.4, Hollywood Boulevard, mile 1072.2.

*Open on the Quarter Hour and Three-Quarter Hour:* NE. 14th Street, mile 1055.0, Oakland Park Boulevard, mile 1060.5, East Las Olas Boulevard, mile 1064.0, Sheridan Street, mile 1070.5, Hallandale Beach Boulevard, mile 1074.0.

If at any time during this test deviation it is determined that the test schedule poses any safety concerns at any location, this test deviation may be withdrawn.

The District Commander has granted a test deviation from the operating regulations listed in 33 CFR 117.5 and 117.261 to evaluate the effectiveness of these new schedules on vehicular and vessel traffic.

Dated: November 4, 2004.

**Greg E. Shapley,**

*Chief, Bridge Administration, Seventh Coast Guard District.*

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**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 117**

**[CGD01-04-096]**

**RIN 1625-AA09**

**Drawbridge Operation Regulations: Annisquam River, Danvers River, Fore River, and Saugus River, MA**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard has changed the drawbridge operation regulations that govern the operation of four

Massachusetts Highway Department bridges; the Blynman (SR127) Bridge, mile 0.0, across the Annisquam River; the Kernwood Bridge, mile 1.0, across the Danvers River; the Quincy Weymouth SR3A Bridge, mile 2.8, across the Fore River; and the Fox Hill (SR107) Bridge, mile 2.5, across the Saugus River, Massachusetts. This final rule allows the four bridges to operate on an advance notice basis from noon to 6 p.m. on Thanksgiving Day each year. This action is expected to allow the draw tenders to spend the holiday with their families while still meeting the reasonable needs of navigation.

**DATES:** This rule is effective on November 25, 2004.

**ADDRESSES:** Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket (CGD01-04-096) and are available for inspection or copying at the First Coast Guard District, Bridge Branch Office, 408 Atlantic Avenue, Boston, Massachusetts 02110, between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mr. Gary Kassof, Bridge Administrator, First Coast Guard District, (212) 668-7165.

**SUPPLEMENTARY INFORMATION:**

**Regulatory Information**

On September 1, 2004, we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulations, Annisquam River, Danvers River, Fore River, and Saugus River, Massachusetts, in the **Federal Register** (69 FR 53376). The Coast Guard provided a 30-day comment period to the public to comment on the proposed rule. We received no comments in response to the notice of proposed rulemaking. No public hearing was requested and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The Coast Guard believes making this final rule effective less than 30 days after publication, in time for Thanksgiving Day, November 25, 2004, is reasonable because there have been no requests to open these bridges on Thanksgiving Day in past years and any mariner requiring a bridge opening during the advance notice time period on Thanksgiving Day noon to 6 p.m. need only provide the one-hour advance notice for a bridge opening at any time.