

loss or permanent loss of use of a member or function of the body, or the permanent disfigurement, of the taxpayer, his spouse, or a dependent (as defined in section 152), and (b) are computed with reference to the nature of the injury without regard to the period the employee is absent from work. Loss of use or disfigurement shall be considered permanent when it may reasonably be expected to continue for the life of the individual. For purposes of section 105(c), loss or loss of use of a member or function of the body includes the loss or loss of use of an appendage of the body, the loss of an eye, the loss of substantially all of the vision of an eye, and the loss of substantially all of the hearing in one or both ears. The term "disfigurement" shall be given a reasonable interpretation in the light of all the particular facts and circumstances. Section 105(c) does not apply if the amount of the benefits is determined by reference to the period the employee is absent from work. For example, if an employee is absent from work as a result of the loss of an arm, and under the accident and health plan established by his employer, he is to receive \$125 a week so long as he is absent from work for a period not in excess of 52 weeks, section 105(c) is not applicable to such payments. See, however, section 105(d) and §1.105-4. However, for purposes of section 105(c), it is immaterial whether an amount is paid in a lump sum or in installments. Section 105(c) does not apply to amounts which are treated as workmen's compensation under paragraph (b) of §1.104-1, or to amounts paid by reason of the death of the employee (see section 101).

§ 1.105-4 Wage continuation plans.

(a) *In general.* (1) Subject to the limitations provided in this section, section 105(d) provides an exclusion from gross income with respect to amounts referred to in section 105(a) which are paid to an employee through a wage continuation plan and which constitute wages or payments in lieu of wages for a period during which the employee is absent from work on account of personal injuries or sickness.

(2)(i) Section 105(d) is applicable only if the wages or payments in lieu of

wages are paid pursuant to a wage continuation plan. (See §1.105-6 for special rules for employees retired before January 27, 1975). The term "wage continuation plan" means an accident or health plan, as defined in §1.105-5, under which wages, or payments in lieu of wages, are paid to an employee for a period during which he is absent from work on account of a personal injury or sickness. Such term includes plans under which payments are continued as long as the employee is absent from work on account of personal injury or sickness. It includes plans under which there is a limitation on the period for which benefits will be paid, such as 13 or 26 weeks, and also plans under which benefits are continued until the employee is either able to return to work or reaches mandatory retirement age. Such term also includes a plan under which wages or payments in lieu of wages are paid to an employee who is absent from work on account of personal injury or sickness, even though the plan also provides that wages or payments in lieu of wages may be paid to an employee who is absent from work for reasons other than a personal injury or sickness.

(ii) Section 105(d) is applicable if, and only if, the employee is absent from work and such absence is due to a personal injury or sickness. Thus, if an employer has a plan for continuing the wages of employees when they are absent from work, regardless of the cause of the absence from work, section 105(d) is applicable to any payments made under this plan to an employee whose absence from work is in fact due to a personal injury or sickness. On the other hand, although the terms of a plan provide that benefits are to be continued only as long as the employee is absent from work on account of a personal injury or sickness, section 105(d) does not apply to payments made to an employee for a period of absence from work where such absence is not in fact due to a personal injury or sickness.

(3)(i)(A) Section 105(d) applies only to amounts attributable to periods during which the employee would be at work were it not for a personal injury or sickness. Thus, an employee is not absent from work if he is not expected to

work because, for example, he has reached mandatory retirement age. If a plan provides that an employee, who is absent from work on account of a personal injury or sickness, will receive a disability pension or annuity as long as he is disabled, section 105(d) is applicable to any payments that he receives under this plan before reaching mandatory retirement age, as defined in paragraph (a)(3)(i)(B) of this section. Thus, section 105(d) would not apply to the payments that an employee receives after reaching mandatory retirement age. The disability retired pay received by a member on the retired list pursuant to section 402 of the Career Compensation Act of 1949 (63 Stat. 802) or chapter 61 of title 10, United States Code (10 U.S.C. 1201 *et seq.*) which is in excess of the amounts excludable under section 104(a)(4) and paragraph (e) of § 1.104-1 shall be excluded from gross income subject to the limitations of section 105(d) and this section, if such pay is received before the member reaches mandatory retirement age. See § 1.72-15 for additional rules relating to the tax treatment of disability pensions. For the rules relating to certain reduced uniformed services retirement pay, see paragraph (c)(2) of § 1.122-1. For rules relating to a waiver by a member or former member of the uniformed services of a portion of disability retired pay in favor of a pension or compensation receivable under the laws administered by the Veterans Administration (38 U.S.C. 3105), see § 1.122-1(c)(3).

(B) The term "mandatory retirement age" as used in paragraph (a)(3)(i)(A) of this section means the age set by an employer for the mandatory retirement of employees in the class to which the taxpayer last belonged, unless such age has been set at an age higher than that at which it has been the practice of the employer to terminate, due to age, the services of such employees, or for purposes of tax avoidance. Where no age is set for mandatory retirement, such term means age 65, or, if higher, the age at which it has been the practice of the employer to terminate, due to age, the services of the class of employees to which the taxpayer last belonged.

(ii) Similarly, an employee who incurs a personal injury or sickness dur-

ing his paid vacation is not allowed to exclude under section 105(d) any of the vacation pay which he receives, since he is not absent from work on account of the personal injury or sickness. Likewise, a teacher who becomes sick during the summer or other vacation period when he is not expected to teach, is not entitled to any exclusion under section 105(d) for the summer or vacation period. However, if an employee who would otherwise be at work during a particular period is absent from work and his absence is in fact due to a personal injury or sickness, a payment which he receives for such period under a wage continuation plan is subject to section 105(d).

(4) A period of absence from work shall commence the moment the employee first becomes absent from work and shall end the moment the employee first returns to work. However, the exclusion provided under section 105(d) is applicable only to payments attributable to a period of absence from work which is due to a personal injury or sickness, and to payments attributable to a period when the employee would have been at work but for such personal injury or sickness.

(5) For the purpose of section 105(d), whether an employee is absent from work depends upon all the circumstances. For example, an employee, who is a farm hand and who lives upon the premises of his employer, is absent from work when he is unable to work even though he remains on the premises of his employer. A member of the Armed Forces, who on a particular day has no assigned duties but to stand ready for duty, is absent from work if he is unable to answer any duty call that may be made upon him. An employee is not absent from work when he performs any services for his employer at his usual place or places of employment, whether or not the services are the usual services performed by the employee. Furthermore, the employee is not absent from work when he performs substantial services for his employer, even though they are performed at a place other than his usual place of employment. Thus, if an employee returns to his usual place or places of employment and performs any services for his employer, he has

returned to work, but if he merely holds occasional short conferences concerning his work with other employees or clients while hospitalized or at home recuperating, such conferences do not constitute a return to work.

(b) *Determination of amount attributable to period of absence.* The amount which is paid to an employee as wages or payments in lieu of wages for a period of absence from work due to a personal injury or sickness shall be determined by reference to the plan under which the amount is paid, and to the contract, statute, or regulation which provides the terms of the employment. However, unless the plan, contract, statute, or regulation provides otherwise, it will be presumed that no wages or plan benefits are attributable to days (or portions of days) which are not normal working days for the particular employee. Also, section 105(d) does not apply to amounts earned prior to or subsequent to the period of absence from work, even though received during such period. These rules may be illustrated by the following examples:

Example (1). Employee A, who receives regular wages of \$70 per week, normally works five days (Monday through Friday) during each week. A is absent from work on a Friday and the succeeding Monday (two working days) on account of a personal injury, but receives his regular wages with respect to such period of absence under his employer's accident and health plan. Unless the plan of A's employer, or the contract, statute, or regulation under which A is employed, provides otherwise, it will be presumed that A is not paid with respect to non-working days (Saturday and Sunday). Therefore, the amount received by A with respect to his period of absence from work due to injury is \$28, which is two days regular wages. If the plan, or the employment contract, statute, or regulation had provided that wages were paid on a 7-day per week basis and that A must be available for call to work on Saturday and Sunday, A's daily wage would have been \$10, and the amount attributable to the period of absence would have been \$40 (\$10 per day for four days).

Example (2). Employee B is a salesman who is paid on a commission basis. The employer purchases for B an accident and health insurance policy which provides that B shall receive \$50 per week during any period (after a 7-day waiting period) that he is unable to work due to personal injuries or sickness. B incurs a personal injury and is incapacitated for two weeks. He receives \$50 under the insurance policy with respect to the second

week of absence. In addition, during the 2-week period of absence he receives a check for \$40 from his employer as his commission on a sale which he made before becoming incapacitated. Section 105(d) applies to the \$50 received through the insurance policy, but does not apply to the \$40 commission which B earned prior to the period of absence from work.

(c) *Limitation in the case of absence from work due to sickness for periods commencing prior to January 1, 1964.* (1) In the case of a period of absence from work on account of sickness commencing prior to January 1, 1964, the exclusion provided by section 105(d) does not apply to amounts attributable to the first seven calendar days of each such period, unless the employee is hospitalized on account of sickness for at least one day during the period of absence from work. This 7-day rule applies to each period of absence from work because of sickness, regardless of the frequency of such absences or the closeness in time to any prior period of absence from work because of sickness. For example, employee A becomes absent from work because of sickness on Friday, October 4, 1963, and returns to work on the morning of Monday, October 14, 1963. He suffers a relapse and again becomes absent from work on the afternoon of Monday, October 14, 1963. A's return to work on the morning of Monday, October 14, 1963, terminates the first period of absence from work because of sickness, and a new period of absence from work because of sickness begins on the afternoon of Monday, October 14, 1963. The 7-day limitation does not apply if the absence from work is due to personal injury. These rules may be illustrated by the following examples:

Example (1). Employee C normally works five days (Monday through Friday) during each week. On Saturday, October 5, 1963 (a nonworking day), C becomes sick and as a result, he does not return to work until Thursday, October 17, 1963. The period of absence from work due to sickness commences on Monday, October 7, 1963, and terminates when C returns to work on Thursday, October 17, 1963. If C is not hospitalized during such period of absence from work, section 105(d) does not apply to amounts which C receives under his employer's wage continuation plan attributable to the 7-day period commencing Monday, October 7, 1963, and ending Sunday, October 13, 1963, inclusive.

Example (2). Employee D incurs a personal injury which causes him to be absent from work two days. His regular wages are continued during this period in accordance with the wage continuation plan of his employer. Since D's absence from work was due to a personal injury, rather than a sickness, the 7-day waiting period does not apply, and, subject to the other requirements of section 105(d), D is entitled to an exclusion with respect to the amounts received under the employer's plan attributable to the 2-day period of absence.

(2) For the purpose of starting the 7-day waiting period, if the period of absence due to sickness commences after the start of a working day, the amount received with respect to the portion of such day that the employee is absent from work shall be considered the amount attributable to the first calendar day of the period of absence from work due to sickness. This rule may be illustrated by the following example:

Example. Employee E normally works from 9 a.m. until 5:30 p.m. on five days (Monday through Friday) during each week. From noon on Friday, September 6, 1963, until noon on Monday, September 16, 1963, E is absent from work on account of sickness but is not hospitalized at any time during this period. Section 105(d) does not apply to amounts received by E under his employer's wage continuation plan which are attributable to the calendar period beginning September 6, 1963, and ending September 12, 1963, inclusive. However, if the other requirements of section 105(d) are met, E may exclude from gross income amounts attributable to the period beginning September 13, 1963, and ending at noon on September 16, 1963, inclusive.

(3) If the absence from work is due to sickness, the amount attributable to the first seven calendar days of such absence includes all amounts paid for such seven calendar days, regardless of the number of work days included in such seven calendar days. For example, if one of such seven calendar days an employee would have worked two 8-hour shifts, the amount he is paid for the two shifts is considered to be an amount attributable to only one calendar day.

(4) An employee is considered to be hospitalized for one day only if he is admitted to and confined in a hospital as a bed patient for at least one hospital day. Entry into a hospital as an in-and-out patient does not constitute hospitalization for purposes of section

105(d). The same applies to mere entry into the outpatient ward or the emergency ward of a hospital.

(d) *Exclusion not applicable to the extent that amounts exceed a weekly rate of \$100 for periods of absence commencing prior to January 1, 1964—(1) In general.* Amounts received under a wage continuation plan, attributable to periods of absence commencing before January 1, 1964, which are not excludable from gross income as being attributable to contributions of the employee (see § 1.105-1) must be included in gross income under section 105(d) to the extent that the weekly rate of such amounts exceeds \$100. Thus, an employee, who receives \$50 under his employer's wage continuation plan on account of his being absent from work for two days due to a personal injury, cannot exclude the entire \$50 under section 105(d) if the weekly rate of such benefits exceeds \$100. If an employee receives payments under a wage continuation plan for less than a full pay period, the excludability of such payments shall be determined under subparagraph (2) of this paragraph. In all other cases, the weekly rate and excludability of such payments under a wage continuation plan shall be determined under subparagraph (3) of this paragraph. If, with respect to any pay period or portion thereof, the employee receives amounts under two or more wage continuation plans (whether such plans are maintained by or for the same employer or by different employers), the weekly rate and excludability of amounts received under each plan shall be determined under subparagraph (3) of this paragraph and the weekly rate for purposes of section 105(d) shall be the sum of all such weekly rates. This rule may be illustrated by the following examples:

Example (1). An employee whose weekly salary is \$120 is covered by two wage continuation plans maintained by his employer. Plan A is a contributory insured plan to which the employee contributes 60 percent of the premiums and which provides a weekly payment of \$30. Plan B is a salary continuation plan completely financed by the employer. Since 60 percent of the cost of plan A is contributed by the employee, 60 percent of the weekly payment of \$30 (\$18) is excluded from gross income under section 104(a)(3). The remainder of each weekly payment (\$12)

is the weekly rate of plan A. Since the employer pays the entire cost of plan B, the weekly rate of this plan is the total amount paid per week. In the case of an employee whose weekly wages of \$120 are continued under plan B, the weekly rate for the employee for purposes of section 105(d) is \$132 (\$120 from plan B, plus \$12 from plan A).

Example (2). Assume in Example (1) that plan A provides a waiting period of four calendar days while plan B is effective immediately. For the first four days of absence the weekly rate for purposes of section 105(d) is \$120, and for periods after the first four days the weekly rate for purposes of section 105(d) is \$132.

(2) *Daily exclusion.* If an employee receives payments under a wage continuation plan for less than a full pay period, the extent to which such benefits are excludable under section 105(d) shall be determined by computing the daily rate of the benefits which can be excluded under section 105(d). Such daily rate is determined by dividing the weekly rate at which wage continuation payments are excludable (\$100) by the number of work days in a normal work week. This rule may be illustrated by the following example:

Example. Employee E is covered by a wage continuation plan maintained by his employer providing that E's regular salary of \$220 semimonthly will be continued in case he is absent from work on account of a personal injury or sickness. E is absent from work on account of a personal injury for three days and under the plan he received \$66 as wage continuation payments. The extent to which the \$66 is excludable under section 105(d) shall be determined by dividing \$100 by 5, the number of work days in a normal work week for E, resulting in a daily exclusion of \$20 and a total exclusion of \$60.

(3) *Determination of weekly rate at which amounts are paid under a wage continuation plan.* (i) For purposes of this subparagraph the pay period of a particular wage continuation plan shall be determined by reference to such plan. If, in the usual operation of the plan, benefits are paid for the same periods as regular wages, then the pay period of such benefits shall be the period for which a payment of wages is ordinarily made to the employee by the employer. If plan benefits are ordinarily paid for different periods than regular wages then the pay period of such benefits shall be the period for

which payment of such benefits is ordinarily made.

(ii) The weekly rate shall be determined in accordance with the following rules:

(a) *Weekly pay period.* If benefits are paid on the basis of a weekly pay period, the weekly rate at which such benefits are paid shall be the weekly amount of such benefits.

(b) *Biweekly pay period.* If benefits are paid on the basis of a biweekly pay period, the weekly rate at which such benefits are paid shall be one-half of the biweekly rate.

(c) *Semimonthly pay period.* If benefits are paid on the basis of a semimonthly pay period, the weekly rate at which such benefits are paid shall be the semimonthly rate multiplied by 24 and divided by 52.

(d) *Monthly pay period.* If benefits are paid on the basis of a monthly pay period, the weekly rate at which such benefits are paid shall be the monthly rate multiplied by 12 and divided by 52.

(e) *Other pay periods.* If benefits are paid on the basis of a period other than a period described in (a) through (d), of this subdivision the weekly rate at which such benefits are paid shall be determined by ascertaining the annual rate at which such benefits are paid and dividing such annual rate by 52.

(f) *Examples.* The operation of the rules of this subdivision may be illustrated by the following examples:

Example (1). A's employer maintains a non-contributory plan which provides for the continuation of regular salary during periods of absence from work due to personal injury or sickness. A, an office employee, receives regular salary of \$520 per month, and he is paid on the basis of a monthly pay period. Since benefits under the salary continuation plan are paid for the same periods as regular salary, the pay period of the plan is monthly. For purposes of section 105(d), the weekly rate at which benefits are paid to A under the plan is \$120, determined as follows:

\$520 (monthly rate)×12	\$6,240 (annual rate).
\$6,240÷52	\$120 (weekly rate).

Example (2). B, a factory employee of the same employer, is paid regular wages on the basis of a 10-day pay period. B's regular wages are \$200 per pay period. If B is absent from work for 15 days, the weekly rate of the amount he receives under his employer's plan will be determined as follows:

365×\$200÷10	\$7,300 (annual rate).
\$7,300÷52	\$140.38 (weekly rate).

(iii) If the weekly rate for purposes of section 105(d) (as determined in subdivision (ii) of this subparagraph) does not exceed \$100, the amount received which is not attributable to the 7-day waiting period described in paragraph (c) of this section is fully excludable from gross income. If the weekly rate for purposes of section 105(d) (as determined in subdivision (ii) of this subparagraph) exceeds \$100, the amount received which is not attributable to the 7-day waiting period provided in paragraph (c) of this section is only partially excludable. The excludable portion of such amount shall bear the same ratio to such amount as \$100 bears to the weekly rate for purposes of section 105(d). This rule may be illustrated by the following example:

Example. The weekly rate of benefits in the case of employee A in example (1) of subdivision (ii) of this subparagraph was \$120. If A does not receive amounts under any other plan, this is the weekly rate for purposes of section 105(d). Assume that A is absent from work on account of a personal injury for one full month and receives full pay of \$520 for such period of absence. Since there is no waiting period requirement, the exclusion is \$433.33 computed as follows:

$$\$100 + \$120 \times \$520 \text{ or } \$433.33.$$

(e) *Limitation in the case of absence from work on account of personal injury or sickness for periods commencing after December 31, 1963.* (1) In the case of periods of absence from work on account of sickness or personal injury commencing after December 31, 1963, the exclusion provided by section 105(d) does not apply to amounts attributable to the first 30 calendar days of each such period, if such amounts are at a rate which exceeds 75 percent of the employee's "regular weekly rate of wages", as determined under subparagraph (5) of this paragraph. If the amounts are at a rate of 75 percent or less of the employee's "regular weekly rate of wages", the exclusion provided by section 105(d) does not apply to amounts attributable to the first 7 calendar days of each such period, unless the employee is hospitalized on account of personal injury or sickness for at least one day during the period of absence from work. The 7- or 30-day waiting period (whichever is applicable) applies to each period of absence

from work because of personal injury or sickness, regardless of the frequency of such absences or the closeness in time to any prior period of absence from work because of personal injury or sickness. The waiting period is to be counted by beginning with the first work day for which the employee was absent. These rules may be illustrated by the following examples:

Example (1). Employee A is absent from work because of sickness on Tuesday, January 7, 1964, and returns to work on the morning of Thursday, February 13, 1964. He suffers a relapse and again becomes absent from work on the afternoon of Thursday, February 13, 1964. A's return to work on the morning of Thursday, February 13, 1964, terminates the first period of absence from work because of sickness, and a new period of absence from work because of sickness begins on the afternoon of Thursday, February 13, 1964.

Example (2). Employee B normally works five days (Monday through Friday) during each week. On Saturday, January 11, 1964 (a nonworking day), B becomes sick or injured and as a result he does not return to work until Monday, February 17, 1964. The period of absence from work commences on Monday, January 13, 1964, and terminates when B returns to work on Monday, February 17, 1964. Assuming B receives amounts under his employer's wage continuation plan at a rate exceeding 75 percent of his "regular weekly rate of wages" (as determined under subparagraph (5) of this paragraph), the exclusion provided by section 105(d) does not apply to amounts B receives under his employer's wage continuation plan which are attributable to the 30-day period commencing Monday, January 13, 1964, and ending Tuesday, February 11, 1964, inclusive. If B receives amounts under his employer's wage continuation plan at a rate which is 75 percent or less of his "regular weekly rate of wages" and he is not hospitalized during the period of absence from work, the exclusion provided by section 105(d) does not apply to amounts B receives which are attributable to the 7-day period commencing Monday, January 13, 1964, and ending Sunday, January 19, 1964, inclusive.

Example (3). Employee C is sick or incurs a personal injury which causes him to be absent from work for two weeks. He receives amounts under his employer's wage continuation plan at a rate which is 75 percent or less of his "regular weekly rate of wages" (as determined under subparagraph (5) of this paragraph) and is hospitalized from the eighth through the eleventh day of his absence. Since C was hospitalized on account of personal injury or sickness for at least one day during the period of absence, the 7-day

waiting period does not apply, and, subject to the other requirements of section 105(d), C is entitled to an exclusion with respect to the amounts received under his employer's plan attributable to the two-week period of absence. If C were receiving amounts under his employer's wage continuation plan at a rate exceeding 75 percent of his "regular weekly rate of wages", he would not be entitled to an exclusion under section 105(d).

(2) For the purpose of starting the 7- or 30-day waiting period, whichever is applicable, if the period of absence commences after the start of a working day, the amount received with respect to the portion of such day that the employee is absent from work shall be considered an amount attributable to the first calendar day of the period of absence from work. This rule may be illustrated by the following example:

Example. Employee D normally works from 9 a.m. until 5:30 p.m. on five days (Monday through Friday) during each week. From noon on Wednesday, January 8, 1964, until noon on Monday, February 17, 1964, D is absent from work on account of personal injury or sickness but is not hospitalized at any time during this period. D receives amounts under his employer's wage continuation plan at a rate not exceeding 75 percent of his "regular weekly rate of wages" (as determined under subparagraph (5) of this paragraph). Section 105(d) does not apply to amounts received by D under his employer's wage continuation plan which are attributable to the calendar period beginning January 8, 1964, and continuing through January 14, 1964, inclusive. However, if the other requirements of section 105(d) are met, D may exclude from gross income amounts attributable to the remainder of the period of absence, ending at noon on Monday, February 17, 1964.

(3) If the exclusion is subject to a 7- or 30-calendar-day waiting period, any amount attributable to such 7- or 30-calendar-day waiting period includes all amounts paid therefor, regardless of the number of work days included in such 7 or 30 calendar days. For example, if on one of the days included in the waiting period, an employee would have worked two 8-hour shifts, the amount he is paid for the two shifts is considered to be attributable to only one calendar day.

(4) An employee is considered to be hospitalized for one day only if he is admitted to and confined in a hospital as a bed patient for at least one hos-

pital day. Entry into a hospital as an in-and-out-patient does not constitute hospitalization for purposes of section 105(d). The same applies to mere entry into the out-patient ward or the emergency ward of a hospital.

(5)(i) In general, the "regular weekly rate of wages", for purposes of section 105(d), shall be the average weekly wages paid for the last four weekly periods falling within a full pay period or full pay periods immediately preceding the commencement of the period of absence. If the employee was absent from work for three or more normal working days during any such pay period, and the amount of wages paid for such pay period was less than the amount of wages paid for the immediately preceding pay period during which the employee was not absent from work for three or more normal working days, then the amount of wages paid for the weekly period or weekly periods falling wholly or partly within the pay period during which each such absence occurred shall not be used in the determination of "regular weekly rate of wages". In such a case, there shall be substituted the amount of wages paid for the last weekly period or weekly periods falling within the pay period or pay periods immediately preceding the pay period or pay periods in which such absence or absences occurred during which the employee was not absent from work for three or more normal working days.

(a) In order to compute wages paid for the last four weekly periods falling within a full pay period or full pay periods immediately preceding the commencement of the period of absence, or any substituted weekly periods therefor, it will be necessary to convert the wages paid for any pay period other than a weekly pay period into a weekly rate or weekly rates of payment of such wages in accordance with the rules stated in subdivision (iv) of this subparagraph. Such weekly rate or weekly rates of wage payments are then used in determining the wages for the last four weekly periods falling within a full pay period or full pay periods immediately preceding the commencement of the period of absence, or any substituted weekly periods therefor.

(b) If the employee does not have four weekly periods falling within a full pay period or full pay periods preceding his absence during which he was not absent from work for three or more normal working days, then the greatest number of available weekly periods shall be used, consistent with the rules set forth in this subdivision (i), in determining the "regular weekly rate of wages."

(c) If the employee has been employed for a full pay period or more preceding his absence, and has worked for the number of days in a normal work week, but was absent from work for three or more normal working days during each of the pay periods preceding his absence, then the "regular weekly rate of wages" shall be determined by multiplying the employee's actual wages paid for the total number of normal working days in the pay period immediately preceding the employee's absence by the number of days that the employee is expected to work in a normal work week, and by dividing the product by the number of normal work days in such pay period for which wages were paid.

(d) If the employee has not been employed for a full pay period preceding his absence, and has worked for the number of days in a normal work week, the "regular weekly rate of wages" shall be determined by multiplying the employee's actual wages paid for the total number of normal working days preceding the employee's absence by the number of days that the employee is expected to work in a normal work week, and by dividing the product by the number of normal work days for which wages were paid.

(e) If the employee has not worked the number of days in a normal work week, then there is no "regular weekly rate of wages," and the employee will not be permitted an exclusion under section 105(d) for amounts attributable to the first 30 calendar days in the period of absence.

(f) Wages paid by a former employer shall not be used in the determination of "regular weekly rate of wages" as described in this subparagraph.

(ii) In the case of a wage continuation plan of an employer under which the benefits are computed as a speci-

fied percentage of average wages, the formula for computing the employee's average wages included in the plan may be used (in lieu of the formula provided in subdivision (i) of this subparagraph) for determining the "regular weekly rate of wages" for purposes of section 105(d), if under the plan—

(a) The definition of wages does not include any items which are not considered "wages" as defined in subdivision (iii) of this subparagraph,

(b) The period for computing average wages is not less than twenty-eight successive calendar days, does not end earlier than five months preceding the date on which the period of absence commences, and is one in which the employee was at work at least 35 percent of the normal working time, and

(c) The period and formula for computing average wages are applied uniformly with respect to all employees eligible to receive benefits under the plan. A plan will not fail to meet the conditions of this subdivision merely because different portions of the employee's wages are averaged over different periods for purposes of computing his average wages, so long as each such period meets the requirements in (b) and (c) of this subdivision.

(iii) For the purpose of determining "regular weekly rate of wages" under subdivision (i) or (ii) of this subparagraph, whichever is applicable, an employee's wages shall comprise basic salary, fees, commissions, tips, gratuities, overtime, and any other type of taxable compensation which is normally paid for services. However, wages shall not include any type of compensation which is not normally paid, such as bonuses and incentive payments. An employee's compensation, for the purpose of determining his "regular weekly rate of wages", will not include any compensation which is not currently includible in gross income. For example, an employee's wages for the purpose of this subdivision shall not include deferred compensation paid by the employer which is not includible in gross income until received by the employee, such as employer contributions to a qualified annuity under section 403(a), or employer contributions to an accident or health plan excluded under section 106.

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(iv) The following rules shall be used to convert wages for pay periods other than weekly pay periods into weekly rates of wage payments to be used in determining "regular weekly rate of wages" as described in subdivision (i) of this subparagraph.

(a) If wages are paid biweekly, the weekly rate of wage payments shall be one-half of the biweekly wages paid.

(b) If the employee is paid semi-monthly, the weekly rate of wage payments shall be the semi-monthly wages paid multiplied by 24 and divided by 52.

(c) If wages are paid monthly, the weekly rate of wage payments shall be the monthly wages paid multiplied by 12 and divided by 52.

(d) If wages are paid on the basis of a pay period other than a period described in (a) through (c) of this subdivision, the weekly rate of wage payments shall be determined by ascertaining the annual rate of wage payments and dividing by 52.

(e) For the purpose of this subparagraph, if separate portions of an employee's wages are paid on the basis of different pay periods, the weekly rate or weekly rates of wage payments of each portion of wages paid with respect to each pay period shall first be determined under the rules set forth in (a) through (d) of this subdivision and the average weekly rate of each portion of wages, determined in accordance with the rules set forth in subdivision (i) of this subparagraph, shall be aggregated to determine the employee's "regular weekly rate of wages" for purposes of section 105(d).

(v) The provisions of subdivisions (i), (iii) and (iv) of this subparagraph may be illustrated by the following examples:

Example (1). Employee A is a salesman who is paid a basic salary of \$60 per week and, in addition, is paid commissions on a weekly basis. A became ill and did not report for work beginning Monday, February 17, 1964. For the four-week period preceding the commencement of the period of absence, A was paid the following:

Week of—	Basic salary	Commissions	Total weekly wages
Jan. 20, 1964	\$60	\$10	\$70
Jan. 27, 1964	60	50	110
Feb. 3, 1964	60	30	90

Week of—	Basic salary	Commissions	Total weekly wages
Feb. 10, 1964	60	40	100
Total 4-week wages			370

A's wages, under the rules set forth in subdivision (iii) of this subparagraph, consist of basic salary plus commissions. Since the amount of A's average weekly wages paid for the last four weekly periods falling within the four pay periods immediately preceding the commencement of his period of absence from work is \$92.50 (\$370÷4), such amount is considered as the "regular weekly rate of wages" (as computed under subdivision (i) of this subparagraph) for purposes of section 105(d).

Example (2). Assume, in example (1), that A normally works five days during each week (Monday through Friday) and that he was also absent from work for any reason from Monday, February 3, 1964, through Wednesday, February 5, 1964. Since A was absent from work for three normal working days during the pay period of February 3, 1964, and was paid a lesser amount of wages for such pay period than in the immediately preceding pay period during which he was not absent from work (week of January 27), the weekly pay period beginning January 27, 1964 is substituted for the weekly pay period beginning February 3, 1964 in the determination of "regular weekly rate of wages" (as computed under subdivision (i) of this subparagraph) for purposes of section 105(d). The "regular weekly rate of wages" is calculated to be \$97.50, as follows:

Week of		Total wages
February 10	\$100	
January 27 (substitute for week of Feb. 3)	110	
January 27	110	
January 20	70	
390÷4 = \$97.50		

Example (3). Employee B is a salesman who is paid a basic salary of \$75 and, in addition, is paid commissions for semi-monthly periods ending on the 15th day and the last day of each month. He was absent from work on account of a personal injury beginning Monday, February 17, 1964. He was paid the following amounts:

Pay period	Salary	Commissions	Total wages
Feb. 1-15, 1964	\$75	\$60	\$135
Jan. 16-31, 1964	75	50	125

The four weekly periods falling within full pay periods preceding the commencement of

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the period of absence are the weeks beginning February 9, February 2, January 26, and January 19. B's wages are converted to weekly rates of wage payments per pay period in accordance with the rule set forth in subdivision (iv)(b) of this subparagraph as follows:

From February 1, 1964—February 15, 1964, inclusive:

$$\$135 \times 24 = \$3240.00 \text{ (annual rate)}$$

$$\frac{\$3240.00}{52} = \$62.31 \text{ (weekly rate)}$$

From January 16-31, inclusive:

$$\$125 \times 24 = \$3000.00 \text{ (annual rate)}$$

$$\frac{\$3000.00}{52} = \$57.69 \text{ (weekly rate)}$$

$$\$125 \times 24 = \$3000.00 \text{ (annual rate)}$$

$$\frac{\$3000.00}{52E} = \$57.69 \text{ (weekly rate)}$$

The weekly rates are then used in determining the wages for four weekly periods falling within the pay periods immediately preceding the commencement of B's absence. B's "regular weekly rate of wages" (as computed under subdivision (i) of this subparagraph) is calculated to be \$60.17, as follows:

Feb. 9-15, inclusive	\$62.31
February 2-8, inclusive	62.31
January 26-February 1, inclusive ($\frac{6}{7} \times \$57.69 + \frac{1}{7} \times \62.31)	58.35
January 19-25, inclusive	57.69

$$\frac{\$48 \text{ (total wages)} \times 5 \text{ (normal work days in week)}}{2 \text{ (number of work days for which wages were paid)}} = \$120.00$$

Example (6). Employee E is an hourly worker who is paid a salary of \$1.25 per hour. E is paid basic salary on a biweekly basis for the periods beginning every other Thursday and ending every other Wednesday. E is also paid monthly for his overtime work and is compensated for such work at one and one-half

$$240.66 \div 4 = \$60.17$$

Example (4). Employee C is paid semi-monthly on the 5th and 20th of each month and he began working for his present employer at the beginning of the semi-monthly pay period commencing Tuesday, January 21, 1964. C received total wages of \$200 for the pay period of January 21, 1964 through February 5, 1964, inclusive. He was not absent during that pay period. C became sick and was absent from work beginning February 7, 1964. Since employee C does not have four weekly periods falling within a full pay period or full pay periods preceding his absence, the average wages for the last two weekly periods falling within such full pay period will be C's "regular weekly rate of wages" (as computed under subdivision (i) of this subparagraph) for purposes of section 105(d), determined to be \$92.31, as follows:

$$\$200 \times 24 = \$4800 \text{ (annual rate)}$$

$$\$4800 \div 52 = \$92.31 \text{ (weekly rate)}$$

Example (5). Employee D, an office worker, is paid weekly and is expected to work five days during each week. He has been employed by his present employer for three weeks, but has been absent from work for three normal work days in each of the weeks preceding his illness. He became ill and was absent from work on Monday, February 17, 1964. During the weekly pay period immediately preceding his absence (week of February 10) D was paid \$48 salary. He was paid for two working days during such weekly pay period. D's "regular weekly rate of wages" (as computed under subdivision (i) of this subparagraph), is calculated to be \$120.00, determined as follows:

times the hourly rate. E worked 16 hours of overtime for his employer during the month of January. E was injured and could not report for work on Friday, February 21, 1964. E returned to work on Monday, March 16, 1964. E was paid as follows for the pay periods indicated:

Pay period	Hours		Salary per hour		Total salary
	Regular	Overtime	Regular	Overtime	
Month of January 1964		16		\$1.875	\$30
Jan. 23-Feb. 5, 1964, inclusive	80		\$1.25		100
Feb. 6-19, 1964, inclusive	80		1.25		100

Under the rule set forth in subdivision (iv)(e) of this subparagraph, the weekly rates of payment of salary and overtime must be determined separately. Since basic salary is paid biweekly, the weekly rate of payment is determined to be one-half of \$100.00, or \$50.00. The full pay period immediately preceding the commencement of E's absence for overtime compensation ended on January 31, 1964. E's overtime earnings are converted to a weekly rate for such period, as follows:

$\$30.00$ (overtime pay) $\times 12 = \$360.00$

(annual rate)

$\$360.00 \div 52 = \6.93 (weekly rate)

The average wages for the last four weekly periods falling within pay periods immediately preceding the commencement of E's absence with respect to basic salary (weeks of February 13, 6, January 30, and 23) is \$50.00. The average wages for the last four weekly periods falling within the pay period immediately preceding the commencement of E's absence with respect to overtime compensation (weeks of January 25, 18, 11, and 4) is \$6.93. Accordingly, E's "regular weekly rate of wages" (as computed under subdivision (i) of this subparagraph) for the purpose of section 105(d) is \$56.93.

(6)(i) Amounts paid under a wage continuation plan must be converted to a weekly rate in order to determine the percentage of benefits paid in relation to the employee's "regular weekly rate of wages", since such percentage is used in determining the waiting period, if any, after which an exclusion is allowable under section 105(d). In order to calculate the weekly rate at which benefits are being paid, reference is made to the particular wage continuation plan. If, in the usual operation of the plan, benefits are paid for the same periods as regular wages, then the pay period of such benefits shall be the period for which a payment of wages is ordinarily made to the employee by the employer. If plan benefits are ordinarily paid for different periods than regular wages, then the pay period of such benefits shall be the period for which payment of such benefits is ordinarily made.

(ii) The weekly rate at which the benefits are paid under a wage continuation plan shall be determined in accordance with the following rules:

(a) If benefits are paid on the basis of a weekly pay period, the weekly rate at which such benefits are paid shall be the weekly amount of such benefits.

(b) If benefits are paid on the basis of a biweekly pay period, the weekly rate

at which such benefits are paid shall be one-half of the biweekly rate.

(c) If benefits are paid on the basis of a semimonthly pay period, the weekly rate at which such benefits are paid shall be the semimonthly rate multiplied by 24 and divided by 52.

(d) If benefits are paid on the basis of a monthly pay period, the weekly rate at which such benefits are paid shall be the monthly rate multiplied by 12 and divided by 52.

(e) If benefits are paid on the basis of a period other than a period described in (a) through (d) of this subdivision the weekly rate at which such benefits are paid shall be determined by ascertaining the annual rate at which such benefits are paid and dividing such annual rate by 52.

(iii) The principles of subdivisions (i) and (ii) of this subparagraph may be illustrated by the following example:

Example. A's employer maintains a non-contributory plan which provides for a monthly benefit of \$400 during periods of absence from work due to personal injury or sickness. A, a salesman, receives regular salary of \$520 per calendar month plus commissions, depending upon the amount of sales made by A during the month. During the month of January 1964, A was paid commissions of \$180. A received a total benefit of \$200 for an absence of two weeks because of illness occurring in February 1964. He was not hospitalized. Since benefits under the salary continuation plan are paid for the same period as regular wages, the pay period of the plan is monthly. A's "regular weekly rate of wages", determined in accordance with the rules set forth in subparagraph (5)(i) of this paragraph is \$161.54. ($\$700 \times 12 \div 52$).

For purposes of determining the percentage of benefits paid in relation to A's "regular weekly rate of wages", the weekly rate of the benefits are calculated to be \$92.31, as follows:

$\$400$ (monthly rate) $\times 12 = \$4,800$ (annual rate)

$\$4,800 \div 52 = \92.31 (weekly rate)

Since \$92.31 does not exceed 75 percent of A's "regular weekly rate of wages", A is entitled to an exclusion under section 105(d) for the second week of absence, subject to the other limitations provided in this section.

(iv) For the purpose of determining whether or not the rate of benefits paid under a wage continuation plan for a period of absence exceeds 75 percent of the employee's "regular weekly rate of

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wages” (as determined under subparagraph (5) of this paragraph), it is necessary to ascertain the average percentage of benefits paid in relation to the employee’s “regular weekly rate of wages” for the first 30 calendar days in the period of absence. Such percentage is derived from a fraction, the numerator of which is the sum of benefits paid (attributable to employer contributions) for the period of absence occurring within the first 30 calendar days, and the denominator of which is the collective sum of the employee’s “regular weekly rate of wages” during such period. This rule may be illustrated by the following examples:

Example (1). Employee A is paid a semi-monthly basic salary of \$150 plus commissions. He normally works five days during each week (Monday through Friday). During the month of January 1964, A received wages of \$150 plus commissions of \$66.67 for each of the semimonthly pay periods. A became ill on Monday, February 3, 1964, and as a result was absent from work until Monday, February 17, 1964, but was not hospitalized. Under the noncontributory wage continuation plan of A’s employer, A received no benefits for the first three working days’ absence (Monday through Wednesday) and was paid benefits at the rate of \$100 a week thereafter. A’s “regular weekly rate of wages,” determined under the rules set forth in subparagraph (5) of this paragraph, is \$100. A is considered to have received average benefits at a rate of 70 percent of his “regular weekly rate of wages”, computed as follows:

(1)	(2)	(3)
Week of absence	Benefits paid	Regular weekly rate of wages
1-Feb. 3	\$40	\$100
2-Feb. 10	100	100
Total	140	200

	\$100		
Plan A—	—	= \$50.00	(weekly rate)
	2	25.00	(less amount attributable to employee contributions (1/2))
		25.00	(weekly rate of Plan A)
	\$400×12		
Plan B—	—	= 92.31	(weekly rate of Plan B)
	52	\$117.31	(combined weekly rate at which benefits are paid)

The \$25 attributable to contributions made by the employee under Plan A would be subject to section 104(a)(3).

Average percentage of benefits paid— 140/200 = 70%. Accordingly, A may exclude amounts attributable to the second week of absence, subject to the other limitations of section 105(d).

Example (2). Assume, in example (1), that A did not return to work until Thursday, February 20, 1964. A is considered to have received average benefits at the rate of 76.92 percent of his “regular weekly rate of wages”, computed as follows:

(1)	(2)	(3)
Week of absence	Benefits paid	Regular weekly rate of wages
1-Feb. 3	\$40	\$100
2-Feb. 10	100	100
2 ¹ / ₅ -Feb. 17	160	160
Total	200	260

¹ Three-fifths of 100.

Average percentage of benefits paid— 200/260 = 76.92%. Accordingly, A would not be permitted any exclusion under section 105(d).

(v) If with respect to any pay period or portion thereof the employee receives amounts under two or more wage continuation plans (whether such plans are maintained by or for the same employers or by different employers), the weekly rate for purposes of section 105(d) shall be the sum of the weekly rates received under all plans. This rule may be illustrated by the following example:

Example. An employee who is absent because of personal injuries or sickness receives \$100 biweekly under wage continuation plan A maintained by his employer. He contributes one-half of the premiums for maintenance of the plan. Under wage continuation plan B maintained by his employer the employee receives \$400 monthly. Plan B is noncontributory. The weekly rate at which benefits are paid for the purpose of section 105(d) is computed as follows:

(f) Amount of exclusion for periods of absence commencing after December 31, 1963—(1) In general. Amounts received

under a wage continuation plan attributable to periods of absence commencing after December 31, 1963, and which are not excludable from gross income as being attributable to contributions of the employee (see § 1.105-1) are excludable from gross income of the employee to the extent that such amounts do not exceed—

(i) A weekly rate of \$75, during the first 30 calendar days in the period of absence; and

(ii) A weekly rate of \$100, after the first 30 calendar days in the period of absence.

For example, an employee who normally works five days during each week is absent from work for two days, is hospitalized during his absence, and receives \$75 under his employer's wage continuation plan, which amount is at a rate of 75 percent of his "regular weekly rate of wages". The employee cannot exclude the entire \$75 under section 105(d), if the weekly rate of such benefits exceeds \$75.

(2) *Daily exclusion.* An employee receiving payments under a wage continuation plan must, in order to determine the amount of the exclusion under section 105(d), compute the daily rate of the benefits. Such daily rate is determined, for amounts attributable to the first 30 calendar days in the period of absence, by dividing the weekly rate at which benefits are paid (as determined under paragraph (e)(6)(ii) of this section), or the maximum weekly rate at which wage continuation payments are excludable (\$75), whichever is lower, by the number of work days in a normal work week. In the case of amounts attributable to days in a period of absence after the first 30 calendar days, the daily rate for such period is determined by dividing the weekly rate at which benefits are paid (as determined under paragraph (e)(6)(ii) of this section), or the maximum weekly rate at which wage continuation payments are excludable (\$100), whichever is lower, by the number of work days in a normal work week. The daily rate or daily rates of exclusion are then multiplied by the number of normal work days in the period of absence for which an exclusion is allowable in order to determine the total allowable exclusion. These rules

may be illustrated by the following examples:

Example (1). Employee A is a salesman receiving salary and commissions on a weekly basis. His employer maintains a non-contributory wage continuation plan which provides for the continuation of A's basic salary of \$80 per week during periods of absence. A was absent from work on account of sickness from Monday, February 3, 1964, through Sunday, March 15, 1964, but was not hospitalized. His normal work week is from Monday through Friday. The weekly amount of benefits paid to A (\$80) does not exceed 75 percent of his "regular weekly rate of wages" as defined in paragraph (e)(5) of this section. Under section 105(d), the daily rate of exclusion for amounts attributable to the first 30 calendar days in the period of absence, excluding the first 7 days thereof (Monday, February 10, 1964, through Tuesday, March 3, 1964, inclusive) is limited to \$15 (\$75, maximum weekly rate of exclusion divided by 5 (number of normal work days in week)). The daily rate of exclusion for amounts attributable to the period of absence in excess of 30 calendar days (Wednesday, March 4, 1964, through Sunday, March 15, 1964, inclusive) is limited to \$16 (\$80, weekly rate of benefits divided by 5). Thus, the total exclusion permitted to employee A by section 105(d) is \$383.00 (\$15 × 17 work days (\$255) + \$16 × 8 work days (\$128)).

Example (2). Assume the facts in example (1) except that A is paid benefits at the rate of \$500 a month during periods of absence. The weekly rate of the benefits computed under the rules stated in paragraph (e)(6)(ii) of this section is \$115.38, which amount does not exceed 75 percent of his "regular weekly rate of wages" as defined in paragraph (e)(5) of this section. Under section 105(d), the daily rate of exclusion for amounts attributable to the first 30 calendar days in the period of absence, excluding the first 7 days thereof (Monday, February 10, 1964, through Tuesday, March 3, 1964, inclusive) is limited to \$15 (\$75, maximum weekly rate of exclusion divided by 5). The daily rate of exclusion for amounts attributable to the period of absence in excess of 30 calendar days (Wednesday, March 4, 1964, through Sunday, March 15, 1964, inclusive) is limited to \$20 (\$100, maximum weekly rate of exclusion divided by 5). Thus, the total exclusion permitted to employee A by section 105(d) is \$415.00 (\$15 × 17 work days (\$255) + \$20 × 8 work days (\$160)).

Example (3). Employee B, an office worker works five days during each week (Monday through Friday) and receives a salary of \$85 per week. His employer maintains a non-contributory wage continuation plan which provides for no benefits during the first three days of absence, the continuation of full salary for one week thereafter and benefits at

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the rate of \$65 per week thereafter. B was absent from work on account of sickness from Monday, March 16, 1964, through Tuesday, March 31, 1964, and was hospitalized from Wednesday, March 18, through Tuesday, March 24. B received total benefits of \$137 for

the period of absence, which does not exceed 75 percent of his "regular weekly rate of wages" as determined under paragraph (e)(5) of this section. B is permitted an exclusion under section 105(d) of \$127 calculated as follows:

Period of absence	Weekly rate of benefits	Maximum weekly rate of exclusion	Daily rate of exclusion	Days of absence in period	Maximum exclusion
Mar. 16-18	0	\$75	0	3	0
Mar. 19-25	\$85	75	\$15	5	\$75
Mar. 26-31	65	75	13	4	52
Total exclusion					\$127

(g) *Definitions.* The term "personal injury" as used in this section, means an externally caused sudden hurt or damage to the body brought about by an identifiable event. The term "sickness" as used in this section, means mental illnesses and all bodily infirmities and disorders other than "personal injuries". Diseases, whether resulting from the occupation or otherwise, are not considered personal injuries, but they are treated as a sickness.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6770, 29 FR 15366, Nov. 17, 1964; T.D. 7352, 40 FR 16666, Apr. 14, 1975]

§ 1.105-5 Accident and health plans.

(a) *In general.* Sections 104(a)(3) and 105 (b), (c), and (d) exclude from gross income certain amounts received through accident or health insurance. Section 105(e) provides that for purposes of sections 104 and 105 amounts received through an accident or health plan for employees, and amounts received from a sickness and disability fund for employees maintained under the law of a State, a Territory, or the District of Columbia, shall be treated as amounts received through accident or health insurance. In general, an accident or health plan is an arrangement for the payment of amounts to employees in the event of personal injuries or sickness. A plan may cover one or more employees, and there may be different plans for different employees or classes of employees. An accident or health plan may be either insured or noninsured, and it is not necessary that the plan be in writing or that the employee's rights to benefits under the plan be enforceable. How-

ever, if the employee's rights are not enforceable, an amount will be deemed to be received under a plan only if, on the date the employee became sick or injured, the employee was covered by a plan (or a program, policy, or custom having the effect of a plan) providing for the payment of amounts to the employee in the event of personal injuries or sickness, and notice or knowledge of such plan was reasonably available to the employee. It is immaterial who makes payment of the benefits provided by the plan. For example, payment may be made by the employer, a welfare fund, a State sickness or disability benefits fund, an association of employers or employees, or by an insurance company.

(b) *Self-employed individuals.* Under section 105(g), a self-employed individual is not treated as an employee for purposes of section 105. Therefore, for example, benefits paid under an accident or health plan as referred to in section 105(e) to or on behalf of an individual who is self-employed in the business with respect to which the plan is established will not be treated as received through accident and health insurance for purposes of sections 104(a)(3) and 105.

[T.D. 6722, 29 FR 5071, Apr. 14, 1964]

§ 1.105-6 Special rules for employees retired before January 27, 1975.

(a) *Application of section 105(d) to amounts received as retirement annuities.* An employee who retired from work before January 27, 1975, receiving payments under his employer-established plan (to which §1.72-15(a) applies) which payments were not treated as