

Coordinating Workers' Compensation Benefits For First Responders

1. Public Employee Disability Act (5 ILCS 345/1) (PEDA)
2. Illinois Pension Code
 - A. Police Officer Line of Duty Disability Pension (40 ILCS 5/3-114.1)
 - B. Police Officer Occupational Disease Disability Pension (40 ILCS 5/3-114.6)
 - C. Firefighter Line of Duty Disability Pension (40 ILCS 5/4-110)
 - D. Firefighter Occupational Disease Disability Pension (40 ILCS 5/4-110.1)
3. Public Safety Employee Benefits Act (820 ILCS 320/1) (PSEBA)



Public Employee Disability Act (5 ILCS 345/1)

- PEDA benefits are available to:
 - (1) Any full-time law enforcement officer (State, local or university)
 - (2) Any full-time firefighter (State, local or university)
 - (3) Any full or part-time employee of the Department of Corrections, any full or part-time employee of the Prisoner Review Board, any full or part-time employee of the Department of Human Services working within a penal institution or a State mental health or developmental disabilities facility operated by the Department of Human Services



Public Employee Disability Act (5 ILCS 345/1(g))

- Just like work comp, PEDA is not available for Chicago police or fire

“This Act does not apply to any home rule unit with a population of over 1,000,000”



Public Employee Disability Act (5 ILCS 345/1)

- One quick point about correctional officers

No injury to an employee of the Department of Corrections or the Prisoner Review Board working within a penal institution or an employee of the Department of Human Services working within a departmental mental health or developmental disabilities facility shall qualify the employee for benefits under this Section UNLESS the injury is the direct or indirect result of violence by inmates of the penal institution or residents of the mental health or developmental disabilities facility.



Public Employee Disability Act (5 ILCS 345/1)

What benefits are provided by PEDDA?

“The employee shall continue to be paid by the employing public entity ***on the same basis*** as he was paid before the injury”

That means **100%** of the normal salary (not 2/3 or 65%)



Public Employee Disability Act (5 ILCS 345/1)

TAX FREE

PUBLICATION 15-A Employer's Supplemental Tax Guide (Jan 05, 2017)

Chapter 6: Payments that Aren't Sick Pay

3. Payments in the nature of workers' compensation – public employees

Specifically references police and firefighters

Payments under a statute in the nature of a workers' compensation law aren't sick pay and aren't subject to employment taxes. See Regulations section 31.3121(a)(2)-1

Public Employee Disability Act (5 ILCS 345/1(b))

PEDA Employee Must Receive Same Benefits

- (1) No deduction from sick leave credits;
- (2) No deduction from compensatory time for overtime accumulations or vacation days;
- (3) Continue to accrue service credits in a public employee pension



Public Employee Disability Act (5 ILCS 345/1)

How long do PEDA benefits last?

“not longer than **one year** in relation to the same injury”

NOTE: This *does not* mean a calendar year. This means a total of **365 days** worth of PEDA benefits for a work-related injury, which **do not necessarily need to be concurrent**. See, *Albee v. City of Bloomington*, 365 Ill. App. 3d 526 (4th Dist. 2006).



Public Employee Disability Act (5 ILCS 345/1)

What is the Remedy When the Employer Refuses to Pay?

The Commission can award TTD, but not PEDDA. *See, e.g., Beuse v Industrial Comm'n*, 299 Ill. App. 3d 180 (1st Dist. 1998)

If administrative remedies are exhausted, a Complaint for Declaratory Judgment can be filed in the applicable Court against the Employer seeking PEDDA benefits



Public Employee Disability Act (5 ILCS 345/1)

PEDA's Interplay With Workers' Comp.

Collateral Estoppel

See, Mabie v Vill. of Schaumburg, 364 Ill. App. 3d 756 (1st Dist. 2006)

A grant of summary judgment was affirmed for a firefighter claiming PEDDA benefits after winning his case at the Commission and settling while the case was on appeal. The court held that the Village was collaterally estopped from relitigating the issue of causation based upon the finding in the workers compensation claim that the plaintiff's injury arose out of the course of his employment.

Public Employee Disability Act (5 ILCS 345/1)

PEDA's Interplay With Workers' Comp.

Under 345/1(d) any compensation due under the Workers' Compensation Act shall revert to the Respondent during the time the Petitioner is being paid under PEDA

Under 345/1(h), 5(b) lien rights are granted to the State (statute explicitly says State employees only – sorry everyone else!)

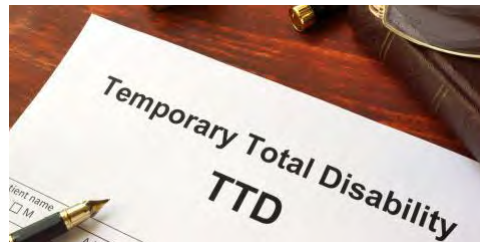
Under 345/1(c), payment of these benefits is subject to IME approval



Public Employee Disability Act (5 ILCS 345/1)

PEDA's Interplay With Workers' Comp.

What happens when PEDA runs out and the petitioner remains disabled from work?



Petitioner Practice Tip: stay ahead of the 365 day expiration and instruct your client to contact his/her employer regarding future payments owed for health insurance, union dues, etc... while on TTD

The police officer or firefighter has now reached MMI and cannot return to full duty work.

What's next?



It might be time to file an application for a Line-of-Duty Disability Pension

Line of Duty Disability Pensions

Brief Summary for Work Comp. Practitioners

- (1) The Pension Code (**40 ILCS 5/**) is divided into separate sections for **Chicago** (Article 5 for police and Article 6 for fire) and **everyone else** (Article 3 for police and Article 4 for fire)
- (2) This is not a claim against the Respondent, but rather a claim with the applicable pension fund, which is a separate and distinct legal entity
- (3) There are three basic types of applicable disability pensions:
 - (I) A Line of Duty Disability Pension;
 - (II) A Not on Duty Disability Pension; and
 - (III) An Occupational Disease Disability Pension

Line of Duty Disability Pensions A Claim With the Pension Fund

An application for benefits can normally be requested by the employee or his representative directly from the department. It typically consists of a questionnaire regarding the circumstances of the accident, medical information (present injury and prior history), and any witness information. Some pension board attorneys require formal interrogatories/requests for production as well.

IMPORTANT PRACTICE POINTER: This application should be submitted prior to the employee's termination regardless of whether he or she is at MMI!

See, *Di Falco v. Board of Trustees*, 122 Ill. 2d 22 (1988) – holding that a firefighter who was terminated prior to the filing of his pension application could not qualify, because the term “fireman” as used in section 4 is operative both at the time of impairment and application

Line of Duty Disability Pensions A Claim With the Pension Fund

<p style="text-align: center; font-size: small;">MATTOON POLICE PENSION BOARD APPLICATION FOR DISABILITY PENSION BENEFITS</p> <p>1. Name of Applicant: _____</p> <p>2. Address: _____</p> <p>3. Telephone: _____</p> <p>4. Social Security Number: _____</p> <p>5. Date of Birth: _____</p> <p>6. Current salary or salary on date of disability: \$ _____</p> <p>7. Date of probationary appointment: _____</p> <p>8. Date of regular appointment and current rank: _____</p> <p>9. Is disability claimed to be (check one): Line-of-duty: _____ Not-on-duty: _____ Heart Attack/Stroke suffered in performance of duty: _____</p> <p>10. Date of removal from payroll: _____</p> <p>11. Date of sickness, accident, injury or illness (referred to as the "event"): _____</p> <p>12. Date last worked: _____</p> <p>13. Location of event: _____</p> <p>14. Names, addresses and telephone numbers of all person(s) who witnessed the event: _____ _____ _____</p>	<p>15. Describe in detail how the sickness, accident, injury or illness was caused: _____ _____ _____</p> <p>16. Names, addresses and telephone numbers of all persons, firm, corporation or governmental entity, other than the Mattoon Police Department, which employed you on the date of the event and at any time 12 months prior to the date of the event: _____ _____ _____</p> <p>17. Describe in detail your physical or mental disability, and why you are disabled for service: _____ _____ _____</p> <p>18. Names, addresses, telephone numbers and dates of treatment of all your hospitalizations, procedures, including, but not limited to, hospitalizations, clinics, doctors, dentists, chiropractors, acupuncturists, etc. per interrogatories, and physical therapists, that have treated or evaluated you for the sickness, accident or injury for which you are claiming disability: <u>PLEASE ATTACH A TYPED/WRITTEN LIST OF NAMES, ADDRESSES, PHONE NUMBERS, AND DATES OF SERVICE.</u></p> <p>19. Names, addresses and telephone numbers of all persons, firm or corporation, which provided you with ambulatory treatment, for one year within the past five (5) years: <u>PLEASE ATTACH A TYPED/WRITTEN LIST OF NAMES, ADDRESSES, PHONE NUMBERS, AND DATES OF SERVICE.</u></p> <p>20. Names, addresses and telephone numbers of all insurance companies to which you made medical benefit applications within the last five (5) years (include claim number(s)): _____ _____ _____</p>	<p>21. Names, addresses and telephone numbers of all persons, firm or corporation against which a claim has been, is currently, or will be made because of the event: _____ _____</p> <p>22. Are you receiving benefits under the Workers' Compensation Act, the Workers' Occupational Disease Act or the Public Employee Disability Act? If so, state the name of the Application for Adjustment of Claim, the amount, and what benefits were received, are being received or will be received: _____ _____</p> <p>The attached Authorization Form must be completed and returned with and as a part of this Application.</p> <p>If insufficient space is provided to answer any of these questions, please continue your answer on a separate sheet of paper and attach as part of this Application, making reference to the question number.</p> <p>Under penalty of perjury the undersigned certifies that the statements set forth in this Application and all other documents, data and information submitted in support hereof, are true, correct and complete.</p> <p>Date: _____ Signature of Applicant: _____</p> <p>SUBSCRIBED and SWORN to before me this ____ day of _____, 2017.</p> <p>_____ NOTARY PUBLIC</p>
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Line of Duty Disability Pensions A Claim With the Pension Fund

The filing of the sworn application with a certificate of the disability gets the process started

The statute also requires that certificates of disability be filed by the police surgeon (if there be one) and **3 practicing physicians selected by the board (IMEs)**. The IMEs do not have to be unanimous and it is up to the board to weigh the evidence just as an arbitrator would in the event of conflicting medical evidence. *See, e.g., Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 540-42 (2006) (per curiam) (board's decision denying disability pension benefits upheld even though only one in four psychiatrists who examined the plaintiff concluded he was not qualified to receive benefits)

The board may require and the applicant may present other evidence of disability. (testimony of witnesses, depositions of the physicians, etc..)

Line of Duty Disability Pensions A Claim With the Pension Fund

The 5-Member Board will consist of:

Two members appointed by the mayor or president of the board of trustees of the municipality;

Two members elected from the active participants of the pension fund; and

One member elected by and from the beneficiaries.

At the hearing, the board will typically make a motion to appoint its attorney as the hearing officer, who will preside over the hearing, ask questions where necessary and make rulings regarding evidence if necessary

The rules of evidence may not necessarily apply, but the rules of fundamental fairness should.

Line of Duty Disability Pensions

The Basics of a Line of Duty Pension

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|--|---|
| <ul style="list-style-type: none"> • <u>40 ILCS 5/3-114.1 for Police</u> • 65% of the salary attached to the rank on the police force held by the officer at the date of suspension of duty or retirement • considered "on duty" while on any assignment approved by the chief of the police department of the municipality he or she serves, whether the assignment is within or outside the municipality. | <ul style="list-style-type: none"> • <u>40 ILCS 5/4-110 for Firefighters</u> • 65% of the monthly salary attached to the rank held by him or her in the fire department at the date he or she is removed from the municipality's payroll • considered "on duty" while on any assignment approved by the chief, even though away from the municipality he or she serves as a firefighter, if the assignment is related to the fire protection service of the municipality |
|--|---|

Line of Duty v. Not on Duty Pensions

- | | |
|--|---|
| <ul style="list-style-type: none"> • <u>NOT ON DUTY PENSION</u> • 50% of salary • taxable • No PSEBA • Need at least 7 years creditable service for firefighters but no minimum for police • Permanent disability | <ul style="list-style-type: none"> • <u>LINE OF DUTY PENSION</u> • 65% of salary • tax free • Potentially comes with PSEBA benefits • No minimum creditable service requirement • Permanent disability |
|--|---|

Line of Duty v. Occup. Disease Pension

- | | |
|---|--|
| <ul style="list-style-type: none"> • <u>OCCUP. DISEASE PENSION</u> • 65% of salary • tax free • No PSEBA • Need at least 5 years creditable service • Does not have to be permanent | <ul style="list-style-type: none"> • <u>LINE OF DUTY PENSION</u> • 65% of salary • tax free • Potentially comes with PSEBA benefits • No minimum creditable service requirement • Permanent injury |
|---|--|

Occupational Disease Pensions come with the presumption of compensability for cancer. 40 ILCS 5/4-110.1

Line of Duty Disability Pensions Pension Interplay With Workers' Comp.

40 ILCS 5/3-114.5 for Police Officers & 40 ILCS 5/4-114.2 for Firefighters
Reduction of benefits for corresponding benefits payable under Workers' Compensation and Workers' Occupational Diseases Acts.

Whenever a person is entitled to a disability or survivor's pension and to benefits under the Workers' Compensation Act or the Workers' Occupational Diseases Act for the same injury or disease, the benefits payable under this Article shall be reduced by the benefits received from Work Comp.

HOWEVER there shall be no reduction for payments for any medical; payments made for scheduled losses for the loss of or permanent and complete or permanent and partial loss of the use of any bodily member or the body taken as a whole under subdivision (d)2 or subsection (e) of Section 8 of the Workers' Compensation Act or Section 7 of the Workers' Occupational Diseases Act; payments made for statutorily prescribed losses under subdivision (d)2 of Section 8 of the Workers' Compensation Act or Section 7 of the Workers' Occupational Diseases Act.

Line of Duty Disability Pensions Pension Interplay With Workers' Comp.

40 ILCS 5/3-114.5 for Police Officers & **40 ILCS 5/4-114.2** for Firefighters

Reduction of benefits for corresponding benefits payable under Workers' Compensation and Workers' Occupational Diseases Acts.

ALSO there shall be no reduction for the portion of the payments which is utilized to pay attorneys' fees and the costs of securing the workers' compensation benefits under either the Workers' Compensation Act or Workers' Occupational Diseases Act.

ALSO if a person entitled to pension benefits paid an attorney fees and costs in order to obtain the pension benefits, any reduction will be reduced by that amount as well.

Line of Duty Disability Pensions Pension Interplay With Workers' Comp.

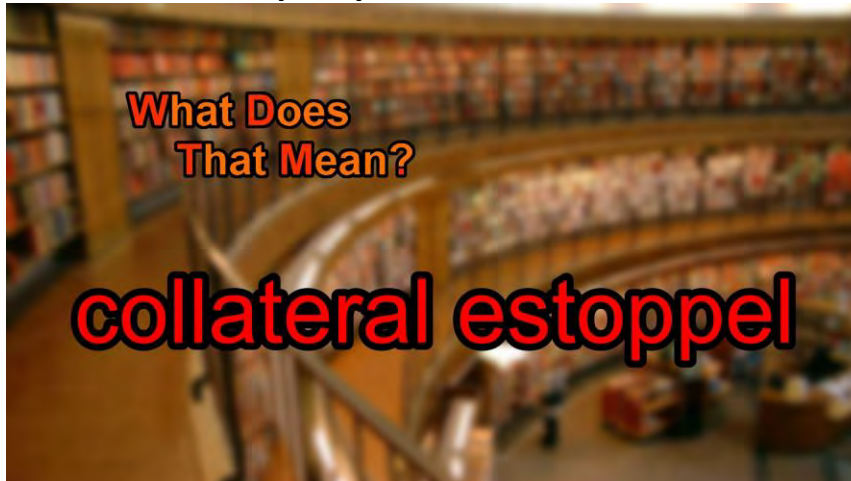
40 ILCS 5/3-114.5 for Police Officers & **40 ILCS 5/4-114.2** for Firefighters

Reduction of benefits for corresponding benefits payable under Workers' Compensation and Workers' Occupational Diseases Acts.

PRACTICE POINTER: Given the language of the offsetting provisions of the pension code, it is almost certainly in the petitioner's best interests to settle a workers' compensation claim for a large PPD award as opposed to 8(d)(1)



Line of Duty Disability Pensions Pension Interplay With Workers' Comp.



Line of Duty Disability Pensions Pension Interplay With Workers' Comp.

Collateral Estoppel?

- (1) the issue decided in the prior adjudication is identical to the issue in the current action;
- (2) the issue was "necessarily determined" in the prior adjudication;
- (3) the party against whom estoppel is asserted was a party or in privity with a party in the prior action;
- (4) the party had a full and fair opportunity to contest the issue in the prior adjudication; and
- (5) the prior adjudication must have resulted in a final judgment on the merits.

Mabie v. Village of Schaumburg, 364 Ill. App. 3d 756, 758 (2006)

Line of Duty Disability Pensions Pension Interplay With Workers' Comp. Examples of Collateral Estoppel

McCulla v Industrial Com., 232 Ill. App. 3d 517 (1st Dist. 1992) – a firefighter was denied a line-of-duty disability pension from the pension board and awarded a not-on-duty pension. The Appellate Court held that he was collaterally estopped from claiming that his accident arose out of and in the course of his employment in the IWCC claim given the pension board's finding.

City of Chicago v Il. Workers' Comp. Comm'n, 2013 IL App (1st) 121507WC – a firefighter in training had a hearing before the pension board which found him fit for full duty work effective August 3, 2009. The Appellate Court held that he was collaterally estopped from claiming that his disability went beyond August 3, 2009 in the corresponding IWCC claim.

Line of Duty Disability Pensions Pension Interplay With Workers' Comp. Examples of No Collateral Estoppel

Rhoads v Board of Trustees of Calumet City, 293 Ill. App. 3d 1070 (1st Dist. 1997) – the petitioner argued that a lump sum settlement in the workers' compensation claim collaterally estopped the pension board from finding his accident was not duty related. The Appellate Court disagreed, holding that the lack of privity between the parties meant no collateral estoppel.

Demski v Mundelein Police Pension Board, 358 Ill. App. 3d 499 (2d Dist. 2005) – a firefighter won his case at the IWCC which found causal connection. He lost his claim before the pension board. He appealed arguing collateral estoppel. The Appellate Court held that collateral estoppel did not apply because of difference in standard between "act of duty" and "arising out of", as well as lack of privity.

Pedersen v Vill. of Hoffman Estates, 2014 IL App (1st) 123402 – firefighter won a line of duty disability pension and sought benefits under PSEBA. The Appellate Court held that collateral estoppel did not apply because of a lack of privity in the parties. Pointed to a shift away from *McCulla* which now required proving privity.

Line of Duty Disability Pensions Pension Interplay With Workers' Comp.

Collateral Estoppel?

**Where does that leave us with collateral estoppel
and pension claims?**

Given the *Pederson* case and the apparent shift since *McCulla* regarding privity, I would suggest that collateral estoppel should come into play if the Respondent intervenes in the Pension claim, thus creating privity. It also seems possible to provide evidence of privity between the pension board and the Respondent, but it is not clear what evidence would be required to meet the burden.

Public Safety Employee Benefits Act PSEBA (820 ILCS 320/1)

The scariest acronym for municipal Respondents



Public Safety Employee Benefits Act PSEBA (820 ILCS 320/10)

An employer who employs a full-time law enforcement, correctional or correctional probation officer, or firefighter who suffers a catastrophic injury or is killed in the line of duty

shall pay the **entire premium** of the employer's health insurance plan for the injured employee, the injured employee's spouse, and for each dependent child of the injured employee

If the injured employee subsequently dies, the employer shall continue to pay the entire health insurance premium for the surviving spouse until remarried and for the dependent children

Public Safety Employee Benefits Act PSEBA (820 ILCS 320/1)

Why so scary?

An example out of O'Fallon, Illinois: The PSEBA benefits of two young and disabled officers with large families were said to cost the city approximately \$40,000.00 annually in each case. The rough actuarial math for these officers and their families over six decades adds up to likely costing the city close to **\$5 million dollars** when all is said and done. See, Jonathan Walters, The Disability Dilemma, Governing Magazine, (May 2007)



Public Safety Employee Benefits Act

What are the elements to qualify for PSEBA?

- (1) Under Section 10(a) an employee is required to have suffered a “catastrophic injury” in the line of duty.
- (2) Under Section 10(b) it is required that the catastrophic injury must have occurred as a result of:
 - (A) the officer’s response to fresh pursuit;
 - (B) the officer or firefighter’s response to what is reasonably believed to be an emergency;
 - (C) an unlawful act perpetrated by another; or
 - (D) during the investigation of a criminal act.

Public Safety Employee Benefits Act

What qualifies as a “catastrophic injury”?

The **Supreme Court** ruled that the phrase “catastrophic injury” is synonymous with an injury resulting in a line-of-duty disability under the pension code. *Krohe v City of Bloomington*, 204 Ill. 2d. 392 (2003)



YES! The Supreme Court reaffirmed this is the law in *Village of Vernon Hills v. Heelan*, 2015 IL 118170

Public Safety Employee Benefits Act What qualifies as a “catastrophic injury”?

In *Vernon Hills*, the Supreme Court made it “irrefutable” that if an employee wins a line of duty disability pension, then he/she suffered a catastrophic injury as a **matter of law**

The Supreme Court ruled there is no due process issue and instructed employers that if they want an opportunity to dispute PSEBA, they should intervene in the pension claim



Public Safety Employee Benefits Act What qualifies as Causation Under 10(b)

The injury must occur in response to what is reasonably believed to be an unforeseen circumstance involving imminent danger to a person or property requiring an urgent response. *Gaffney v. Bd. of Trustees of Orland Fire Protection Dist.*, 2012 IL 110012

The employee’s response to what is reasonably believed to be an emergency **can include training exercises**. However, causation will be decided on a case-by-case basis depending upon whether the facts demonstrate the plaintiff reasonably believed there was an emergency situation.



Public Safety Employee Benefits Act

Instructive Examples of Causation 10(b)

(1) In a live fire training drill, the hose line became entangled in an unseen object, resulting in an injury to the plaintiff. The entanglement of the hose in the unseen object is certainly an unforeseen circumstance. The response to this event was also unforeseen. The plaintiff was required to follow the hose line back to the obstruction and free the hose with no visibility and the risk of becoming disoriented in the smoke-filled building. Thus, this qualifies! *Gaffney v. Bd. of Trustees of Orland Fire Protection Dist.*, 2012 IL 110012

(2) The second set of facts considered in *Gaffney* was a firefighter who was required to participate in a training exercise simulating a fire. The plaintiff's mask was "blacked out" to simulate live fire conditions, but there was no live fire during the exercise. If a firefighter's air supply ran out, he or she would stop participating and take off the mask. The training exercise was conducted under planned, "controlled conditions." No unforeseen developments arose during this drill, thus no emergency. *Gaffney v. Bd. of Trustees of Orland Fire Protection Dist.*, 2012 IL 110012

Public Safety Employee Benefits Act

Instructive Examples of Causation 10(b)

(3) An officer suffered a head injury while reaching into his squad car for his police radio to respond to a request from dispatch. The Supreme Court ruled that answering a call from dispatch is not an unforeseen circumstance. It could evolve into an emergency and unforeseen circumstances, but not in this case. *Vaughn v. City of Carbondale*, 2016 IL 119181

(4) An officer slipped and fell while cleaning chunks of asphalt off the highway after pulling over and activating his emergency signals. This qualified as an emergency situation. *Springborn v Village of Sugar Grove*, 2013 IL APP (2d) 120861

(5) An officer was investigating an auto accident when he noticed a fallen traffic signal. He injured his back while attempting to move the signal. This qualified as an emergency. *Springborn v Village of Sugar Grove*, 2013 IL APP (2d) 120861

Public Safety Employee Benefits Act Occupational Disease Cases Do Not Qualify!

See, *Bremer v City of Rockford*, 2016 IL 119889 – the Supreme Court held that the legislature did not intend for the term “catastrophic injury” to be synonymous with a disease resulting in an award for an occupational disease pension.



Coordinating Workers' Compensation Benefits For First Responders

Any Questions?

Brent R. Eames
Whiteside & Goldberg, Ltd.
beames@wglawgroup.com
312-334-6875



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Future Developments

For the latest information about developments related to Pub. 15-A, such as legislation enacted after it was published, go to IRS.gov/pub15a.

What's New

Social security and Medicare tax for 2017. The social security tax rate is 6.2% each for the employee and employer, unchanged from 2016. The social security wage base limit is \$127,200.

The Medicare tax rate is 1.45% each for the employee and employer, unchanged from 2016. There is no wage base limit for Medicare tax.

Social security and Medicare taxes apply to the wages of household workers you pay \$2,000 or more in cash wages in 2017. Social security and Medicare taxes apply to

ulations sections 1.409A-1 through 1.409A-6. Notice 2008-113 provides guidance on the correction of certain contribution failures of a NQDC plan. Notice 2008-113, 2008-51 I.R.B. 1305, is available at IRS.gov/irb/2008-51_IRB/ar12.html. Also see Notice 2010-6, 2010-3 I.R.B. 275, available at IRS.gov/irb/2010-03_IRB/ar08.html and Notice 2010-80, 2010-51 I.R.B. 853, available at IRS.gov/irb/2010-51_IRB/ar08.html.

Social security, Medicare, and FUTA taxes. Employer contributions to nonqualified deferred compensation (NQDC) plans, as defined in the applicable regulations, are treated as wages subject to social security, Medicare, and FUTA taxes when the services are performed or the employee no longer has a substantial risk of forfeiting the right to the deferred compensation, whichever is later.

Amounts deferred are subject to social security, Medicare, and FUTA taxes at that time unless the amount that is deferred can't be reasonably ascertained; for example, if benefits are based on final pay. If the value of the future benefit is based on any factors that aren't yet reasonably ascertainable, you may choose to estimate the value of the future benefit and withhold and pay social security, Medicare, and FUTA taxes on that amount. You'll have to determine later, when the amount is reasonably ascertainable, whether any additional taxes are required. If taxes aren't paid before the amounts become reasonably ascertainable, when the amounts become reasonably ascertainable they are subject to social security, Medicare, and FUTA taxes on the amounts deferred plus the income attributable to those amounts deferred. For more information, see Regulations sections 31.3121(v)(2)-1 and 31.3306(r)(2)-1.

Tax-Sheltered Annuities

Employer payments made by a public educational institution or a tax-exempt organization to purchase a tax-sheltered annuity for an employee (annual deferrals) are included in the employee's social security and Medicare wages, if the payments are made because of a salary reduction agreement. However, they aren't included in box 1 on Form W-2 in the year the deferrals are made and aren't subject to federal income tax withholding. See Regulations section 31.3121(a)(5)-2 for the definition of a salary reduction agreement.

Contributions to a Simplified Employee Pension (SEP)

An employer's SEP contributions to an employee's individual retirement arrangement (IRA) are excluded from the employee's gross income. These excluded amounts aren't subject to social security, Medicare, or FUTA taxes, or federal income tax withholding. However, any SEP contributions paid under a salary reduction agreement (SARSEP) are included in wages for purposes of social security, Medicare, and FUTA taxes. See Pub. 560 for more information about SEPs.

Salary reduction simplified employee pensions (SARSEP) repealed. You may not establish a SARSEP after 1996. However, SARSEPs established before January 1, 1997, may continue to receive contributions.

SIMPLE Retirement Plans

Employer and employee contributions to a savings incentive match plan for employees (SIMPLE) retirement account (subject to limitations) are excludable from the employee's income and are exempt from federal income tax withholding. An employer's nonelective (2%) or matching contributions are exempt from social security, Medicare, and FUTA taxes. However, an employee's salary reduction contributions to a SIMPLE are subject to social security, Medicare, and FUTA taxes. For more information about SIMPLE retirement plans, see Pub. 560.

6. Sick Pay Reporting

Special rules apply to the reporting of sick pay payments to employees. How these payments are reported depends on whether the payments are made by the employer or a third party, such as an insurance company.

Sick pay is usually subject to social security, Medicare, and FUTA taxes. For exceptions, see *Social Security, Medicare, and FUTA Taxes on Sick Pay*, later in this section. Sick pay may also be subject to either mandatory or voluntary federal income tax withholding, depending on who pays it.

Sick Pay

Sick pay generally means any amount paid under a plan because of an employee's temporary absence from work due to injury, sickness, or disability. It may be paid by either the employer or a third party, such as an insurance company. Sick pay includes both short- and long-term benefits. It is often expressed as a percentage of the employee's regular wages.

Payments That Aren't Sick Pay

Sick pay doesn't include the following payments.

1. **Disability retirement payments.** Disability retirement payments aren't sick pay and aren't discussed in this section. Those payments are subject to the rules for federal income tax withholding from pensions and annuities. See [section 8](#).
2. **Workers' compensation.** Payments because of a work-related injury or sickness that are made under a workers' compensation law aren't sick pay and aren't subject to employment taxes. But see *Payments in the nature of workers' compensation—public employees* next.

3. **Payments in the nature of workers' compensation—public employees.** State and local government employees, such as police officers and firefighters, sometimes receive payments due to an injury in the line of duty under a statute that isn't the general workers' compensation law of a state. If the statute limits benefits to work-related injuries or sickness and doesn't base payments on the employee's age, length of service, or prior contributions, the statute is "in the nature of" a workers' compensation law. Payments under a statute in the nature of a workers' compensation law aren't sick pay and aren't subject to employment taxes. For more information, see Regulations section 31.3121(a)(2)-1.
4. **Medical expense payments.** Payments under a definite plan or system for medical and hospitalization expenses, or for insurance covering these expenses, aren't sick pay and aren't subject to employment taxes.
5. **Payments unrelated to absence from work.** Accident or health insurance payments unrelated to absence from work aren't sick pay and aren't subject to employment taxes. These include payments for:
 - a. Permanent loss of a member or function of the body,
 - b. Permanent loss of the use of a member or function of the body, or
 - c. Permanent disfigurement of the body.

Example. Donald was injured in a car accident and lost an eye. Under a policy paid for by Donald's employer, Delta Insurance Co. paid Donald \$20,000 as compensation for the loss of his eye. Because the payment was determined by the type of injury and was unrelated to Donald's absence from work, it isn't sick pay and isn't subject to federal employment taxes.

Sick Pay Plan

A sick pay plan is a plan or system established by an employer under which sick pay is available to employees generally or to a class or classes of employees. This doesn't include a situation in which benefits are provided on a discretionary or occasional basis with merely an intention to aid particular employees in time of need.

You have a sick pay plan or system if the plan is in writing or is otherwise made known to employees, such as by a bulletin board notice or your long and established practice. Some indications that you have a sick pay plan or system include references to the plan or system in the contract of employment, employer contributions to a plan, or segregated accounts for the payment of benefits.

Definition of employer. The employer for whom the employee normally works, a term used in the following discussion, is either the employer for whom the employee was working at the time that the employee became sick or disabled or the last employer for whom the employee

worked before becoming sick or disabled, if that employer made contributions to the sick pay plan on behalf of the sick or disabled employee.

Note. Contributions to a sick pay plan through a cafeteria plan (by direct employer contributions or salary reduction) are employer contributions unless they are after-tax employee contributions (that is, included in taxable wages).

Third-Party Payers of Sick Pay

Employer's agent. An employer's agent is a third party that bears no insurance risk and is reimbursed on a cost-plus-fee basis for payment of sick pay and similar amounts. A third party may be your agent even if the third party is responsible for determining which employees are eligible to receive payments. For example, if a third party provides administrative services only, the third party is your agent. If the third party is paid an insurance premium and isn't reimbursed on a cost-plus-fee basis, the third party isn't your agent. Whether an insurance company or other third party is your agent depends on the terms of their agreement with you.

A third party that makes payments of sick pay as your agent isn't considered the employer and generally has no responsibility for employment taxes. This responsibility remains with you. However, under an exception to this rule, the parties may enter into an agreement that makes the third-party agent responsible for employment taxes. In this situation, the third-party agent should use its own name and EIN (rather than your name and EIN) for the responsibilities that it has assumed.

Third party not employer's agent. A third party that makes payments of sick pay other than as an agent of the employer is liable for federal income tax withholding (if requested by the employee) and the employee part of the social security and Medicare taxes.

The third party is also liable for the **employer** part of the social security and Medicare taxes, and the FUTA tax, unless the third party transfers this liability to the employer for whom the employee normally works. This liability is transferred if the third party takes the following steps.

1. Withholds the **employee** part of social security and Medicare taxes from the sick pay payments.
2. Makes timely deposits of the **employee** part of social security and Medicare taxes.
3. Notifies the employer for whom the employee normally works of the payments on which employee taxes were withheld and deposited. The third party must notify the employer within the time required for the third party's deposit of the **employee** part of the social security and Medicare taxes. For instance, if the third party is a monthly schedule depositor, it must notify the employer by the 15th day of the month following the month in which the sick pay payment is made because that is the day by which the deposit is required to be made. The third party should notify the employer as soon as information on payments is