



TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

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FSLG Interim Memo #53  
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MEMORANDUM FOR ALL EMPLOYEES, FEDERAL, STATE AND LOCAL  
GOVERNMENTS DIVISION

FROM: Paul Marmolejo, Director /s/ *Paul A. Marmolejo*  
Federal, State and Local Governments Division

SUBJECT: Examination Reports Involving Reclassification of Workers Covered by  
Section 218 Agreements

**Purpose:**

This memorandum extends the guidance provided in FSLG Interim Memo #50 (Control No. TE/GE-04-1112-09) issued November 20, 2012. The memorandum clarifies use of reports used in examinations involving reclassification of workers who are covered by a 218 agreement. Specific guidelines are set forth to distinguish between the use of Form 2504 and Form 2504WC with respect to agreed and unagreed cases.

**Agreed Cases**

When a "worker classification" issue involves workers covered under a section 218 agreement and the taxpayer agrees to the proposed "worker reclassification" adjustments, then no Letter 950 is used. Instead, because the taxpayer agrees, both the FICA and FIT can be reported on a Form 2504-WC, which includes a waiver of the restrictions on assessment under IRC 7436. This process is sufficient because as long as the taxpayer signs the Form 2504-WC, the taxpayer has waived any restrictions on assessment that may apply under IRC 7436 and agreed to the assessment of both FICA and FIT. If the taxpayer changes its mind after waiving the restrictions on assessment and wishes to litigate either the FICA tax or the FIT issue, refund courts remain available to it. A taxpayer can pay the tax, file a claim for refund, and after the claim is denied or after six months if the IRS does not act, it can file a refund suit in a district court or the Court of Federal Claims.

This guidance will be included in IRM 4.90.9, *Workpapers and Report Writing*.

## **Unagreed Cases**

When a "worker classification" issue involves workers covered under a Section 218 Agreement and the taxpayer will not agree, there are two separate issues, one regarding the FICA tax and one regarding the FIT.

(1) The proposed FICA taxes will be reported on Form 2504, which will be issued with Letter 950-D. This is because workers covered under a Section 218 Agreement are employees for purposes of the FICA without application of the common law rules. See IRC 3121(d)(4). The determination of whether an employee is covered under a Section 218 Agreement is made by the Social Security Administrator and the Social Security Administration, not by the IRS. Because the proposed FICA taxes do not result from a determination by the IRS, the restrictions on assessment in IRC 7436 do not apply, and there is no right to Tax Court review.

(2) The proposed FIT will be reported on Form 2504-WC, which will be issued with Letter 950-C. This is because the IRS has jurisdiction over the determination of whether state and local workers are employees for federal income tax withholding purposes. There is no parallel of IRC 3121(d)(4) in the FIT provisions making workers covered under a Section 218 Agreement employees by statute for FIT purposes. An IRS determination that workers covered under a Section 218 Agreement are employees for purposes of FIT is a determination under IRC 7436 and therefore is subject to Tax Court review.

## **Effect on Other Documents:**

This guidance supersedes Interim Memo #50, and adds to procedures contained in IRM 4.90.9, *Workpapers and Report Writing*.

## **Effective Date:**

This memorandum is effective upon issuance.

This memorandum will be posted to the IRS Freedom of Information Act electronic reading room (e-FOIA) for public inspection.

## **Contact:**

If you have any questions, please contact Dwayne Jacobs, CPM Manager, at (307) 672-7425 X33.