

Part III. Administrative, Procedural, and Miscellaneous

Employee Consents

Notice 2015-15

PURPOSE AND SCOPE

This notice contains a proposed revenue procedure providing guidance to employers on employee consents used to support a claim for refund under § 6402 of the Internal Revenue Code and § 31.6402(a)-2 of the Employment Tax Regulations for overpaid taxes under the Federal Insurance Contributions Act (FICA) and the Railroad Retirement Tax Act (RRTA).

Questions have arisen concerning what information must be provided in an employee consent and whether an employee consent may be requested, furnished, and retained in an electronic format. The proposed revenue procedure clarifies that, in addition to providing the relevant name, address, and taxpayer identification number, a valid employee consent must identify the basis of the claim for refund and be signed by the employee under penalties of perjury. The proposed revenue procedure also provides guidance as to what constitutes “reasonable efforts” to secure an employee consent when a consent is not obtained.

The proposed revenue procedure permits, but does not require, the employee consent to be requested, furnished, and retained in an electronic format, as an alternative to a paper format. The proposed revenue procedure is not intended to require employers to solicit new employee consents for those requested prior to the date of publication of the final revenue procedure in the Internal Revenue Bulletin. However, an employer may rely on this proposed revenue procedure for employee consents requested before the date that the final revenue procedure is published.

REQUEST FOR COMMENTS

The IRS requests comments on this revenue procedure. In particular, the IRS requests comments regarding the specific requirements for a request for a consent and for the employee consent itself, the requirements for electronic employee consents, and the steps that will constitute “reasonable efforts” to obtain an employee consent. In particular, comments are requested on ways to formulate requirements that advance the goal of making the process more efficient while protecting the interests of employees.

Comments may be submitted on or before **31 May 2015** to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2015-15), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224. Comments may also be hand-delivered Monday through Friday between the hours of 8:00 a.m. to 4:00 p.m. to the Courier’s Desk,

Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Attn: CC:PA:LPD:PR (Notice 2015-15). Comments may also be submitted electronically via the following email address: Notice.Comments@irs.counsel.treas.gov. Please include "Notice 2015-15" in the subject line of any electronic submission.

DRAFTING INFORMATION

For further information regarding this notice contact Cynthia McGreevy of the Office of the Associate Chief Counsel (Tax Exempt and Government Entities). Mrs. McGreevy may be contacted at 202-317-4774 (not a toll-free call).

PROPOSED REVENUE PROCEDURE

SECTION 1. PURPOSE

.01 The purpose of this revenue procedure is to provide guidance to employers on the requirements for employee consents used by an employer to support a claim for refund of overpaid taxes under the Federal Insurance Contributions Act (FICA) and the Railroad Retirement Tax Act (RRTA) pursuant to § 6402 of the Internal Revenue Code and § 31.6402(a)-2 of the Employment Tax Regulations. FICA taxes include the old-age, survivors, and disability insurance taxes imposed on employees under § 3101(a) and on employers under § 3111(a), also known as social security taxes, and the hospital insurance tax imposed on employees under § 3101(b) and on employers under § 3111(b), also known as Medicare taxes. Under RRTA, railroad employment is subject to a system of taxes separate and distinct from the taxes imposed under FICA, which covers most other employees. Tier 1 RRTA taxes, imposed under §§ 3201(a), 3211(a), and 3221(a), provide benefits equivalent to social security and Medicare benefits.

.02 This revenue procedure clarifies the basic requirements for a request for a consent and for the employee consent itself, including the requirement that an employee consent must include the basis for the claim for refund and be signed by the employee under penalties of perjury. In addition, this revenue procedure permits an employee consent to be requested, furnished, and retained in an electronic format as an alternative to a paper format. It also contains guidance concerning what constitutes "reasonable efforts" if an employee consent is not secured in order to permit the employer to claim a refund of the employer share of overpaid FICA or RRTA taxes.

SECTION 2. SCOPE

.01 This revenue procedure applies to employee consents that are used by an employer to support a claim for refund of overpaid FICA or RRTA taxes. Section 31.6402(a)-2 provides rules under which a refund claim for an overpayment of FICA or RRTA tax may be made. For ease of reading, the remainder of the revenue procedure will discuss FICA taxes but this revenue procedure applies equally to RRTA taxes.

.02 Any references to Medicare tax or FICA tax in this revenue procedure do not include Additional Medicare Tax imposed by § 3101(b)(2). Under § 3102(f), an

employer is responsible for withholding the 0.9% Additional Medicare Tax from the wages it pays to an employee in excess of \$200,000 in a calendar year. However, under § 31.6402(a)-2(a)(1)(iii), employers may claim a refund of overpaid Additional Medicare Tax only if the employer did not withhold the overpaid Additional Medicare Tax from the employee's wages. An employee may claim a refund of overpaid Additional Medicare Tax on Form 1040, U.S. Individual Income Tax Return, or, if the employee has filed Form 1040, on Form 1040X, Amended U.S. Individual Income Tax Return. Thus, the rules for employee consents are not applicable to overpayments of Additional Medicare Tax.

SECTION 3. TERMS

For purposes of this revenue procedure-

.01 "Written statement" means a statement required by § 31.6402(a)-2(a)(2)(ii) with respect to amounts collected in a year prior to the calendar year in which the credit or refund is claimed, certifying that the employee has not made any previous claims (or the claims were rejected) and will not make any future claims for refund or credit of the amount of the overcollection.

.02 "Email address" refers to any employee email address on a secure employer-provided email network provided to its employee in the regular course of business. To the extent that a personal email address is used in lieu of, or in addition to, an employee email address, an email address includes only the most recent personal email address provided by the employee to the employer that is maintained in an employer's personnel records in the regular course of business. It does not include an email address obtained from a third-party source other than one obtained from an authorized representative of the employee.

.03 "Employee" includes both current and former employees.

.04 "Last known address" means the employee's address of record in the employer's personnel records, or as updated by any notification of change of address from the United States Postal Service.

.05 "Signature" includes an original, facsimile (fax), or other electronic signature. A fax signature may be transmitted either online or telephonically (*i.e.*, delivered via traditional fax machine). An electronic signature must meet the requirements stated in section 6 of this revenue procedure, as modified by any subsequently published guidance.

SECTION 4. BACKGROUND

.01 In general, employers may choose to correct FICA tax overpayment errors by either making an interest-free adjustment or filing a claim for refund. Section 31.6402(a)-2 provides rules under which a refund claim for an overpayment of FICA tax may be made. The claim must be filed on the form prescribed by the IRS and must designate the return period to which the claim relates, explain in detail the grounds and

facts relied upon to support the claim, and set forth such other information as may be required by § 31.6402(a)-2 and by the instructions relating to the form used to make the claim. Employers use the employment tax “X” form (e.g., Form 941-X, Adjusted Employer’s QUARTERLY Federal Tax Return or Claim for Refund) corresponding to the employment tax return filed (e.g., Form 941, Employer’s QUARTERLY Federal Tax Return) to claim refunds. For examples showing how the claim for refund process operates, see Rev. Rul. 2009-39, 2009-52 I.R.B. 951, which applies the regulations to different situations.

.02 An employer may not receive a refund of the employer share of overpaid FICA tax without making reasonable efforts to protect its employee’s interests. See § 31.6402(a)-2; Rev. Rul. 81-310, 1981-2 C.B. 241; *Atlantic Department Stores, Inc. v. United States*, 557 F.2d 957 (2d Cir. 1977). An employer has a duty to make reasonable efforts to protect its employees’ interests in any employee share of the refund. Section 31.6402(a)-2(a)(1)(ii) specifically provides that no refund for the employer share of the overpaid FICA taxes will be allowed unless the employer has first repaid or reimbursed its employee or has secured the employee’s consent to the allowance of the claim for refund and includes a claim for the refund of such employee tax. Section 31.6402(a)-2(a)(2) generally requires the employer to certify, as part of the claim process, that the employer has repaid or reimbursed the employee share of the overpayment of FICA tax to the employee or has secured the written consent of the employee to allowance of the refund or credit. For refund claims for employee tax overcollected in prior years, the employer must also certify that it has obtained the employee’s written statement confirming that the employee has not made any previous claims (or the claims were rejected) and will not make any future claims for refund or credit of the amount of the overcollection. However, these requirements do not apply to the extent that the taxes were not withheld from the employee. Nor do these requirements apply if, after the employer’s reasonable efforts to obtain the employee’s consent (including any required written statement), the employer cannot locate the employee or the employee does not furnish either the employee consent or a response indicating that the employee is not authorizing the employer to claim a refund of FICA taxes on his or her behalf. In these cases, the employer may claim a refund of the overpaid employer share of the tax but may not obtain a refund of the employee share. Under *Chicago Milwaukee Corp. v. United States*, 40 F.3d 373, 375 (Fed. Cir. 1994), an employer need not repay or reimburse its employees or obtain the employees’ consents for the filing of a refund claim prior to filing the claim in order for the claim to be valid. However, the employer must repay or reimburse its employees or obtain the employees’ consents before the IRS can grant the claim.

.03 If an employer files a claim for refund based on a certification that consents were secured from the employees, and the IRS grants the refund, the IRS will refund the taxes (including any applicable interest paid pursuant to § 6611) to the employer, which will then give each employee his or her share.

.04 Under § 31.6402(a)-2(a)(2)(i), the employer must retain the employee consent (including any required written statement) as part of the employer’s records.

.05 Section 6061 provides that any return, statement, or other document required to be made under any provision of the Code or regulations be signed in accordance with forms or regulations prescribed by the Secretary. Section 6065 requires that, except as otherwise provided by the Secretary, any such document must contain or be verified by a written declaration that it is made under the penalties of perjury. To facilitate taxpayers' compliance with the verification requirement of § 6065, the IRS has long provided that an acceptable "penalties of perjury statement" should be located immediately above the required signature and include substantially the following language: "I declare, under penalties of perjury, that I have examined the above statements and information and to the best of my knowledge and belief they are true, correct, and complete."

.06 Under § 31.6001-1 and § 31.6001-2, an employer that claims a refund must retain a complete and detailed record with respect to the tax to which the claim relates, including a copy of any statement or other documents, for as long as the contents may become material in the administration of any internal revenue law, but not less than four years after the date the claim is filed.

SECTION 5. REQUIREMENTS FOR A REQUEST FOR A CONSENT AND REQUIREMENTS FOR AN EMPLOYEE CONSENT

.01 In general, a request for a consent may be solicited on paper or in an electronic format. The request must clearly inform the employee of the purpose of the employee consent. It must provide a name and contact information for any questions by the employee and must give a reasonable period of time to respond, which period shall not be less than 45 days from the date of the request. A request for a consent may include an express presumption that if an employee's response has not been received by the employer during this time period, the employee will be considered to have refused to provide the employee consent. In no case, however, may a failure to respond be deemed consent. A request for consent may also include a request that the employee keep the employer informed about any change in mailing address or email address. Finally, it must clearly state that the employee will be repaid or reimbursed the employee share of the overpayment (plus any interest allocable to the employee share) to the extent it is refunded by the IRS.

.02 The employer may furnish a paper request for a consent by personal delivery or by mail to the employee's last known address by the United States Postal Service or a designated delivery service under § 7502(f) . An electronic request for a consent may be sent to the employee's email address in accordance with section 6 of this revenue procedure.

.03 An employee consent must meet the following requirements:

- (1) Contain the name, address, and social security number of the employee;
- (2) Contain the name, address, and employer identification number of the employer;

(3) Contain the tax period(s), type of tax (e.g., social security and Medicare taxes), and the amount of tax for which the employee consent is provided;

(4) Affirmatively state that the employee authorizes the employer to claim a refund for the overpayment of the employee share of tax;

(5) For amounts collected in a prior year, include the employee's written statement;

(6) Identify the basis of the claim (e.g., request for refund of the social security and Medicare taxes withheld with regard to excess transit benefits provided in 2014 due to a retroactive legislative change); and

(7) Be dated and contain the employee's signature under penalties of perjury. The penalties of perjury statement should be located immediately above the required signature.

.04 The request for a consent and the employee consent itself (including any required written statement), or the employee's response indicating that the employee does not authorize the employer to claim a refund of FICA taxes on his or her behalf, must be retained as long as their contents may be material in the administration of any internal revenue law, but not less than four years after the date the claim is filed. Copies must be submitted to the IRS if requested.

SECTION 6. ELECTRONIC COMMUNICATIONS, EMPLOYEE CONSENTS, AND RECORD RETENTION PERMITTED

.01 This revenue procedure permits an employer to establish an electronic system to request, furnish, and retain employee consents, including permitting employees to submit an employee consent by fax. It also permits the retention in an electronic format of requests and employee consents submitted in a paper format. The rules for furnishing and retaining employee consents also apply to an employee's response indicating that the employee does not authorize the employer to claim a refund of FICA taxes on his or her behalf. Electronic information obtained under this revenue procedure is subject to the basic requirements that the IRS considers to be essential for record retention set forth in Rev. Proc. 97-22, 1997-1 C.B. 652, Rev. Proc. 98-25, 1998-1 C.B. 689, and any subsequently published guidance.

.02 The electronic system must be reasonably accessible to the employee and must be reasonably designed to preclude anyone other than the employee from giving the employee consent. It must provide the electronic request for a consent to the employee in a manner no less understandable than a written paper document.

.03 Electronic records and signatures are given the same legal effect as their paper counterparts. Any signature should be located immediately below the required penalties of perjury statement. Until further guidance is published, an electronic signature is acceptable as provided below:

(1) A person (*i.e.*, the signer) must use an acceptable electronic form of signature; for purposes of this revenue procedure, this includes a typed name that is within or at the end of an electronic record, such as typed into a signature block or other acceptable electronic form, or as otherwise identified in IRS published guidance, publications, forms, instructions, or on the irs.gov website;

(2) The electronic form of signature must be executed by a person with the intent to sign the electronic record (*e.g.*, to indicate a person's approval of the information contained in the electronic record);

(3) The electronic form of signature must be attached to or associated with the electronic record being signed;

(4) There must be a means to identify and authenticate a particular person as the signer; and

(5) There must be a means to preserve the integrity of the signed record.

.04 No employee may be required to provide an employee consent in an electronic format. Thus, the employee must be given the option to provide the employee consent in a paper format. Upon request, the employer must provide a paper copy of any electronic communications to the employee, including the request for a consent.

.05 Any electronic system used for purposes of obtaining employee consents must inform the employee that he or she must make the declaration contained in the penalties of perjury statement and that the declaration is made by signing the employee consent.

.06 Upon request by the IRS, the employer must supply a hard copy of the electronic employee consent or a response indicating that the employee was not authorizing the employer to claim a refund of FICA taxes on his or her behalf. The employer must include a statement that, to the best of the employer's knowledge and belief, the electronic employee consent or response was furnished by the named employee.

SECTION 7. REASONABLE EFFORTS

.01 Generally, if the employer has not repaid or reimbursed an employee, a refund for the employer share of the overpaid FICA taxes will not be allowed unless the employer has secured the employee's consent and included a claim for the refund of such employee tax. However, these requirements do not apply if, after the employer's reasonable efforts to obtain the employee's consent, the employer cannot locate the employee or the employee does not furnish either the employee consent or a response indicating that the employee is not authorizing the employer to claim a refund of FICA taxes on his or her behalf.

.02 The employer will be deemed to have made reasonable efforts with respect to a request for a consent if:

(1) The employer properly requests a consent of the employee as provided in this revenue procedure;

(2) A request for a consent sent electronically provides for an acknowledgement of receipt of the email message. The request must specifically ask the employee to acknowledge receipt of the request for a consent (e.g., by clicking on a voting button (YES) or by sending a reply message to the employer). A read-receipt message is not sufficient;

(3) The employer retains a record of mailing the request for a consent, record of emailing the request for a consent (including acknowledgement of receipt of the email message), or record of personal delivery to the employee who does not furnish an employee consent, or a response indicating that the employee was not authorizing the employer to claim a refund of FICA taxes on his or her behalf;

(4) In the event the mailing is undeliverable, the employer makes an effort to determine the employee's current address and, if a new address is discovered, the employer delivers a request for a consent in a paper format to the new address or delivers a request for a consent by email or by personal delivery, giving the employee not less than 45 days from the date of the request to reply to the subsequent request; and

(5) In the event of an email delivery failure (e.g., the employer is notified that the message the employer tried to send did not reach the employee because of a problem with the email address) or in the event that the employee does not acknowledge receipt of the email message, the employer mails a request for a consent in a paper format to the employee's last known address or provides a request for a consent to the employee by personal delivery giving the employee not less than 45 days from the date of the request to reply to the subsequent request.

SECTION 8. EFFECTIVE DATE

This revenue procedure applies to employee consents requested on or after [the date of publication of the final revenue procedure in the Internal Revenue Bulletin]. This revenue procedure will not affect the validity of any employee consent received pursuant to a request made prior to [the date of publication of the final revenue procedure in the Internal Revenue Bulletin].

SECTION 9. PAPERWORK REDUCTION ACT

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid Office of Management and Budget (OMB) control number. This revenue procedure does not impose any new information collection burden. The collection of information contained in this revenue procedure is in § 31.6402(a)-2 of the regulations which has been

previously approved by the OMB under control number 1545-2097 and in the existing claim forms (e.g., Forms 941-X, 941-X(PR), 943-X, 943-X(PR), 944-X, 944-X(PR), 944-X(SP), and CT-1X).

The collection of information is required to obtain a refund of FICA taxes. The likely respondents are employers and employees. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law, but, not less than four years after the date the claim is filed. Generally, tax returns and tax return information are confidential, as required by § 6103.

SECTION 10. DRAFTING INFORMATION

For further information regarding this revenue procedure, contact Cynthia McGreevy of the Office of the Associate Chief Counsel (Tax Exempt and Government Entities) at 202-317-4774 (not a toll-free call).