

26 CFR 31.6402(a)-2. Credit or refund of tax under Federal Insurance Contributions Act or Railroad Retirement Tax Act.

(Also: 3101, 3111, 3201, 3221, 6001, 6065, and 6402)

Employee Consents

REVENUE PROCEDURE 2017-28

## SECTION 1. PURPOSE

.01 The purpose of this revenue procedure is to provide guidance to employers on the requirements for employee consent used by an employer to support a claim for credit or refund<sup>1</sup> 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 both a request for employee consent and for the employee consent, including the requirement that an employee consent must include the basis for the claim for refund and be signed by the

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<sup>1</sup> For ease of reading, the revenue procedure will refer to “claim,” “claim for refund,” or “refund claim” interchangeably, and these terms will include a claim for credit.

employee under penalties of perjury. In addition, this revenue procedure permits, but does not require, 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 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. PRINCIPAL CHANGES FROM DRAFT REVENUE PROCEDURE

.01 In Notice 2015-15, 2015-9 I.R.B. 687, the Internal Revenue Service (IRS) asked for comments concerning a proposed revenue procedure (included in the notice) providing guidance to employers on employee consents used to support a claim for refund for overpaid FICA and RRTA taxes. After considering the public comments, this revenue procedure adopts the proposed revenue procedure with certain minor changes. Some commentators asked that the amount of time afforded an employee to respond to a request for consent be reduced from 45 to 21 days. This revenue procedure does not reduce the time period because the IRS is concerned that 21 days may not be a sufficient amount of time for an employee to consider and respond to a request for consent. However, in response to these comments, this revenue procedure shortens the time to respond to a second request for consent from 45 to 21 days. Other commentators expressed concerns about identity theft, requesting clarification whether a truncated taxpayer identification number (TTIN) might be used in a consent. In response to these comments, this revenue procedure permits the use of a TTIN in place of the complete social security number (SSN) of the employee if the employer prepares a consent for the employee to sign and prepopulates the employee’s taxpayer

identification number with the TTIN. A TTIN may not be used if the employer merely requests that the employee provide an SSN as the employee's taxpayer identification number or if the employee furnishes the number via the consent.<sup>2</sup>

.02 This revenue procedure also adds a new requirement that all requests for consent must indicate that an employee cannot authorize the employer to claim a refund on the employee's behalf for any overpaid Additional Medicare Tax. See section 3.02 of this revenue procedure for an explanation of Additional Medicare Tax.

### SECTION 3. 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 and wages, but this revenue procedure applies equally to RRTA taxes and RRTA compensation. However, any references to Medicare tax or FICA tax in this revenue procedure do not include Additional Medicare Tax imposed by § 3101(b)(2).

.02 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

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<sup>2</sup> Some of the comments received were beyond the scope of this revenue procedure and are not addressed in this revenue procedure. Specifically, several commentators requested guidance on when consent is required under certain identified fact patterns, rather than addressing the required content of a request for consent or the employee consent. Those comments may be addressed in future guidance.

a refund of overpaid Additional Medicare Tax on Form 1040, U.S. Individual Income Tax Return, or, if the employee has previously filed Form 1040 for the year, on Form 1040X, Amended U.S. Individual Income Tax Return. Since employees may not be aware that a refund will not include overpaid Additional Medicare Tax, any employer request for consent must clearly inform the employee that the employee cannot authorize the employer to claim a refund on the employee's behalf for any overpaid Additional Medicare Tax. See section 6.01 of this revenue procedure.

#### SECTION 4. 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 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 of the amount of the overcollection.

.02 "Email address" refers to any employee email address on an employer-provided email network provided to its employee in the regular course of business. Email address also includes a personal email address if it is 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 (e.g., delivered via traditional fax machine). An electronic signature must meet the requirements stated in section 7 of this revenue procedure, as modified by any IRS guidance published in the Internal Revenue Bulletin (IRS published guidance), publications, forms or instructions.

.06 “Truncated taxpayer identification number” (TTIN) refers to a taxpayer identification number in which the first five digits of the nine-digit number are replaced with Xs or asterisks. See § 301.6109–4(a). A TTIN replacing an SSN appears in the form XXX–XX–1234 or \*\*\*–\*\*–1234.

## SECTION 5. BACKGROUND

.01 In general, employers may choose to correct FICA tax overpayment errors either by 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 an employer corrects employment tax reporting errors using the claim process, see Rev. Rul. 2009-39, 2009-52 I.R.B. 951.

.02 An employer may not receive a refund of the employer share of overpaid FICA tax without making reasonable efforts to protect its employees' 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). If taxes were withheld from an employee, the employer has a duty to make reasonable efforts to protect the employee's 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 the employee share. However, this requirement does not apply to the extent that the taxes were not withheld from the employee or, after the employer makes reasonable efforts to repay or reimburse the employee or secure the employee's consent, the employer cannot locate the employee or the employee will not provide consent.

.03 Under § 31.6402(a)-2(a)(2), every employer that files a claim for refund of the employee share of overpaid FICA tax is required 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 filing of the claim for refund, except to the extent taxes were not withheld from the employee. 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 of the amount of the overcollection.

.04 If after reasonable efforts the employer cannot locate the employee or the employee will not provide the requested consent, the employer may file a claim for refund for only the employer share of the FICA taxes. See § 31.6402(a)-2(a)(1)(ii) and Rev. Rul. 81-310.

.05 Under *Chicago Milwaukee Corp. v. United States*, 40 F.3d 373 (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 (subject to the exceptions under § 31.6402(a)-2(a)(1)(ii)) before the IRS may grant the claim.

.06 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 must then give each employee his or her share of the refund.

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

.08 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.”

.09 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 of the statement or document may become material in the administration of any internal revenue law, but in no event for less than four years after the date the claim is filed.

#### SECTION 6. REQUIREMENTS FOR A REQUEST FOR CONSENT AND REQUIREMENTS FOR AN EMPLOYEE CONSENT

.01 The request for consent 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 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; however, a failure to respond may not be deemed consent. A request for consent may also include a request that the employee keep the employer informed about any change in the employee’s mailing address or email address. The request for consent must clearly state that the employer

will repay or reimburse the employee share of the overpayment (plus any interest allocable to the employee share) to the extent the overpayment (plus allocable interest) is refunded by the IRS. Finally, all requests for consent must indicate that an employee cannot authorize the employer to claim a refund on the employee's behalf for any overpaid Additional Medicare Tax, regardless of whether Additional Medicare Tax was withheld from the employee; the following language may be used in any request for consent to meet this requirement:

“You cannot authorize us to claim a refund on your behalf for any overpaid Additional Medicare Tax, and our claim will not include a claim for Additional Medicare Tax withheld from employees. Additional Medicare Tax (0.9%) applies to wages, railroad retirement (RRTA) compensation, and self-employment income (together with that of your spouse if filing a joint return) that are more than:

\$125,000 if married filing separately,  
\$250,000 if married filing jointly, or  
\$200,000 for any other filing status.

If, as a result of our refund claim, your wages are adjusted, you may also be able to claim a refund for Additional Medicare Tax. For more information on the Additional Medicare Tax, see the Instructions for Form 8959.”

.02 A request for consent may be solicited on paper or in an electronic format.

The employer may furnish a paper request for consent by personal delivery or by mail to the employee's last known address using the United States Postal Service or a designated delivery service under § 7502(f). An electronic request for consent may be

sent to the employee's email address in accordance with section 7 of this revenue procedure.

.03 An employee consent must meet the following requirements:

- (1) Contain the name, address, and taxpayer identification 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 refund claims for employee tax overcollected in prior years, 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 employer may use a TTIN on an employee consent as the employee's taxpayer identification number, in place of the complete SSN of the employee, if the employer prepares the consent for the employee to sign and prepopulates the employee's taxpayer identification number with the TTIN. The use of a TTIN is not

permitted if the employer requests that the employee provide an SSN as the employee's taxpayer identification number or if the employee furnishes the number via the consent.

.05 An employer must retain all requests for consent, employee consents (including any required written statement), and employees' responses (indicating that the employee does not authorize the employer to claim a refund of FICA taxes on his or her behalf), as long as their contents may be material in the administration of any internal revenue law, but in no event for less than four years after the date the claim is filed. These documents are not submitted with the claim for refund, but copies must be submitted to the IRS if requested.

#### SECTION 7. ELECTRONIC COMMUNICATIONS, EMPLOYEE CONSENTS, AND RECORD RETENTION PERMITTED

.01 This revenue procedure permits an employer to establish a system to request, furnish, and retain employee consents in an electronic format, including permitting employees to submit employee consent by fax. It also permits the retention in an electronic format of requests for consent 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 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 subsequent IRS published guidance, publications, forms or instructions.

.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 consent to the employee in a manner no less understandable than a written paper document.

.03 Any electronic system used for purposes of obtaining employee consent must inform the employee that by signing the employee consent the employee is making the required declaration contained in the penalties of perjury statement.

.04 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 that meets the following requirements is acceptable:

(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 as otherwise identified in IRS published guidance, publications, forms, or instructions;

(2) The electronic form of signature must be executed or adopted 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 electronic record.

.05 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 consent.

.06 Upon request by the IRS, the employer must supply to the IRS 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 8. 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 both secured the employee's consent and included a claim for the refund of the employee share. However, these requirements do not apply to the extent that the taxes were not withheld from an employee or, after the employer makes reasonable efforts to repay or reimburse the employee or secure the employee's consent, the employer cannot locate the employee or the employee will not provide consent. The employer can show that the employee will not provide the requested consent if the employee does not respond to the employer's request for consent or if the employee provides a response that indicates that the employee does not authorize 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 consent if:

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

(2) A request for 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 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) the record of mailing the request for consent; (b) the record of emailing the request for consent (including any acknowledgement of receipt of the email message); (c) the record of personal delivery to the employee who does not furnish an employee consent; or (d) the employee's 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 a mailing is undeliverable, the employer makes a good faith attempt to determine the employee's current address and, if a new address is discovered, the employer delivers a request for consent in a paper format to the new address or delivers a request for consent by email or by personal delivery, giving the employee not less than 21 days from the date of the second request to reply; 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 consent in a paper format to the employee's last known address or provides a request for consent to the employee by personal delivery giving the employee not less than 21 days from the date of the second request to reply.

#### SECTION 9. EFFECTIVE DATE

.01 This revenue procedure applies to employee consents requested on or after June 5, 2017. It does not require employers to solicit new employee consents and will not affect the validity of any employee consent received pursuant to a request made prior to June 5, 2017, that was provided in accordance with the requirements in § 31.6402(a)-2.

.02 Employers may rely on the proposed revenue procedure set forth in Notice 2015-15 for employee consents requested before June 5, 2017.

#### SECTION 10. 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(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 in no event for 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 11. 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).