



# IRS Issues Revised Requirements for Employers to Claim FICA Tax Refunds

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# **IRS Issues Revised Requirements for Employers to Claim FICA Tax Refunds**

*Written by [Kevin Spencer](#) - 4/4/17*

## Summary

On March 20, 2017, the Internal Revenue Service (IRS) issued [Revenue Procedure 2017-28](#), which provides guidance to employers on obtaining employee consents used to support a claim for credit or refund of overpaid taxes under the Federal Insurance Contributions Act (FICA) and the Railroad Retirement Tax Act (RRTA). This OTS describes the new procedures and provides valuable information regarding the rules for amending past employment tax returns due to the over- or under-payment of Social Security, Medicare and Federal income tax on employee wages.

## In Depth

### **Overview of Correcting Employment Tax Returns**

On March 20, 2017, the Internal Revenue Service (IRS) issued [Revenue Procedure 2017-28](#), 2017-14 IRB - IRC Sec(s). 6402, 03/20/2017 which provides guidance to employers on obtaining employee consents used to support a claim for credit or refund of overpaid taxes under the Federal Insurance Contributions Act (FICA) and the Railroad Retirement Tax Act (RRTA). The revenue procedure adopts many of the requirements included in initial guidance on employee consents released in IRS Notice 2015-15.

IRS procedures allow for interest and penalty-free amendments of employment tax returns, Forms 941, generally with respect to all types of employment taxes, if the error is corrected in the same calendar year in which the error occurred. However, under payments or over payments of Federal income tax and the additional 0.9 percent Medicare tax withholding generally cannot be corrected in a subsequent year. Fortunately, Social Security and the regular Medicare tax can be corrected for any year for which the statute of limitations has not expired (typically three years following the April 15 of the year following the year of the error). Revenue Procedure 2017-28 describes the special procedures that taxpayers must follow with respect to over-payments of FICA taxes in the year after the over payment has occurred and before the statute of limitations has expired. The employer is not permitted to obtain a refund of the employer portion of FICA and Medicare tax unless these procedures are followed.

When an error is discovered after the return is filed, federal tax law indicates that the taxpayer “should” amend and correct its return. The taxpayer, however, is not required to amend and correct its return.

With respect to over-payments of FICA taxes (or RRTA), in Revenue Procedure 2017-28, the IRS clarifies the basic requirements for both a request for employee consent and for the employee consent and permits employee consent to be requested, furnished and retained in an electronic format. The revenue procedure also contains guidance regarding what constitutes “reasonable efforts” if employee consent is not acquired so that the employer can still claim a credit or refund of the employer share of overpaid FICA (or RRTA) taxes.

## **Background**

Pursuant to the Treasury regulations, generally an employer must make reasonable attempts to protect employees' interests in any employee share of the overpayment of prior-year FICA (or RRTA) taxes before an employer can obtain a credit or refund from the IRS. To protect an employee's interests, the IRS will not process the employer's refund claim unless the employer first certifies that it has repaid or reimbursed its employees or has secured the employees' consent to the allowance of the claim for refund and includes a claim for the refund of the employee tax. Once the employer receives the refund, it is responsible for paying the employees' share to its employees. For prior-year refund claims, the employer must also certify that it has obtained employee written statements, confirming that employees have not made any previous claims, or such claims were rejected and will not make future claims for refund or credit of the amount the employer over-paid.

If the employer has expended reasonable efforts to obtain the employee's consent but cannot locate the employee, the employee does not provide consent or does not authorize the employer to claim a refund of FICA (or RRTA) taxes on his or her behalf, the employer may claim a refund of the over-paid employer share of the tax but may not obtain a refund of the employee's share.

IRS Notice 2015-15 specified that an employee consent must include: the employee's name, address and social security number; the employer's name, address, the person to contact or any questions or additional information and employer identification number (EIN); the tax period(s); type of tax (*e.g.*, Social Security and Medicare taxes); and the amount of tax for which the employee's consent is provided. The consent must also affirmatively state that the employee authorizes

the employer to claim a refund of the employee share for prior years, include the employee's written statement that the employee has not made any previous refund claims and will not make any future claims, identify the basis of the claim, be dated and be signed under penalties of perjury. An optional provision could be included expressing a presumption that if an employee's response is not received by the employer during the applicable time period, the employee will be considered to have refused to provide the employee consent but in no case will a failure to respond be deemed consent.

### **New Requirements for Requesting Employee Consent**

- The employer may claim a refund of the over-paid *employer* share of the FICA (or RRTA) taxes *without* obtaining employee consent if 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 demonstrate to the IRS 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 (or RRTA) taxes on his or her behalf. The revenue procedure sets forth the various methods for satisfying the new reasonable efforts rule.
- The IRS guidance provides that employees should be given a minimum of 45 days as a "reasonable period of time" to respond to the employer's request for consent to participate in the FICA refund claim. However, the revenue procedure does shorten the

- amount of time to respond to a second request for consent from 45 to 21 days.
- The employer is permitted, but not required, to solicit and secure employee consents electronically, either by email or fax. However, the employer is required to provide employees with the option to provide the employee consent in a paper format upon request.

### **Requirements for Employee Consent**

- The IRS guidance provides that employee consents must specifically identify *the basis for the claim for refund*. The revenue procedure provides the following example: “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.”
- The employee consent must be dated and contain the employee’s signature under penalties of perjury. The penalties of perjury jurat should be located immediately above the required signature. Undoubtedly, this requirement will hinder employers’ efforts to obtain signed consents from employees as most employees will naturally be reluctant to sign a document that will be provided to the IRS under threat of penalties of perjury.
- The employee consent must specifically inform the employee that the employer refund claim does not include any claims for the overpayment of Additional Medicare Taxes. The employee, however, may make his or her own claim for a refund of over-paid Additional Medicare Taxes with his personal tax return (Form 1040).

- In order to minimize the risk of identity theft, the employee consent request can use a truncated taxpayer identification number (TTIN), replacing the first five digits of the employee's nine-digit number social security number with either Xs or asterisks (*e.g.*, XXX-XX-1234 or \*\*\*-\*\*-1234).

Employers should review the revenue procedure before submitting new claims for refunds of overpaid FICA (or RRTA) taxes to confirm that planned tax refund requests comply with the revised requirements.

### **Effective Date**

Revenue Procedure 2017-28 applies to employee consents requested on or after June 5, 2017. Employers who issued requests for employee consents prior to the effective date are not required to send new requests and can continue to rely on the procedures found in IRS Notice 2015-15 until June 5, 2017.

### **Practice Point**

Revenue Procedure 2017-28 is welcome guidance to Employers because it provides further certainty to the exact procedures which must be followed in order to obtain FICA refunds.

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