



YOUR VOICE AT THE IRS



THE OFFICE OF THE TAXPAYER ADVOCATE OPERATES INDEPENDENTLY OF ANY OTHER IRS OFFICE AND REPORTS DIRECTLY TO CONGRESS THROUGH THE NATIONAL TAXPAYER ADVOCATE.

March 18, 2020

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Subject: Refund Claims for School Districts and Employees

As you are aware, there have been numerous changes to retirement benefits for employees of Michigan's public school system as a result of various Public Acts (for example, Michigan Public Act 75 of 2010 and Michigan Public Act 300 of 2012) and court cases in which those Public Acts were at issue. Consequently, there has been confusion among the school districts as to the proper employment tax consequences for the employees' contributions to the retirement system. This letter is intended to provide general information for the school districts which did not treat the 3 percent healthcare contributions for current and former school district employees as exempt from Federal Insurance Contributions Act (FICA) taxes and income tax withholding and therefore withheld FICA taxes and income taxes from their employees on those contributions. In these instances, it may be permissible for the employer to file a claim for refund with the IRS or make an interest-free adjustment for both the employer and employee shares of the FICA taxes remitted on this contribution. It is not permissible for the employer to make an interest-free adjustment or claim a refund of income taxes overwithheld from employees in prior years. Therefore, employees who had income taxes withheld on this contribution may need to file a claim for refund with the Internal Revenue Service (IRS). This letter provides general information about how to file a proper refund claim or to make an adjustment and the approaching deadlines regarding timely refund claims or adjustments for FICA taxes as well as withheld income taxes; however, this letter does

not constitute legal advice, and school districts and employees should consult a tax professional regarding any specific legal questions.

What is the Taxpayer Advocate Service?

The Taxpayer Advocate Service (TAS) is the taxpayer's voice at the IRS. We are an independent organization within the IRS. See Internal Revenue Code (IRC) § 7803(c). We help taxpayers resolve issues with the IRS and protect taxpayer rights. We can offer help if a taxpayer's tax problem is causing a financial difficulty; the taxpayer has tried and been unable to resolve the issue with the IRS; or the taxpayer believes an IRS system or procedure is not working as it should. If a taxpayer qualifies for our assistance, which is always free, we will do everything possible to help the taxpayer.

How long does an employer have to file a claim for refund or make an interest-free adjustment on an amended tax return?

If an employer has overpaid FICA taxes, it has the option to take two different actions. First, it can claim a refund of the taxes paid. Second, it can make an interest-free adjustment on the overreported amounts, which lets the employer apply the overreported amounts as a credit for the FICA taxes owed for the period in which the adjustment is made.

Time limits for claiming a refund

IRC § 6511 limits how long an employer has to claim a refund of taxes. In general, an employer must file for a claim for refund of tax *by the later of* (1) three years after the return was filed, or (2) two years after the tax was paid. There are numerous exceptions to the general rule, however.

Time limits for making an interest-free adjustment

The time limits in IRC § 6511 described in the previous paragraph apply to interest-free adjustments of FICA as well, except that an employer cannot make an interest-free adjustment in the last 90 days of the limitations period. Because of the special 90-day rule, it is too late to make an interest-free adjustment for any quarter within the 2016 calendar year; however, an employer may make an interest-free adjustment with respect to FICA taxes for any quarter within calendar year 2017 and later. An employer is not permitted to make an interest-free adjustment of overwithheld income taxes after the close of the calendar year in which the taxes were withheld.

How does an employer claim a refund of overpaid FICA taxes or make an interest-free adjustment?

Both refund claims and interest-free adjustments for FICA taxes are made on Form 941-X, *Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund*. Instructions on how to prepare Form 941-X are available at <https://www.irs.gov/pub/irs-pdf/i941x.pdf>. A separate Form 941-X must be filed for each taxable period for which a refund is requested or an interest-free adjustment is made within the time limits in IRC § 6511.

If you are an employer claiming a refund

As stated in Revenue Procedure 2017-28 (available at <https://www.irs.gov/pub/irs-drop/rp-17-28.pdf>), "If [FICA] 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." Accordingly, to seek a refund of the employer's share of FICA taxes, the employer must also seek to obtain a refund of the employee share. Revenue Procedure 2017-28 states that the regulations governing refunds provide "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."

Therefore, for the employer to seek a refund of the employee share of the overpaid FICA taxes, one of the following conditions must be met: (1) the employer has first repaid or reimbursed its employee, or (2) the employer has secured the employee's consent to the allowance of the refund claim.

The employer must certify that it has obtained a written statement from the employee confirming that the employee has not made any previous claims (or the claims were rejected) and won't make any future claims for refund of the amount overwithheld. This is necessary to prevent duplicate claims for the amount overwithheld.

If you are an employer making an interest-free adjustment

If an employer makes an interest-free adjustment regarding FICA taxes, the employer must first repay or reimburse the employee unless the employer cannot locate the employee or the employee refuses to provide consent. The employer **cannot** merely seek consent to make the adjustment.

The employer must certify that it has obtained a written statement from each affected employee stating that he or she has not claimed a refund (or the claim was rejected) and

won't make any future claim for refund of the amount overwithheld. Again, this is to prevent duplicate claims for the amount overwithheld.

Filing Form 941-X

The instructions for Form 941-X, on page 8, indicate that an employer can request 100% of the employer share of overpaid FICA taxes despite not having secured 100% of the employee consents and statements as long as the employer follows the requirements for making reasonable efforts.

If the employer files a timely claim for refund for the FICA taxes and the refund requirements in Revenue Procedure 2017-28 are met, the IRS will refund the taxes (including any applicable interest) to the employer. The employer must then give each employee who has not already been repaid or reimbursed his or her share of the refund.

In the case of an interest-free adjustment, the employer must repay or reimburse the employee (or certify on Form 941-X that the employer could not locate the affected employee or that the employee would not give the employer a written statement) prior to filing the adjustment.

What must the employer do after it has received a refund or made an interest-free adjustment?

Upon receiving a refund or making an interest-free adjustment, the employer must file a Form W-2c, *Wage and Tax Statement*, for each affected employee. General instructions on how to prepare Form W-2c are available at <https://www.irs.gov/pub/irs-pdf/iw2w3.pdf>.

The employer must also inform each affected employee that he or she may file a Form 1040-X, *Amended U.S. Individual Income Tax Return*, to get a refund of overpaid income taxes. This is separate from the FICA tax refund or reimbursement. A Form 1040-X must be filed by the employee for each taxable year for which a refund of overpaid income taxes is requested within the time limits in IRC § 6511. General instructions on how to prepare Form 1040-X are available at <https://www.irs.gov/pub/irs-pdf/i1040x.pdf>.

What happens if the employer does not have all the consents back from the employees before the time prescribed in IRC § 6511 expires?

If there is not enough time for the employer to gather all the consents and statements from the employees before the time prescribed in IRC § 6511 expires, the employer can prepare a protective claim for refund of the employee share of the FICA taxes to protect the employees' rights to a refund, and later the claim can be "perfected" by each employee. Protective claims for refund are discussed in general in Publication 17, *Your Federal Income Tax For Individuals*, on page 18 and is available at <https://www.irs.gov/pub/irs-pdf/p17.pdf>. The instructions to Form 941-X provide on page

8 that in instances where the time prescribed in IRC § 6511 is about to expire, the employer should “file Form 941-X, but don’t check a box on line 5. Tell us on line 24 that you haven’t repaid or reimbursed employees or obtained consents at the time you file the claim. However, you must repay or reimburse your employees and certify that you’ve done so before the IRS can allow the claim.”

If an employee doesn’t send the consent to the employer, can the employee still obtain a refund of the overpaid FICA and income taxes?

If the employee *does not* provide the employer with a consent to file a refund claim on Form 941-X on his or her behalf, the employee will need to file a timely request for credit or refund of FICA taxes withheld within the time limits in IRC § 6511 mentioned above (three years after the return was filed or two years after the tax was paid). The employee must file a claim using Form 843, *Claim for Refund and Request for Abatement*. The Form 843 instructions (available at <https://www.irs.gov/forms-pubs/about-form-843>) contain requirements an employee must satisfy, including attaching a statement to the Form 843 which says:

- The amount, if any, the employer has repaid or reimbursed to the employee for excess taxes withheld, and
- The amount, if any, of credit or refund claimed by the employer or authorized by the employee to be claimed by the employer.

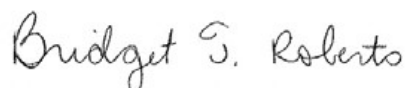
Like the Form 941-X, an employee must file Form 843 for each taxable year for which a refund is requested within the time limits in IRC § 6511. Please note that the time for filing a refund claim for the employee share of FICA taxes withheld from contributions to the retirement fund for the 2016 calendar year will expire on April 15, 2020.

In addition, the employer must also inform each affected employee that he or she may file a Form 1040-X to request an income tax refund.

When to seek assistance from TAS

Taxpayers who receive notices regarding this issue and require immediate assistance can call TAS at 1-312-292-2316. I hope you find the above information helpful. TAS wants to protect the rights of employers and employees to pay no more than the correct amount of tax. Therefore, we ask that you please share the information with school districts and employees as soon as possible.

Sincerely,



Bridget T. Roberts
Acting National Taxpayer Advocate