

FAQs about RIFs and Possible FICA Refunds

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A few weeks ago, the 6th Circuit ordered the IRS to refund over \$1 million of Social Security (FICA) taxes on severance benefits that Quality Stores paid in connection with involuntary terminations of employment.¹ If your company has paid FICA taxes under similar circumstances, please consider seeking a refund. The following Q&As demonstrate that seeking one is easy.

Q-1: What are the key facts that could open the door for a FICA refund?

The 6th Circuit's decision rests on a conclusion that the severance pay satisfied this five-part statutory test:

1. the employer made payments to employees,
2. the payments were pursuant to a company-sponsored plan,
3. the payments were made because of the employees' permanent separation from employment,
4. that separation resulted directly from a reduction in force or plant or operations shutdown, and
5. the payments were included in the gross income of the employees.

Q-2: What was the 6th Circuit's rationale?

The court explained that satisfaction of the five requirements listed above qualifies the severance as "supplemental unemployment benefit" (SUB) payments within the meaning of Internal Revenue Code (the "Code") section 3401(o). This, as the 6th Circuit reasoned, exempts the severance from FICA because the premise for Code section 3401(o) is that SUB payments are not "wages" for tax withholding (or FICA) purposes, and only become subject to tax withholding due to section 3401(o)'s "extension of withholding to certain payments other than wages" (quoted from its title in the tax code).

Q-3: Will the 6th Circuit's decision come to apply nationwide?

That is an open question, and there is contrary authority. The Federal Circuit reached a different decision in 2008, in *CSX Corp. v. United States*, 518 F.3d 1328. The 6th Circuit squarely rejected that decision as resting on an argument that "misses the target" and creates inconsistency within the Federal Circuit's own law. Further, IRS revenue rulings reject the 6th Circuit view. The 6th Circuit focused at length on this, and concluded as follows: "we resolve the tension between the statutory enactments and the IRS revenue rulings in favor of the expressed will of the legislature."

Overall, the 6th Circuit's decision provides a clear basis for seeking FICA refunds in other jurisdictions. Those who pursue relief should have a reasonable prospect for success. Nevertheless, because the

Internal Revenue Service has not acquiesced in the *Quality Stores* decision, employers who do not have significant operations within the 6th Circuit (Kentucky, Ohio, Michigan, and Tennessee) should be prepared to litigate the matter.

Q-4: What are the steps to pursue a FICA refund?

First, the employer files a protective claim for refund with the Internal Revenue Service, seeking a refund of the employer's and employees' share of FICA taxes. The deadline for seeking a refund of FICA taxes for a given year is three years from the following April 15. Thus, a refund claim for FICA taxes for the four quarters of 2009 must be filed by April 15, 2013.

Second, after the earlier of (1) the IRS' denial of the refund claim or (2) the lapse of six months, the employer could either file suit in federal district court to obtain the refund or await the resolution of the conflict in the circuits between the decisions in *Quality Stores* and *CSX Corp.*

If the IRS denies the refund claim, the employer will have two years to bring suit to federal district court. Although the employer could also bring suit in the Court of Federal Claims, it would not be advisable as those courts will be governed by the *CSX Corp.* decision.

Q-5: Where can I find the 6th Circuit's decision?

Just go to [U.S. v Quality Stores](http://www.ca6.uscourts.gov/opinions.pdf/12a0313p-06.pdf) (<http://www.ca6.uscourts.gov/opinions.pdf/12a0313p-06.pdf>). A copy of the decision is attached for ease of reference.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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¹ *United States v. Quality Stores, Inc.*, No. 10-1563 (6th Cir. Sept. 7, 2012).