

The Internal Revenue Service (IRS) accepts most federal employment tax returns as filed. However, some employment tax returns are examined to determine if wages, tips, compensation, credits, and taxes are reported accurately.

This publication discusses general rules and procedures that the IRS follows when examining employment tax returns. It explains what happens before, during, and after an examination, as well as appeal procedures and special procedures dealing with tips, worker classification, and section 530 relief issues.

The IRS must follow the tax rules that Congress sets in the Internal Revenue Code (IRC). We also follow Treasury Regulations, case law, and other rules and procedures written to administer the tax laws.

## What's Inside?

## The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the tax law with integrity and fairness to all.



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## An Overview of Employment Taxes

Employment taxes include the amounts you must withhold from your employees' wages or compensation for income, social security, Medicare, and Railroad Retirement Tax Act (RRTA) taxes. You must pay over the amounts withheld and pay the employer share of social security, Medicare, and RRTA taxes.

In addition to withholding Medicare tax, you must withhold a 0.9% Additional Medicare Tax from wages or compensation you pay to an employee in excess of \$200,000 in a calendar year. Additional Medicare Tax is only imposed on the employee. There is no employer share of Additional Medicare Tax. All wages or compensation that are subject to Medicare tax are subject to Additional Medicare Tax withholding if paid in excess of the \$200,000 withholding threshold.

Federal unemployment taxes are also considered employment taxes. Only employers pay federal unemployment taxes; they are not withheld from employees' wages or compensation.

For purposes of this publication, the term employment taxes includes withheld income tax reported on **Form 945**, Annual Return of Withheld Federal Income Tax.

Employment tax returns include the following returns and any related Spanish-language returns or returns for U.S. possessions:

- **Form 940**, Employer's Annual Federal Unemployment (FUTA) Tax Return
- **Form 941**, Employer's QUARTERLY Federal Tax Return
- **Form 943**, Employer's Annual Federal Tax Return for Agricultural Employees
- **Form 944**, Employer's ANNUAL Federal Tax Return
- **Form 945**, Annual Return of Withheld Federal Income Tax
- **Form CT-1**, Employer's Annual Railroad Retirement Tax Return

## How Does the IRS Select Returns to Examine?

The IRS accepts most employment tax returns as filed. However, we examine some returns to determine if wages, tips, compensation, credits, and taxes are reported accurately. Examinations are also called audits.

The process of selecting a return to examine usually begins in one of two ways:

- We use computer programs to identify returns that may have incorrect amounts. The programs may be based on information returns, on studies of past examinations, or on certain issues that other special projects have identified.
- We use information from compliance projects that suggests a return may have incorrect amounts. We may use information from various sources including news media and public and internal records. If we determine that the information from these sources is accurate and reliable, we may use it to select a return to examine.

If we select your return to examine, it does not mean that you have made an error. Depending on the results of the examination we may determine that you:

- Owe additional tax,
- Are entitled to a refund, or
- Have no changes to your liability as reported.

For more information on the examination "process," refer to the IRS web page titled IRS Audits located at <https://www.irs.gov/businesses/small-businesses-self-employed/irs-audits>

## Your Rights as a Taxpayer

As a taxpayer, you have the right to be treated fairly, professionally, promptly, and courteously by IRS employees. **Publication 1**, Your Rights as a Taxpayer, explains your rights when dealing with the IRS.

## How to Contact Your Taxpayer Advocate

The Taxpayer Advocate Service (TAS) is an independent organization within the IRS whose employees ensure that every taxpayer is treated fairly and that you know and understand your rights. TAS employees assist taxpayers who experience financial hardship, who seek help in resolving tax problems that have not been resolved through normal channels, or who believe that an IRS system or procedure is not working as it should, or the manner in which the tax laws are being administered raise consideration of equity or impair your taxpayer rights.

You can contact TAS by calling the TAS toll-free at 1-877-777-4778 or TTY/TDD 1-800-829-4059 to see if you are eligible for assistance.

You can also call or write to your local taxpayer advocate, whose phone number and address are listed in your local telephone directory or go to [Publication 1546, Taxpayer Advocate Service - We Are Here to Help You, on how to reach TAS](#). You can submit a [Form 911, Request for Taxpayer Advocate Service Assistance \(And Application for Taxpayer Assistance Order\)](#). You can also ask an IRS employee to complete it on your behalf.

For more information, refer to [Publication 1546, The Taxpayer Advocate Service Is Your Voice at the IRS \(pdf\)](#).

## Once Your Return Is Selected for an Examination, What You Can Expect

The length of each examination varies depending on the type of examination, the complexity of items being reviewed, the availability of information being requested, the availability of both parties for scheduling meetings, and your agreement or disagreement with IRS findings.

Some examinations are handled entirely by mail. Others are conducted through an in-person interview to review your records. The IRS makes the final determination of when, where, and how the examination will take place.

### Examinations by Mail

We conduct some examinations entirely by mail. We sometimes call these correspondence or remote examinations. If we are going to conduct an examination by mail, we will send you a letter asking for more information about certain items on your return.

Attach copies of the documents you are sending us to a copy of the letter we sent you and send them to the address provided.



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**DO NOT send us original documents.**  
We will not return any documents you submit.

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**Reminder:**

Put your business name, Employer Identification Number (EIN), and the applicable tax periods on each page that you send. This helps us ensure that all pages are associated with your case.

If we conduct the examination by mail, you can choose to:

- Act on your own behalf, or
- Have someone represent you in correspondence with us. This person must be an attorney, accountant, enrolled agent, or the person who prepared the return and signed it as the paid preparer. If someone represents you, you must give us written authorization using [Form 2848, Power of Attorney and Declaration of Representative](#).

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**Reminder:**

Be sure to respond by the deadline given in any letters from us.

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## Examinations in Person

If we are going to conduct an examination in person, we will send you a letter to inform you that we have selected your return for an in-person examination. We will tell you what information you must provide. Having the information available when requested may allow us to complete the examination more easily and more quickly.

If we plan to conduct the examination in person, we can do so at your place of business, at an IRS office, or at the office of your attorney, accountant, or enrolled agent. The examiner will try to find a suitable time and place with you.

**Recordings** **You may make an audio recording of the examination interview.** At least 10 days before the interview, write to the examiner to ask to record the interview. You must bring your own recording equipment. You may not videotape or film the examination interview.

We can also record an interview. If we initiate the recording, you must be notified 10 days before the interview. You may get a copy of the recording at your expense.

If we conduct the examination in person, you can choose to:

- Act on your own behalf. If you act on your own behalf, you may leave the session to consult with your representative. In that case, we will suspend the interview and reschedule the examination. However, we cannot suspend the interview if we are conducting it because you received an administrative summons.
- Have someone accompany you, either to support your position or to witness the session.
- Accompany someone who will represent you. This person must be an attorney, accountant, enrolled agent, or the person who prepared the return and signed it as the paid preparer.
- Have your representative act for you and not be present at the examination yourself. If someone represents you in your absence, you must give us written authorization using **Form 2848**.

**Note:**

Many employers outsource some of their payroll and related tax duties to third-party payroll service providers. They can help assure filing deadlines and deposit requirements are met and greatly streamline business operations. But remember, employers are ultimately responsible for the payment of income tax withheld and both the employer and employee portions of social security and Medicare taxes (though in certain situations employers who are customers of a Certified Professional Employer Organization are relieved of their liability for income tax withholding and social security and Medicare taxes). For further information see [Outsourcing payroll duties](#) and [Third party arrangements](#) at [irs.gov](http://irs.gov).

## What Happens During an Examination?

### The Examiner Will Verify That You Have Complied with Information Reporting Requirements

An examiner will verify information reporting compliance, as well as employment tax return filing compliance, during the initial stages of an employment tax examination. To ensure the timely and correct filing of information returns, examiners are required to ascertain that the taxpayer filed all required information returns and furnished statements to the recipients from the period of the return under examination to the most recent calendar year. The examiner will determine whether penalties for failure to file and failure to furnish apply.

Three information returns that taxpayers are commonly required to file are **Form W-2**, Wage and Tax Statement, **Form 1099-NEC**, Nonemployee Compensation and **Form 1099-MISC**, Miscellaneous Information.

Generally, you must report wages and compensation you paid to employees on **Form W-2**. When correcting an omission or error in a return, you are required to furnish and file **Form W-2c**, Corrected Wage and Tax Statement.

See the [General Instructions for Forms W-2 and W-3](#).

You must file Form 1099-NEC to report payments totaling the threshold amount or greater to persons not treated as employees (for example, independent contractors) for services performed for your trade or business. All other miscellaneous reportable payments are included on Form 1099-MISC. For details about filing Forms 1099 for payments made during the calendar year and for information about required electronic filing, see the [General Instructions for Certain Information Returns](#) for general information (these general instructions will be replaced by new Pub. 1099 for payments made after 2025), and the separate, specific instructions for each information return you file (for example, the Instructions for Forms 1099-MISC and 1099-NEC).

## We May Contact a Third Party About Your Case

To investigate your case, the law allows us to contact third parties, such as neighbors, banks, employers, employees, or independent contractors. We will notify you before contacting other people about your tax matters.

When we contact other people, we generally need to tell them limited information, such as your name. The law prohibits us from disclosing any more information than is necessary to obtain or verify the information we are seeking. You have a right to request a list of people we contact. You can make your request by phone, in writing, or when speaking to us. These third party contact requirements do not apply:

- When you authorized the contact,
- If providing notice would jeopardize collection of any tax liability,
- If providing notice may result in reprisal against any person, or
- To any pending criminal investigation.

## We May Ask You to Extend the Period of Limitation for Assessment

The Internal Revenue Code requires the IRS to assess additional taxes within specific time limits. These limits are known as periods of limitation. When they expire, we can no longer assess additional tax.

We try to examine tax returns as soon as possible after they are filed, but occasionally we may ask that taxpayers extend the period of limitation for assessing employment taxes.

Extending the period of limitation will give you more time to provide documentation to support your position or to appeal if you do not agree with our findings. Extending the period also allows us to finish the examination, make any additional assessment, if necessary, and provide sufficient time for processing.

Generally, the period of limitation for assessment is 3 years, measured from the date the return is filed.

According to the rule governing early returns, we consider a tax return that is filed before its due date (determined without regard to any extension of time for filing) to be filed on the due date.

Here are some examples of specific employment forms and their deadlines:

- **Form 940**, is filed on a calendar year basis and is due January 31 of the next calendar year. The rule governing early returns applies. For any Form 940 filed before January 31 of the next calendar year, the period of limitation is measured from January 31 of the next calendar year. If the return is filed on or after January 31 of the next calendar year, the period is measured from the date the return is actually filed.
- **Form CT-1**, is filed on a calendar year basis and is due the last day of February of the next calendar year. The rule governing early returns applies. For any Form CT-1 filed before February 28 (or February 29 in a leap year) of the next calendar year, the period of limitation is measured from the last day of February of the next calendar year. If the return is filed on or after the last day of February of the next calendar year, the period is measured from the date the return is actually filed.
- A special rule applies to a return reporting social security and Medicare taxes or federal income tax withholding. Any **Form 941**, **Form 943**, **Form 944**, or **Form 945**, that is filed before April 15 of the next calendar year is deemed filed on April 15 of the next calendar year. For example, if you filed your 2021 fourth quarter **Form 941** on January 27, 2022, the IRS treats the return as if it were filed on April 15, 2022. Thus, the 3-year period of limitation for assessment ends on April 15, 2025. If the return is filed on or after April 15 of the next calendar year, we measure the period of limitation from the date the return is actually filed.
- Filing an amended **Form 940** or an X form (for example, **Form 941-X**, Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund), does not affect the period of limitation for assessment.

## How to Extend the Period of Limitation for Assessment

A written agreement between you and the IRS to extend the period of limitation for assessment of employment taxes is made using **Form SS-10**, Consent to Extend the Time to Assess Employment Taxes. The **Form SS-10** sets a specific expiration date for the extension.

If the period of limitation for assessment is about to end, we may ask you to sign **Form SS-10**. We will send you **Form SS-10** and **Publication 1035**, Extending the Tax Assessment Period.

You may choose to do one of the following:

- Agree to extend the period of limitation for assessment.
- Agree to an extension restricted to particular issues or for a particular period of time, or both. An extension restricted to particular issues allows the period of limitation to expire for all items on the return except those covered by the restricted language.
- Refuse to extend the period of limitation for assessment.

## Fast Track Settlement Can Help Resolve Disputes

During the examination process, if you and the examiner cannot agree on one or more issues, you may want to consider using Fast Track Settlement (FTS). In certain cases, the IRS offers this process to help resolve disputes that occur during examinations.

Fast Track Settlement involves a trained mediator from the Independent Office of Appeals who is independent of the IRS office conducting the examination. The FTS process:

- Is optional,
- May expedite resolution of your issue,
- Requires no fee to use, and
- Is available to most taxpayers and for most issues, with certain exclusions. Issues must be fully developed before starting this process.

You may ask to use this process, or we may make the request. The process will only take place if both you and the IRS agree. Either party may withdraw at any time.

Issues will only be resolved if both you and the IRS reach an agreement. You will not be required to accept any resolution. If any issues remain unresolved, you will still have all of your traditional appeal rights.

- **Publication 4539**, Fast Track Settlement - A Process for Prompt Resolution of Large Business and International Tax Issues
- **Publication 5022**, Fast Track Settlement - A Process for Prompt Resolution of Small Business Self Employed Tax Issues
- **Publication 5092**, Fast Track Settlement - A Process for Prompt Resolution of Tax Exempt and Government Entities (TE/GE) Tax Issues

## What the Results of the Examination May Be

If we accept your return as filed, we will send you a letter stating that the examiner proposed no changes to your return. Keep this letter with your tax records.

If we do not accept your return as filed, we will explain any proposed changes to you. It is important that you understand the reasons for any proposed changes. Ask us about anything that is unclear.

If your tax liability changes as a result of our examination, you may ask us to reconsider the results. Some reasons we may reconsider your case include:

- You have more information to submit that could change the additional amount we have determined that you owe,
- You filed an original delinquent return after we have determined that you owe an additional amount, or
- You identified a math or processing error that we made.

## Procedures for Requesting Relief from Paying Income Tax Withholding and Additional Medicare Tax

Under IRC 3402(d) and 3102(f)(3), you may be entitled to relief from paying income tax and Additional Medicare Tax that was not withheld if you can show that the employees or payees have reported the income and paid the tax. However, you are still liable for any penalties or interest that applies.

Use **Form 4670**, Request for Relief of Payment of Certain Withholding Taxes, and **Form 4669**, Statement of Payments Received, to request relief from paying income tax or Additional Medicare Tax. Discuss with the examiner about how to submit these forms.

# Interest, Interest-Free Adjustments of Employment Taxes, and How to Stop Interest from Accruing

If you underpay your employment tax, interest will be assessed as provided by law. Interest generally accrues from the due date of the original return to the date the tax was paid. Interest on any penalties will accrue from the return due date, extended return due date, or assessment date, whichever applies.

You may qualify for an interest-free adjustment. To qualify, an adjusted return correcting an underpayment must be filed by the due date of the return for the return period in which the error is discovered. Adjusted returns include:

- Agreement forms used in the context of an examination or appeals process such as **Form 2504**, Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Employment Tax Adjustments Not Subject to IRC 7436), or
- X forms such as **Form 941-X**

If you qualify and:

- pay the full amount of the underpayment by the time either the adjusted return is submitted, or the agreement form is signed, then no interest will be assessed.
- you pay less than the full amount, then interest will accrue on the balance due from the date you submitted the adjusted return until you make your payment.

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**Note:** The interest-free adjustment rules do not apply to FUTA adjustments that are reportable on **Form 940**.

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If your examination includes worker classification issues or a section 530 relief determination issue and you have not yet received a **Letter 3523**, Notice of Employment Tax Determination Under IRC Section 7436, you can make a deposit with the IRS to stop any interest from accruing and still preserve your right to go to Tax Court. Refer to *Special Procedures for Worker Classification Issues and Section 530 Relief Determination* later in this publication.

You will not be eligible for an interest-free adjustment if:

- The underreported amounts relate to an issue that was raised in an examination of a prior return period,
- You knowingly underreported your employment tax liability,
- You received a **Letter 3523** prior to filing the adjusted return, or
- You received a Notice and Demand for Payment based on an assessment of tax. (This notice is not the same as Letters 3263 and 4520, Section 3121(q) Notice and Demand referred to in Tip Examinations later in this publication.)

If you do not qualify for an interest-free adjustment and you think you will owe additional tax at the end of the examination, you can stop interest from accruing by paying all or part of the amount you think you will owe. Interest will stop accruing on the part you pay when the IRS receives your payment. Interest will be charged only on the tax, penalties, and interest that remain unpaid.

For more information about interest-free adjustments and examples, refer to Rev. Rul. 2009-39, 2009-52 C.B. 951, at [www.irs.gov/irb/2009-52\\_IRB/ar14.html](http://www.irs.gov/irb/2009-52_IRB/ar14.html). Also see section 13 of **Publication 15** (Circular E), Employer's Tax Guide.

## What Should You Do After You Receive the Examination Results?

### If You Agree with the Results of the Examination

If you agree with the results of the examination, you should:

- Sign the agreement form that the examiner prepared, and
- Pay any amount you owe.

### Sign the Agreement Form

Agreement forms include:

- **Form 2504**, Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Employment Tax Adjustments Not Subject to IRC 7436);
- **Form 2504-T**, Agreement to Assessment and Collection of Additional Employment Tax and Acceptance of Overassessment (Employment Tax Adjustments Subject to IRC 7436); and
- **Form 2504-S**, Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Employment Tax Adjustments Not Subject to IRC 7436; Worker Classification or Section 530 Issues Not Addressed in this Exam).

The agreement form gives us permission to assess the proposed amounts quickly. Signing the agreement form will not prevent you from filing a claim for refund if you later believe that you are entitled to a refund. It will not prevent us from later determining, if necessary, that you owe additional tax. It will also not extend the time provided by law for either action.

**Note:** If you are entitled to a refund, you will receive it sooner if you sign the agreement form at the end of the examination.

## Pay Any Amount You Owe by the Time You Submit the Agreement Form

By signing the agreement form, you may qualify for an interest-free adjustment. If you qualify, the adjustment will be interest-free if you pay the full amount due by the time you submit the signed agreement form.

If you do not pay the full amount by the time you submit the signed agreement form, we will send you a bill. Interest will generally accrue on the balance due from the date you submit the signed agreement form until the date you pay. (Refer to Interest, *Interest-Free Adjustment and How to Stop Interest from Accruing* earlier in this publication.)

If you do not qualify for an interest-free adjustment, pay the amount you owe, including any interest and penalties. If you do not pay the entire amount, we will send you a bill.

If you cannot pay the full amount due, you should pay as much as you can as soon as you can to limit the amount of interest that accrues.

For more information about payment options, Refer to **Publication 594**, The IRS Collection Process.

## If You Disagree with the Results of the Examination

If you disagree with the results of the examination, the examiner will explain your appeal rights. You may then ask for a meeting or a call with the examiner's manager to explain your position. If an agreement is reached, sign the agreement form and pay any amount due.

If you cannot reach an agreement with the manager at this meeting, the examiner will prepare and provide you an examination report explaining your position and ours.

### We will send you these documents

A letter (called <i>the 30-day letter</i> )	To tell you of your right to appeal the proposed changes within 30 days. Examples of 30-day letters:
	<ul style="list-style-type: none"><li>• <b>Letter 950-C</b> for unagreed employment tax cases involving IRC 7436 issues. This applies to the reclassification of at least one worker and/or the determination that the taxpayer was not entitled to section 530 relief. This also applies to wage issues that are determined to be IRC 7436 issues.</li><li>• <b>Letter 950-D</b> for unagreed employment tax cases involving all other (for example non-IRC 7436) employment tax examination issues</li></ul>
A copy of the examination report	To explain the examiner's proposed changes to your tax liability
An agreement form	To sign and return if you now agree with the adjustments
<b>Publication 5</b> , Your Appeal Rights and How to Prepare a Protest If You Disagree	To explain the Appeals process and procedures for preparing a protest

# How Do You Appeal an IRS Decision?

## How the Appeal System Works

Because taxpayers sometimes disagree with the IRS on tax matters, the IRS has an appeal system. You may appeal our tax decision to a local Independent Office of Appeals. The Appeals offices are independent of the IRS office that proposed the adjustment.

An Appeals office is the only level of appeal within the IRS. Most differences are settled at the appeals level. An Appeals Officer has the authority to resolve tax disputes without litigation. However, the Appeals office cannot consider your reasons for disagreeing if these reasons do not come within the scope of the tax laws (for example, if you disagree solely on moral, religious, political, constitutional, or similar grounds).

If you do not want to appeal your case within the IRS, or if you disagree with the outcome of the IRS appeals process, you may take your employment tax case to a U.S. District Court or the U.S. Court of Federal Claims. If your case involves reclassification of at least one worker and/or the determination that you were not entitled relief under section 530, you may also be able to take your case to the U.S. Tax Court if certain requirements are met.

Each of these appeal methods has specific requirements, time limits, and procedures. Information about the IRS appeal system and appeals to the federal courts is provided below. For more information, refer to **Publication 5**.

## How to Appeal Within the IRS

You or your authorized representative may request a conference with Appeals office personnel. If you want to have a conference with an Appeals Officer, follow the instructions in the 30-day letter you received, for example, **Letter 950-C** or **Letter 950-D**.

We will send your request to the Appeals office to try to arrange a conference at a suitable time if there is sufficient time left on the statute of limitations. At the conference, you or your authorized representative should be prepared to discuss and present documentation for all disputed issues. Conferences with Appeals office personnel are held with you or your authorized representative in an informal manner. Only attorneys, certified public accountants, and enrolled agents are allowed to represent you before Appeals.

Appeals may not engage in discussions with the originating function regarding the strengths and weaknesses of the issues and the parties' positions in cases without providing the taxpayer/representative an opportunity to participate.

## How to Appeal to Federal Courts

If you and the IRS still disagree after the Appeals conference, or if you did not choose to use our appeal system, you may be entitled to take your case to a U.S. District Court, the U.S. Court of Federal Claims, and in some cases, the U.S. Tax Court. The U.S. Tax Court generally does not have jurisdiction to review employment tax cases (with limited exceptions, as explained below).

Each of these courts is independent of the IRS. Different procedures and time limits apply, depending on which court you use.

### U.S. District Courts and U.S. Court of Federal Claims

Generally, if you do not reach an agreement with our examiner or the Appeals Officer, we will assess the employment taxes we determine that you owe. (Refer to *Special Procedures for Worker Classification and Section 530 Relief Determination Issues*, below for a possible exception for worker classification issues.)

You may seek judicial review of the assessment by filing a refund suit in either a U.S. District Court or the U.S. Court of Federal Claims.

Please note that before you can file an employment tax refund suit, you must first pay to the IRS, at a minimum, the amount of the employment tax assessment that relates to one worker for one tax period and then file a claim for refund with the IRS.

To file a claim for refund, you must file the X form that corresponds to the return being corrected. For example, **Form 941-X**, is used by an employer to correct **Form 941**. Use an amended **Form 940** to claim a refund of FUTA taxes for a return that you previously filed.

If the claim for refund is disallowed (or the IRS does not respond to the refund claim within 6 months), then you may file a refund suit in a U.S. District Court or in the U.S. Court of Federal Claims and challenge the employment tax assessment. You generally must file your refund suit no later than 2 years after the IRS informs you that your claim for refund has been disallowed.

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## U.S. Tax Court

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While the U.S. Tax Court generally does not have jurisdiction to review employment tax cases, it does have jurisdiction over cases that involve worker classification and entitlement to relief under section 530 when certain requirements are met.

Other determinations by the IRS in connection with proposing employment tax adjustments are not subject to review by the Tax Court. For more information about the conditions needed to petition Tax Court for an employment tax case refer to Rev. Proc. 2022-13, 2022-6 I.R.B. 477 at [www.irs.gov/pub/irs-drop/rp-22-13.pdf](http://www.irs.gov/pub/irs-drop/rp-22-13.pdf).

You may also seek judicial review for worker classification cases in a U.S. District Court or the U.S. Court of Federal Claims. You must first pay a divisible portion of the tax, equal to the tax liability for one worker for one tax period, and file a claim for refund with the IRS. You must follow the courts' procedures and time limits.

For more information about worker classification cases, and entitlement to relief under section 530 see *Special Procedures for Worker Classification Section 530 Relief Determination Issues*, later in this publication.

## Special Procedures for Worker Classification and Section 530 Relief Determination Issues

It is critical that businesses correctly determine whether their workers should be treated as employees or non-employees (for example, independent contractors). In an examination, the IRS may determine that you are not entitled to section 530 relief, that you did not correctly classify one or more workers, and that you owe employment taxes, penalties, and interest because of the misclassification. For more information on worker classification, refer to **Publication 15-A**, Employer's Supplemental Tax Guide.

## Section 530 of the Revenue Act of 1978 May Provide Relief

If you meet certain requirements, you may qualify for relief from employment tax obligations in worker classification disputes under Section 530 of the Revenue Act of 1978, as amended. For more information, refer to **Publication 1976**, Do you Qualify for Relief under Section 530?

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**Note:** Section 530 applies only to matters involving the issue of the status of an individual as an employee or non-employee and not to matters involving the issue of the proper characterization of payments to that individual.

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## You May Be Eligible for the Classification Settlement Program

If you do not qualify for relief under section 530, and we determine that you incorrectly treated your workers as non-employees, you may be eligible for the Classification Settlement Program (CSP). The CSP is an optional program that permits you to prospectively reclassify workers as employees in an examination if you meet certain criteria. In exchange, your employment tax liability will be reduced for the past non-employee treatment.

Under the CSP, you enter into a closing agreement with the IRS to prospectively treat the workers as employees. CSP may be available to you through the appeals process. If you qualify for section 530 relief but prefer to treat workers as employees, you can also enter into a CSP agreement without giving up your claim to section 530 relief for prior years.

## IRC 3509 Provides Reduced Rates

IRC 3509 provides special rates for the employee share of social security and Medicare taxes and income tax withholding when workers are reclassified as employees in certain circumstances. The rates depend on whether you filed the required information returns.

IRC 3509 rates are not available if you intentionally disregarded the requirement to withhold taxes from employees or if you withheld income tax but not social security or Medicare taxes.

For more information about IRC 3509 rates, refer to section 2 of **Publication 15**.

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**Note:** IRC 3509 does not apply to RRTA taxes reportable on **Form CT-1**.

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## We May Send You a Letter 3523, Notice of Employment Tax Determination Under IRC Section 7436

You will receive a **Letter 3523**, Notice of Employment Tax Determination Under IRC Section 7436, when

- The issue involves a worker reclassification or a section 530 relief determination,
- The issue not resolved in the examination or with the Appeals office, and
- The IRS has determined that you owe additional tax because of those issues.

A Notice of Employment Tax Determination Under IRC Section 7436 will detail how we calculated the amount of your additional employment tax liability. The notice may include these documents:

- **Form 4666**, Summary of Employment Tax Examination;
- **Form 4667**, Examination Changes – Federal Unemployment Tax;
- **Form 4668**, Employment Tax Examination Changes Report;
- **Form 2504-T**, Agreement to Assessment and Collection of Additional Employment Tax and Acceptance of Overassessment (Employment Tax Adjustments Subject to IRC 7436); and
- **Publication 3953**, Questions and Answers About Tax Court Proceedings for Determination of Employment Status Under IRC § 7436.

If you agree with our determinations in the notice, you should sign and return the agreement form, **Form 2504-T**. **Form 2504-T** gives us permission to assess the proposed amounts.

Signing the agreement form will not:

- Prevent you from filing a claim if you later believe you are entitled to a refund,
- Prevent us from later determining that you owe additional tax,
- Extend the time provided by law for either action, or
- Change any other requirements for an employment tax refund suit.

Refer to *How to Appeal to Federal Courts*, earlier in this publication.

If you do not agree with our determinations in the notice, the notice gives you instructions on how to ask the U.S. Tax Court to review the IRS' determinations. More information about Notice of Employment Tax Determination Under IRC Section 7436 review by the U.S. Tax Court is provided below.

If you do not sign and return the **Form 2504-T**, and you do not file a petition with the U.S. Tax Court within the time limit, we will assess the employment taxes, additions to tax, and penalties that the notice shows that we determined, plus the interest required by law. We will send you a bill.

## Understanding Interest-free Adjustments in the Worker Classification or Section 530 Context

An interest-free adjustment is not available after you receive a Notice of Employment Tax Determination Under IRC Section 7436, even if an interest-free adjustment would have been available otherwise.

If your examination includes a worker reclassification or a section 530 relief determination issue and you have not yet received a notice, then you can make a cash bond deposit with the IRS to stop any interest from accruing and still preserve your right to go to Tax Court. The IRS treats a cash bond deposit made before receiving a notice as an interest-free adjustment. No interest will accrue on amounts posted as a deposit. Talk to the examiner about how to make a deposit.

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**Note:** The IRS treats a deposit made before receiving a Notice of Employment Tax Determination Under IRC Section 7436 as an interest-free adjustment. For more information, see Rev. Rul. 2009-39, 2009-52 C.B. 951, at [www.irs.gov/irb/2009-52\\_IRB/ar14.html](http://www.irs.gov/irb/2009-52_IRB/ar14.html).

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## How to Seek Court Review of Worker Classification Cases

### U.S. Tax Court Review of Determinations Made in Worker Classification Cases

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The Notice of Employment Tax Determination Under IRC Section 7436 we send you will tell you how you can ask the U.S. Tax Court to review our determinations in the notice. Unlike seeking review with a U.S. District Court or the U.S. Court of Federal Claims, you can file a petition for the U.S. Tax Court to review a worker reclassification or a section 530 relief determination case without first paying any of the amounts we determined in the notice that you owe.

Assessment and collection of the tax is suspended while the U.S. Tax Court review is taking place. Also, a case petitioned to the U.S. Tax Court will normally be considered for settlement by an Appeals Officer before the court hears the case if the case has not already been considered by an Appeals office.

To seek U.S. Tax Court review of a Notice of Employment Tax Determination Under IRC Section 7436, you must file a petition with the U.S. Tax Court before the 91st day (or before the 151st day if the notice is addressed to a person outside the United States) after the notice was mailed by certified or registered mail. The time you have to file a petition with the U.S. Tax Court is set by law and cannot be extended or suspended. Thus, contacting us or the U.S. Tax Court for more information, or receiving other correspondence from us, will not change the period for filing a petition with the U.S. Tax Court.

The first page of the notice will include a date under the heading Last date to petition Tax Court. Your U.S. Tax Court Petition will be considered timely if you file by that date.



**CAUTION**

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If we send you a Notice of Employment Tax Determination Under IRC Section 7436 by certified or registered mail and you want to seek U.S. Tax Court review of our determinations, you **MUST** file your petition before the 91st day after the notice was mailed.

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#### **U.S. District Court or U.S. Court of Federal Claims Review of Determinations Made in Worker Classification Section 530 Cases**

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If you disagree with our determinations in the Notice of Employment Tax Determination Under IRC Section 7436, and the U.S. Tax Court does not review your worker classification case, you may seek judicial review of the assessment by filing a refund suit within applicable time limits in a U.S. District Court or in the U.S. Court of Federal Claims.

There are important differences between the rules for suing in these courts and in the U.S. Tax Court. To seek judicial review of an employment tax assessment in a U.S. District Court or in the U.S. Court of Federal Claims, you must first pay the IRS, at a minimum, the amount of the employment tax assessment attributable to one worker for any one tax period, and then file a claim for refund with the IRS. To file a claim, you must file the X form that corresponds to the return being corrected. For example, **Form 941-X**, is used by an employer to correct **Form 941**.

Use an amended **Form 940** to claim a refund of federal unemployment taxes for a return that you previously filed. If the claim for refund is disallowed (or the IRS does not respond to the refund claim within 6 months), you may file a refund suit in a U.S. District Court or in the U.S. Court of Federal Claims and challenge the employment tax assessment. However, you generally must file your refund suit no later than 2 years after the IRS informs you that your claim for refund has been disallowed.

For more information, refer to:

- **Publication 5**
- **Publication 3953**

## **Tip Examinations**

An employee who fails to report tips to the employer is liable for the employee share of social security and Medicare taxes on those unreported tips and is subject to penalties under IRC 6652(b).

The employer is not liable to withhold and pay the employee share of social security and Medicare taxes on the unreported tips.

In addition, the employer is not liable for the employer share of social security and Medicare taxes on the unreported tips until the IRS makes a Section 3121(q) Notice and Demand for the taxes to the employer.

(This notice is not the same as the Notice and Demand for Payment referred to in Interest, *Interest- Free Adjustments of Employment Taxes, and How to Stop Interest from Accruing*, earlier in this publication.)

For employment tax examinations with an unreported tip income issue, the following occurs at the end of the examination:

- You will receive a pre-notice and demand letter notifying you in advance that we will issue a Section 3121(q) Notice and Demand for the employer's share of social security and Medicare taxes due on the unreported tip income. The letter will tell you the amount you owe.
- No less than 30 days after you receive the pre-notice and demand letter, you will receive a Section 3121(q) Notice and Demand for the employer's share of social security and Medicare taxes on the unreported tips. The notice and demand letter will tell you specifically how and where to report the tax due on the unreported tip income.

If you report and pay the tax due as instructed in the Section 3121(q) Notice and Demand, you will not owe interest or penalties on the additional tax due for the unreported tips. For more information, refer to Rev. Rul. 2012-18, 2012-26 I.R.B. 1032, at [http://www.irs.gov/irb/2012-26\\_IRB/ar07.html](http://www.irs.gov/irb/2012-26_IRB/ar07.html).

## What Should You Do When You Receive a Bill for Your Balance Due?

If you did not pay your liability in full at the close of the examination, you will receive a bill. At that point, you should pay the amount you owe in full or you should pay as much as you can.

You may pay the amount you owe electronically for free through your business tax account, direct pay for business, or Electronic Federal Tax Payment System (EFTPS). You may use one of these methods; however, they may charge a fee:

- Ask your financial institution to initiate an automated clearing house (ACH) credit payment on your behalf.
- Ask a trusted third party, such as a tax professional or payroll service, to make the payment for you.
- Ask your financial institution to make a same-day wire payment for you.

If you pay by check or money order, make it payable to United States Treasury. On your check or money order, be sure to write your EIN, tax year, and related tax form or notice number.

If you cannot pay your bill in full, you should call the telephone number on the bill you receive to ask about possible payment arrangements. The collection process will begin if you do not make payment in full and on time after you receive your bill.

For details about what to do if you cannot pay, see **Publication 594**, The IRS Collection Process. This publication generally describes the IRS collection process.

## Trust Fund Recovery Penalty

### About Trust Fund Taxes

Trust fund taxes include the income tax and the employees' share of social security and Medicare taxes withheld from employees' wages. They are called trust fund taxes because the employer holds these funds in trust for the government until it submits them in a federal tax deposit or payment.

To encourage prompt payment of withheld employment taxes, Congress enacted a law that provides for the Trust Fund Recovery Penalty.

### Trust Fund Recovery Penalty

The Trust Fund Recovery Penalty is assessed against persons (who, among others, may include an individual, another corporation, a Payroll Service Provider (PSP), a Professional Employer Organization (PEO) or Certified Professional Employer Organization (CPEO)) who were responsible for paying the trust fund taxes to the IRS but willfully did not do so. The amount of the penalty is equal to the amount of the unpaid trust fund taxes.

For more information, refer to **Publication 15**, or go to [www.irs.gov](http://www.irs.gov) and enter "trust fund recovery penalty" in the search box.

### Do you have questions or need help?

#### For information and help about your examination:



Call the phone number shown in the letter you received.



Write to the address shown in the letter you received.

In any document you send us, include your name, employer identification number (EIN), and tax form and period shown on the letter. Also enclose a copy of the letter you received.

#### For general information:



Call us toll free at:

1-800-829-4933

1-800-829-4059 (TTY/TDD for hearing and speech-impaired people)



Go online at:

[www.irs.gov](http://www.irs.gov)

#### To order tax forms and publications:



Go online at:

[www.irs.gov](http://www.irs.gov)



Call us at:

1-800-829-3676

1-800-829-4059 (TTY/TDD for hearing and speech-impaired people)

1-703-368-9694 (Forms by fax)

## Other IRS Products You May Need

**Form 940**, Employer's Annual Federal Unemployment (FUTA) Tax Return

**Form 941**, Employer's QUARTERLY Federal Tax Return

**Form 941-X**, Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund

**Form 943**, Employer's Annual Federal Tax Return for Agricultural Employees

**Form 943-X**, Adjusted Employer's Annual Federal Tax Return for Agricultural Employees or Claim for Refund

**Form 944**, Employer's ANNUAL Federal Tax Return

**Form 944-X**, Adjusted Employer's ANNUAL Federal Tax Return or Claim for Refund

**Form 945**, Annual Return of Withheld Federal Income Tax

**Form 945-X**, Adjusted Annual Return of Withheld Federal Income Tax

**Form CT-1**, Employer's Annual Railroad Retirement Tax Return

**Form CT-1 X**, Adjusted Employer's Annual Railroad Retirement Tax Return or Claim for Refund

**Form 2848**, Power of Attorney and Declaration of Representative

**Form 4669**, Statement of Payments Received

**Form 4670**, Request for Relief of Payment of Certain Withholding Taxes

**Publication 1**, Your Rights As A Taxpayer

**Publication 5**, Your Appeal Rights and How to Prepare a Protest if You Don't Agree

**Publication 15 (Circular E)**, Employer's Tax Guide

**Publication 15-A**, Employer's Supplemental Tax Guide

**Publication 556**, Examination of Returns, Appeal Rights, and Claims for Refund

**Publication 594**, The IRS Collection Process

**Publication 966**, Electronic Federal Tax Payment System: A Guide to Getting Started

**Publication 1035**, Extending the Tax Assessment Period

**Publication 1546**, The Taxpayer Advocate Service Is Your Voice at the IRS

**Publication 1976**, Do You Qualify for Relief Under Section 530?

**Publication 3953**, Questions and Answers About Tax Court Proceedings for Determination of Employment Status Under I.R.C. 7436

**Publication 4167**, Appeals – Introduction to Alternative Dispute Resolution

**Publication 4539**, Fast Track Settlement – A Process for Prompt Resolution of Large Business and International Tax Issues

**Publication 5022**, Fast Track Settlement - A Process for Prompt Resolution of Small Business Self Employed Tax Issues

**Publication 5092**, Fast Track Settlement A Process Resolution of Tax Exempt and Government Entities (TE/GE) Tax Issues

## Comments or Suggestions

We welcome your comments about this publication and your suggestions for future editions. Although we cannot respond individually to each comment we receive, we do appreciate your feedback and will consider your comments as we revise our tax products.

Because we respond to many letters by telephone, it would help if you would include your daytime phone number, with the area code, in your correspondence.

Write to us at:

Internal Revenue Service  
Tax Forms & Publications Division  
1111 Constitution Ave. NW, IR-6526  
Washington, DC 20224

Email us at:

[taxforms@irs.gov](mailto:taxforms@irs.gov). Please put Publication 5146 on the subject line.

Send us comments from  
[www.irs.gov/formspubs](http://www.irs.gov/formspubs).

Click on More Information and then click on Comment on Tax Forms and Publications.