

One Minute Memo®



Supreme Court Holds Severance Pay Subject to FICA

By *Durward James Gehring*

The Supreme Court has ruled that severance pay is subject to the Social Security (FICA) withholding tax, dashing the hopes of many employers who had filed for refunds on the basis of lower court decisions.

The issue of whether severance pay is subject to FICA withholding has been the subject of conflicting decisions in the lower courts for several years, and when the Court of Appeals for the Sixth Circuit held in *In re Quality Stores, Inc.*, that severance was exempt from FICA, the Supreme Court agreed to review the decision to resolve the issue once and for all. On Tuesday, the Supreme Court ruled unanimously in favor of the IRS, reversing the *Quality Stores* decision and holding that severance is subject to FICA. For more on the background of *Quality Stores*, see our client alert [here](#).

While the cases were pending, many employers filed refund claims with the IRS for FICA previously paid on severance. Those claims are now moot, and the employers who filed them don't need to take any action. The IRS will simply deny them. However, any employer who stopped withholding FICA on severance pay on the strength of lower court decisions may need to file amended returns and pay the FICA. Certain types of FICA underpayments can be corrected without payment of interest or penalties if an amended Form 941-X is filed, and the tax is paid, by the end of the month following the calendar quarter in which the error is "discovered." Employers that failed to pay FICA on severance pay should consider whether the underpayment can be treated as an error that was "discovered" when the Supreme Court issued its decision, which would enable them to file a Form 941-X by April 30, 2014.

One intriguing question left open by the Supreme Court's decision is whether supplemental unemployment benefit, or SUB plans, which have become more popular in recent years, are also subject to FICA. The IRS has previously held that SUB plans are exempt from FICA, and one of the principal issues in *Quality Stores* was whether other types of severance should be included in the same exemption that applies to SUB plans. However, the Supreme Court's decision implied that SUB plans should also be subject to FICA, and it remains to be seen whether the IRS will take the hint and reverse its position on SUB plans.

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