

# Circuit Split: Severance Payments Not Subject to FICA?

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Recently, the Sixth Circuit held that severance payments following involuntary termination were not wages for FICA withholding purposes. *U.S. v. Quality Stores, Inc.*, No. 10-1563 (6th Cir. 2012). This creates a split in the federal courts, since in 2008 the Federal Circuit took a contrasting stance, agreeing with the IRS that severance is wages for FICA purposes. *CSX Corp. v. U.S.*, 518 F.3d 1328 (Fed. Cir. 2008).

The issue in these cases has been primarily whether the severance pay constitutes supplemental unemployment compensation benefits ("SUB payments"). Even determining an answer to that issue, however, doesn't fully resolve the issue. While SUB payments are exempt from income tax withholding under Internal Revenue Code Section 3402(o), it is much less clear whether it follows that SUB payments are also exempt from FICA taxes.

This split in the circuit courts has implications for employers (especially those within the Sixth Circuit) paying severance that may fit within the SUB payment definition. The government is likely to petition the U.S. Supreme Court for review, but resolution of the case is probably at least a couple years away. Until then, employers will likely want to take the safe course of action and pay FICA on severance, but they may choose to file protective refund claims to prevent the statute of limitations from closing on years currently open under the statute.

For questions on this or any other payroll or benefits question, contact a member of Holland & Hart's Benefits Law Group.

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