



Global Reward Update

United States

Application of US FICA on RSUs for internationally mobile employees

September 2023



Headline

On July 7, 2023, the US Internal Revenue Service (IRS) published Chief Counsel Advice 202327014 (CCA) <https://www.irs.gov/pub/irs-wd/202327014.pdf> commenting on, among other items, the application of US social taxes under the Federal Insurance Contributions Act (FICA)¹ on Restricted Stock Unit (RSU) awards for certain internationally mobile employees. With respect to trailing FICA tax obligations, in the specific fact pattern described in the CCA, the IRS concludes that:

- the portion of any RSU income earned by US Citizens and Residents² while performing services in the US is subject to FICA tax,
- the portion earned by US Citizens and Residents while performing outside the US for a non-American³ employer is not subject to FICA tax, and
- a reasonable sourcing allocation method should be used to determine US employment and wages subject to FICA tax.

Background

In general, trailing income and FICA tax obligations may arise when a US Citizen or Resident performs services in more than one country during the period in which compensation is earned. Among other factors, whether or not an individual is covered by a certificate of coverage⁴ (COC) under a totalization agreement must be considered in order to assess actual FICA tax obligations.

The US tax code and Treasury Regulations provide specific sourcing rules for federal income taxes, but do not provide specific rules for the sourcing of FICA tax to equity or cash-based compensation earned over a multi-year period in the US and outside the US, such as RSUs that partially vest while an individual is an employee in the US and an employee of a non-American employer outside the US. Further, with respect to US Citizens, Residents and Non-Residents⁵ that are employed outside the US by a non-American employer when RSUs become subject to FICA tax, the US tax code and Regulations do not provide specific rules for the manner in which compensation should be sourced for FICA tax purposes. Due to the lack of specific sourcing rules for FICA tax purposes, tax practitioners and employers have taken various positions as to FICA sourcing requirements for compensation earned over a multi-year period.

Impact of the CCA

With respect to US Citizens and Residents, not subject to a COC, that have been awarded RSUs that are earned over a multi-year vesting period for services provided in the US to a US employer and for services outside the US for a non-American employer, the CCA articulates the IRS position that:

- 1) FICA is applicable to wages for employment in the US even if the individual is not a US employee when the RSU becomes FICA taxable, and
- 2) a reasonable allocation method must be used to determine sourcing of wages for FICA tax purposes. The CCA provides that the income tax sourcing rules are a reasonable allocation method for purposes of sourcing FICA.

The CCA applies only to the specific taxpayer fact pattern and assumptions outlined in the CCA.

Deloitte's view

The CCA is written advice issued by the Office of Chief Counsel of the IRS to an IRS field office to convey the Office of Chief Counsel legal interpretation and position regarding the specific taxpayer (i.e., employer) fact pattern described in the CCA. CCA memorandums have no precedential value and are not treated as generally applicable legal advice. However, such memorandums provide useful insight into IRS views on tax technical issues and positions, in particular with respect to matters for which no or limited guidance has been issued. To the extent that a taxpayer is under exam or audit by the IRS regarding FICA tax trailing obligations, it is expected that an IRS agent would likely consider the CCA technical analysis and conclusions in assessing the taxpayer FICA positions.

Global Reward Update

Internal Revenue Code Section 3121 defines “employment” and “wages” for FICA tax purposes and the CCA outlines an analysis of FICA requirements based on those key concepts. In light of the CCA, with acknowledgement that the CCA cannot be used or cited as precedent and no statutory or regulatory rules specifying a sourcing methodology of FICA wages are included in the Internal Revenue Code or existing IRS guidance, Deloitte recommends that taxpayers utilize the allocation methodology outlined in the CCA or another reasonable allocation methodology to determine FICA taxes under the taxpayer fact pattern presented in the CCA for US Citizens and Residents.

The CCA does not address the FICA tax treatment of Non-Residents who perform services during the RSU vesting period in the US and who are employed outside the US by a non-American employer when RSUs become subject to FICA tax. However, based on the analysis contained in the CCA and prior IRS guidance, it is likely the IRS would view any US employment during the RSU vesting period as giving rise to wages subject to FICA tax.

It is also reasonable to expect that the IRS would take a similar approach to other forms of award delivering multi-year compensation (e.g., stock options). Therefore, we would recommend that employers review their current social tax policy for all equity and cashed based incentive awards and consider the associated risks if their FICA positions are different from the IRS position detailed in the CCA. As part of a review, it is recommended that employers consider specific facts that may differ from those outlined in the CCA that may impact FICA positions, such as the use of COCs under totalization agreements.

Who to contact

If you would like to discuss this further, or have any questions, please speak to your usual Deloitte contact or any of the contacts listed below:

Mark Miller

Principal

mamiller@deloitte.com

Scott Walter

Managing Director

swalter@deloitte.com

Meridith Fronza

Principal

mfronza@deloitte.com

¹ FICA taxes are comprised of the three components, which are Old Age Survivors, and Disability Insurance (commonly referred to as Social Security Tax), Medicare and Additional Medicare Tax.

² US Residents include green card holders and those individuals meeting the substantial presence test of IRC Sec. 7701(b).

³ The term "American employer", as defined under IRC Sec. 3121(h), is an employer which is (1) the United [States](#) or any instrumentality thereof, (2) an individual who is a resident of the United [States](#), (3) a partnership, if two-thirds or more of the partners are residents of the United [States](#), (4) a trust, if all of the trustees are residents of the United [States](#), or (5) a corporation organized under the laws of the United [States](#) or of any [State](#). A Non-American employer is any employer not meeting that definition, which would generally include foreign corporations and nonresident aliens.

⁴ Link to US Social Security Administration website for information about COCs and Totalization Agreements - https://www.ssa.gov/international/CoC_link.html

⁵ Non-US Residents include individuals that are neither US Citizens or US Residents, as defined above.



Deloitte.

This publication has been written in general terms and we recommend that you obtain professional advice before acting or refraining from action on any of the contents of this publication. Deloitte LLP accepts no liability for any loss occasioned to any person acting or refraining from action as a result of any material in this publication.

Deloitte LLP is a limited liability partnership registered in England and Wales with registered number OC303675 and its registered office at 1 New Street Square, London EC4A 3HQ, United Kingdom.

Deloitte LLP is the United Kingdom affiliate of Deloitte NSE LLP, a member firm of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"). DTTL and each of its member firms are legally separate and independent entities. DTTL and Deloitte NSE LLP do not provide services to clients. [Please click here to learn more about our global network of member firms.](#)

© 2023 Deloitte LLP. All rights reserved.

Designed by CoRe Creative Services. RITM1508935