

THE
NATIONAL LAW REVIEW

IRS Guidance on Employment and Income Tax Refunds on Same-Sex Spouse Benefits

Thursday, October 17, 2013

Employers extending benefit coverage to employees' same-sex spouses and partners should review their payroll procedures to ensure that such coverages are properly taxed for federal income and FICA tax purposes. Employers also should review the options in Notice 2013-61 and consider filing claims for refunds or adjustments of FICA overpayments.

Employers that provided health and other welfare plan benefits to employees' same-sex spouses prior to the [Supreme Court of the United States' June 2013 ruling in *U.S. v. Windsor*](#) may be interested in filing claims for refunds or adjustments of overpayments in federal employment taxes on such benefits. To reduce some of the administrative complexity of filing such claims, the U.S. Department of the Treasury and the Internal Revenue Service (IRS) recently issued [Notice 2013-61](#), which outlines several optional procedures that employers can use for overpayments in 2013 and prior years.

In *Windsor*, the Supreme Court ruled Section 3 of the **Defense of Marriage Act (DOMA)** unconstitutional.

Section 3 of DOMA had provided that, for purposes of all federal laws, the word "marriage" means "only a legal union between one man and one woman as husband and wife," and the word "spouse" refers "only to a person of the opposite-sex who is a husband or wife."

Federal Taxation of Same-Sex Spouse Benefits

The *Windsor* ruling thus extends favorable federal tax treatment of spousal benefit coverage to same-sex spouses. The [IRS issued guidance in July](#) clarifying that this tax treatment would extend to all same-sex couples legally married in any jurisdiction with laws authorizing same-sex marriage, regardless of whether the couple resides in a state where same-sex marriage is recognized. This IRS approach recognizing same-sex marriages based on the "state of celebration" took effect September 16, 2013.

Prior to the ruling, an employer that provided coverage such as medical, dental or vision to an employee's same-sex spouse was required to impute the fair market value of the coverage as income to the employee that was subject to federal income tax (unless the same-sex spouse qualified as the employee's "dependent" as defined by the Internal Revenue Code). The employer was required to withhold federal payroll taxes from the imputed amount, including federal income and the employee's Social Security and Medicare (collectively FICA) taxes. In addition, employers paid their own share of FICA taxes on the imputed amount, as well as unemployment (FUTA).

As a result of the ruling, an employee enrolling a same-sex spouse for benefit coverage under an employer-sponsored health plan no longer has imputed income for federal income tax purposes; may pay for the spouse's coverage using pre-tax contributions under cafeteria plans; and may take tax-free reimbursements from flexible spending accounts (FSAs), health reimbursement accounts (HRAs) and health savings accounts (HSAs) to pay for the same-sex spouse's qualifying medical expenses. This same favorable federal tax treatment does not extend to employer-provided benefits for an unmarried same-sex partner, unless the same-sex partner qualifies as the employee's dependent.



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Overpayments of Employment Taxes in 2013

Employers that overpaid both federal income and FICA tax in 2013 as a result of income imputed to employees for benefit coverage for a same-sex spouse may use the following optional administrative procedures for the year:

- Employers may use the fourth quarter 2013 Form 941 (Employer's Quarterly Federal Tax Return) to correct overpayments of employment taxes for the first three quarters of 2013. This option is available only if employees have been repaid or reimbursed for over-collection of FICA and federal income taxes by December 31, 2013.

Alternatively, employers may follow regular IRS procedures to correct an overpayment in FICA taxes by filing a separate Form 941-X for each quarter in 2013. Notice 2013-61 provides detailed instructions for each of the alternative options, including how to complete the Form 941, as well as Form 941-X, which requires "WINDSOR" in dark, bold letters across the top margin of page one.

Overpayments of FICA Taxes in Prior Years

Employers that overpaid FICA taxes in prior years as a result of imputed income for same-sex spousal benefit coverage may make a claim or adjustment for all four calendar quarters of a calendar year on one Form 941-X filed for the fourth quarter of such year if the period of limitations on such refunds has not expired and, in the case of adjustments, the period of limitations will not expire within 90 days of filing the adjusted return.

Alternatively, employers may use regular procedures to make such claims or adjustments. The regular procedures require filing a Form 941-X for each calendar quarter for which a refund claim or adjustment is made.

Note that under the alternative procedure provided by Notice 2013-61 or under the regular procedure, filing of a Form 941-X requires either employee consents, or repayment or reimbursements, as well as amended Form W-2s to reflect the correct amount of taxable wages.

Employee Overpayments of Federal Income Taxes

Employers who provided benefits to employees' same-sex spouses in 2013 may adjust the amount of reported federally taxable income on each employee's Form W-2 (Wage and Tax Statement) to exclude any income imputed on the fair market value of the coverage and to permit the employee to pay for the coverage on a pre-tax basis.

Employees who overpaid federal income taxes in prior years as a result of same-sex spouse benefit coverage may claim a refund by filing an amended federal tax return for any open tax year. Refunds are available for overpayments resulting from income imputed on the fair market value of the coverage and from premiums paid on an after-tax basis for the coverage. An amended tax return generally may be filed from the later of three years from the date the return was filed or two years from the date the tax was paid.

Employers that file Form 941-X are required to file Form W-2c (Corrected Wage and Tax Statement) to show the correct—in this case reduced—wages. Employers that do not file Form 941-X may want to begin preparing for employee requests for a Form W-2c for each open tax year in which benefit coverage was offered to employees' same-sex spouses.

Next Steps

Employers extending benefit coverage to employees' same-sex spouses and partners should carefully review their payroll processes and procedures to ensure that such coverages are now properly taxed for federal income and FICA tax purposes. In addition, employers should review the options in Notice 2013-61, and consider filing claims for refunds or adjustments of overpayments of FICA taxes for any prior open tax years and issuing Form W-2c to allow employees to claim refunds of federal income tax. Most importantly, by acting promptly, employers can correct the 2013 over-withholdings for both FICA and federal income tax and overpayment of the employer portion of FICA tax, without the necessity and burden of filing a Form 941-X.

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