

Treasury Department/IRS Issue Guidance Instructing Employers on How to Make Claims for FICA (Federal Insurance Contributions Act) Refunds or Credits Post-Windsor

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On June 26, 2013, in *United States v. Windsor*,¹ the Supreme Court held that section 3 of the **Defense of Marriage Act (DOMA)** is unconstitutional. (For a discussion of the issues and holding in *United States v. Windsor*, please see our [client advisory of July 12, 2012](#).) Before *Windsor*, the IRS applied section 3 of DOMA to prohibit the recognition of same-sex marriages for purposes of Federal tax law. As a result, employers were required to withhold and pay employment taxes with respect to otherwise non-taxable benefits provided to the same-sex spouse of an employee. Shortly after the decision was handed down, the Treasury Department and the IRS announced that they intended to issue “**streamlined procedures for employers who wish to file refund claims for payroll taxes paid on previously-taxed health insurance and fringe benefits provided to same-sex spouses.**”² On August 29, the Treasury Department issued Rev. Rul. 2013-17,³ which held:

- For Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term “marriage” includes such a marriage between individuals of the same sex;
- For Federal tax purposes, a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex is valid even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages; and
- For Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” do not include individuals (whether of the opposite sex or the same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state, and the term “marriage” does not include such formal relationships.

Rev. Rul. 2013-17 clarified that individual taxpayers are allowed to file a claim for a credit or refund of an overpayment of FICA and/or income tax with respect to employer-provided health coverage benefits or certain other fringe benefits. It also provided instructions for the filing of certain income and payroll tax refunds. (For an explanation of Rev. Rul. 2013-17, please see our [client advisory of September 9, 2013](#).)

In recently issued Notice 2013-61, the Treasury Department and the Internal Revenue Service described methods, and provided special administrative procedures, under which employers and employees may make claims for refund or adjustments of FICA and Federal income tax withholding with respect to certain benefits provided to same-sex spouses. (The notice refers to these claims for refunds and adjustments collectively as “corrections.”) Affected benefits include group health plans, cafeteria plans, and health reimbursement arrangements, along with qualified tuition reduction programs, arrangements providing or reimbursing meals and lodging for the convenience of the employer, and dependent care assistance programs (relating to the care of a disabled spouse). Thus, if an employee made a pre-tax salary-reduction cafeteria plan election that included health coverage for a same-sex spouse on an after-tax basis under his or her employer’s group health plan, the taxpayer may now treat these amounts as pre-tax salary reduction amounts for both payroll and income tax purposes.

General correction procedures under current regulations

FICA taxes are reported on IRS Form 941, “Employer’s QUARTERLY Federal Tax return,” which is filed quarterly. Corrections are made using a Form 941-X, “Adjusted Employer’s QUARTERLY Federal Tax Return,” for each calendar quarter being corrected. Generally, a separate X form must be filed for each taxable period. Where an employer claims a refund or credit of FICA taxes for a prior year, the employer must file Forms W-2c (Corrected Wage and Tax Statement) for such year.

The employer’s and employees’ shares of FICA taxes (Social Security and Medicare taxes) may be corrected for any period during which the statute of limitations has not expired. In contrast, Federal income tax withholdings may be corrected only for the current calendar year, except in the case of an administrative error (e.g., wrong amount of withholdings reported on Form 941). The statute of limitations is generally three years from the date a return is filed. For Form 941 purposes, however, all four quarterly returns are deemed to be filed on April 15 of the following year. No adjustment may be made, however, if the overpayment relates to a return period for which the period of limitations on credit or refund of such overpayment will expire within 90 days of filing the adjusted return.

Corrections of overpayments of FICA tax are generally made only after an error has been determined or “ascertained” by making a claim for a refund. An error is ascertained only when the employer has sufficient knowledge of the error to be able to correct it. Before making an adjustment of an overpayment of FICA tax with respect to an employee, an employer must repay or reimburse the employee in the amount of the over-collection. In the case of FICA tax over-collected in a prior year, the employer must secure the employee’s written statement confirming that the employee has not made any previous claims (or that the claims were filed but rejected) and will not make any future claims for a refund or credit of the amount of the over-collected FICA tax. This requirement does not apply, however, to the extent that the employee FICA taxes were not withheld from the employee or, after the employer makes reasonable efforts to repay or reimburse the employee or secure the employee’s consent, the employer cannot locate the employee or the employee will not provide consent. No refund to the employer is allowed for the overpayment of withheld income tax which the employer deducted or withheld from an employee.

Special rule for the 3rd quarter of 2013

If an employer (i) withheld employment taxes with respect to same-sex spouse benefits paid to or on behalf of an employee in the third quarter of 2013, (ii) ascertains the amount withheld on such benefits, and (iii) repays or reimburses the employee for the amount of such taxes before filing the third quarter 2013 Form 941, the employer need not report the wages and withholding on its third quarter 2013 Form 941. If, however, the employer does not repay or reimburse the employee for the amount of the over-collection before filing the third quarter 2013 Form 941, the employer must report the amount of the over-collection either under the general method explained above or by applying one of the special administrative procedures described below.

Special administrative procedures for 2013 (on 4th quarter 2013 Form 941)

Notice 2013-61 provides two alternative special administrative procedures for employers that treated the value of same-sex spouse benefits as wages on Forms 941 for the first three quarters of 2013:

- First alternative special administrative procedure — correct all calendar quarters of 2013 on 4th quarter Form 941 (due January 31, 2014).

Under the first alternative special administrative procedure, an employer must repay or reimburse its employees for the amount of the over-collected FICA tax and the over-collected income tax withholding with respect to the same-sex spouse benefits for the first three quarters of 2013 on or before December 31, 2013. After repaying or reimbursing the employees, the employer may reduce the fourth quarter wages, tips, and other compensation by the amount of the same-sex spouse benefits treated as wages for the first three quarters of 2013. The income tax withheld from wages, tips, and other compensation is similarly reduced by the amount of affected income tax withholding. The advantage of this procedure is that employers will not have to file separate Forms 941-X to correct each of the first three quarters of 2013.

Adjustments of Social Security taxes are limited to that portion of the benefits that, when added to other Social Security wages for the year, does not exceed the taxable wage base for the year (\$113,700 in 2013). To the extent an employee's other wages exceed the taxable wage base, the adjustment of the FICA taxes related to same-sex spouse benefits will be limited to Medicare taxes. Additional rules are provided to ensure that use of this special administrative procedure does not result in a mismatch between total taxes and total liability for the quarter.

- Second alternative special administrative procedure — correct all calendar quarters of 2013 on a single Form 941-X for the 4th quarter of 2013.

The second alternative special administrative procedure applies where an employer does not repay or reimburse employees for the amount of withheld FICA and income taxes with respect to same-sex spouse benefits provided in 2013 on or before December 31, 2013. In this case, the employer will file the 2013 fourth quarter Form 941 without making the adjustment. Correction will, therefore, require the filing of a Form 941-X. Under this option, an employer may file a single Form 941-X for the fourth quarter of 2013 to make adjustments or claim refunds or credits of overpayments of FICA taxes with respect to same-sex spouse benefits paid in all quarters of 2013. This option is available only if the employer has otherwise satisfied the requirements for filing Form 941-X, including repaying or reimbursing the over-collected employee FICA tax to employees (or, for refund claims, securing

consents from employees), and obtaining the required written statements from employees. Employers using this approach are instructed to write “WINDSOR” in dark, bold letters across the top margin of page 1 of Form 941-X.

Notice 2013-61 advises that “[a]n employer may not make an adjustment for an overpayment of income tax withholding for a prior calendar year unless the overpayment is attributable to an administrative error.” As a consequence, this second special administrative procedure *cannot* be used with regard to income tax withheld from employees with respect to same-sex spouse benefits in 2013 because an employer can use this Form 941-X procedure only if the employer did not repay or reimburse employees for the amount of withheld taxes with respect to same-sex spouse benefits provided in 2013 on or before December 31, 2013. Instead, employees will receive credit for the income tax withheld for purposes of determining any entitlement to a refund of income tax paid with respect to same-sex spouse benefits provided in 2013 when they file their individual return.

Special administrative procedure for years before 2013

Notice 2013-61 provides a separate special administrative procedure for employers to make adjustments or claims for refund or credit of overpayments of FICA taxes paid with respect to same-sex spouse benefits for any year before 2013. Under this procedure, the employer must take into account the applicable Social Security wage base in determining the overpayment of FICA taxes for the prior year being corrected. The employer may file one Form 941-X for the fourth quarter of the prior year, which includes the adjustments or refunds for all overpayments of employment taxes with respect to same-sex spouse benefits provided during such prior year, including overpayments reflected in the Forms 941 for the first three quarters of the year. As is the case with the second alternative special administrative procedure described above, employers using this approach are directed to write “WINDSOR” in dark, bold letters across the top margin of page 1 of Form 941-X.

This special procedure is subject to the usual requirements that apply in the case of corrections of overpayments for prior years, including the filing of Forms W-2c, repaying or reimbursing employees for overwithheld taxes, and obtaining the required written statements (and consents where applicable) from employees.

¹ 570 U.S. ___, (2013).

² U.S. Department of the Treasury Press Center, “All Legal same-sex Marriages Will Be Recognized for Federal Tax Purposes” (Aug. 29, 2013), available at: <http://www.treasury.gov/press-center/press-releases/Pages/jl2153.aspx>.

³ 2013-38 I.R.B. 201.