

Management Alert



IRS Announces Special Procedures for Correcting Overwithholding on Same-Gender Spouse Benefits

By Jim Gehring

On Monday, in Notice 2013-61, the IRS took the next step to implement the Supreme Court's decision in *Windsor v. United States* striking down the provision of the Defense of Marriage Act that prohibited the recognition of same-gender couples as married for purposes of federal law. Notice 2013-61 provides simplified procedures for correcting overwithholding of federal income tax and Social Security and Medicare (FICA) tax on benefits previously provided to same-gender spouses on an after-tax basis. (For a general discussion of the issues facing plan sponsors that provide benefits to same-gender spouses post-*Windsor*, see our Management Alert dated June 28, 2013 available [here](#).)

Background. Under federal law, a number of employee benefits, particularly health coverage, can only be provided on a pre-tax basis to an employee's partner if the employee and his or her partner are legally married (or the partner is a qualifying dependent under the Internal Revenue Code). As a result, employers that allowed an employee to cover his or her same-gender spouse under the employer's health plan have been required to withhold the employee's share of the extra premium on an after-tax basis, and to impute taxable income on the employer's share. Employers have also withheld and paid employment taxes on benefits provided to same-gender spouses.

In Rev. Rul. 2013-17, the IRS ruled that same-gender couples legally married in a domestic or foreign jurisdiction that recognizes their marriage will be treated as married for federal tax purposes, regardless of where they reside. Consequently, employees who pay for health coverage for a same-gender spouse on an after-tax basis, or who recognize imputed income, will now have those amounts treated as pre-tax and excludable from income. (See our Management Alert, entitled *IRS Adopts Ceremony Rule for Same-Gender Spouse Determinations*, available [here](#).) This guidance opened the possibility that employees in same-gender marriages could claim a refund for overwithholding in prior periods. Similarly, employers who previously paid FICA taxes on health coverage provided to same-gender spouses may want to claim a refund.

In Notice 2013-61, the IRS spells out some simplified methods for dealing with such claims. Basically, the simplified procedures allow an employer in some cases to "net out" the overwithholding within the same quarter or year and avoid having to file amended returns, and in other cases allow the employer to file a single amended return (Form 941-X) for the final quarter of each affected year rather than requiring an amended return for each quarter.

Correction of Third Quarter of 2013. Technically, Rev. Rul. 2013-17 only requires an employer to start treating same-gender spouses as married beginning with September 16, 2013, the day the ruling was effective. Consequently, an employer who had at least one payroll date in September after September 16 may have overwithheld on employees in same-gender marriages. Notice 2013-61 provides that an employer may correct overwithholding of both income tax and FICA for the third quarter of 2013 simply by refunding the overwithholding to the affected employees by the time Form 941 for the quarter is

due (October 31, or November 11 if all taxes were deposited on time), and reducing the amount of taxable wages shown on the Form 941. Since the employer will in all probability have already deposited the overwithheld taxes, it will show a credit for overwithholding that can be applied to the fourth quarter's return.

Rev. Rul. 2013-17 also allows an employer to treat same-gender spouses as married retroactively for periods prior to September 16, as long as it does so consistently. Technically this procedure can be used for all overwithholding that occurred in the third quarter, not just that which occurred on payroll dates after September 16. However, an employer that chooses to apply Rev. Rul. 2013-17 retroactively will probably also have overwithholding for the first and second quarters of 2013, which means that all three quarters can be corrected under one of the procedures below.

Correction of First Three Quarters of 2013. Notice 2013-61 provides two alternative methods for correcting overwithholding that occurred in the first three quarters of 2013. First, the employer can refund the overwithholding to employees by December 31, 2013, and reduce the amount of taxable wages shown on its fourth quarter Form 941. This will eliminate the need to file amended returns for the earlier quarters. This method can also be used to correct overwithholding in the first part of the fourth quarter if the employer was not able to correct its withholding procedures by October 1. The notice also spells out exactly how the Form 941 should be completed.

Second, if the employer is unable to complete the process of reimbursing employees for the overwithholding by December 31, the Notice allows the employer to correct overwithholding for all four quarters of 2013 by filing a single amended return (Form 941-X) for the fourth quarter of 2013, and treating all of the overwithholding for 2013 as having occurred in the fourth quarter, rather than filing a separate amended return for each quarter. The Form 941-X must have the word "Windsor" written on it and can only include corrections under the special Notice 2013-61 procedure, which may require filing a separate Form 941-X if other errors were made.

Under this procedure, the employer may refund the overwithholding of FICA, but cannot correct the overwithholding of income tax. The employee will receive credit for the actual amount of income tax withheld, which will reduce the amount of tax owed (or increase the employee's refund) when the employee files his or her 2013 return.

Correction of Years Prior to 2013. The statute of limitations on FICA withholding is three years, beginning on April 15 of the following year, which means that employers can also file for a refund of FICA overwithholding on same-gender spouses for 2010 (through April 15, 2014), 2011 and 2012. As with the alternative 2013 correction procedure described above, Notice 2013-61 allows employers to file a single 941-X for the fourth quarter of each affected year, which must have the word "Windsor" written on it and cannot include any other corrections, and excess income tax withholding cannot be corrected.

Other Considerations. Notice 2013-61 makes it clear that the special procedures outlined above are alternatives only, and an employer is also free to use the usual procedures for claiming a refund of overpaid FICA. Some employers may choose to seek a refund only of the overpaid employer share of FICA, which eliminates the need for refunding the overwithheld employees' share to the employees involved. A refund claim that is limited to the employer's share of FICA can only be made through the normal IRS procedures, which involves filing a separate Form 941-X for each quarter during which the excess FICA was paid.

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