

AN ALERT FROM THE BDO COMPENSATION &amp; BENEFITS TAX PRACTICE

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## COMPENSATION & BENEFITS



### ► SUBJECT

## IMPORTANT TAX GUIDANCE FOR EMPLOYERS AND EMPLOYEES TO RECOVER EMPLOYMENT TAXES PAID ON CERTAIN BENEFITS PROVIDED TO SAME-SEX SPOUSES

### ► SUMMARY

On Monday, September 23, 2013, the Internal Revenue Service issued Notice 2013-61, which provides guidance for employers and employees to recover overpayments of employment taxes that were withheld in connection with certain benefits provided to same-sex spouses. Certain alternative special administrative procedures applicable to 2013 should be evaluated as soon as possible.

The recent United States Supreme Court decision in *United States v. Windsor*, 570 U.S. \_\_\_, 133 S.Ct. 2675 (2013), held that section 3 of the Defense of Marriage Act was unconstitutional. In response to the decision, the Service issued Rev. Rul. 2013-17, providing in part that, 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 married under state law, and the term "marriage" includes such a marriage between individuals of the same sex.<sup>1</sup> As a result, certain benefits that were provided to a same-sex spouse of an employee are now entitled to the same exclusions from gross income and wages that have traditionally been available only to opposite-sex married couples.

The Notice provides a special administrative procedure that permits employers to consolidate its claims or adjustments for overwithheld employment taxes with respect to certain same-sex spouse benefits by making the claim for each calendar year on a single Form 941-X, Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund, for the fourth quarter of each calendar year.

<sup>1</sup> Conversely, for federal tax purposes, these terms 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.

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This special administrative procedure is available for all years that are open under the statute of limitations including 2013. Employers following the special administrative procedure under the Notice are instructed to write "WINDSOR" in dark, bold letters across the top margin of the first page of the fourth quarter Form 941-X.

The regular IRS procedures for amending quarterly Forms 941, Employer's Quarterly Federal Tax Return, can still be followed. However, those procedures require a Form 941-X to be filed for each affected quarter.

In all cases the employer is required to provide a Form W-2c, Corrected Wage and Tax Statement, to the employee to reflect the revised federal income tax and social security wages, Medicare wages, social security tax withholding, and Medicare tax withholding as adjusted on the Form 941-X.

### **Corrections for Third Quarter of 2013**

Under the IRS correction procedures, an employer can correct for federal income and FICA taxes that have been withheld with respect to same-sex spouse benefits in the third quarter of 2013 by simply refunding the over-withheld employment taxes to the affected employees prior to the due date for the Form 941 (generally October 31, or November 11 if all employment taxes have been timely deposited with the Service), and making a corresponding adjustment to the amount of wages and withholding reported on the third quarter 2013 Form 941 (Treas. Reg. § 31.6413(a)-1(a)(1)). If the employer is unable to repay the excess withholding to the affected employee prior to filing the third quarter 2013 Form 941, the employer must report the amount of the over-collection on the Form 941 and can use one of the special administrative procedures for 2013 described below to make an adjustment or claim for refund for the overpayment.

As a practical matter, most employers will also be making similar adjustments or claims for over-withheld employment taxes related to same-sex spouse benefits for earlier quarters of 2013, and for prior open employment tax years as well. Accordingly, most employers will probably elect to adopt the same correction process for all affected employment tax quarters.

### **Alternative Special Administrative Procedures for 2013**

With respect to overpayments of employment taxes for the first three quarters of 2013, the Notice provides an alternative special administrative procedure to make a claim or adjustment instead of filing the Form 941-X for the fourth quarter of 2013 as described above. Inasmuch as the 2013 fourth quarter Form 941 has not been filed, the alternative allows the employer to make the adjustments on its fourth quarter 2013 Form 941 to correct these overpayments for the first three quarters of 2013. Adjustments made before the end of 2013 avoid the need to issue corrected Forms W-2 and can in certain cases avoid the need to obtain consents and certification from the employees as discussed below. In addition, employers can in most cases only make adjustments for 2013 federal income tax withholding prior to the end of 2013.

### **Statute of Limitations for FICA and Medicare Claims or Adjustments**

The statute of limitations for employment tax claims or adjustments begins to run on April 15 of the calendar year following the year in which the wage payments were made (section 6501(b)(2)). Thus, the three-year period of limitations to file claims or adjustments for Social Security and Medicare ("FICA") tax overpayments in connection with certain same-sex spouse benefits provided during 2010 will expire on April 15, 2014. The period of limitations for claims or adjustments for 2011 or 2012 will expire on April 15, 2015 and 2016, respectively.

### **FICA Tax Withholding Refund Procedures**

Under the IRS employment tax refund procedures, an employer generally may not simply make a claim or adjustment only for the employer's share of overpaid FICA taxes. Rather, Treas. Reg. § 31.6402(a)-1(a)(1)(ii) requires an employer to solicit consents and certifications from employees, in order to permit the employer to act as their agent to receive a claim or adjustment for the employee's share of overpaid FICA taxes. After a reasonable time, if no reply is received, then the employer can file an employer-only claim.

These procedures continue to apply to any Form 941-X filed under these special administrative procedures. However, if the employer corrects the 2013 overpaid FICA taxes on or before December 31, 2013, the repayment of overpaid FICA can be made through the 2013 payroll without obtaining certifications from employees.

### Federal Income Tax Withholding Refund Procedures

The FICA tax refund procedures permit the employer recovery of over-withheld employer and employee FICA taxes for prior, open calendar years (Treas. Reg. § 31.6413(a)-1(a)(1) and (2)). However, an employer is generally not permitted to recover over-withheld federal income taxes after the end of the calendar year (Treas. Reg. § 31.6413(a)-1(a)(2)). After the end of the calendar year, the claim or adjustment for the over withholding of federal income tax is a matter for settlement directly between the individual employee and the Service, typically in connection with the filing of the employee's federal income tax return on Form 1040.

Affected employees can recover any federal income tax previously reported in connection with certain same-sex spouse benefits provided during any year open under the statute of limitations by filing an amended federal income tax return (Form 1040-X) for each of the affected years.

The statute of limitations for making a claim or adjustment in connection with the employee's individual income tax return generally runs for three years from the tax return due date of April 15, or potentially longer if a valid extension to file was obtained and availed of (section 6501(b)(1)). Generally, as of the time this Tax Alert was issued, individuals could file amended returns for 2010, 2011, and 2012, and in some cases, 2009.

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