

## Publications

### *Labor and Employment Alert: IRS Guidance on Employment Tax Refunds for Health Benefits Provided to Same-Sex Spouses*

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**Summary:** On September 23, 2013 the IRS issued Notice 2013-61. The Notice sets forth streamlined refund procedures for overpayments of federal employment taxes paid by employers and employees relating to health benefits provided to legally married same-sex spouses. The Notice addresses health benefits provided both in 2013, and prior open years. The IRS had previously released Revenue Ruling 2013-17 setting forth its position that same-sex partners legally married under the laws of any state would be considered married for federal tax purposes regardless of where the couple resides. Under this state of celebration standard, the laws of the state where the marriage was celebrated (rather than the state of domicile) governs marital status for federal income tax purposes.

IRS Notice 2013-61 sets forth the procedure to address health benefits provided during the third quarter of 2013 and for which the Form 941 has not yet been filed. It also provides two alternative streamlined procedures to address over-withholding for quarters in 2013 that already have been reported on the Form 941. Lastly, the Notice addresses over-withholding for health benefits provided in years prior to 2013.

### **Employment Tax Returns for Third Quarter 2013**

The Form 941 employment tax return is due by the last day of the month following the end of the quarter. Thus, the third quarter Form 941 is due October 31, 2013. The Notice provides that if an employer repays or reimburses the affected employee for third quarter over-withholding before the Form 941 for the third quarter is filed, the employer will not report the wages and withholding on the third quarter 2013 Form 941.

If the employer does not repay or reimburse the employee for the over-collection before filing the Form 941, the employer must report the over-collection on the Form 941 return and may use one of the special administrative procedures for 2013 to claim a refund or credit.

## Special Administrative Procedures for Adjustments for 2013 on Fourth Quarter 2013 Form 941 or Fourth Quarter 2013 Form 941-X.

The Notice provides two alternative procedures to correct overpayment of employment taxes in the first three quarters of 2013. Under the first alternative, the employer must repay affected employees their over-collected FICA and income tax withholding by December 31, 2013. The employer is then permitted to reduce the wages reported on the fourth quarter Form 941 by the amount of same-sex spouse benefits treated as taxable wages in the prior three quarters of 2013. In this way, the employer can avoid filing Forms 941-X to correct each of the Forms 941 filed for the first three quarters of 2013.

Under the second alternative procedure, an employer that 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, and thus, files the 2013 fourth quarter Form 941 without making the adjustment, may correct overpayments of FICA taxes with respect to same-sex spouse benefits provided in 2013 using Form 941-X. Under this option, an employer may file one 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 provided in all quarters of 2013, provided the employer has satisfied the usual 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. The employer should write "WINDSOR" in dark, bold letters across the top margin of page 1 of Form 941-X. Only corrections made under this special administrative procedure may be shown on this Form 941-X.

## Special Administrative Procedure for Adjustments or Claims for Refund for Years Before 2013

The IRS is also providing a 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 for which the applicable period of limitations on credit or refund has not expired. Under this procedure, the employer may file one Form 941-X for the fourth quarter of the prior year. This fourth quarter Form 941-X would include 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. The employer should write "WINDSOR" in dark, bold letters across the top margin of page 1 of Form 941-X. Only corrections made under this special administrative procedure may be shown on this Form 941-X. Although the employer may file for all four quarters of a prior year on the fourth quarter Form 941-X, this special administrative 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 the overwithheld taxes, and obtaining the required written statements (and consents if applicable) from employees.

Employers are not obligated to file for refunds. It is possible for employees to file employment tax refund claims on their own behalf. However, given employees general lack of familiarity with employment taxes, and relevant statutes of limitation, it is likely that many employees would fail to seek refund if their employer fails to inform them of the availability of the refund, or if the employer fails to pursue the refund on their behalf. Accordingly, as part of the cost benefit analysis in determining whether it is worthwhile to

seek refund on its own behalf, the employer should also factor in the employee relations aspect of the equation.

### **A reminder of same-sex spousal rights under retirement plans**

Beginning on September 16, 2013, qualified retirement plans must recognize marriages between same-gender spouses. We are still waiting for guidance with regard to any retroactive application to retirement plans and the required timing for retirement plan amendments.

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This alert is a summary and cannot include all details that may be relevant to your situation. As always, please contact us if you want more information on these developments or other employee benefits matters.