

employee benefits lawflash

April 8, 2013

Employer Tax Considerations for Supreme Court's Pending DOMA Decision

High Court considers the constitutionality of DOMA, which may create tax-refund opportunities for employers and employees before April 15.

On March 27, the U.S. Supreme Court heard oral arguments in *United States v. Windsor* to determine the constitutionality of section 3 of the Defense of Marriage Act (DOMA), which provides that the term "marriage" means only a legal union between one man and one woman as husband and wife and that the term "spouse" refers only to a person of the opposite sex who is a husband or a wife. The U.S. Court of Appeals for the Second Circuit previously held that section 3 was unconstitutional. Although a decision in the case may not be issued until the end of June 2013, employers and employees may want to consider taking steps in advance of the decision with regard to potential tax refunds.

Implications

Currently, the Internal Revenue Code of 1986, as amended (the Code), precludes same-sex spouses from receiving certain health benefits enjoyed by their opposite-sex counterparts on a tax-free basis. Consequently, employers must impute the value of employer-paid healthcare provided to an employee's nondependent same-sex spouse as additional income to an employee. Employees are subject to payroll taxes on this imputed income, commonly referred to as Federal Insurance Contributions Act (FICA) taxes, at the current rate of 7.65%, as well as federal and state income taxes. Employers are also subject to corresponding FICA payroll tax costs associated with this imputed income, at the same current rate of 7.65%. If the U.S. Supreme Court holds that section 3 of DOMA is unconstitutional, it would appear that same-sex spouses would be eligible for certain tax-free employer-paid health benefits and, as a result, employers may be entitled to a refund of their share of any FICA taxes paid and employees may be entitled to a refund of their share of both FICA taxes and income taxes.

Key Considerations

As April 15, 2013 is the deadline for filing a protective refund claim for 2009 calendar year taxpayers, employers may want to consider filing protective FICA tax-refund claims for all open payroll tax periods to cover the FICA taxes paid on this imputed income. While a ruling on the constitutionality of DOMA may not be issued until the end of June 2013, a protective refund claim simply preserves the right to a refund and extends the statute of limitations for a minimum of two years. Similar to FICA refund claims that have been filed for employers as a result of the *United States v. Quality Stores, Inc.* decision,¹ which held that severance payments paid to former employees pursuant to an involuntary reduction in force are not taxable "wages" for FICA tax purposes, the process for filing a protective claim is simple.

The decision to file for a refund will depend upon the extent to which an employer has had to impute income to employees with same-sex partners. In many instances, employers may have insufficient imputed income at issue to warrant spending the resources needed to file a FICA refund claim. Employers may also want to consider

1. *United States v. Quality Stores, Inc.*, No 10-1563 (6th Cir. Sept. 7, 2012). For further details on the *Quality Stores* decision and the process to file FICA refund claims, see our September 27, 2012, LawFlash, "Sixth Circuit: Downsizing Payments Are Not FICA-Taxable Wages," available at http://www.morganlewis.com/pubs/EB_LF_6thCircuitConfirmsPayrollTaxRefundOpportunity_27sep12.

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informing affected employees that they can file a protective refund claim for 2009.

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