

employee benefits lawflash

September 27, 2013

IRS Issues Notice on Special Tax Adjustment Procedures for Same-Sex Marriages

Notice 2013-61 provides alternative administrative procedures for reporting income and FICA tax adjustments in response to the Windsor decision and Revenue Ruling 2013-17.

On September 24, the U.S. Department of the Treasury and the Internal Revenue Service (IRS) issued Notice 2013-61, which outlines special administrative procedures to correct overpayments of employment taxes paid in 2013 and any prior calendar periods open under the statute of limitations for employer-provided spousal benefits that are excludable due to marital status.¹ Notice 2013-61 adds to the IRS guidance released on August 29, 2013 (Revenue Ruling 2013-17),² which clarified that same-sex couples who are legally married in jurisdictions or countries that recognize their marriages will be treated as married for all federal tax purposes, regardless of whether the same-sex couple resides in a state or jurisdiction that recognizes same-sex marriages.³

Purpose of Notice 2013-61

Notice 2013-61 and Revenue Ruling 2013-17 were issued in response to the June 26, 2013 U.S. Supreme Court ruling in *United States v. Windsor*, where the Court held that section 3 of the Defense of Marriage Act (DOMA) was unconstitutional. Section 3 of DOMA prevented the federal government from recognizing same-sex unions as marriages. Consequently, prior to the *Windsor* decision, employers were required to impute the value of employer-paid healthcare or other fringe benefits provided by the employer to same-sex couples that would normally be excludable based on the employee's marital status. Following the *Windsor* decision and the issuance of Revenue Ruling 2013-17, same-sex spouses who are legally married in a jurisdiction that recognizes same-sex marriages are eligible for certain tax-free employer-paid health benefits and are thus entitled to a refund of any overpayment of income and Federal Insurance Contributions Act (FICA) taxes related to these benefits.

To reduce filing and reporting burdens, Notice 2013-61 provides additional administrative guidance for employers and employees when correcting and reporting these employment tax adjustments.

Procedures for Correcting 2013 Returns

Notice 2013-61 sets out the following two alternative procedures for employers that treated excludable same-sex spousal benefits as wages on their Forms 941 for the first three quarters of 2013:

- An employer is allowed to adjust for and reduce the wages and overwithheld taxes paid for the first three quarters of 2013 on its fourth quarter Form 941 if the employer repays or reimburses its employees for the amount of overcollected FICA and income taxes on or before December 31, 2013.
- An employer who does not repay or reimburse its employees for the overpayment of FICA and income taxes on or before December 31, 2013 can file one Form 941-X for the fourth quarter of 2013 to correct FICA taxes paid in all quarters for 2013. An employer may correct these overpayments under this option if the employer

1. View Notice 2013-61 at <http://www.irs.gov/pub/irs-drop/n-13-61.pdf>.

2. For more information on other key considerations and tax treatments related to the issuance of Revenue Ruling 2013-17, see our September 17, 2013 LawFlash, "Guidance on Tax Treatment of Same-Sex Marriages Takes Effect," available at http://www.morganlewis.com/pubs/EB_LF_StepsForComplyingWithSame-SexMarriageGuidance_17sep13.

3. For more information on Revenue Ruling 2013-17, see our September 3, 2013 LawFlash, "Same-Sex Marriages Recognized for Federal Tax Purposes," available at http://www.morganlewis.com/pubs/EB_LF_Same-SexMarriagesRecognizedTaxPurposes_03sep13.

Morgan Lewis

has satisfied the usual requirements for filing a Form 941-X (i.e., reimbursing its employees for the overcollected FICA taxes or obtaining employee consents when filing a refund claim for any overwithheld employment taxes). By utilizing this special alternative procedure, an employer can avoid having to file a separate Form 941-X for each calendar quarter in 2013.

It is important to note that, under the second alternative, an employer may not make an adjustment for an overpayment of income tax withholding unless the overpayment is attributable to an administrative error. Employees in same-sex marriages will receive credit for the income taxes withheld from any excludable employer-provided spousal benefits in 2013 when they file their individual income tax returns (Forms 1040) in 2014.

Procedures for Correcting Prior Returns (2010–2012)

For prior years still open under the statute of limitations (i.e., calendar years 2010 through 2012), Notice 2013-61 permits an employer to file a single Form 941-X for the fourth quarter of an applicable year to correct and adjust for any overpayments made in any or all quarters for that prior year. This fourth quarter Form 941-X should include all adjustments for the overpayment of employment taxes with respect to the same-sex spousal benefits provided for the applicable calendar year.

Although an employer may file one Form 941-X to correct for all four quarters of a prior year, this special procedure does not relieve an employer from its obligation to file Forms W-2c, obtain the required written consents from the employees at issue, and reimburse employees for the overcollected FICA taxes. Similarly, an employer may not make an adjustment for an overpayment of income tax withholdings for a prior year unless the mistake is attributable to an administrative error.

Procedural Issues

When correcting returns, an employer should consult the procedural guidance in Notice 2013-61 to ensure that there is not a mismatch of information on the applicable Form 941. Also, Notice 2013-61 requires that all Forms 941 or Forms 941-X include the word “WINDSOR” in dark, bold letters across the top of page one to alert the IRS that the Forms at issue are related to adjustments in response to the *Windsor* decision and Revenue Ruling 2013-17.

Recommendations

In light of the special administrative procedures outlined in IRS Notice 2013-61, employers should consider the following:

- Employers may want to determine any income taxes that were overwithheld in 2013 and make the necessary corrections on the 4Q 2013 Form 941.
- Employers should consider whether to file refund claims for prior years or to simply take a credit since the interest will likely be nominal.
- While filing a claim is not required, employers will need to consider the administrative issues and employee messaging of this issue.

Contacts

If you have any questions or would like additional information on this issue, FICA refund claims, or any other payroll tax or similar matter, please contact any of the following Morgan Lewis attorneys:

Chicago

Andy R. Anderson	312.324.1177	aanderson@morganlewis.com
Brian D. Hector	312.324.1160	bhector@morganlewis.com
Louis L. Joseph	312.324.1726	louis.joseph@morganlewis.com
Marla J. Kreindler	312.324.1114	mkreindler@morganlewis.com
Julie K. Stapel	312.324.1113	jstapel@morganlewis.com

Morgan Lewis

New York

Craig A. Bitman	212.309.7190	cbitman@morganlewis.com
Gary S. Rothstein	212.309.6360	grothstein@morganlewis.com

Palo Alto

Zaitun Poonja	650.843.7540	zpoonja@morganlewis.com
---------------	--------------	--

Philadelphia

Robert L. Abramowitz	215.963.4811	rabramowitz@morganlewis.com
Brian J. Dougherty	215.963.4812	bdougherty@morganlewis.com
Amy Pocino Kelly	215.963.5042	akelly@morganlewis.com
Robert J. Lichtenstein	215.963.5726	rlichtenstein@morganlewis.com
Joseph E. Ronan	215.963.5793	ironan@morganlewis.com
Steven D. Spencer	215.963.5714	sspencer@morganlewis.com
Mims Maynard Zabriskie	215.963.5036	mzabriskie@morganlewis.com
David B. Zelikoff	215.963.5360	dzelikoff@morganlewis.com

Pittsburgh

Lisa H. Barton	412.560.3375	lbarton@morganlewis.com
John G. Ferreira	412.560.3350	jferreira@morganlewis.com
Randall C. McGeorge	412.560.7410	rmcgeorge@morganlewis.com
R. Randall Tracht	412.560.3352	rtracht@morganlewis.com

Washington, D.C.

Althea R. Day	202.739.5366	aday@morganlewis.com
David R. Fuller	202.739.5990	dfuller@morganlewis.com
Mary B. (Handy) Hevener	202.739.5982	mhevener@morganlewis.com
Claudia L. Hinsch	202.739.5155	chinsch@morganlewis.com
Daniel L. Hogans	202.739.5510	dhogans@morganlewis.com
Gregory L. Needles	202.739.5448	gneedles@morganlewis.com
Patrick Rehfield	202.739.5640	prehfield@morganlewis.com

About Morgan, Lewis & Bockius LLP

With 25 offices across the United States, Europe, the Middle East, and Asia, Morgan Lewis provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labor and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. Our international team of lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists—more than 1,600 legal professionals total—serves clients from locations in Almaty, Beijing, Boston, Brussels, Chicago, Dallas, Dubai,* Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Moscow, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein. For information about why we are required to include this legend, please see <http://www.morganlewis.com/circular230>.

*In association with Mohammed Buhashem Advocates & Legal Consultants

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change. © 2013 Morgan, Lewis & Bockius LLP. All Rights Reserved.