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James Paille • Feb. 06, 2014

The Supreme Court's rejection of the Defense of Marriage Act (DOMA) was big news in 2013. And in 2014, it has big payroll tax implications for employers who offer cafeteria benefits to same-sex spouses.

Those employers need to know two key things:

1. Same-sex spousal benefits are no longer taxable. This means that employers no longer need to pay FICA tax on these benefits, and employees no longer need to pay income tax on them.
2. Because the Supreme Court's decision was applied retroactively, employees and employers are eligible for a refund of taxes paid on same-sex benefits in prior years. The statute of limitations on this credit is usually three years.

The procedure for recouping FICA tax isn't exactly simple, but the IRS has taken some steps to make it a little less onerous for employers.

Filing a protective claim

For employers that would like to recoup the FICA tax paid on same-sex benefits in prior years, the first step is to file a protective claim with the IRS. A protective claim “stops the clock” on the statute of limitations, buying some time to file amended 941-X returns. Employers will need to cite a valid contingency that prevents them from filing an adjusted or claim-for-refund return in time to uphold the statute of limitations.

Some employers may have already filed a protective claim in anticipation of the

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but those claims will have to cite a valid contingency that prevents the employer from filing an adjusted or claim-for-refund return in time to uphold the statute of limitations.

For more information on contingencies, refer to IRS [Notice 2014-7](#) and IRS [Notice 2013-80](#)

Filing an amended 941-X return

After their protective claims are in place, employers will need to begin the process of filing amended 941-X returns to recoup FICA tax paid on same-sex benefits. The IRS has set up a special procedure that enables employers to re-file a single return for each year affected by the change, rather than having to re-file each individual quarterly return. So employers can file one Form 941-X for the fourth quarter of the prior year to make corrections for remuneration paid in all four quarters of the prior year. See [IRS Notice 2013-61](#) for rules related to this special administrative procedure.

For prior year adjustments, employers will generally need to show W-2Cs. They'll also be responsible for refunding FICA tax incorrectly withheld from employees to the individual employees.

State tax implications

In states that sanction same-sex marriage, same-sex spousal benefits are not taxable. Other states do not sanction same-sex marriages but have chosen to recognize same-sex marriage for income tax purposes. These states do not tax same-sex spousal benefits. Other states do not sanction same-sex marriages and do not recognize same-sex marriage for income tax purposes. These states do tax same-sex spousal benefits. Still other states have not announced how they will handle the taxation of same-sex spousal benefits. Here's the latest information as of this writing:

States that sanction same-sex marriage:

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not recognize same-sex marriage for state income tax purposes:

AL, AZ, GA, ID, IN, KS, KY, LA, MI, MS, MT, NE, NC, ND, OH, OK, SC, UT, VA, WI

States that do not sanction same-sex marriage and have not yet announced state income tax treatments:

AR, PA, WV

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