Labor and Employment Alert: Federal Tax Treatment of Same-Gender Spouses

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Summary: Marriages between same-gender spouses will be recognized for federal income tax purposes if valid where performed (the state of celebration) regardless of whether the state in which the spouses live (the state of residence) recognizes the marriage.

Background

On June 26, 2013, the Supreme Court of the United States held in *United States v. Windsor* that Section 3 of the Defense of Marriage Act (DOMA) violated the equal protection clause of the Fifth Amendment of the Constitution. Before this decision, Section 3 of DOMA had prohibited the federal recognition of marriages between same-gender spouses, affecting more than 1,000 federal laws. We previously issued client alerts regarding the impact of this decision on immigration and FMLA.

On August 29, 2013, the IRS issued Revenue Ruling 2013-17 and several FAQs giving us another piece of the puzzle: how the IRS intends to implement this decision.

State of Celebration Used to Determine Marital Status for Federal Tax Purposes

A majority of states still do not recognize marriages between same-gender spouses. Although marital status is determined by the laws of the state of residence for purposes of FMLA, the IRS will apply a simpler state of celebration test for federal tax purposes.

Under a state of residence test, the marital status of an employee with a same-gender spouse would change when he or she moves from a recognition state to a non-recognition state. To avoid this complexity, the IRS determined that it will recognize marriages based on the state of celebration. If a marriage was validly formed in a state (or foreign jurisdiction), the marriage will continue to be recognized regardless of where the couple later resides.

Individual Tax Returns

The IRS has determined that same-gender spouses must file their individual tax returns as married (either married filing jointly or married filing separately) for any original tax return filed after September 16, 2013. For prior years where the statute of limitations has not yet run, same-gender spouses may, but are not required to, file an amended tax return as married.

Refund claims may only be sought for open tax years. Generally, this means within three years after the tax return was filed or two years after the taxes were paid. The IRS will establish a special refund process for these claim.

Impact on Employer-Provided Health Coverage

If you have been imputing income to employees on account of health coverage provided to same-gender spouses and their children, you will need to reprogram your payroll system. Health coverage for a same-gender spouse is not taxable! Employees may make pretax contributions for the health coverage of same-gender spouses and their children. If your company offers health coverage to employees' same-gender domestic partners and you have not to date identified which individuals enrolled as same-gender domestic partners are actually in a same-gender marriage, you will need to get that information.

Refund claims may be filed for income and employment taxes previously paid on such coverage for any open tax year. With regard to overpaid income taxes, only the employee may filed the refund claim. However, either the employer or the employee may file a refund claim for overpaid social security and Medicare taxes. The IRS said it will provide a special procedure for such refund claims in the near future.

Impact on Retirement Benefits

Beginning on September 16, 2013, qualified retirement plans must recognize marriages between same-gender spouses. This means that spousal consents will be required for certain forms of payment and to name a non-spouse beneficiary.

More guidance is expected with regard to any retroactive application to plans and the required timing for plan amendments.

Impact on Adoption Assistance

The adoption credit is not available to the adoption by a spouse, no adoption tax credit or tax-free adoption assistance benefit is available to cover the cost of adoption by a same-gender spouse.

State Registered Domestic Partnership and Civil Union is Not a Marriage

Several states have adopted domestic partnership registries or civil union laws that provide all or most of the legal responsibilities, rights and privileges as marriage. These laws are often referred to as "marriage in all but name." However, the IRS determined that registered domestic partners and members of civil unions are not "married" and therefore will not be treated as married under the tax laws. Despite that, in a FAQ with potentially broad implications, the IRS said that "If a registered domestic partner [or civil union

member] is the stepparent of his or her partner's child under state law, the registered domestic partner is the stepparent of the child for federal income tax purposes."

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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.