

FYI® Alert

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Same-sex marriage developments — IRS guidance addresses employment tax refunds

The IRS has issued [Notice 2013-61](#), which sets out special administrative procedures that employers may use to request refunds or adjustments of federal employment taxes paid on benefits provided to legally married same-sex spouses in 2013 as well as for prior open tax years. Previous IRS guidance, which defines "spouse" and "marriage" by the state law where individuals marry (state of celebration) rather than where they currently live, permitted employers and employees to recover overpayments of those taxes and had indicated that special procedures would be made available. (See our [August 30, 2013 For Your Information.](#))

The notice provides several alternative procedures that employers can use for correcting overpayments made in 2013. Under each of the procedures, in order to obtain a refund or adjustment of FICA taxes paid on the value of same-sex spousal benefits, an employer must first repay the employee the amount of withheld FICA and income taxes attributable to those benefits or apply the amounts to subsequent wages. Employers seeking a refund for prior years must follow a different procedure — under this procedure, not only must they repay or apply the overpayment as described above, but they must also file a Form W-2c for the applicable year and obtain a written statement from affected employees that they have not and will not file a claim for overcollected FICA taxes.

Buck Comment. An employer is not obligated to file for refunds of these taxes for prior tax years. If the employer elects not to claim the refunds, employees still can claim refunds of the employee portion of FICA taxes. Employers will need to determine which employees covered legally married same-sex spouses (e.g., under employer-provided health coverage). With the aid of accountants and tax attorneys, employers also will need to assess the savings gained from this filing against the administrative efforts to make this determination as well as file for the refund. For some employers, the administrative challenges may outweigh the benefits of filing.

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