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Same-Sex Spouses

Updated FMLA and Tax Guidance

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Issued date: 09/05/13

In June 2013, the U.S. Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA) as unconstitutional. This opened the door for federal recognition of same-sex marriages in states that recognize such unions.

The Obama administration has pledged a thorough and expedited review of federal laws, including federal benefit laws. We expect the agencies to release guidance soon with regard to various health and welfare compliance requirements potentially including, but not limited to, COBRA qualified beneficiary determinations, Form W-2 reporting changes, plan document, SPD and cafeteria plan document amendments, open enrollment and new hire packet language changes, etc. We have already received guidance surrounding FMLA and federal tax treatment, which you will find summarized below.

FMLA Guidance

The Wage and Hour Division of the Department of Labor issued updated guidance for employers subject to federal FMLA rules. The revised guidance requires employers subject to FMLA to allow eligible employees FMLA leave to care for a same-sex spouse with a serious health condition. This new rule applies to an employee who "resides" in a state that recognizes same-sex marriages. It does not apply to an employee residing in a state that does not recognize same-sex marriages. Employers will need to work with employment law counsel to revise employee handbooks and policies to reflect this new requirement. While not clear, it appears the new rules are effective immediately.

Continuation of health plan benefits as required under FMLA would also extend to an FMLA leave to care for a same-sex spouse for an eligible employee residing in a state that recognizes same-sex marriage.

There remain a number of unanswered issues for employers under the Supreme Court decision, particularly multi-state employers with employees residing in states that do not recognize same-sex marriage and same-sex married spouses who move from a state recognizing their marriage to a state that does not recognize their marriage. While little formal guidance beyond this recent FMLA information has been issued, the federal government has begun to implement new policies and procedures with respect to federal employees under this decision.

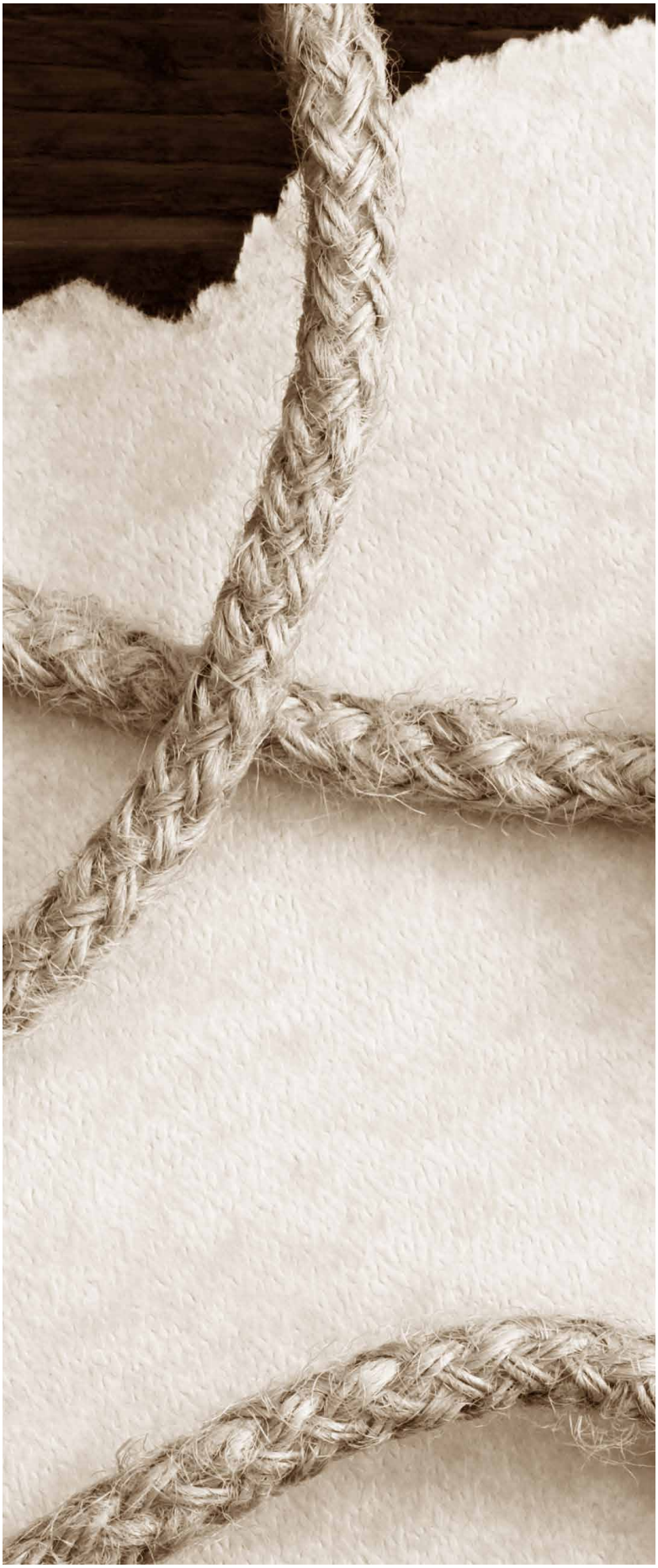
Federal Tax Treatment

On August 29, 2013, the Department of Treasury declared that same-sex couples legally married in jurisdictions that recognize such marriages will be treated as married for federal tax purposes regardless of whether the jurisdiction in which they currently reside recognizes such marriages. Under this guidance, essentially all Internal Revenue Code references to *spouse, marriage, husband, or wife* will now be interpreted as applying to same-sex couples if the marriage was legally performed in any state or foreign country. Under the ruling, same-sex couples will be treated as married for all federal tax purposes, including income and gift and estate taxes.

What Does this Mean for Employer-Provided Health and Welfare Plans?

The ruling will have a significant and immediate tax impact on employer-provided health and welfare benefits, although there are certain issues that will require further clarification. Under the ruling:

- The employer-funded portion of the value of coverage for a same-sex spouse (and his or her dependents) will no longer be imputed as income on the employee's Form W-2.
- Employees will be able to contribute the employee share of the value of the coverage for the same-sex spouse on a pre-tax basis prospectively from the effective date of the ruling (September 16, 2013) under a cafeteria plan, although the employer can decide to refund withheld amounts for the earlier part of 2013 and effectively treat the contributions pre-tax.
- Employees will be able to file amended returns for all open tax years to seek a refund of taxes paid on the imputed income of the employer's share of the value of the coverage and the employee's own after-tax contributions.
- Employers will also be able to seek refunds or adjustments of Medicare and social security taxes employers paid for same-sex spouse benefits and, in certain circumstances, seek refunds of Medicare and social security taxes paid by employees for such benefits. Special administrative procedures will be announced for this purpose.



This guidance does not affect state income tax treatment. States that do not recognize same-sex marriages will generally continue to tax same-sex spouse benefits as they do domestic partnership benefits. The ruling does not extend to domestic partners, parties to a civil union, or other similar relationships.

The ruling does not address whether group plans are required to provide coverage for same-sex married spouses. For now, insured plans will continue to be subject to state insurance rules on whether spousal coverage will extend to same-sex marriages. We expect guidance from the DOL that may require self-insured plans to extend coverage to same-sex spouses, if they provide spousal coverage. It is not clear if a similar requirement can be imposed on insured plans due to ERISA's statutory recognition of state insurance laws.

Changing Employer-Provided Coverage from Post-Tax to Pre-Tax

Current Tax Year

Beginning with the 2013 tax year, employees with same-sex spouses who were legally married under state law and who elect an employer's same-sex benefits may pay their contributions for their spouses on a tax-favored basis. Additionally, employers who contribute to or subsidize the cost of same-sex spouse benefits can do so on a tax-favored basis beginning with the 2013 tax year. The guidance allows the employer to "correct" the after-tax treatment of employee contributions for the current year by reimbursing the employee for overwithholding of taxes, if done by the end of 2013.

Employee Retroactive Corrections

The new tax rules are effective prospectively as of September 16, 2013, but are also retroactive to previous tax years, so same-sex spouses legally married in previous tax years can file amended tax returns for those years. In general, amended tax returns are permitted for three years from the date of the filing or two years from the date the tax was paid, whichever was greater (generally meaning 2010, 2011, and 2012). For previous tax years, employees can file amended returns to recover overwithholdings of income taxes paid on employee-paid portions of benefits and any imputed income amounts for employer-paid portion of benefits.

Employer Retroactive Corrections

If the period of limitations for filing a claim for refund is open, the employer may claim a refund of, or make an adjustment for, any excess social security taxes and Medicare taxes paid by the employer and employee. The requirements for filing a claim for refund or for making an adjustment for an overpayment of the employer and employee portions of social security and Medicare taxes can be found in the instructions for Form 941-X, *Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund*. A special administrative procedure for employers to file claims for refunds or make adjustments for excess social security taxes and Medicare taxes paid on same-sex spouse benefits will be provided in forthcoming guidance to be issued by the IRS.

If the employer makes reasonable attempts to locate a former employee who paid for same-sex spouse coverage on an after-tax basis and/or had the value of such benefits imputed as taxable wages, but the employer is unable to locate the employee, the employer can claim a refund of the employer portion of social security and Medicare taxes, but not of the employee portion. Also, if an employee is notified and given the opportunity to participate in the claim for refund of social security and Medicare taxes but declines to do so in writing, the employer can claim a refund of the employer portion of the taxes, but not the employee portion, to file these claims.

Action to Take

Although we still need further guidance, employers need to begin to address the impact of the tax guidance on their plans. Impacted employees should do the following:

- Work with payroll and accounting vendors to determine the prospective tax implications of this ruling.
- All imputed income tables and calculations need to be reconsidered and revised.
- Consult qualified tax counsel, along with IRS Form 941-X and associated instructions for filing refunds of excess social security and Medicare taxes paid on same-sex spouse benefits and await guidance on special administrative procedures. Employers may also want to encourage their affected employees to seek tax advice.
- Current plan eligibility and coverage rules should be reviewed for consistency with the guidance.
- All plan documentation and communications need to be reviewed.
- Await further guidance.

We will continue to keep you apprised of further details as development occur.