
DOMA consideration triggers FICA claims—April 15 deadline to file approaches

April 3, 2013

In brief

Employers may need to react now, despite the fact that the US Supreme Court has not yet ruled on the validity of the US Defense of Marriage Act (DOMA). The US Supreme Court heard oral arguments on March 27, 2013 in *US v. Windsor*, which considered the validity of Section 3 of the DOMA, enacted in 1996. Implicated by this case is the determination of whether certain benefit payments, such as employer-paid health care coverage and group-term life insurance premiums, are taxable wages. If the US Supreme Court upholds the earlier decision by the US Court of Appeals for the Second Circuit, employers may be able to request a refund of FICA taxes paid, by both employers and employees, on the imputed income attributable to certain benefit payments. These benefit payments were originally ineligible for exclusion because they were provided to or on behalf of their employees' same-sex spouses.

While the matter is pending in the US Supreme Court, the deadline is fast approaching for employers to protect their right, and those of the affected employees, to a refund of FICA taxes on certain payments made during the 2009 tax year.

In detail

On December 7, 2012, the Court granted the writ of certiorari filed by the US Department of Justice, appealing the decision by the Second Circuit that Section 3 of the DOMA was unconstitutional. The issue in *Windsor* was whether Section 3 violates the right to equal protection of the laws articulated in the Fifth Amendment of the US Constitution for same-sex couples who are legally married under state law. While the Second Circuit decision was favorable for the taxpayer in

that case, it is unclear whether the US Supreme Court will likewise hold that Section 3 of DOMA is unconstitutional. See *US v. Windsor*, 699 F.3d 169 (2d Cir. 2012).

Protective claims

Employers that wish to protect their right to file claims at a later date for any FICA taxes associated with eligible benefit payments made in the 2009 tax year should **file protective refund claims by April 15, 2013**. The protective claim is filed on Form 941-X, *Adjusted Employer's Quarterly Federal Tax Return*, for each entity that

made an eligible payment and each quarter in which the eligible payment was made. The protective claim is filed to preserve the employer's and affected employees' claim to a refund in case the *Windsor* decision, or this issue in general, is resolved in the taxpayer's favor.

A protective claim is straightforward to file. A protective claim does not have to state a particular dollar amount or demand an immediate refund. Further, an employer that files a protective claim by April 15, 2013 can later

decide whether to file a full refund claim should the *Windsor* case be decided in the taxpayer's favor. A protective claim must generally only include the following:

- be in writing and be signed under penalties of perjury
- include the taxpayer's name, address, employer identification number, and other contact information
- identify and describe the contingencies affecting the claim
- clearly alert the IRS to the essential nature of the claim

- identify the specific period(s) for which a refund is sought (i.e. the first quarter of 2009).

Until the matter is resolved, employers that file a protective claim may receive a Notice of Claim Denial. A taxpayer has two years from the date of the Notice of Claim Denial to file a refund suit in the US District Court or in the US Court of Federal Claims. Additionally, the notice indicates a taxpayer could file an administrative appeal within 30 days. Employers may also choose to take a "wait-and-see" approach in anticipation of the *Windsor* decision. We anticipate that the US Supreme

Court will issue its decision in the summer of 2013.

The takeaway

The *Windsor* case should provide incentive for employers to preserve their right to a refund of FICA taxes on certain eligible benefit payments made to or on behalf of their employees' same-sex spouses. We encourage employers to file protective claims for payments made during the 2009 tax year.

Let's talk

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