

# **Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law**

The following questions and answers provide information to individuals of the same sex who are lawfully married (same-sex spouses). These questions and answers reflect the holdings in Revenue Ruling 2013-17, 2013-38 IRB.

## **Q1. When are individuals of the same sex lawfully married for federal tax purposes?**

A1. For federal tax purposes, the IRS looks to state or foreign law to determine whether individuals are married. The IRS has a general rule recognizing a marriage of same-sex spouses that was validly entered into in a domestic or foreign jurisdiction whose laws authorize the marriage of two individuals of the same sex even if the married couple resides in a domestic or foreign jurisdiction that does not recognize the validity of same-sex marriages.

## **Q2. Can same-sex spouses file federal tax returns using a married filing jointly or married filing separately status?**

A. Yes. For tax year 2013 and going forward, same-sex spouses generally must file using a married filing separately or jointly filing status. For tax year 2012 and all prior years, same-sex spouses who file an original tax return on or after September 16, 2013 (the effective date of Revenue Ruling 2013-17), generally must file using a married filing separately or jointly filing status. For tax year 2012, same-sex spouses who filed their tax return before September 16, 2013, may choose (but are not required) to amend their federal tax returns to file using married filing separately or jointly filing status. For tax years 2011 and earlier, same-sex spouses who filed their tax returns timely may choose (but are not required) to amend their federal tax returns to file using married filing separately or jointly filing status provided the period of limitations for amending the return has not expired. A taxpayer generally may file a claim for refund for three years from the date the return was filed or two years from the date the tax was paid, whichever is later. For information on filing an amended return, go to Tax Topic 308, *Amended Returns* at <http://www.irs.gov/taxtopics/tc308.html>.

## **Q3. Can a taxpayer and his or her same-sex spouse file a joint return if they were married in a state that recognizes same-sex marriages but they live in a state that does not recognize their marriage?**

A3. Yes. For federal tax purposes, the Service has a general rule recognizing a marriage of same-sex individuals that was validly entered into in a domestic or foreign jurisdiction whose laws authorize the marriage of two individuals of the same sex even if the married couple resides in a domestic or foreign jurisdiction that does not recognize the validity of same-sex marriages. The rules for using a married filing jointly or married filing separately status described in Q&A #2 apply to these married individuals.

## **Q4. Can a taxpayer's same-sex spouse be a dependent of the taxpayer?**

A4. No. A taxpayer's spouse cannot be a dependent of the taxpayer.

**Q5. Can a same-sex spouse file using head of household filing status?**

A5. A taxpayer who is married cannot file using head of household filing status. However, a married taxpayer may be considered unmarried and may use the head-of-household filing status if the taxpayer lives apart from his or her spouse for the last 6 months of the taxable year and provides more than half the cost of maintaining a household that is the principal place of abode of the taxpayer's dependent child for more than half of the year. See Publication 501 for more details.

**Q6. If same-sex spouses (who file using the married filing separately status) have a child, which parent may claim the child as a dependent?**

A6. If a child is a qualifying child under section 152(c) of both parents who are spouses (who file using the married filing separate status), either parent, but not both, may claim a dependency deduction for the qualifying child. If both parents claim a dependency deduction for the child on their income tax returns, the IRS will treat the child as the qualifying child of the parent with whom the child resides for the longer period of time during the taxable year. If the child resides with each parent for the same amount of time during the taxable year, the IRS will treat the child as the qualifying child of the parent with the higher adjusted gross income.

**Q7. Can a same-sex spouse itemize deductions if his or her spouse claims a standard deduction?**

A7. No. The law prohibits one spouse from itemizing deductions if the other spouse claims the standard deduction (section 63(c)(6)(A)).

**Q8. If a taxpayer adopts the child of his or her same-sex spouse as a second parent or co-parent, may the taxpayer ("adopting parent") claim the adoption credit for the qualifying adoption expenses he or she pays or incurs to adopt the child?**

A8. No. The adopting parent may not claim an adoption credit. A taxpayer may not claim an adoption credit for expenses incurred in adopting the child of the taxpayer's spouse (section 23).

**Q9. Do provisions of the federal tax law such as section 66 (treatment of community income) and section 469(i)(5) (\$25,000 offset for passive activity losses for rental real estate activities) apply to same-sex spouses?**

A9. Yes. Like other provisions of the federal tax law that apply to married taxpayers, section 66 and section 469(i)(5) apply to same-sex spouses because same-sex spouses are married for all federal tax purposes.

**Q10. If an employer provided health coverage for an employee's same-sex spouse and included the value of that coverage in the employee's gross income,**

**can the employee file an amended Form 1040 reflecting the employee's status as a married individual to recover federal income tax paid on the value of the health coverage of the employee's spouse?**

A10. Yes, for all years for which the period of limitations for filing a claim for refund is open. Generally, a taxpayer may file a claim for refund for three years from the date the return was filed or two years from the date the tax was paid, whichever is later. If an employer provided health coverage for an employee's same-sex spouse, the employee may claim a refund of income taxes paid on the value of coverage that would have been excluded from income had the employee's spouse been recognized as the employee's legal spouse for tax purposes. This claim for a refund generally would be made through the filing of an amended Form 1040. For information on filing an amended return, go to Tax Topic 308, *Amended Returns* at <http://www.irs.gov/taxtopics/tc308.html>.

For a discussion regarding refunds of social security and Medicare taxes, see FAQ #12.

Example. Employer sponsors a group health plan covering eligible employees and their dependents and spouses (including same-sex spouses). Fifty percent of the cost of health coverage elected by employees is paid by Employer. Employee A was married to same-sex Spouse B at all times during 2012. Employee A elected coverage for Spouse B through Employer's group health plan beginning January 1, 2012. The value of the employer-funded portion of Spouse B's health coverage was \$250 per month.

The amount in Box 1, "Wages, tips, other compensation," of the 2012 Form W-2 provided by Employer to Employee A included \$3,000 (\$250 per month x 12 months) of income reflecting the value of employer-funded health coverage provided to Spouse B. Employee A filed Form 1040 for the 2012 taxable year reflecting the Box 1 amount reported on Form W-2.

Employee A may file an amended Form 1040 for the 2012 taxable year excluding the value of Spouse B's employer-funded health coverage (\$3,000) from gross income.

**Q11. If an employer sponsored a cafeteria plan that allowed employees to pay premiums for health coverage on a pre-tax basis, can a participating employee file an amended return to recover income taxes paid on premiums that the employee paid on an after-tax basis for the health coverage of the employee's same-sex spouse?**

A11. Yes, for all years for which the period of limitations for filing a claim for refund is open. Generally, a taxpayer may file a claim for refund for three years from the date the return was filed or two years from the date the tax was paid, whichever is later. If an employer sponsored a cafeteria plan under which an employee elected to pay for health coverage for the employee on a pre-tax basis, and if the employee purchased coverage on an after-tax basis for the employee's same-sex spouse under the employer's health plan, the employee may claim a refund of income taxes paid on the premiums for the

coverage of the employee's spouse. This claim for a refund generally would be made through the filing of an amended Form 1040. For information on filing an amended return, go to Tax Topic 308, *Amended Returns* at <http://www.irs.gov/taxtopics/tc308.html>. For a discussion regarding refunds of social security and Medicare taxes, see FAQ #12.

Example. Employer sponsors a group health plan as part of a cafeteria plan with a calendar year plan year. The full cost of spousal and dependent coverage is paid by the employees. In the open enrollment period for the 2012 plan year, Employee C elected to purchase self-only health coverage through salary reduction under Employer's cafeteria plan. On March 1, 2012, Employee C was married to same-sex spouse D. Employee C purchased health coverage for Spouse D through Employer's group health plan beginning March 1, 2012. The premium paid by Employee C for Spouse D's health coverage was \$500 per month.

The amount in Box 1, "Wages, tips, other compensation," of the 2012 Form W-2 provided by Employer to Employee C included the \$5,000 (\$500 per month x 10 months) of premiums paid by Employee C for Spouse D's health coverage. Employee C filed Form 1040 for the 2012 taxable year reflecting the Box 1 amount reported on Form W-2.

Employee C's salary reduction election is treated as including the value of the same-sex spousal coverage purchased for Spouse D. Employee C may file an amended Form 1040 for the 2012 taxable year excluding the premiums paid for Spouse D's health coverage (\$5,000) from gross income.

**Q12. In the situations described in FAQ #10 and FAQ #11, may the employer claim a refund for the social security taxes and Medicare taxes paid on the benefits?**

A12. Yes. 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. 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 in the near future.

**Q13. In the situations described in FAQ #10 and FAQ #11, may the employer claim a refund or make an adjustment of income tax withholding that was withheld from the employee with respect to the benefits in prior years?**

A13. No. Claims for refunds of overwithheld income tax for prior years cannot be made by employers. The employee may file for any refund of income tax due for prior years

on Form 1040X, provided the period of limitations for claiming a refund has not expired. See FAQ #10 and FAQ #11. Employers may make adjustments for income tax withholding that was overwithheld from an employee in the current year provided the employer has repaid or reimbursed the employee for the overwithheld income tax before the end of the calendar year.

**Q14. If an employer cannot locate a former employee with a same-sex spouse who received the benefits described in FAQ #10 and FAQ #11, may the employer still claim a refund of the employer portion of the social security and Medicare taxes on the benefits?**

A14. Yes, if the employer makes reasonable attempts to locate an employee who received the benefits described in FAQ #10 and FAQ #11 that were treated as 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 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 in writing, the employer can claim a refund of the employer portion of the taxes, but not the employee portion. Employers can use the special administrative procedure that will be set forth in forthcoming guidance to file these claims.

**Q15. If a sole proprietor employs his or her same-sex spouse in his or her business, can the sole proprietor get a refund of social security, Medicare, and FUTA taxes on the wages that the sole proprietor paid to the same-sex spouse as an employee in the business?**

A15. Yes, services performed by an employee in the employ of his or her spouse are excluded from the definition of employment for purposes of social security, Medicare, and FUTA taxes. Therefore, for all years for which the period of limitations is open, the sole proprietor can claim a refund of the social security, Medicare, and FUTA taxes paid on the compensation that the sole proprietor paid his or her same-sex spouse as an employee in the business.

**Q16. What rules apply to qualified retirement plans pursuant to Rev. Rul. 2013-17?**

A16. Qualified retirement plans are required to comply with the following rules pursuant to Rev. Rul. 2013-17:

1. A qualified retirement plan must treat a same-sex spouse as a spouse for purposes of satisfying the federal tax laws relating to qualified retirement plans.
2. For purposes of satisfying the federal tax laws relating to qualified retirement plans, a qualified retirement plan must recognize a same-sex marriage that was validly entered into in a jurisdiction whose laws authorize the marriage, even if the married couple lives in a domestic or foreign jurisdiction that does not recognize the validity of same-sex marriages.

3. A person who is in a registered domestic partnership or civil union is not considered to be a spouse for purposes of applying the federal tax law requirements relating to qualified retirement plans, regardless of whether that person's partner is of the opposite or same sex.

**Q17. What are some examples of the consequences of these rules for qualified retirement plans?**

A17. The following are some examples of the consequences of these rules:

1. Plan A, a qualified defined benefit plan, is maintained by Employer X, which operates only in a state that does not recognize same-sex marriages. Nonetheless, Plan A must treat a participant who is married to a spouse of the same sex under the laws of a different jurisdiction as married for purposes of applying the qualification requirements that relate to spouses.
2. Plan B is a qualified defined contribution plan and provides that the participant's account must be paid to the participant's spouse upon the participant's death unless the spouse consents to a different beneficiary. Plan B does not provide for any annuity forms of distribution. Plan B must pay this death benefit to the same-sex surviving spouse of any deceased participant. Plan B is not required to provide this death benefit to a surviving registered domestic partner of a deceased participant. However, Plan B is allowed to make a participant's registered domestic partner the default beneficiary who will receive the death benefit unless the participant chooses a different beneficiary.

**Q18. As of when do the rules of Rev. Rul. 2013-17 apply to qualified retirement plans?**

A.18. Qualified retirement plans must comply with these rules as of September 16, 2013. Although Rev. Rul. 2013-17 allows taxpayers to file amended returns that relate to prior periods in reliance on the rules in Rev. Rul. 2013-17 with respect to many matters, this rule does not extend to matters relating to qualified retirement plans. The IRS has not yet provided guidance regarding the application of *Windsor* and these rules to qualified retirement plans with respect to periods before September 16, 2013.

**Q.19. Will the IRS issue further guidance on how qualified retirement plans and other tax-favored retirement arrangements must comply with *Windsor* and Revenue Ruling 2013-17?**

A19. The IRS intends to issue further guidance on how qualified retirement plans and other tax-favored retirement arrangements must comply with *Windsor* and Revenue Ruling 2013-17. It is expected that future guidance will address the following, among other issues:

1. Plan amendment requirements (including the timing of any required amendments).

2. Any necessary corrections relating to plan operations for periods before future guidance is issued.