

## Nonprofit Organizations Committee Legal Quick Hit:

### Employee Benefits for Same-Sex Couples: What Your Nonprofit Needs to Know

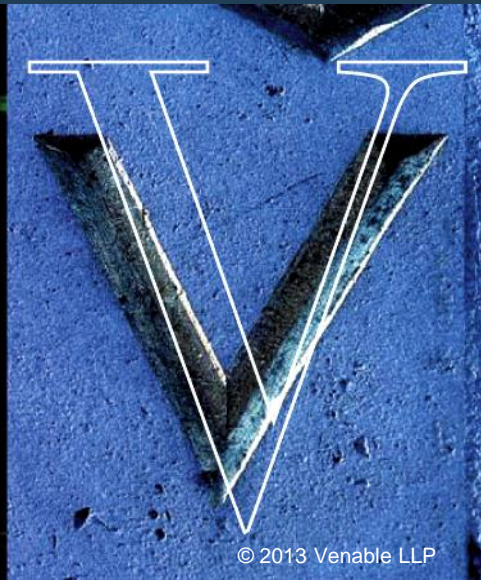
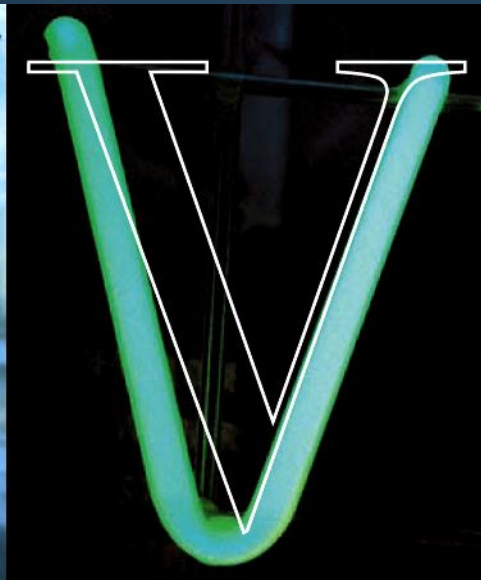
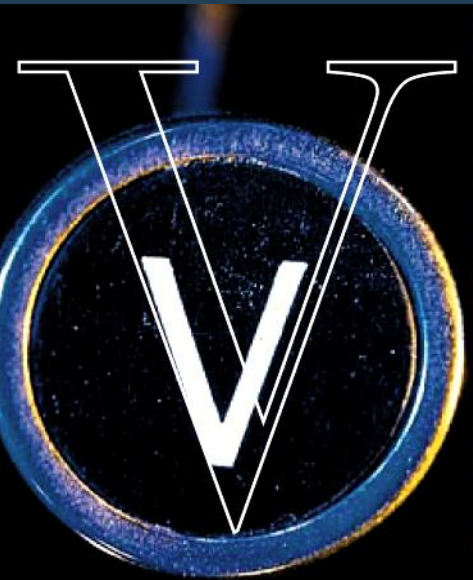
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TUESDAY, NOVEMBER 12, 2013

3:00 p.m. EDT



# *United States v. Windsor*

June 2013

- Provision of the Defense of Marriage Act defining “marriage” for federal law purposes as between one man and one woman is unconstitutional.
- Provision of the Defense of Marriage Act allowing each state to decide whether to honor same-sex marriages performed in other states is not affected by the ruling.



## *United States v. Windsor* (cont'd.)

June 2013

- Because *Windsor* does not require all states to honor a same-sex marriage that was valid where performed, a fundamental question remains:
  - What is the status, in a state that does not recognize same-sex marriage, of a same-sex couple that was validly married in another state?



# IRS Revenue Ruling 2013-17

For federal tax purposes:

- “Marriage” includes two individuals of the same sex, provided those individuals are lawfully married under state law (or the laws of a territory or foreign jurisdiction).
- A same-sex marriage sanctioned under the laws of the state or territory in which it was performed will be recognized, even if the married couple lives in a state that does not recognize same-sex marriage.
- A same-sex (or opposite-sex) couple is not considered married by virtue of entering into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law (but not classified as a marriage under the laws of that state).



# IRS FAQs

Issued with Rev. Rul. 2013-17 – Health Insurance

- Health insurance coverage for same-sex spouse is no longer taxable.
- Employee may file amended Form 1040 to claim refunds for “open” years under the statute of limitations.



# IRS Notice 2013-61

Correction of employment tax overpayments for health and other fringe benefits

## Special Administrative Procedure – 2013

- For 2013 – In the 4th quarter of 2013, repay employee the excess FICA and income tax withholding amounts, and net out the amounts on the 4th quarter Form 941; OR
- For 2013 – After 2013, repay employee the excess FICA (but not income tax), and file one Form 941-X to correct FICA (but not income tax) for all of 2013.
  - Employees must provide written statements that they will not otherwise claim FICA refunds. Employees recoup excess income tax withholding through regular Form 1040 channel.



# IRS Notice 2013-61 (cont'd.)

## Correction of employment tax overpayments for health and other fringe benefits

### Special Administrative Procedure – Before 2013

- For pre-2013 years still “open” under the SOL. Applies to FICA only, not income tax.
- Repay employee the excess FICA (but not income tax), and file a Form 941-X for the 4<sup>th</sup> quarter of the earlier year to correct FICA for the earlier year.
- Employer must issue corrected Form W-2 (i.e., Form W-2c).
- Employees certify that they will not otherwise claim FICA refund.
- Employees recoup excess income tax withholding through filing amended Form 1040 (i.e., Form 1040-X).



## Correction of employment tax overpayments for health and other fringe benefits

- An employer is not obligated to pursue a refund of overpaid FICA for earlier years.
- If an employer does not pursue a refund for FICA overpayments for earlier years, an employee can file a refund claim on IRS Form 843.





# IRS FAQs

Issued with Rev. Rul. 2013-17 – Retirement Plans

- As of 9/16/2013, same-sex married spouse must be treated as a spouse for qualified plan purposes:
  - QJSA/QPSA rights
  - Surviving spouse rights (when QJSA/QPSA inapplicable)
  - Hardship distributions
- Guidance not yet issued for pre-9/16/2013 periods
  - Retroactive benefit claims are at issue



# DOL Technical Release 2013-04

- Echoes IRS Rev. Rul. 2013-17
- Applies same principles to ERISA-governed 403(b) plans



## Other Health and Welfare Benefit Implications

- COBRA - independent spousal election rights
- Qualified tuition reduction for spouses - Sec. 117(d)
- Dependent care expenses
  - Higher dollar limits for married couple
  - Care of spouse's child qualifies
- Medical flexible spending accounts – coverage of spouse claims



# Family & Medical Leave Act (FMLA)

## The State of Residence Rule

- The FMLA provides certain leave rights to eligible employees, permitting them to attend to family matters (e.g., qualifying events related to a spouse's military leave) and serious health conditions (e.g., to care for a spouse with a serious health condition).
- Following the *Windsor* decision, the DOL issued guidance defining a "spouse" for FMLA purposes as "a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including 'common law' marriage and same-sex marriage."



# Family & Medical Leave Act (cont'd.)

## The State of Residence Rule

- Therefore, when considering leave requests and FMLA rights related to, for example, the serious health condition of an employee's same-sex spouse, employers must consider whether the employee is:
  - Legally married to a same-sex spouse; *and*
  - Residing in a state that recognizes same-sex marriage (this is known as the “state of residence” rule, versus the “state of celebration” rule).



# Questions?

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