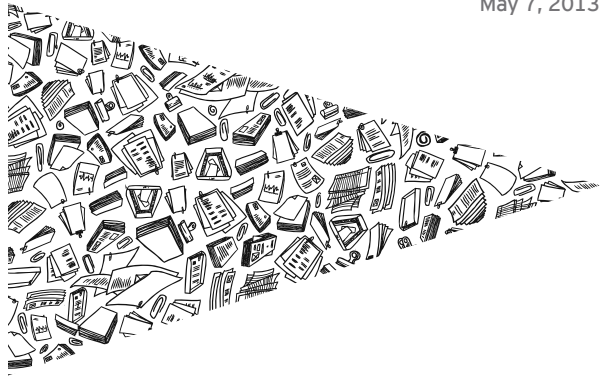


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Special edition

Supreme Court case
could mean change in tax
treatment of same-sex
partner benefits



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States recognizing same-sex marriage

- ▶ Connecticut
- ▶ Iowa
- ▶ Maine
- ▶ Maryland
- ▶ Massachusetts
- ▶ New Hampshire
- ▶ New York
- ▶ Rhode Island
- ▶ Vermont
- ▶ Washington

States considering same-sex marriage

- ▶ Delaware
- ▶ Illinois
- ▶ New Jersey
- ▶ New Mexico

The widely publicized *Windsor* case has fueled widespread speculation concerning the potential federal tax implications of a finding by the Supreme Court that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional. While the specifics of the *Windsor* case deal with the federal inheritance tax applicable to the spouse of a same-sex marriage, a broad range of federal tax provisions could be affected in removing gender specifics from the definition of marriage. What's more, the impact of extending the federal marriage definition to same-sex couples could trigger tax refunds for prior years.

Federal tax treatment of same-sex partner benefits

The Defense of Marriage Act (*P.L. 104-199*), enacted on September 21, 1996, provides that, for purposes of interpreting federal laws, including the Internal Revenue Code, the term "spouse" means only a "person of the opposite sex who is a husband or wife" within a "legal union between one man and one woman."

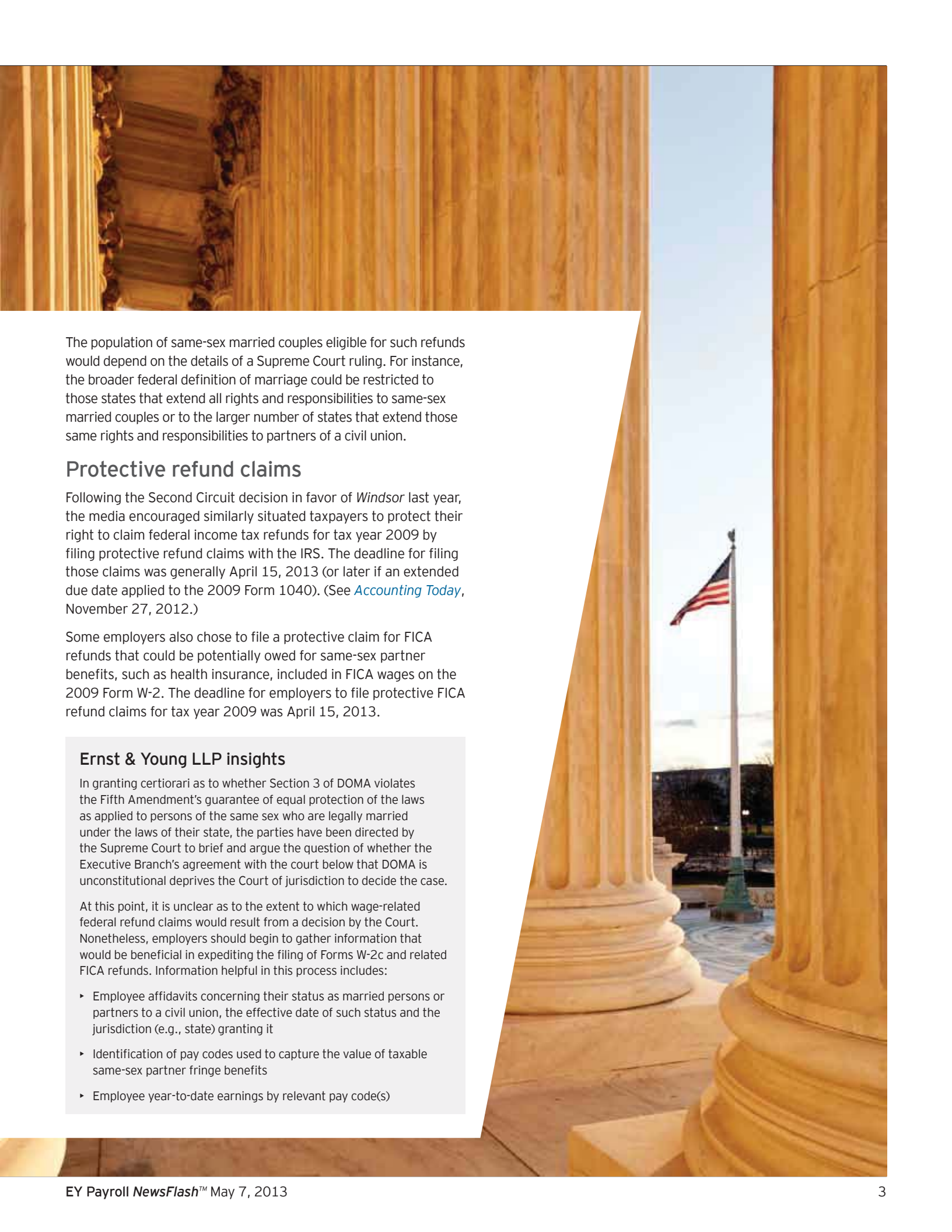
Certain fringe benefits provided to an employee's spouse are excluded from federal taxable wages. For instance, IRC §105(b) provides that amounts received by an employee, including a spouse or dependent, through health or accident insurance funded by the employer is excluded from gross income (and federal taxable wages). In accordance with DOMA, a "spouse," for purposes of IRC §105(b), cannot be a same-sex marital partner.

When benefits are provided to a same-sex spouse, employers have to include the value of those benefits in wages subject to federal income tax (FIT), federal income tax withholding (FITW) and Social Security/Medicare (FICA). In particular, the value of spousal health benefits can result in a sizable increase in employees' annual taxable wages and in the related FIT and FICA they pay.

Possible implication of the *Windsor* case on federal taxable wages

In 2012, the U.S. District Court for the Southern District of New York ruled, and the Second Circuit Court affirmed, that the IRS imposition of a federal estate tax on the inheritance of a surviving spouse in a same-sex marriage was based on unconstitutional discrimination against same-sex married couples under Section 3 of DOMA. On December 7, 2012, the Supreme Court granted *certiorari* and is now determining if it will consider the case as a more far-reaching challenge of DOMA. (*Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir.2012) *cert. granted*, *United States v. Windsor*, 133 S. Ct. 786 (U.S. 2012).)

Should the Supreme Court rule that the federal definition of marriage must include same-sex married couples, it is possible that employers would be required to issue Forms W-2c to exclude the value of spousal health and other fringe benefits that were included in wages subject to FIT and FICA because of DOMA. Employers would be expected to issue any FICA refunds due as a result of a Form W-2c showing a reduction in FICA wages, and individual taxpayers would file for any FIT refunds owed with the IRS.



The population of same-sex married couples eligible for such refunds would depend on the details of a Supreme Court ruling. For instance, the broader federal definition of marriage could be restricted to those states that extend all rights and responsibilities to same-sex married couples or to the larger number of states that extend those same rights and responsibilities to partners of a civil union.

Protective refund claims

Following the Second Circuit decision in favor of *Windsor* last year, the media encouraged similarly situated taxpayers to protect their right to claim federal income tax refunds for tax year 2009 by filing protective refund claims with the IRS. The deadline for filing those claims was generally April 15, 2013 (or later if an extended due date applied to the 2009 Form 1040). (See [Accounting Today](#), November 27, 2012.)

Some employers also chose to file a protective claim for FICA refunds that could be potentially owed for same-sex partner benefits, such as health insurance, included in FICA wages on the 2009 Form W-2. The deadline for employers to file protective FICA refund claims for tax year 2009 was April 15, 2013.

Ernst & Young LLP insights

In granting certiorari as to whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their state, the parties have been directed by the Supreme Court to brief and argue the question of whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives the Court of jurisdiction to decide the case.

At this point, it is unclear as to the extent to which wage-related federal refund claims would result from a decision by the Court. Nonetheless, employers should begin to gather information that would be beneficial in expediting the filing of Forms W-2c and related FICA refunds. Information helpful in this process includes:

- ▶ Employee affidavits concerning their status as married persons or partners to a civil union, the effective date of such status and the jurisdiction (e.g., state) granting it
- ▶ Identification of pay codes used to capture the value of taxable same-sex partner fringe benefits
- ▶ Employee year-to-date earnings by relevant pay code(s)

Ernst & Young LLP employment tax advisory contacts

Mary Angelbeck
mary.angelbeck@ey.com
+1 215 448 5307

Anthony Arcidiacono
anthony.arcidiacono@ey.com
+1 732 516 4829

Peter Berard
peter.berard@ey.com
+1 212 773 4084

Gregory Carver
gregory.carver@ey.com
+1 214 969 8377

Bryan De la Bruyere
bryan.delabruyere@ey.com
+1 404 817 4384

Jennie DeVincenzo
jennie.devincenzo@ey.com
+1 732 516 4572

David Germain
david.germain@ey.com
+1 516 336 0123

Julie Gilroy
julie.gilroy@ey.com
+1 312 879 3413

Mary Gorman
mary.gorman@ey.com
+1 202 327 7644

Ken Hausser
kenneth.hausser@ey.com
+1 732 516 4558

Nicki King
nicki.king@ey.com
+1 214 756 1036

Kristie Lowery
kristie.lowery@ey.com
+1 704 331 1884

Thomas Meyerer
thomas.meyerer@ey.com
+1 202 327 8380

Chris Peters
christina.peters@ey.com
+1 614 232 7112

Matthew Ort
matthew.ort@ey.com
+1 214 969 8209

Stephanie Pfister
stephanie.pfister@ey.com
+1 415 894 8519

Debera Salam
debera.salam@ey.com
+1 713 750 1591

Debbie Spyker
deborah.spyker@ey.com
+1 720 931 4321

Mike S. Willett
mike.willett@ey.com
+1 404 817 4637

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