

Married Same-Sex Couples Should File Protective Claims for Tax Refunds Now

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By [William D. Rohrer](#) When the Supreme Court ultimately decides *United States v. Windsor*, it could strike down the portion of the Defense of Marriage Act (DOMA) that prohibits married same-sex couples from receiving the federal benefits provided to married opposite-sex couples. It is expected that if the Supreme Court strikes down DOMA, it will not set a specific date on which DOMA would become unconstitutional, allowing married same-sex taxpayers to receive refunds on federal income, estate and gift taxes, and Federal Insurance Contributions Act (FICA) taxes as far back as 2009. To preserve their rights to a refund of federal taxes, married same-sex couples should file protective claims for tax refunds. Taxpayers who were married as of 2009, should file protective claims for tax refunds before the statute of limitations for 2009 refund claims expires on April 15, 2013. Employers can also file for refunds on their portion of FICA taxes paid on benefits for same-sex married couples. Both employers and employees can file protective claims for refunds by citing *United States v. Windsor*, but employers are not obligated to do so. Even if the Supreme Court finds DOMA unconstitutional, same-sex married couples who reside in states that do not recognize same-sex marriage may not receive the benefit of a refund. However, by filing a refund claim now, they can protect their claims if the Supreme Court rules broadly in *United States v. Windsor*, or if there is a future challenge to Section 2 of DOMA, which allows states not to recognize same-sex marriages performed in other states. If the IRS denies the refund claim, taxpayers will still have two years from the date of the denial to file a protest. Additionally, there is no need to put a dollar amount on the protective refund claim when filed, so taxpayers would be able to adjust the dollar amount of their refund depending on the Supreme Court's ruling. Carlton Fields has the experience and expertise to assist clients with the tax implications of the Supreme Court's expected decision. If you have questions regarding this alert, please feel free to contact us.

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