

Coronavirus National Emergency Declaration Permits Employers to Offer Tax-Favored Financial Assistance to Employees

Article By:

Erika Mayshar

Robert C. Louthian, III

On March 13, 2020, President Trump declared a national emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the “Declaration”) due to extraordinary circumstances resulting from Coronavirus. This Declaration opens up new methods for employers to provide tax-favored financial assistance to employees who are affected, directly or indirectly, by the virus.

IN DEPTH

It appears more and more likely that a significant number of employees of large businesses will be quarantined and/or told not to report to their workplace because of either their diagnosis with Coronavirus or as a precautionary measure across the board for employees. Any of these situations could result in a significant adverse financial impact on employees, depending upon their available resources and employer-provided benefits. Some options already existed for employers to provide financial assistance to employees affected by Coronavirus, but now, in light of the Declaration, additional forms of potential tax-favored employer-provided assistance are available.

Forms of Employer-Provided Assistance Available Prior to the Declaration

- *Taxable payments to employees.* An employer may continue to pay employees affected by Coronavirus in the form of taxable wages and other distributions. In each such case, the payments would be taxable income/wages to the recipient, and the employer should withhold taxes on such amounts.
- *Tax-free payments to employees by certain “Employee Emergency Financial Assistance Funds” (“Emergency Funds”).* Many large employers have established Section 501(c)(3) charitable organizations, the purpose of which is to provide emergency disaster and/or financial hardship assistance to employees who face unexpected emergencies that have left the employee in financial distress. The type of financial assistance that may be provided by an

Emergency Fund depends on the fund's classification under the tax laws. If an Emergency Fund is classified by the IRS as a "public charity" (because, in very general terms, it receives a significant amount of support from the employees as opposed to the employer), then the Emergency Fund may provide financial assistance to any employee who experiences a qualifying financial hardship because of Coronavirus events. To be clear, an Emergency Fund cannot simply provide wage replacement across the board to all affected employees. Instead, individual determinations of financial need for each affected employee must be made by the Emergency Fund and the assistance provided must be tailored to such need. If public charity Emergency Funds make distributions to affected employees pursuant to proper procedures, these payments should be tax-free to the employees and not treated as wages. If an Emergency Fund is classified instead as a Section 501(c)(3) "private foundation" as opposed to a public charity, the analysis is normally more complex and potential significant adverse tax consequences could result if the private foundation Emergency Fund provides assistance to employees—no matter how compelling the facts may be. As described below, however, the President's emergency declaration removes these barriers and will permit private foundation Emergency Funds to participate in employee assistance efforts as well.

- *Leave bank.* An employee leave bank is a method by which employees may donate their excess leave to affected coworkers who lack sufficient leave to cover an absence from work. These programs are especially attractive for employees with excess leave who want to assist their coworkers but do not have disposable income to make cash donations. Depending on plan design features, employees can deposit a wide range of unused hourly or daily leave increments into the leave bank. Employees affected by Coronavirus (or other medical emergencies) who have exhausted, or will exhaust, their paid leave due to the medical emergency may then withdraw leave from the leave bank. The leave withdrawn and used from the bank is taxed as compensation to the withdrawing employee. The employee donating the deposited leave is not taxed on the leave donated, because leave bank programs override traditional assignment of income considerations. Although leave banks are not well-known employee plans within the private sector, they are regularly used by governmental entities, including the IRS.

Additional Forms of Tax-Favored Employer-Provided Assistance Now Available After the Declaration

The Declaration will permit employers to offer additional assistance to affected employees. Under Section 139 of the Internal Revenue Code, "qualified disaster relief payments" are not treated as taxable wages/income to employees and are fully deductible to the employer as salary expense. A "qualified disaster relief payment" includes any amount paid to reimburse or pay reasonable and necessary personal, family, living or funeral expenses (not otherwise compensated for by insurance) incurred because of a "qualified disaster." The term "qualified disaster" includes a federally declared disaster or emergency under the Stafford Act. Accordingly, due to the Declaration, Coronavirus is now a "qualified disaster" for Section 139 purposes, so the following additional forms of assistance may be provided to employees on a tax-free basis (assuming all the requirements of Section 139 are satisfied):

- *Employers may provide direct tax-free assistance.* Under Section 139 of the Code, employers may provide direct financial assistance to employees as a result of a qualified disaster. The assistance provided will not be treated as income/wages to the employees, and the employer will be able to deduct those payments as ordinary and necessary business expenses. There

is no specific cap on the amount of assistance that may be provided to an employee under Section 139 other than it must be “reasonable and necessary” and must not be for an expense reimbursable by the employee’s insurance.

- *Employer-sponsored Emergency Funds designated as private foundations may provide assistance.* Employer-sponsored Emergency Funds classified as private foundations may now provide the same type of assistance as their public charity counterparts described above without adverse tax consequences. Payments by the private foundation, if properly made and documented, would not constitute proscribed acts of self-dealing under Section 4941 of the Code and would not constitute taxable expenditures under Section 4945 of the Code. Unlike scholarship and certain other individual grant programs, there is no requirement to seek pre-approval of grant procedures from the IRS prior to initiating this type of program.

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National Law Review, Volume X, Number 74

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