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How Can Employees Help Victims of Louisiana’s August 2016 Storms

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Labor and Preventive Practices

...Through an Employer Leave Donation Program or Leave Sharing Program?

Leave Donation.

In mid-September, the IRS announced income tax relief for individuals who donate through their employers to aid victims of the Louisiana storms that began on August 11, 2016. See IRS Notice 2016-55 (Sept. 16, 2016). To get this special relief — similar to that provided for leave donation aid given after the September 11, 2001 terrorist attacks, Hurricane Sandy, and the Ebola outbreak in Africa — an employer must establish a leave-based donation program (a “Leave Donation Program”). Under that program, employees forego their vacation, sick, or personal leave and ask the employer instead to make a cash-equivalent donation to charitable organizations aiding those victims from the Louisiana storms.

Under normal tax concepts, if an employee can direct an employer to make a charitable contribution on the employee’s behalf, that amount is typically included in the donating employee’s income and is thus subject to tax, as the IRS views the amount donated as “constructively received.” Under the IRS Notice, however, there will be no income to the employee foregoing vacation, sick, or personal leave when the employer makes the cash-equivalent donation (prior to January 1, 2018) to qualified tax-exempt organizations (as described in Internal Revenue Code § 170(c)) that are providing relief to the victims of the Louisiana storms. Moreover, employers will not have to include such cash amounts in Box 1, 3, or 5 of the employee’s Form W-2. Under this IRS tax relief, the employee will not be viewed as in constructive receipt of income. However, the donating employee will not be allowed a charitable deduction on his or her individual income tax return (the employee already avoided receiving income; a charitable deduction of the donated cash-equivalent would be viewed as “double dipping” on the tax benefit). Employers making contributions on behalf of the employee may deduct the payments as trade or business expenses (as the vacation, sick, or personal leave would have been deductible to the employer). [Certainly, an individual can contribute (and get a deduction for contributing) to a charity that helps Louisiana storm victims, but using a Leave Donation Program such as this allows not only for the individual to avoid income tax and but also for the employer to avoid associated employment tax obligations.]

Leave Donation Program vs. Leave Sharing Program.

We notice that employers sometimes confuse Leave Donation Programs and Leave Sharing Programs. Cash that an employer contributes because an employee has foregone vacation, sick, or personal leave, as described above, is done through a “Leave Donation” Program. This program is distinguishable from a “Leave Sharing” Program, where employees share their vacation, sick, or personal leave with co-workers who are in need of additional leave to tend to those co-workers’ own personal medical needs or major disasters.
Leave Sharing.

An employee’s donation to an employer’s Leave Sharing Program is framed as an assignment of income issue (that is, the employee “assigns” income he or she expects to receive to someone else). Normally, under tax concepts, the cash-equivalent of a donor employee’s leave is income (i.e., will show on the employee’s Form W-2), subject to income, FICA, and FUTA tax. As with the Leave Donation Program described above for charity aid to victims, the IRS here allows for exceptions to income inclusion for employer Leave Sharing Programs if an employee may donate to and thus share leave with co-workers to use for the limited instances of a “medical emergency” or “major disaster.” Generally, a “medical emergency” requires the would-be recipient employee’s prolonged absence from work be due to a major illness or medical condition (e.g., cancer, heart attack, etc.) that would result in a substantial loss of income, without the benefit of a Leave Sharing Program. See PLR 200720017 (Feb. 9, 2007) (analyzing tax relief from assignment of income when an employer has a proper Leave Sharing Program in place). A “major disaster” is one where employees need leave assistance tied to an event that the President of the United States has declared as such. See Notice 2006-59, 2006-28 I.R.B. 60.

The IRS imposes stringent requirements on employers when designing a Leave Sharing Program. Employer and employee missteps often occur from good intent. Perhaps an employee wants to specify which specific employee can use the donated sick leave. That can’t be done. Sometimes an employer believes that any employees affected by a public health crisis (such as those suffering from the Zika virus) can avail themselves of shared leave. That also can’t be done.

Recommendation: Leave Donation or Leave Sharing?

An employer wanting to provide a vehicle for employees to donate — through a charity — to victims of a certain crisis should design a Leave Donation Program. An employer wanting to provide a charitable environment (but not a charity donation) where employees can share leave with co-workers experiencing a medical emergency or President-declared major disaster should design a Leave Sharing Program. In either situation, a well-crafted program will help insulate employers and employee from easily-avoided income and employment tax consequences.

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