

Leave Donation Programs for COVID-19

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The IRS recently issued Notice 2020-46 that provides for a special leave donation program available for the COVID-19 pandemic. This brings the total to three tax-favored leave programs that are currently available to employees and employers to assist with COVID-19 relief:

- COVID-19 Leave Program per Notice 2020-46
- Medical Emergency Plan per Rev. Rul. 90-29
- Major Disaster Plan per Notice 2006-59

We summarize each of these programs below. Notably, there is additional relief contemplated in H.R. 6800, the Health and Economic Recovery Omnibus Emergency Solutions (“HEROES”) Act, which provides special rules for paid sick and family leave provisions. [See https://www.groom.com/resources/the-heroes-act-key-retirement-health-and-welfare-and-tax-provisions/](https://www.groom.com/resources/the-heroes-act-key-retirement-health-and-welfare-and-tax-provisions/)

COVID-19 Leave Program

Under the newly issued Notice 2020-46, an employee can elect to forgo vacation, sick, or personal leave in exchange for tax-favored cash payments that the employer makes to charitable organizations described under Code section 170(c). The foregone leave pay is not considered taxable wages to the employee (so not reported in boxes 1, 3, or 5 of the Form W-2), provided that the cash payment is (1) made to a section 170(c) charitable organization for the relief of victims of the COVID-19 pandemic in the affected geographic areas, and (2) paid to such organizations before January 1, 2021. For this purpose, the “affected geographic areas” is the 50 United States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

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An employee is not entitled to a section 170 charitable deduction, but the employer can either (1) take a charitable deduction under the rules of Code section 170, or (2) take a section 162 business deduction.

Typically, an employee selects a charity (or employer selects the charity) to receive the cash equivalent of all or some portion of his or her unused leave pay for the year. The charity must provide relief for COVID-19 victims and make payments before January 1, 2021.

If the donation policy extends beyond the relief provided by the Notice, the employee is treated as receiving taxable wages (although her or she may be able to take a section 170 deduction on their tax return), and the employer is entitled to a section 162 deduction for compensation (and not a section 170 charitable deduction).

Medical Emergency Plan

The rules related to medical emergency plans are set forth in Revenue Ruling 90-29. This guidance provides for a tax-favored program where an employee may forego leave pay for another employee, and the recipient employee (and not the donor) is the only one to have taxable wages. Notably, the donor employee has neither taxable income nor a tax deduction as a result of the program.

To qualify for this treatment, the following requirements must be met:

1. Plan. An employer must establish a plan where its employees who suffer “medical emergencies” may qualify as recipients of leave surrendered to the employer by other employees or leave deposited by its employees in an employer-sponsored leave bank.
2. Medical Emergency. A “medical emergency” must be defined under the plan as a medical condition of the employee or a family member of the employee that will require the prolonged absence of the employee from duty and will result in a substantial loss of income to the employee because the employee will have exhausted all paid leave available apart from the leave-sharing plan.
3. Application Process. A written application describing the medical emergency must be submitted to the employer by or on behalf of the employee requesting additional paid leave under the leave-sharing plan.
4. Exhaustion of All Paid Leave. After the application has been approved and the employee has exhausted all of his or her paid leave, the employee is eligible to receive additional paid leave (to be paid at his or her normal rate of compensation) with respect to leave surrendered to the employer or leave deposited in the leave bank.
5. Restrictions. The plan must contain restrictions on the amount of leave that may be surrendered to the employer or deposited in the leave bank and also must contain rules as to the manner in which surrendered or deposited leave will be granted to eligible leave recipients.

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Major Disaster Plan

A major disaster plan must meet the requirements set forth in Notice 2006-59. As with a medical emergency plan, a major disaster plan also provides for a tax-favored program where an employee may forego leave to provide for another employee, and the recipient employee (and not the donor) is the only one to have taxable wages. Notably, the donor employee has neither taxable income nor a tax deduction as a result of the program.

A major disaster leave-sharing program would need to be set forth in a written plan document, subject to the following restrictions—

1. Leave Bank for Employees Adversely Affected by a Major Disaster. The plan allows a leave donor to deposit accrued leave in an employer-sponsored leave bank for use by other employees who have been adversely affected by a major disaster. For this purpose, a “major disaster” means (a) a major disaster as declared by the President under §401 of the Stafford Act, 42 U.S.C. §5170, that warrants individual assistance or individual and public assistance from the federal government under that Act, or (b) a major disaster or emergency as declared by the President pursuant to 5 U.S.C. §6391, in the case of employees described in that statute. Moreover, an employee is considered to be “adversely affected by a major disaster” if the disaster has caused severe hardship to the employee or a family member of the employee that requires the employee to be absent from work.
2. No Naming a Specific Recipient. The plan does not allow a leave donor to deposit leave for transfer to a specific leave recipient.
3. Maximum Donation. The amount of leave that may be donated by a leave donor in any year generally does not exceed the maximum amount of leave that an employee normally accrues during the year.
4. Use and Rate of Leave Pay. A leave recipient may receive paid leave (at his or her normal rate of compensation) from leave deposited in the leave bank. Each leave recipient must use this leave for purposes related to the major disaster.
5. Specific Program Duration. The plan adopts a reasonable limit, based on the severity of the disaster, on the period of time after the major disaster occurs during which a leave donor may deposit the leave in the leave bank, and a leave recipient must use the leave received from the leave bank.
6. No Cash Option. A leave recipient may not convert leave received under the plan into cash in lieu of using the leave. However, a leave recipient may use leave received under the plan to eliminate a negative leave balance that arose from leave that was advanced to the leave recipient because of the effects of the major disaster. A leave recipient also may substitute leave received under the plan for leave without pay used because of the major disaster.
7. Amount of Leave. The employer must make a reasonable determination, based on need, as to how much leave each approved leave recipient may receive under the leave-sharing plan.

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8. Use and Return of Leave. Leave deposited on account of one major disaster may be used only for employees affected by that major disaster. Except for an amount so small as to make accounting for it unreasonable or administratively impracticable, any leave deposited under a major disaster leave-sharing plan that is not used by leave recipients by the end of the period specified in paragraph 5, above, must be returned within a reasonable period of time to the leave donors (or, at the employer's option, to those leave donors who are still employed by the employer) so that the donor will be able to use the leave. The amount of leave returned to each leave donor must be in the same proportion as the amount of leave donated by the leave donor bears to the total amount of leave donated on account of that major disaster.

Next Steps

Review your current leave programs and determine if they should be expanded or supplemented to provide for tax-favored leave donation relief for COVID-19. Remember to consider privacy concerns and impact on other benefit programs available to employees prior to implementation.

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