

# Making Sure Your Disaster Relief Isn't a Disaster:

How Nonprofits and Employers Can Provide Relief in Response to the  
COVID-19 Crisis

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# Overview

Disaster relief through grantmaking

Proper handling of direct disaster relief to individuals

Designing compliant employer-sponsored charitable disaster relief funds

Options for providing disaster relief to your own employees

# Disaster Relief Through Grantmaking



# Disaster Relief Through Grantmaking

General support grants to charities or public agencies engaging in disaster relief efforts

Provide funding for specific disaster relief efforts

- Recipient could be a non-501(c)(3) organization
- Must have a grant agreement defining permissible use of grant funds for a non-501(c)(3) grantee
- Requires expenditure responsibility for private foundation funders

# Disaster Relief Through Grantmaking

- Grants for disaster relief must be consistent with:
  - The purposes of the grantmaker, and
  - Any use or spending restrictions on the underlying assets
- Note: Solicitations for a particular purpose create a binding obligation to use contributions only for that purpose



# Proper Handling of Direct Disaster Relief to Individuals



# Direct Disaster Relief to Individuals

- Must benefit a “charitable class”
  - A charitable class must be either large or indefinite
    - A class is indefinite if the group of potential beneficiaries is open-ended, e.g., all persons who *have been or may be* severely harmed by COVID-19 or future qualified disasters
    - Cannot solicit or accept donations earmarked for a specific individual or small group of individuals
- Note: Recommend retaining flexibility as to future use of funds when framing solicitation requests

# Direct Disaster Relief to Individuals

- Recipients must satisfy “needy or distressed test”
  - Requires a specific assessment that a recipient is financially or otherwise in need
  - Objective documentation of each applicant’s need is required
  - Charity should uniformly apply objective, non-discriminatory, need-based criteria for selecting recipients;
- Note: Potential recipients generally should not include the grantmaker’s leadership or their family members





# Direct Disaster Relief to Individuals

- Must maintain appropriate documentation, including:
  - The type of aid provided and the purpose for which it was given;
  - Costs associated with providing the aid;
  - How the recipients were selected; and
  - Identifying information, such as a recipient's name and address and the amount provided to each recipient.



# Disaster Relief through Aid to Businesses

Aid to businesses can qualify as furthering charitable purposes, but only in fairly limited circumstances, such as:

- The business owners themselves are financially needy or otherwise members of a charitable class; or
- The community in which the business is located is deteriorated (e.g., a low-income census tract) and in need of assistance.

As with relief to individuals, must select recipients using objective written criteria and maintain appropriate documentation

# Designing Compliant Employer-Sponsored Charitable Disaster Relief Funds



# Disaster Relief to Employees

## How to operate and fund an employee disaster relief program?

- By the employer directly (no charitable involvement)
- Through a related charitable organization
- Through an independent public charity

## Potential tax advantages in working with a charity or foundation:

- Allow employers to claim charitable contribution deduction
- Allow employees who are contributing to do the same
- Allow aid to employees to be non-taxable to the employees

# Employees as a Charitable Class

- Like other charitable programs, employee disaster relief programs run through charities or foundations must benefit a charitable class
- Review: Charitable class must be sufficiently large or indefinite
- Employees of large multinational and national employers likely qualify as a charitable class on the basis that the class is large
- Employees of smaller employers may qualify on the basis that the class is indefinite— if the relief program covers victims of future qualified disasters, not just COVID-19



# Special Requirements for Employer-Specific Disaster Relief Programs

Purpose of the program should be to provide relief to those most in need

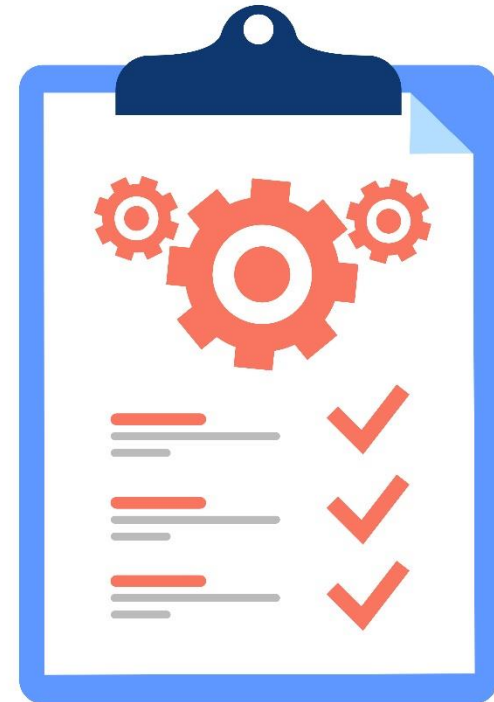
...not to provide additional compensation to employees or a benefit (such as recruiting) to the employer

Selection process has special requirements

Other requirements we described for programs that grant to individuals also continue to apply

# Selection Process for Employer-Specific Disaster Relief Programs

- Majority of selection committee members should not be in a position to “exercise substantial influence” over the employer
  - Directors, officers, or senior management employees may not be a majority of the selection committee
- Selection must be based on an objective determination of need
  - Establish written criteria in advance
  - Document how criteria apply to each applicant
- Selection must not discriminate on the basis of race, color, sex, religion, national origin, veteran status, or disability status



# Additional Requirements for Private Foundations

- Aid may be provided only in the event of a “qualified disaster”
  - IRS has confirmed that COVID-19 is a qualified disaster for purposes of these rules, following President Trump’s March 13 disaster declaration
- No aid may go to “disqualified persons”; any such aid is self-dealing
  - Directors
  - Officers
  - Substantial contributors
  - Members of the disaster relief program’s selection committee
  - Family members of all of the above



# Community Foundation Funds for Disaster Relief

- To provide employee disaster relief, funds at community foundations must be formed only for that purpose
- Payments may not be made to officers, directors, or trustees of the sponsor, or members of the selection committee
- Traditional donor-advised funds may not make disaster relief payments (or other payments) to individuals

# Options for Providing Disaster Relief to Your Own Employees



# Leave Sharing Programs





# Leave Sharing Programs

- PTO donation or leave-sharing arrangement allows employees to donate PTO, vacation, and sick days to other employees
  - No specific governing rules
  - Discrimination and state law considerations
- Assignment of income doctrine generally taxes donor
- Exceptions for:
  - Bona fide medical emergencies (Rev. Rule 90-29)
  - Major disasters (IRS Notice 2006-59)
- If exception satisfied, tax shifted to recipient
  - Gross-up option
  - Non-compliant purpose taints entire program



# Leave Sharing for Medical Emergencies

- Program limited to employees who suffer “medical emergency”
  - Medical condition of employee or family member
  - Requiring prolonged absence of work
  - Resulting in substantial loss of income
- Requires written policy or plan
- Eligible recipients must:
  - Be eligible to earn PTO
  - Exhaust all other PTO or paid leave
- Recipient must use donated PTO for medical emergency and return any excess



# COVID-19 and Medical Emergency Exception

No IRS guidance

Positive COVID-19 test

Symptomatic or exposed and instructed by doctor to quarantine

Self-quarantine alone unlikely to qualify

# Leave Sharing for Major Disasters

- Plan limited to employees adversely affected by “major disaster” declared by the President
- Must require employee to be absent from work
- Leave may not be converted into cash
- Employees may not designate specific leave recipient
- Donated leave cannot exceed maximum amount of leave that employee normally accrues during year
- Leave deposited on account of one major disaster must be used only for employees affected by that major disaster
- All unused leave must be returned to the leave donors after reasonable time period

# PTO Cash Outs





# Emergency PTO Cash Outs

- Employers may wish to permit cash-out of accrued vacation, sick leave, or PTO, without a penalty
- Exception for unforeseeable emergencies caused by COVID 19
  - Constructive receipt
- Limited window period



# Disaster Relief Payments



# Section 139 Qualified Disaster Relief

- “**Qualified disaster relief payments**” that serve to reimburse or pay an individual’s expenses incurred in connection with a “**qualified disaster**” are not taxable as federal income and are not subject to employment taxes or withholding
  - State withholding may apply
- Includes payments received for: (i) *reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster*, (ii) reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence due to a qualified disaster (rented or owned), and (iii) reasonable and necessary expenses incurred for the repair or replacement of the contents of a personal residence due to a qualified declared disaster.

# Section 139 Qualified Disaster Relief

- Tax-free (not reported on W-2 or 1099)
- Limited to employees impacted by a qualified disaster
- Expenses that would not have been incurred but for the disaster:
  - Childcare costs
  - Telecommuting
  - Unreimbursed medical expenses
  - Funeral expenses
  - Commuting expenses
  - Other unusual expenses resulting from the pandemic
- May not serve as income replacement or unemployment benefits
- Best practice: written policy, set procedures to apply for and receive aid



# Thank You!



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