

Mendrygal Law, PLLC – Client Alert

When widespread disasters or emergencies occur, employers (both businesses and nonprofits) often ask how they can support current and former employees and staff. Establishing a charity specifically for this purpose is a popular option that we commonly assist with, but there are several other less intensive options that can facilitate a timely response by employers. Options available under the CARES act or other recent Congressional action are outside of the scope of this alert.

Employer Payments. Under Section 139 of the Internal Revenue Code, employers may provide to employees “qualified disaster relief payments” that are not treated as wages and can be excluded from income for federal tax purposes. Employers may also be able to claim a business deduction for qualified disaster relief payments. These payments are permitted when the President declares a “disaster” under the Stafford Act, as President Trump did on March 13, 2020 due to the ongoing COVID-19 pandemic.

Only certain payments meet the applicable definition. With respect to COVID-19, “qualified disaster relief payments” include payments “to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster.” Reimbursable items potentially include over-the-counter medications, hand sanitizers, disinfectants, childcare or tutoring due to school closings, remote work expenses, increased costs from unreimbursed health-related expenses, and increased transportation costs due to work relocation or changing requirements.

Important rules related to qualified disaster relief payments include:

- Expenses reimbursed may not also be paid by insurance or otherwise;
- All expenses must be “incurred as a result of” the disaster (here, the COVID-19 pandemic);
- Collecting receipts from employees is not required if the payment amounts are reasonably expected to be commensurate with the expenses incurred;
- Expenses must be “reasonable and necessary” and cannot be for luxury or other non-essential items;
- Payments may not be made as income replacement or to replace lost wages; and
- Eligibility should extend to all employees.

Employers should implement guidelines and processes addressing the points above, as well as setting forth an application process and program parameters. Employers should ask employees to attest to the key requirements laid out above when requesting a payment.

Leave Sharing or Donation Programs. Employers have several options to establish programs for employees to donate unused vacation, sick, or personal time, including (i) a major disaster leave sharing program, (ii) leave donations for employees on medical leave, and (iii) leave donations to charity. Each option carries a unique set of benefits and requirements, but all are relatively simple and quick to establish. Properly structured, these programs can also offer tax advantages to the employees who donate leave.

Employee Relief Fund at an Existing Charity. Employers may establish a fund at a local community foundation or other existing charity to provide assistance to employees affected by a disaster or other emergency. In fact, there are a number of charities specifically focused on administering these programs for large employers. Outsourcing a fund in this manner typically requires that an employer forego a certain degree of control and oversight with respect to the operation and management of the fund. In exchange,

the administration and compliance is handled almost exclusively by the sponsoring charity. Such funds can generally be established quickly with no need for IRS recognition of 501(c)(3) status. These funds may receive donations from any source, including the employer, employees, and vendors—without any restrictions related to the amount of funding from any one source.

New Employee Relief Charity. We work with many large employers that establish charities to support employees (sometimes including furloughed employees or retirees) and their families who have been impacted by an emergency or disaster. Specific guidelines govern the administration of these charities, and thresholds apply related to the minimum size of the employee base. These charities may receive donations from any source, including the employer, employees, or vendors—provided that the amount of employer support is continuously monitored to ensure the foundation qualifies as a “public charity”. Charities funded primarily by an employer are also permitted, but the types of permissible assistance are significantly restricted. An employee relief charity can be an excellent tool for promoting employee morale and participation despite the administrative burden. There is generally a great degree of flexibility related to control of the charity (for example, the Board can be composed of C-suite management), so long as a selection committee predominantly composed of “rank and file” employees retains the authority to approve grants. Employees may receive grants for a broad range of uses, so long as each applicant demonstrates financial need and is evaluated objectively. A new charity can be established within a few weeks and can begin operations as soon as it fills leadership and committee positions and adopts the requisite documentation establishing program parameters. IRS recognition of 501(c)(3) status will follow months later, but will be retroactive to the date of formation.

Existing Corporate Foundations. Most corporate foundations are classified as “private foundations” due to extensive funding by the corporation. Such foundations are generally precluded from providing employee assistance, with one exception. Employer-sponsored private foundations may provide assistance to employees for “qualified disasters” and with appropriate safeguards in place. As above, a qualified disaster includes Presidentially declared disasters such as the COVID-19 pandemic. In the current environment, corporate foundations may be able to make distributions to employees of the sponsoring employer even though they are classified as private foundations. Foundations considering this option should seek guidance regarding permissibility and the necessary safeguards. Important factors include the size of the employee base and eligibility requirements, compliance with the required program parameters, and permissible foundation purposes as set forth in the organizing documents.

If you have any questions related to the above programs, please do not hesitate to contact one of the following attorneys or visit www.mendrygallaw.com for more information about our practice

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Mendrygal Law, PLLC is a boutique law firm devoted exclusively to guiding nonprofits through the complexities of the legal and regulatory requirements for tax-exempt organizations.

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