



COMPLIANCE BULLETIN

How to Create a Coronavirus Leave Donation Program

Leave donation programs have been considered and implemented by employers for years to allow employees to donate accrued paid time (PTO), vacation or sick leave to a general pool. The time available in this pool serves to be used by fellow employees who have medical emergencies or who are affected by major disasters and have exhausted all paid leave available to them. These programs can provide good-will for employees while serving to fill a need due to unfortunate circumstances.

With the advent of the COVID-19 crisis, many employers are considering a Leave Donation Program to lessen the burden of limited Paid Time Off (PTO) available to employees who become ill and to increase camaraderie amongst their employees in the time of a crisis. The rules surrounding a program like this are onerous and can have major tax and compliance implications if not implemented correctly. Below is a summary of rules and considerations employers who want to create such a program need to understand.

Generally, without a plan in place, the general IRS regs would require that both the donor and recipient pay taxes on the PTO being donated. As noted by the IRS in private ruling letter Rev. Rul. 90-29, 1990-1 C.B. 11 (<https://www.irs.gov/pub/irs-wd/0720017.pdf>), a “basic principle of tax law is that a taxpayer’s assignment to another person of his or her right to receive compensation for personal services does not relieve the taxpayer of the tax liability on the assigned income.” However, there are two IRS exceptions that could avoid taxes for the donor or the leave:

Medical Emergency Exception

A “medical emergency exception” is defined as a “medical condition of the employee or a family member that will require the prolonged/extended absence of the employee from duty and will result in a substantial loss of income to the employee due to the exhaustion of all paid leave available, apart from the leave-sharing plan.” See Private Ruling Letter, Rev. Rul. 90-29, 1990-1 C.B. 11.

Major Disaster Exception

A “major disaster exception” is defined as a disaster declared by the president under §401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act) or as a major disaster or emergency declared by the president pursuant to 5 U.S.C. §6391 for federal government agencies. Once the president declares a major disaster as stated above, the IRS allows leave donations to employees affected by the disaster **without negative tax consequences to the donor(s)**. See IRS Notice 2006-59 (https://www.irs.gov/irb/2006-28_IRB#NOT-2006-59).

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COMPLIANCE BULLETIN

The president's emergency declaration on Friday, March 13, invoked the Stafford Act. Due to the circumstances surrounding the COVID-19 outbreak and this emergency declaration by President Trump, employers considering implementing a Leave Donation Program should consider utilizing the Major Disaster Exception to avoid negative tax implications within their program. Below is detailed information surrounding Major Disaster Leave and how to meet the criteria within this IRS exception:

Major Disaster Leave (Stafford Act)

Once the president declares a major disaster, leave from an employer-sponsored leave bank or pool may be taken by an employee who is adversely affected by that major disaster.

To meet the IRS exception, major disaster plans must be in writing and must also meet the following requirements:

- 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 purposes of the plan, an employee is considered to be adversely affected by a major disaster if the disaster has caused severe hardship to the employee or to a family member of the employee that requires the employee to be absent from work.
- The plan does not allow a leave donor to deposit leave for transfer to a specific leave recipient.
- 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.
- 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.
- 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.
- 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.
- 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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COMPLIANCE BULLETIN

- 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.

Under both medical emergency plans and major disaster plans, donor employees may not claim an expense, a tax deduction or a charitable contribution for any of the leave donated under the plans. Additionally, while the exception should alleviate tax implications from the donor, all paid leave granted to the recipient employee is considered wages and is subject to Federal Insurance Contributions Act (FICA) withholding, Federal Unemployment Tax Act (FUTA) withholding and other required tax withholdings.

Should a plan fail to meet the specified criteria to qualify for an IRS exception, leave donations paid out to a recipient are considered taxable wages to the donor as well.

Innovative Benefit Planning can assist in setting up these benefits and ensure your leave donation program is compliant. Do not hesitate to call us for assistance.

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