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Employers Helping Employees—Disaster Relief

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When a disaster hits, people often want to help those affected; employers often want to help their own affected employees. This article explains how employers can make certain payments, implement reimbursements, and provide other forms of assistance, so that some or all of the assistance is not treated as taxable compensation to employees, but is tax deductible for the employers. The article also discusses other approaches that companies sometimes use for helping employees.

Section 139

Under section 139,[1] qualified disaster relief payments are not includible in income. This can include payments made by an employer to an employee, if all of the section 139 rules are satisfied. Determining whether a payment is a qualified disaster relief payment involves three steps:

- Is the disaster a "qualified disaster" under the Internal Revenue Code definition?
- Is the employee within the qualified disaster zone?
- Are the payments made as a result of the disaster for expenses that are considered qualified under section 139?

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[1] Unless otherwise indicated, section references are to the Internal Revenue Code of 1986, as amended (the "Code") or the applicable regulations promulgated pursuant to the Code (the "regulations").

A qualified disaster is:

- A disaster which results from terrorist or military action;
- A federally declared disaster (i.e., a disaster subsequently determined by the President of the United States to warrant assistance by the federal government);

As an example, a federally declared disaster had been announced for certain counties in Texas and Louisiana due to Hurricane Harvey. Thus, payments or reimbursements from an employer that qualify as qualified disaster relief payments will not be includable in the income of the recipient if paid to an affected employee who resides in one of the counties that has been listed under the federally declared disaster zone (the declared counties can be found online or in *Tax relief available for businesses affected by Hurricane Harvey*, TaxNewsFlash (Sept. 1, 2017) (discussing disaster relief issues outside the employment area)).

A qualified disaster relief payment is any payment received or incurred as a result of a qualified disaster that:

- Is paid or reimburses reasonable and necessary personal, family, living, or funeral expenses; or
- Is paid or reimburses reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence, or repair or replacement of its contents to the extent that the need for such repair, rehabilitation, or replacement is attributable to a qualified disaster;

AND, in addition, the payment or reimbursement is not paying for an amount otherwise compensated by insurance.[2]

Dealing with the Insurance Clause

A qualified disaster payment made by an employer to an employee affected by the qualified disaster is not treated as wages or compensation subject to employment taxes.[3] Therefore, no federal income tax withholding needs be done, and amounts are not subject to FICA/Medicare, so long as the payment meets the rules as described above. However, if the employer pays or reimburses for expenses covered by the employee's insurance, the payment is likely to be taxable compensation subject to the usual FICA/Medicare and income tax withholding. Thus, the employer needs to consider the insurance requirement.

We generally recommend that an employer with more than one location coordinates its monetary efforts from a central location, rather than having each individual office decide to provide aid on its own. Several offices that are not working with the same information may inadvertently provide aid that does

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[2] Section 139(b).

[3] Section 139(d).

not meet the section 139 rules, resulting in taxable compensation for the employees who are being helped.

Because of the statutory requirements, it is useful to have a policy in place to try to determine whether the payments or aid sent are likely to be covered under the employee's insurance. Some companies have a very short list of questions they ask of employees as they contact them and try to ascertain their needs. For example:

- How can we contact you going forward?
- Where are you staying this week? Do you have a place to stay after this week (out of town with relatives, hotel, etc.)?
- Do you have transportation?
- What are your immediate needs?
- What sort of insurance do you have (homeowners, tenant, flood)?
- Have you had a chance to contact your insurance agent and talk about coverage?
- Are the expenses of living elsewhere, transportation, etc. covered under your policy?

While all insurance policies are different, some homeowners insurance might cover staying in a hotel until certain types of damage is being repaired, but the policy might not cover meals while displaced. Having a general understanding of the likely coverage can help determine the types of payments that are more likely to be subject to taxation and the types are more likely to be tax free.

Companies sometime want to send reimbursement payments before the insurance coverage can be determined. If so, the company should keep track of the payments so that payroll can report the amounts if it turns out some of the payments are taxable. Given the broad benefits available under section 139, in many cases the payments can be used for reimbursements that are more likely to be tax free, but having a mechanism to show that the insurance issues were considered makes it easier to argue for tax-free treatment.

General Insurance Issues

For some sorts of disasters, such as a large wildfire affecting an area (that is declared a federal disaster), regular homeowners insurance may cover some of the damage and may also cover the cost of living somewhere else while the damage is repaired. Thus, the employer would need to be aware of the insurance coverage once the employee has information from the insurance agent. For floods, most regular homeowners insurance policies do not cover flood damage and thus people in flood zones sometimes have separate flood insurance (some mortgage lenders require separate flood insurance if the property is in a flood zone). As a practical matter, many flood insurance policies do not cover all costs incurred because of a flood, and thus it is likely that even an employee with flood insurance will have costs not covered by insurance.

Employer Loans to Employees

Employers can generally loan up to $10,000 to employees without charging interest. A loan is not taxable compensation so long as there is a reasonable expectation of repayment. For a loan from an employer to an employee eligible for section 139 qualified disaster payments, it may be possible to provide higher dollar value interest-free loan. Note that loans from employers to employees may also be governed by state payroll laws, which are beyond the scope of this article.

Employee-to-Employee Gifts

Sometimes employees want to help out affected colleagues, but need some help in coordinating their efforts. Companies may collect amounts from various employees for a group of affected employees or even a specific affected employee. There are a few issues to consider if the employer gets involved in the effort.

Section 102(c) does not respect “gifts” from an employer to an employee (other than as discussed in section 139 above). If an employer helps by simply pooling employee-to-employee payments, these gifts need to be separate from any employer assistance. Generally, companies set up a separate bank account just for these amounts. The employer is essentially acting as agent for the employees, collecting the employee amounts, and sending them along to the recipients on behalf of the donor employees.

When providing the funds to a specifically affected employee, these payment can be labeled “employee-to-employee amounts” or as "gifts from your fellow employees".

Companies need to be mindful of the employee personal information rules when trying to help employees give to other employees.

Paid Time Off Donations

The IRS also, separately, may allow employees of a company to donate “paid time off” to be used by employees affected by a disaster (the affected employee taking the additional paid time off is taxed on the paid time off). The IRS has generally allowed companies to set up this sort of donation program after a specific major disaster. The IRS has not yet done so for Hurricane Harvey in Texas and Louisiana, but it is possible that it will do so in the near future. This separate rule is not specifically under section 139. The employee donating the leave does not have compensation income on the “donation,” but also cannot take a charitable deduction.