

September 9, 2005

## IRS Issues Guidance for the Donation of Employee Leave for Hurricane Katrina Relief

IRS Notice 2005-68 provides guidance for employers who have adopted or may be considering adopting employee leave-based donation programs to aid victims of Hurricane Katrina. Under these programs, employees elect to donate vacation, sick or personal leave in exchange for cash payments that their employers make to organizations described in Code Section 170(c). A Code Section 170(c) organization means:

- a state, a possession of the United States (e.g., a territory or protectorate), or any political subdivision thereof, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes, or
- a U.S.-based corporation, trust, or community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals.

The IRS has indicated that it will not assert that the cash payments an employer makes to organizations in exchange for vacation, sick or personal leave donated by its employees constitute gross income or wages to such employees (actual or constructive) if: (1) the donation is made to a Code Section 170(c) organization for the relief of victims of Hurricane Katrina; and (2) paid to the organization before January 1, 2007. Accordingly, cash payments made under these programs do not need to be included in Box 1, 3 (if applicable), or 5 of Form W-2.

Employees who elect to donate their vacation, sick or personal leave may not claim a charitable deduction for the value of the forgone leave which is excluded from their compensation and wages. The IRS has also indicated that it will not assert that employers are only permitted to deduct their cash payments under the rules of Code Section 170 rather than the rules of Code Section 162.

Although not specified in the IRS guidance, employers should consider leave-based donation programs that are limited to accrued but unused leaves. Further, these programs and elections should be adequately documented by election/donation forms, employee communications and amendments to the appropriate program or policy documents to minimize the risk of issues arising and to demonstrate compliance under Notice 2005-68.

If you have questions or need additional information on this IRS Guidance, please contact the Seyfarth Shaw attorney with whom you normally work, or any Employee Benefits attorney on our website at [www.seyfarth.com](http://www.seyfarth.com).