

# Employee Benefit ■ Plan Review

## Too Much Time on My Hands: Helping Employees Through COVID-19 Pandemic with PTO Donation

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**T**ax law plays a key role in how paid time off (“PTO”) donation programs work. As a general rule, taxpayers cannot avoid taxable income by giving away their accrued PTO, unless an exception applies, such as setting the program up as a medical emergency leave-sharing plan or a qualified major disaster leave-sharing plan. Under either of these options, the employer establishes a plan under which employees may voluntarily donate their accrued, but unused PTO for the benefit of their fellow employees in need. The programs differ based on which employees may use the PTO and for what purpose. If a plan satisfies the applicable requirements, then the donor employee is not taxed on the income. Instead, the recipient employee receives the donated leave time as taxable wages.

### **MEDICAL EMERGENCY LEAVE-SHARING PLANS**

A medical emergency leave-sharing plan is for employees who have exhausted all of their PTO and who need more because of a “medical emergency.” A plan can allow a donor-employee to donate accrued PTO either to a “leave bank” to be held available for any other employee as needed, or to a specific co-worker.

For this purpose, a medical emergency is a medical condition of the employee or a member

of the employee’s family that will require a prolonged absence from work and will result in a substantial loss of income because the employer will have exhausted all paid leave. An Internal Revenue Service (“IRS”) ruling also approved a plan that allowed an employee to receive donated leave time if the employee required extended time off following the death of the employee’s parent, spouse or child.

Under the current circumstances, if an employee is required to be absent from work because the employee (or spouse or child) is diagnosed with COVID-19, a distribution of PTO to the employee should qualify as a proper medical emergency distribution from the plan. It is not clear, however, how a medical emergency leave-sharing plan would apply to other situations involving COVID-19, such as when an employee is quarantined but is not (and whose family is not) actually infected.

If a leave-sharing plan allows donated leave to be distributed to an employee who did not suffer a medical emergency, the entire plan could lose its status as a medical emergency leave-sharing plan. This could mean that all donations and distributions from the plan (not just the distributions to employees who did not suffer a medical emergency), would lose the expected tax treatment discussed above.

### MAJOR DISASTER LEAVE-SHARING PLANS

A major disaster leave-sharing plan is a plan that benefits employees adversely affected by a major disaster. For this purpose, a “major disaster” is a major disaster as declared by the President under Section 401 of the Stafford Act that warrants individual assistance or individual and public assistance from the federal government under that Act. Unlike the medical emergency leaving-sharing plan, this type of plan does not allow a leave donor to deposit leave for a specific leave recipient. Instead, a leave donor must deposit accrued leave in an employer-sponsored leave bank for use by those employees who are adversely affected by a specific major disaster in that it caused severe hardship to the employee (or a family member) that requires the employee to be absent from work.

Further, these plans must meet the following requirements:

- The amount of leave that may be donated by a leave donor in any year generally cannot 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 the leave bank and must use this leave for purposes related to the major disaster.

- A leave recipient may not convert the leave into cash in lieu of using the leave.
- The plan must adopt a reasonable time limit following the disaster for depositing the leave in the leave bank and for using it.
- 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.
- Leave deposited on account of one major disaster may be used only for employees affected by that major disaster and unused leave generally must be returned to the donor employee within a reasonable period of time.

As of the date of this article, the District of Columbia and all 50 states have been declared COVID-19 major disasters by the president, but only certain states have been declared major disasters that warrant individual assistance. While a state’s major disaster declaration may be modified in the future to include individual

assistance, currently employers can establish a qualified major disaster leave-sharing plan for the benefit of employees adversely affected by COVID-19 only in those states which have.

### STATE-SPECIFIC CONSIDERATIONS

Employers considering implementing one of these PTO leave-sharing programs should first confirm that no state tax or leave law in the jurisdiction in which they operate would impact their ability to do so. Specifically, employers should review state tax guidelines to ensure that they do not depart from IRS guidance on leave sharing. Further, employers should consider whether state or municipal leave ordinances would limit their ability to permit employees to donate leave, such as mandated sick leave, reducing their accrued leave to a level below what is permitted under local law. 🌐

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