

COVID-19 AND THE USE OF LEAVE-SHARING PLANS

As employers and employees continue to grapple with the spread of COVID-19, an employer-sponsored leave-sharing program can be a good tool to help alleviate the strain on employee populations that encounter circumstances where they need time away from work. If structured and administered properly, certain leave-sharing arrangements allow employees to donate PTO, medical leave and vacation time ("Leave") in a tax-efficient manner to an employer-sponsored leave bank for use by employees adversely impacted by a particular event or circumstance. More specifically, the Internal Revenue Service ("IRS") has provided favorable tax treatment to the particular types of programs described below: (1) Medical Emergency Leave-Sharing Programs; and (2) Major Disaster Leave-Sharing Programs.

MEDICAL EMERGENCY LEAVE-SHARING PROGRAMS - IRS REVENUE RULING 90-29

Ordinarily, Leave donated by an employee to a co-worker is treated as taxable wages to the donor employee and not the recipient. In other words, the Leave is included in the donor employee's W-2 wages and is subject to applicable federal income tax withholding and employment taxes (FICA and FUTA). However, the IRS has created an exception to this treatment for a Medical Emergency Leave-Sharing Program under IRS Revenue Ruling 90-29, which can help encourage employees to donate their Leave.

Under this Ruling, the Leave is not taxable to the Leave donor, but it is instead taxable to the Leave recipient (*i.e.*, the co-worker). There are several design guidelines that should be taken from the Ruling and incorporated into an employer-sponsored Medical Emergency Leave-Sharing Program to ensure the tax-favored treatment. This includes:

1. The program must be limited to "medical emergencies," which are defined as a medical condition of the employee or his or her family member that would require the employee's prolonged absence from work and result in a substantial loss of income.
2. The program must establish rules for (a) the amount of Leave employees can contribute, and (b) the criteria for awarding Leave to recipients.
3. Leave recipients must be required to submit an application for the Leave under the program.
4. Leave may not be made available to the Leave recipient until his or her own paid leave has been exhausted.
5. Although not explicitly stated in the Ruling, the program should be in writing.

Employers who want to offer an avenue for employees to help co-workers dealing with medical emergencies stemming from COVID-19 could utilize their existing Medical Emergency Leave-Sharing Program, if they already have one, or they can establish a new program as described above. However, to ensure tax-favored treatment, employers should be mindful that the program must be limited to circumstances involving medical emergencies.

MAJOR DISASTER LEAVE-SHARING PROGRAMS - IRS NOTICE 2006-59

Another tax-favored program recognized by the IRS is the Major Disaster Leave-Sharing Program identified in IRS Notice 2006-59. Under this guidance, the IRS established the following features and requirements:

1. The program should be in writing.
2. The program must allow a Leave donor to donate accrued leave to an employer-sponsored leave bank for use by other employees adversely affected by a major disaster. An employee is considered "adversely affected" by a major disaster if it has caused severe hardship to the employee or a family member of the employee that requires the employee to be absent from work.
3. A Leave donor cannot be permitted to designate a specific Leave recipient.
4. The amount of Leave that a Leave donor may donate in any year generally may not exceed the maximum amount of leave that he or she normally accrues during the year.
5. A Leave recipient may receive paid leave (at his or her normal rate of compensation) from the Leave bank. Each Leave recipient must

use this leave for purposes related to the major disaster.

6. The program must include 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 donate, and a Leave recipient must use, the donated Leave.
7. A Leave recipient may not convert Leave received under the program into cash in lieu of using the Leave, but Leave can be used to restore a negative leave balance (if an employer had provided an advance).
8. The employer must make a reasonable, need-based determination as to how much leave each approved Leave recipient may receive under the program.
9. Leave deposited for one major disaster may only be used for employees affected by that disaster, and any unused Leave must be returned to the donor after a reasonable period of time.

What Constitutes a Major Disaster? A critical component to utilizing a Major Disaster Leave-Sharing Program is the definition of a "major disaster." Under IRS Notice 2006-59, a major disaster must be declared by the President under the provisions of Section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act. As of Thursday, March 26, 2020, a major disaster declaration stemming from the COVID-19 pandemic has been issued by the President for the following States:

1. New York (March 20, 2020)
2. Washington (March 22, 2020)
3. California (March 22, 2020)
4. Iowa (March 23, 2020)
5. Louisiana (March 24, 2020)
6. Florida (March 25, 2020)
7. Texas (March 25, 2020)
8. North Carolina (March 25, 2020)
9. New Jersey (March 25, 2020)
10. Illinois (March 26, 2020)
11. Missouri (March 26, 2020)
12. Maryland (March 26, 2020)

Thus, only employers with employees in these States could implement a Major Disaster Leave-Sharing Program to further assist employees in circumstances that do not include a medical emergency. Given the trajectory of the COVID-19 pandemic, it is likely that additional states will be added to this list. Employers with employees in states not listed above should monitor developments for new disaster declarations applicable to their state.

ADDITIONAL CONSIDERATIONS

Aside from the tax elements, employers who are contemplating establishing one of these leave-sharing programs or utilizing an existing leave-sharing program in response to the COVID-19 pandemic should also take the following into consideration:

- Employers will need to coordinate Leave available under these leave-sharing programs with new federal laws that require employers to provide a certain amount of paid leave stemming from the COVID-19 pandemic. Additional information about these laws is available on Hall Render's COVID-19 Resource Center link below.
- There is the potential for high demand under these leave-sharing programs. Employers will need to carefully consider how Leave will be awarded and how to allocate Leave when demand exceeds donated Leave.

- Leave-sharing programs must be non-discriminatory. Care should be taken to avoid decisions – including decisions regarding awarding and allocation of Leave – that could be viewed as discriminatory.
- To the extent the leave-sharing program requires employees to provide personal information, including but not limited to information regarding the medical condition or history about an employee, employers should consider their obligations to maintain confidentiality in accordance with the ADA and other applicable laws.

Please refer to Hall Render's [COVID-19 Resource Center](#) and hotline at (317) 429-3900 for any questions, as well as up-to-date information regarding the virus. If you have any questions on the issues discussed in or related to this post, please contact:

- [Calvin Chambers](#) at (317) 977-1459 or cchambers@hallrender.com;
- [Bill Roberts](#) at (502) 314-6667 or ebplans@hallrender.com;
- [John Bowen](#) at (317) 429-3629 or jbowen@hallrender.com; or
- Your regular Hall Render attorney.