

**March 2020**

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## **Coronavirus Declaration of National Emergency**

Private foundations and charities can, as a general matter, make need-based distributions to victims of disasters, the poor and distressed. Persons negatively impacted by the coronavirus may fall within the ambit of the needy and distressed.

### **Private Foundation Aid to Employees of Sponsoring Employer**

Several issues arise when an employer-sponsored private foundation provides aid to the employees of the sponsoring employer (e.g., the company that funded foundation). The Internal Revenue Service (the "IRS") has previously advised that, because the availability of the disaster relief programs aided employers in recruiting and retaining a stable workforce, such programs conferred a significant private benefit on the sponsoring companies. Yet, subsequent to the September 11 attacks, Congress took the position that employer-sponsored private foundations should be allowed to provide assistance to employees pursuant to certain conditions.

Employer-sponsored private foundations may provide assistance to company employees or family members affected by a qualified disaster, as defined in Internal Revenue Code Section ("IRC") 139, provided certain safeguards are in place to ensure that such assistance is serving charitable purposes, and not the business purposes of the employer. Employer-sponsored private foundations can make payments to employees or their family members affected by qualified disasters.

The IRS will presume that payments in response to a qualified disaster made by a private foundation to employees (or family members of employees) of an employer that is a disqualified person (such as a company that is a substantial contributor) are consistent with the foundation's charitable purposes if:

- the class of beneficiaries is large or indefinite (a "charitable class"),
- the recipients are selected based on an objective determination of need, and
- the selection is made using either an independent selection committee or adequate substitute procedures to ensure that any benefit to the employer is incidental and tenuous. The foundation's selection committee is independent if a majority of the members of the committee consists of persons who are not in a position to exercise substantial influence over the affairs of the employer.

While a private foundation may fail to meet all of the requirements of the presumption, other procedures and standards may be considered to constitute adequate substitutes to ensure that any benefit to the employer

is incidental and tenuous, when all the facts and circumstances are taken into account. Conversely, even though a private foundation meets the presumption, the IRS may still review the facts and circumstances to ensure that any benefit to the employer is tenuous and incidental.

If the requirements of this presumption are met, the private foundation's payments in response to a qualified disaster are treated as made for charitable purpose and do not result in prohibited self-dealing merely because the recipient is an employee (or family member of an employee) of the employer-sponsor. Such payments do not result in taxable compensation to such employees.

The presumption described above does not apply to payments that would otherwise constitute self-dealing and subject the organization to excise taxes. For example, the presumption does not apply to payments made to (or for the benefit of) individuals who are directors, officers, or trustees of the private foundation or members of the private foundation's selection committee.

### **Declaration of National Emergency**

On March 13, 2020, President Trump declared a national emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the "Declaration") due to extraordinary circumstances resulting from coronavirus. This Declaration provides for employers to provide assistance to employees who are affected, directly or indirectly, by the virus.

### **Tax-free payments to employees by Charities and Foundations**

*Charities* — Many large employers have established IRC Section 501(c)(3) charitable organizations, the purpose of which is to provide, among other things, emergency disaster and/or financial hardship assistance to employees who face unexpected emergencies that have left the employee in financial distress. If the organization is classified by the IRS as a "public charity" (because, in very general terms, it receives a significant amount of support from the employees as opposed to the employer), then the organization may provide financial assistance to any employee who experiences a qualifying financial hardship because of coronavirus events. Please note that the organization cannot simply provide wage replacement across the board to all impacted employees. Instead, individual determinations of financial need for each impacted employee must be made by the charitable organization and the assistance provided must be tailored to such need. If a public charity makes distributions to impacted employees pursuant to proper procedures, these payments should be tax-free to the employees and not treated as wages.

*Foundations* — If the organization is classified as an IRC Section 501(c)(3) "private foundation" as opposed to a public charity, the analysis is normally more complex and potential significant adverse tax consequences could result if the private foundation provides assistance to employees no matter how compelling the facts may be. However, the President's National Emergency Declaration removes these barriers and will permit private foundations to participate in employee assistance efforts as well.

### **Closing**

Remember to properly document the selection process and expenditures. We remain committed to assisting our clients during this challenging time.

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