

Issues for Employers Considering Leave-Sharing Plans for Haitian Disaster Relief

U.S. employers have begun considering ways to facilitate Haiti-focused employee disaster-relief efforts. In past domestic disasters (*e.g.*, Hurricane Katrina), some employers allowed their employees to donate accrued paid leave to affected colleagues or to forgo leave and direct the employer to make a cash contribution to a qualifying charitable organization. The IRS provided limited relief to enable these programs to be offered on a tax-favored basis. The IRS has also declared that certain expenses related to non-U.S. disasters (*e.g.*, the 2008 Chinese earthquake) were entitled to tax-favored treatment.

As of the date of this Alert, the IRS has not provided Haiti-specific tax breaks for workplace relief efforts. However, the following may assist employers as guidance and employee inquiries develop.

Leave-Sharing Plans Generally

Employer-sponsored leave-sharing programs enable employees to contribute unused, accrued leave time to a bank for other employees to use in qualifying circumstances. If IRS guidelines are followed, the donor employee is not taxed. (This marks an exception to the general principle that an employee is taxed on income earned even if the income is “assigned” to another.) The recipient is taxed on the value of amounts received. Donor employees may not take a deduction for the value of any donated leave time.

Leave-Sharing Plans During Major Disasters

The special tax treatment granted to leave-sharing plans is ordinarily limited to circumstances involving a medical emergency affecting the recipient or a family member. However, in Notice 2006-59, the IRS extended the treatment to certain domestic events declared by the President of the United States to be “major disasters.” When a major disaster is declared, employees covered by a leave-sharing plan may donate leave time to be used by affected employees, so long as the leave-sharing plan is in writing and meets the following requirements:

- The plan allows employees to elect in writing to contribute accrued leave to a bank to be used when a major disaster causes another employee or a family member of the employee to suffer a severe hardship that requires the employee to be absent from work.
- The plan does not allow donors to direct leave contributions to specific recipients.
- Donors may not donate more than the maximum amount of leave that the employee would normally accrue in a year.
- Leave recipients must receive paid leave at their normal rate of compensation and must use the leave for purposes related to the major disaster.
- The plan adopts a reasonable limit, based on the severity of the disaster, on the period of time during which leave can be banked and withdrawn.

- Recipients may not convert leave into cash. Recipients can use leave received to reduce or eliminate negative leave balances for leave advanced or as a substitute for unpaid leave.
- The employer must make a reasonable, need-based determination as to how much leave each recipient may receive under the plan.
- Leave deposited for a specific major disaster may only be used by employees affected by that major disaster.
- Except for *de minimis* amounts, all leave deposited but unused within the plan's specified time limit must be returned to the donors within a reasonable amount of time and in the same proportion as the individual's donation amount bears to the total amount of leave donated toward that major disaster.

Other Disaster-Relief Opportunities

The federal government on occasion has also taken action to create charitable giving incentives in response to major disasters – *e.g.*, the Katrina Emergency Relief Act of 2005 (see related [Ropes & Gray Alert](#)). In an effort to encourage timely action, the Tax Section of the New York State Bar Association on January 18, 2010 sent a [letter to the Secretary of the Treasury](#) advocating that the IRS adopt tax relief for the Haiti earthquake similar to that adopted for other recent disasters. (Andrew Oringer of Ropes & Gray's New York office, Co-Chair of the Tax Section's Committee on Employee Benefits, was the principal author of the letter.)

Other avenues may also be available to the IRS. Section 139 of the Internal Revenue Code generally provides that payments to an individual to reimburse or cover certain expenses arising from a “qualified disaster” are not includible in income. A “qualified disaster” includes Presidentially declared disasters (*e.g.*, Hurricane Katrina, the California wildfires, and Midwestern flooding) and events that the Treasury Secretary determines to be of a “catastrophic nature,” such as the Chinese earthquake of May 12, 2008. Such payments generally are also deductible business expenses if made by the employer, so long as they are not derived from employee donations. Should the Treasury Secretary determine that the Haitian earthquake is “catastrophic” in nature, additional tax relief may be available.

Legislative efforts are also ongoing. A bipartisan coalition of Senators Charles Schumer, Kirsten Gillibrand, Bill Nelson, and George LeMieux has proposed introducing legislation to lift temporarily the deduction limit on charitable contributions toward Haiti earthquake relief efforts. Congressmen Kendrick Meek and Tom Perriello have also proposed a bill that would allow individuals that make charitable contributions toward the relief efforts to claim the charitable deduction for these contributions on their 2009 tax return instead of having to wait until 2010 to claim the deduction.

If you are thinking about how you can support employee interest in helping with the Haiti earthquake recovery efforts, or if you would like to learn more about the tax or other issues raised in this Alert, please contact your usual Ropes & Gray adviser.