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Practice Update

Leave Sharing Programs – Returning to Work in the Age of COVID-19

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As portions of the United States and various industries begin to resume operations during the ongoing COVID-19 pandemic, employers must consider how to implement workplace policies that appropriately balance employees' potential need for time to recover or care for others with employers' already stretched budgets. If increasing leave benefits is not an option for employers already hit by the accompanying financial downturn, they may consider implementing paid time off (PTO) donation or "leave sharing" programs designed to provide relief for employees who have exhausted their available paid time off. This alert provides a high-level summary of these programs.

Background

Employer-sponsored leave-sharing programs allow employees with a surplus of paid time off or other leave (leave donors) to donate their accrued leave to colleagues who have exhausted their own (leave recipients). Under the "assignment of income" tax principle, a leave donor is generally treated as having received taxable income for the value of donated time off, *unless* the donation satisfies one of two exceptions created under Internal Revenue Service (IRS) guidance: (1) "major disaster" leave-sharing programs and (2) "medical emergency" leave-sharing programs. If the leave-sharing program meets the IRS-established criteria

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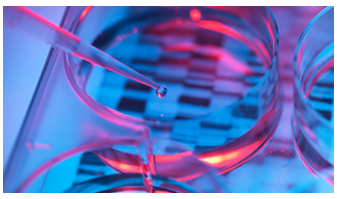
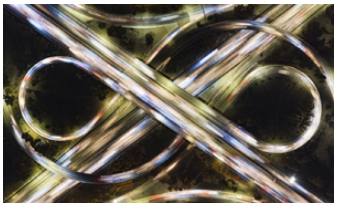


Return to Work Resource Guide

(discussed below), leave *recipients*, rather than *leave donors*, will be taxed on the value of the PTO. Under either program, the employer must still treat the payments to the leave *recipient* as wages for purposes of FICA and FUTA, including employer portions, and income tax withholding (and as "compensation" for purposes of RRTA and "rail wages" for purposes of RURT, unless excluded under the Internal Revenue Code).

View the Resource Guide



Major Disaster Leave Programs

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act) authorizes the President to declare a major disaster in the event of any natural catastrophe that is sufficiently severe as to warrant federal assistance to supplement local, state, and disaster relief agencies' efforts. IRS Notice 2006-59 provides that an employee who donates paid time off to an employer-sponsored leave-sharing program for major disasters as defined under the Stafford Act (or under the federal executive agency personnel leave transfer program) that meets certain requirements will receive the aforementioned favorable tax treatment. The major disaster leave-sharing program must be a written plan that:

- Allows a leave donor to deposit his or her accrued leave in the employer-sponsored leave bank for other employees who have been "adversely affected by a major disaster" – that is, the disaster has caused severe hardship to the employee or a family member of the employee that requires the employee to be absent from work;
- Does not allow the leave donor to deposit leave for any particular leave recipient;
- Limits the amount of leave that a leave donor may donate in a particular year to that which an employee would normally accrue in a year;
- Allows a leave recipient to receive paid leave (at his or her normal rate of compensation) from the leave bank for purposes related to the disaster;

- Imposes a reasonable time limit after the major disaster (depending on its severity) during which the donor employee may deposit leave in the bank and a recipient employee may use such leave;
- Prohibit a recipient employee from converting leave received under the plan to cash instead of using it (although such leave may be used to alleviate a negative leave balance or substitute it for unpaid leave used due to the disaster);
- Reasonably allocates, based on need, how much leave each leave recipient may receive under the program; and
- Limits leave under the program to employees affected by the declared major disaster and returns any unused leave back to donor employees at the end of the aforementioned time limit.

In the COVID-19 context, the Trump Administration invoked the Stafford Act to declare the pandemic a major disaster nationwide on March 13, 2020.

Medical Emergency Leave Programs

In Revenue Ruling 90-29, the IRS provided guidance outlining the aforementioned favorable tax treatment for "medical emergency" leave programs. A qualified medical emergency, is "a medical condition of the [recipient] employee or a family member of the employee that will require the prolonged absence of the employee from duty and will result in a substantial loss of income to the employee because the employee will have exhausted all paid leave available." The medical leave program should be a written plan that:

- Requires a requesting employee to submit a written application describing the medical condition;
- Requires employer approval of the requesting employee application;

- Requires the requesting employee to exhausted all prior paid leave first;
- Requires the donated leave to be paid at the recipient employee's normal rate of compensation;
- Restricts the amount of leave that employees may donate to the program; and
- Stipulates the manner in which donated leave will be granted to eligible leave recipients.

In the COVID-19 context, a medical leave emergency program would be suitable for employees who need to take time off due to a "medical condition" of the employee or a family member related to the disease. However, it is not clear that the tax advantages of the program would cover absences related to quarantine protocols or asymptomatic cases.

Employer Considerations

The IRS has not issued guidance as to how these programs synchronize with paid leave temporarily mandated under the Families First Coronavirus Response Act (FFCRA) passed earlier in the crisis. An employer that maintains a leave-sharing program with respect to parts of this mandated leave should note that, while employers are only required to provide paid leave (and entitled to receive tax credits for said leave) up to a certain amount of wages under the FFCRA, a leave recipient under both types of leave-sharing programs must be paid at his or her normal rate of compensation.

Note that leave-sharing programs are not to be confused with leave *donation* programs whereby employees may donate unused accrued paid time off back to employers in exchange for the employer's donation to a charitable cause. Normally, such an arrangement would be taxable to the donor employee. However, the IRS issues periodic guidance for special relief designed to support leave donation programs to aid disaster victims (e.g., victims of Hurricane Katrina, Hurricane Sandy, the

2014 Ebola outbreak, etc.). Under programs covered by specific IRS guidance, the donated leave will not be included in the income or wages of donor employees. However, no IRS special relief guidance has been issued with respect to the COVID-19 pandemic.

Though outside the scope of this writing, sponsors of leave sharing programs should also be mindful of the potential impact of state sick leave, PTO, tax, nondiscrimination and privacy laws on the implementation or written procedures of these programs. Please reach out to an Akerman attorney should you need assistance navigating these or other considerations for your leave-sharing program.
