

COVID-19 Presents Opportunities for Leave Sharing

By: John Kirk on March 18, 2020 on graydon.law

While leave-sharing programs are common in the public sector, many private sector employers have not yet embraced these programs. For many, the tax issues involved with such a program are more trouble than they are worth. In an attempt to find a silver-lining to the current health situation, this post examines how the current national emergency for COVID-19 presents an opportunity for employers to enhance their benefits for employees.

Thankfully, the IRS has issued specific guidance for a leave-sharing arrangement that permits employees to donate leave to an employer-sponsored leave bank for use by other employees adversely affected by an event declared a major disaster or emergency by the President. However, in order to take advantage of the favorable tax treatment, the IRS' guidelines must be strictly followed.

With a normal leave-sharing program, the employee who donates leave will have income equal to the amount of donated time, based on their normal rate of pay. Fortunately, the IRS has created several exemptions to this rule, including our focus, the "major disaster leave-sharing plan." If the plan meets all the requirements of a "major disaster leave-sharing plan," donating employees will not be taxed on the donated leave and employees who use the donated leave will have the donated leave treated as wages.

In order to receive the above treatment, a "major disaster leave-sharing plan" must be a written document that:

- Allows the donor to donate accrued leave to leave bank for use by other employees adversely affected by a major disaster or emergency (as declared by the President and requested by each State's Governor). 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.

- The donor cannot donate leave to a specific leave recipient.
- A donor may not donate more leave than he or she normally accrues during the year.
- Each leave recipient must use this leave for purposes related to the major disaster. And leave is received at the recipient's normal rate of pay.
- The plan sets a reasonable limit, based on the severity of the disaster, on the time period during which a donor may donate, and a recipient must use, the donated leave.
- The donated leave may not be converted to cash by the recipient. It must be used as leave. However, a recipient may use the leave to eliminate a negative leave balance that arose from advanced leave because of the major disaster. A recipient also may substitute received leave for leave without pay used because of the major disaster.
- The employer must reasonably determine, based on need, how much leave each approved recipient may receive.
- Leave donated due for one major disaster may be used only for employees affected by that disaster.
- Generally, any donated leave not used by leave recipients by the end of the period specified in the plan must be returned to the donors (or, at the employer's option, to those leave donors still employed by the employer) so the donor can use the leave.
- The leave returned to each leave donor must be in the same proportion as: (1) the leave donated by each donor bears to (2) the total leave donated because of that major disaster.

If a leave-sharing arrangement does not meet the above requirements, then the donating employee **MUST** be treated as having W-2 compensation for the donated time (based on their rate of pay at the time of the donation).

Fortunately, the IRS neither requires plan sponsor to obtain pre-approval of a leave-sharing program nor does it require any filings or reports to be made about the program. Also, since a leave-sharing plan generally is not subject to ERISA, there are no DOL filings required. In short, the only employer reporting obligation is to properly report W-2 wages and withhold taxes.

For questions about setting up a leave-sharing plan to deal with the impact of COVID-19 please reach out to any of our labor and employment or employee benefits attorneys.