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PERSPECTIVE

A couple ways to help your employees weather the COVID-19 storm

By Bob Blum

Do you want to help your employees right now to weather the COVID-19 storm? Here are two ways that go beyond the new small employer mandated leave time — one at no cost to the employer, one with cost but more bang for the buck than paying wages. Be aware, though, that there are some issues to be resolved and you should consult your tax and other legal advisors.

Let your employees share their leave time

Some employees have lots of accumulated leave, some have little or none. In a crisis, often those who have leave time want to help those who don't and are happy to share with co-workers who need it. For example, employees may have used up leave time to take care of sick kids, and need more for child care because schools are closed. If the employer allows leave sharing and this is done in accord with IRS rules, there is no additional out of pocket cost to the employer, the employees who share their leave do this tax free, and the employees who are the beneficiaries pay tax on this leave in the same way as for any other leave.

Leave sharing can be put into place with minimal documentation and minimal constraints. The prime rule is that leave sharing must be related to a federally declared disaster, which is COVID-19 in this case. Leave donation must be used only by employees adversely affected by COVID-19. Also, the donation

must occur, and donated leave be used, within a reasonable time related to the crisis. Also, leave cannot be donated to a specified individual but must be to an anonymous "bank" from which leave is then drawn for the beneficiaries. There are a few other straightforward rules, which your tax or benefits lawyer can provide. The key IRS document is Notice 2006-59 (7/10/2006).

There is one potential labor law hitch, but there are workarounds. California requires accrued leave to be cashed out on termination of employment. But the IRS says that donated leave cannot be cashed out and must be used to take paid time off. What to do? Two ways to handle this. One — some opine that the cash-out rule only applies to "earned" leave which is essentially deferred compensation and donated leave is not earned, so cash out is not required for this leave. The other way is a bit more complicated: let the recipient take "advance" leave, run a negative balance in the leave account, and then backfill that account back to zero with donated leave. In that case there is no leave to cash out. In any case, be sure to get legal advice on this issue.

Give your employees tax-free cash for their COVID-19-related expenses

If you want to pay employees for the extra expenses they have from COVID-19 — like child care because schools are closed — the amounts paid can be tax free. No income tax, no Social Security or other payroll taxes are due, and

the employer gets a full deduction for amounts paid. So a dollar paid of this type is worth more to the employee than an extra dollar of wages. Int. Rev. Code Section 139 (California has the same rule).

The stated requirements are simple. Payments to employees are tax free if used to pay or reimburse them for "reasonably necessary" "personal, family, [or] living" expenses incurred as a result of a federally declared disaster. Also, the tax laws allow you to pick and choose who benefits. Remember, though, that the usual anti-discrimination labor laws still apply.

What are personal, family, or living expenses incurred because of COVID-19? While there is little guidance from the IRS, it is reasonable to conclude that the expenses should be different from the usual ordinary living expenses. For example, it seems pretty clear that if, in order to work, a nurse has to hire child care because her/his kid's school is closed, that is a family expense incurred because of COVID-19. Also, if an employee is self-quarantined, cannot go out to get food or medicine, and must hire someone to do this, that additional expense should fit the rules. But what about having to dig into your savings or borrow at high interest to pay bills because you are laid off? Without more from the IRS, it does not seem likely that reimbursement for these expenses would qualify for tax free treatment.

In the usual disaster case property, etc. has been destroyed so the IRS has effectively waived detailed

accounting for expenses. Rev. Rul. 2003-12. For a COVID-19 disaster payment, though, an employer may want to require more information to support the payment such as declarations of amounts paid, to whom and for what purpose, and when. This would support the reimbursement and rationale for tax free treatment.

Because there is little IRS guidance on this part of the tax law, be sure to consult your tax advisor if you want to provide this benefit.

To watch

Congress is working quickly to enact laws that may add new requirements or may interact in unexpected ways with both leave sharing and tax free reimbursements. Be sure to check new federal (and state) legislation when you consider either of these programs.

Also, be sure to check with your tax and other legal advisors. Each organization's and person's situation is unique and this article cannot be relied on for tax or other legal advice. ■

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