



May 25, 2022 - IRS Issues Guidance on the Tax Treatment of Employer Leave-Based Programs to Aid Victims of the Further Russian Invasion of Ukraine

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On May 19, 2022, the IRS issued Notice 2022-28 (available at <https://www.irs.gov/pub/irs-drop/n-22-28.pdf>), which provides guidance under the Internal Revenue Code (the "Code") on the federal income and employment tax treatment of cash payments made by employers to Code Section 170(c) charitable organizations under employer leave-based donation programs to aid victims of the further Russian invasion of Ukraine, which began on February 24, 2022.

As background, under an application of a broad taxation principle known as the "assignment of income doctrine", donations of unused vacation, sick, personal or other leave made by employees in exchange for charitable contributions made by their employers are generally taxable to the employees and subject to federal income tax withholding and other applicable employment taxes (for example, FICA and FUTA taxes). Employees who are eligible to participate in employer-sponsored leave donation programs, but who choose not to participate, are not taxed on their unused leave simply because they were eligible to participate under the program.

From time to time, however, the IRS has provided temporary exceptions to the general taxation rule for leave donation programs, typically in the wake of terrorist attacks, natural disasters or disease pandemics. For example, in Notice 2001-69, the IRS granted an exception to taxation for leave donations made by employees to fund charitable contributions made prior to January 1, 2003 to aid victims of the September 11, 2001 terrorist attacks. In Notice 2005-68, the IRS granted another exception for leave donations made by employees in exchange for an employer's cash contributions made prior to January 1, 2007 to charitable organizations aiding victims of Hurricane Katrina. More recently, in Notices 2020-46 and 2021-42, the IRS granted yet another exception for leave donations made by employees in exchange for an employer's cash contributions made prior to January 1, 2022 to charitable organizations to aid victims of the COVID-19 pandemic.

IRS Notice 2022-28. Now, in Notice 2022-28, the IRS has provided guidance under the Code on the federal income and employment tax treatment of cash payments made by employers under leave-based donation programs to aid victims of the further Russian invasion of Ukraine.

Employer Leave-Based Donation Programs. Notice 2022-28 explains that, under employer leave-based donation programs, employees can elect to forgo vacation, sick, or personal leave in exchange for their employers making cash payments to Code Section 170(c) charitable organizations. Cash payments made by an employer to Code Section 170(c) charitable organizations under an employer leave-based donation program are referred to as "employer leave-based donation payments".

Tax Treatment of Qualified Employer Leave-Based Donation Payments. Under the temporary relief provided in Notice 2022-28, employer leave-based donation payments made by an employer before January 1, 2023 to Code Section 170(c) charitable organizations to aid victims of the further Russian invasion of Ukraine (i.e., "qualified employer leave-based donation payments") will not be treated as gross income or wages (or compensation, as applicable) of the employees of the employer.

Similarly, employees electing, or with an opportunity to elect, to forgo leave that funds the qualified employer leave-based donation payments will not be treated as having constructively received gross income or wages (or compensation, as applicable).

Employers should not include the amount of qualified employer leave-based donation payments in Box 1 (Wages), Box 3 (Social security wages) (if applicable), or Box 5 (Medicare wages) of the electing employees' Form W-2.

Employees are not eligible to claim a charitable contribution deduction under Code Section 170 for the value of the forgone leave that funds qualified employer leave-based donation programs.

An employer may deduct qualified employer leave-based donation payments under the rules of Code Section 170 (deductions for charitable contributions and gifts) or Code Section 162 (deductions for ordinary and necessary trade or business expenses) if the employer otherwise meets the respective requirements of either Code section.

If you have any questions, please contact Melanie N. Aska, at 617-457-4131 or maska@murthalaw.com.

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