

COVID-19: EMERGENCY LEAVE-SHARING PLANS FOR U.S. EMPLOYERS

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In addition to the paid sick leave and family leave U.S. employers must provide under the Families First Coronavirus Response Act (“FFCRA”), some employers are seeking additional ways to support employees affected by COVID-19. The IRS has published [guidance](#) on leave-sharing plans for employees affected by a major disaster or emergency, as declared by the President. President Trump issued such a declaration on March 13 (retroactive to March 1), so this guidance applies to employers who wish to implement an emergency leave-sharing plan at this time.

A major disaster leave-sharing plan as applied to the current COVID-19 emergency is a *written* plan that meets the following requirements:

- The plan allows employees to voluntarily deposit accrued leave in an employer-sponsored bank for use by other employees who have been adversely affected by COVID-19. An employee is considered to be adversely affected by a COVID-19 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 plan does not allow employees to deposit leave for a specific leave recipient.
- The amount of leave that may be deposited by an employee in any year generally does not exceed the maximum amount of leave that the employee normally accrues in a year. Under this requirement, employees likely cannot donate emergency sick leave provided under the FFCRA.
- An employee may receive paid leave, at his or her normal rate of compensation, from leave deposited in the leave bank; this leave must be used for purposes related to the major disaster (i.e., COVID-19).
- The plan adopts a reasonable limit, based on the severity of the disaster, on the period after the disaster occurs during which leave may be deposited in the leave bank, and a leave recipient must use leave received from the leave bank.

- A leave recipient may not convert leave from the leave bank into cash in lieu of leave, but may use such leave to eliminate a negative leave balance incurred due to an advance of leave resulting from the disaster. The leave recipient may also substitute leave received under the plan for unpaid leave used because of the disaster.
- The employer must make a reasonable determination, based on need, on the amount of leave an approved recipient may receive under the plan.
- Leave deposited on account of COVID-19 may be used only for employees affected by COVID-19. Any unused leave in the leave bank after the reasonable time for using such leave has passed (as determined by the employer) must be returned within a reasonable time to the donors (or the donors who are still employed by the employer, at the employer's option).[1] The amount returned to each donor must be in the same proportion as the amount donated by that employee bears to the total amount donated on account of COVID-19.

Any payment received by an employee on leave under this type of plan will be treated as wages for purposes of FICA, FUTA, and income tax withholding. An employee who donates leave to such a program will not recognize income as to the deposited leave, but the donating employee cannot claim an expense, charitable contribution, or loss deduction on the account of such donation.

[1] If the amount remaining is so small as to make accounting for it unreasonable or administratively impracticable, this requirement need not be met.

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