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## EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

**COVID-19 NATIONAL DISASTER RELIEF DECLARATION PAVES WAY FOR TAX-ADVANTAGED WAY FOR EMPLOYERS TO PROVIDE RELIEF TO EMPLOYEES**

In the midst of the COVID-19 pandemic, many employers are looking for ways to help their employees cope with the ongoing crisis. For example, many employers have offered free coverage of COVID-19 testing and treatment under their group health plans (see our recent [LEGALcurrents here](#) for information) and enhancing employee assistance program benefits to deal with the psychological toll. Of course, in these uncertain times, many employees are worried about the financial impact of the pandemic, not only with respect to potential lost wages, but also from the ancillary expenses, such as caring for impacted loved ones and daycare expenses now that many schools have closed.

When President Trump declared that the COVID-19 pandemic constituted a national emergency on March 13, he opened the door for employers to take advantage of an often-overlooked provision in the tax code that would allow employers to make tax-free “qualified disaster relief payments” to employees.

Congress added section 139 to the Internal Revenue Code in the wake of the September 11, 2001 terrorist attacks. Section 139 provides that in the event of a “qualified disaster” (which would include the COVID-19 pandemic), an individual’s gross income does not include any amount paid to or for the benefit of an individual to reimburse or pay, among other things, the reasonable and necessary personal, family, living or funeral expenses incurred as a result of a qualified disaster. The income exclusion does not apply if the employee was compensated by insurance. Any payments made by employers to employees would likely be tax deductible as a business expense, thus creating a “win-win” for the employee and employer. And any payments made pursuant to section 139 will not be subject to employment taxes. Accordingly, employers would not have to withhold any income from payments, and nor would they have to report such payments on a Form W-2.

In Revenue Ruling 2003-12, the IRS concluded that payments made by an employer to employees impacted by a flood (that was a “qualified disaster”) constituted qualified disaster relief payments. Under the facts of the Revenue Ruling, the employer had a written program that provided grants to employees in amounts reasonably expected to be commensurate with the amount of unreimbursed medical, temporary housing, and transportation expenses employees incurred as a result of the flood. The program specifically excluded payment for nonessential and luxury items. Notably, employees were not required to provide proof of actual expenses. The IRS concluded that the payments made under the program constituted excludable qualified disaster relief payments under section 139.

A section 139 qualified disaster relief program can provide employers with a tax-advantaged mechanism to help employees impacted by COVID-19. Employers will want to be careful, however, to tailor the program so that payments under the program are reasonable and necessary for “personal, family, living, or funeral

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expenses” incurred as a result of a qualified disaster. Code section 139 does not require that employees provide substantiation for expenses; however, employers would be well-advised to have a written document describing the expenses reimbursable, as that would serve as evidence that the program was designed only to reimburse reasonable and essential expenses. While the IRS has not provided extensive guidance on exactly what expenses would qualify as reimbursable, it would seem that expenses for items like disinfectants, medicines, childcare, and care for elderly individuals would qualify, provided the reimbursement amounts are reasonable. Amounts paid to employees as income replacement, such as lost wages or unemployment benefits, would not count as qualified disaster payments.

Employers implementing a disaster relief program should also be sure to understand the implications of the program on other benefits offerings. For example, it’s possible (though not likely) that qualified disaster relief payments would be considered compensation under the employer’s qualified or nonqualified plans.

If you are interested in establishing a qualified disaster relief program in light of the COVID-19 pandemic, please contact any member of the [Employee Benefits and Executive Compensation](#) Group at 585.232.6500, 716.853.1616 or visit [www.hselaw.com](http://www.hselaw.com).

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