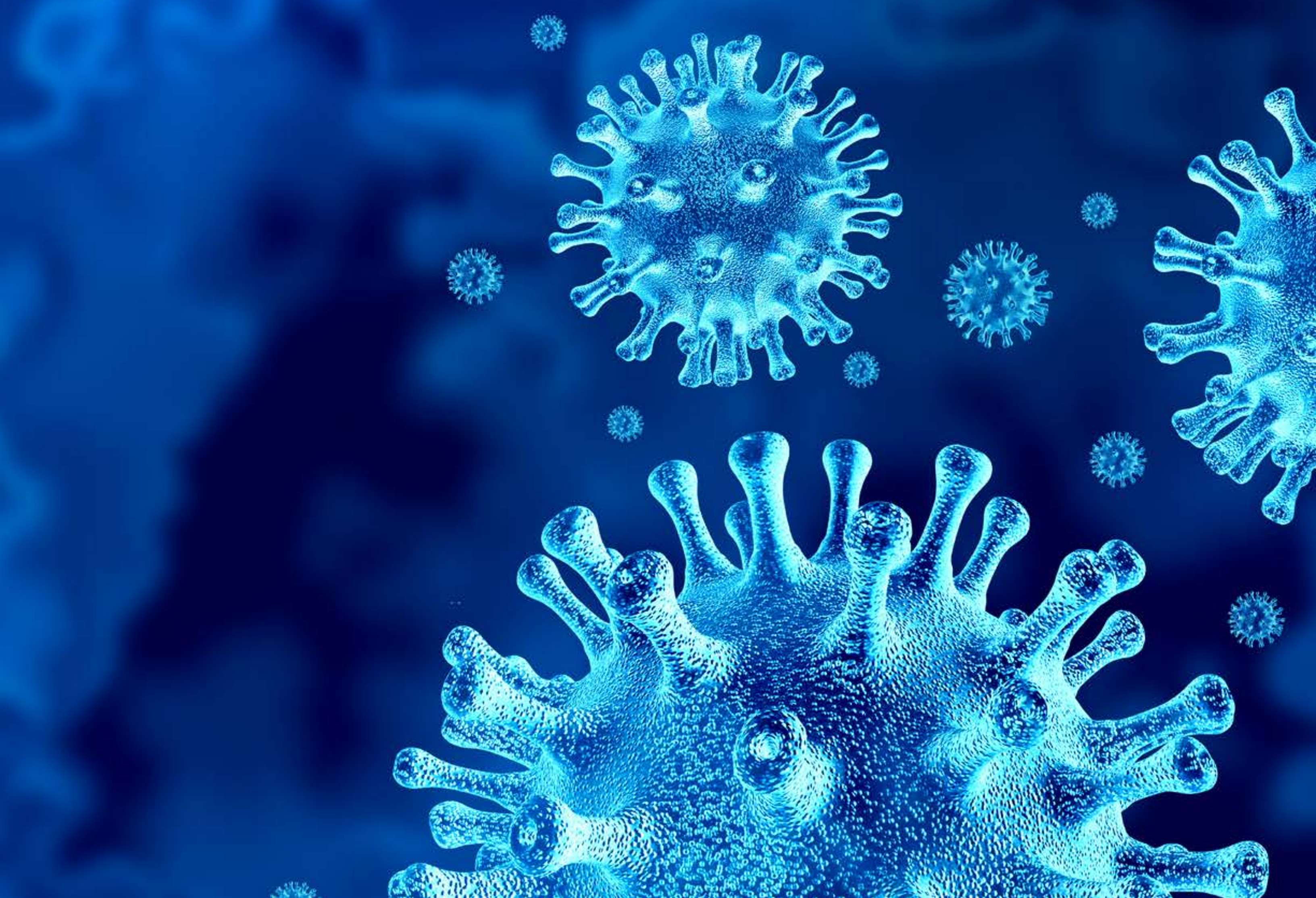
SCHELL BRAY

Attorneys and Counselors at Law

Providing Employee Assistance in the Wake of the Coronavirus Pandemic



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Now that the coronavirus pandemic has been designated a "qualified disaster" by the federal government, employers may take advantage of a special provision in the tax code to provide employees tax-free financial assistance. There are several ways to provide this assistance, each of which has different practical and tax considerations, including whether assistance can be provided for a broader array of non-pandemic hardships.

1. Direct Employer Assistance: Qualified Disaster Relief Payments

Under Section 139 of the Internal Revenue Code, employers can provide employees direct financial assistance by way of a "qualified disaster relief payment." A qualified disaster relief payment includes, among other things, any payment or reimbursement made to a company employee for reasonable and necessary personal, family, living, or funeral expenses incurred in connection with a qualified disaster. Qualified disaster relief payments are not includable in employees' income, but it is important to note that only costs and expenses that are not reimbursed by insurance or other sources qualify as tax-free. Similarly, payments in response to non-pandemic hardships, such as a house fire or catastrophic auto accident, generally are not tax free to the employee.

There is no cap on the amount an employer may provide to an employee, but the assistance should be commensurate with employee needs. Contributions from third parties to a designated qualified disaster relief fund held by the employer are not deductible as charitable contributions; however, employers may deduct the expense of the assistance payments for their own tax purposes.

2. Assistance through Employer-Sponsored Private Foundations

Company-affiliated private foundations may also provide financial assistance to company employees in response to a qualified disaster. Because this type of assistance is an exception to limits on private foundations, it must be provided within certain parameters. For instance, the foundation program must benefit a large or indefinite charitable class, the foundation must establish objective and need-based criteria for awarding assistance, and recipients should be selected by a committee of individuals who are not in the position to exercise substantial influence over the affairs of the employer.

Assistance provided consistent with these parameters will be tax free to the employee. But, importantly, company private foundations can only provide employee assistance in response to a qualified disaster. They may not provide such assistance in response to other types of hardships, such as a house fire or catastrophic auto accident.

3. Employer-Advised Disaster Relief Funds

Employers can also provide financial assistance to employees through an advised fund held by a public charity. Generally, donor-advised funds may not make grants to individuals, but an appropriately structured employer-sponsored disaster relief fund is an exception to the definition of a donor-advised fund.

To qualify for this exception, the fund may provide assistance only in connection with qualified disasters. In addition, like assistance from a company-affiliated private foundation, the fund must benefit a large or indefinite class and should select recipients based on an objective determination of need. Recipients must also be selected by an independent selection committee, but unlike with employer-sponsored private foundations, a majority of the members will be representatives of the sponsoring charity. The remaining members may be rank and file employees.

Contributions to the fund are tax deductible, and relief payments are tax free to the employees.

4. Employer/Employee-Sponsored Public Charity

Employers can also sponsor charitable organizations that qualify as public charities due to the amount of support received from employees and the public. These public charities may make assistance awards to employees following procedures similar to employer-affiliated private foundations. However, public charities are not limited to providing relief in response to a qualified disaster. Instead, they may provide relief to other types of tragedies as well, such as a house fire or a catastrophic injury or illness.

Contributions to the fund are tax deductible, and relief payments are tax free to the employees.

5. Non-Advised Disaster Relief Funds

Finally, employers can also establish a disaster relief fund at an existing public charity (such as a community foundation or special purpose charity) to provide assistance to employees for disasters or emergencies. Unlike employer-advised funds, the employer does not retain any role in the fund's selection process. The public charity provides all administrative services to the fund such as receiving, processing, and approving requests from employees. However, this distinction gives the fund the flexibility of an employer-sponsored public charity: It is not limited to making awards only in response to a qualified disaster. The sponsoring charity typically charges a start-up fee plus a per-application review fee. As a result, this option may be more costly than an employer-sponsored public charity, depending on several factors, including the number of annual applications.

Contributions to the fund are tax deductible, and relief payments are tax free to the employees.

6. Other Types of Assistance

Employers can provide assistance to victims of a qualified disaster in other forms than qualified disaster relief payments, such as programs that allow employees to donate their leave time to other employees affected by the disaster. In addition, employers can create a number of volunteer and charitable giving opportunities tailored for their particular communities or industries.

Summary

Employers should consider a number of factors in determining which option is best for their companies, including tax consequences, costs, control, and administrative burden. They should also consult their advisors to ensure that the desired option is appropriately structured to avoid unintended tax consequences.
Please contact Ed Chaney at echaney@schellbray.com, Paul Livingston at plivingston@schellbray.com, or Peter Mattocks at pmattocks@schellbray.com to learn more about Schell Bray's Tax-Exempt Organizations and Philanthropy practice.

Option	Limitations	Taxable to Employee	Contributions	Other Factors
Direct employer assistance	Tax advantage limited to qualified disasters	Not taxable in the case of qualified disaster assistance	Not deductible as charitable contributions	Offers most employer control, but most limiting
Employer-sponsored private foundation	Can only provide financial assistance in response to qualified disasters	Not taxable	Deductible	Offers moderate employer control; separate charitable entity increases costs and administrative burden
Employer-advised disaster relief fund	Can only provide financial assistance in response to qualified disasters	Not taxable	Deductible	Offers little employer control; costs can vary depending on sponsor
Employer-sponsored public charity	Can provide assistance in a broader array of disasters and personal tragedies and hardships	Not taxable	Deductible	Offers limited employer control; separate charitable entity increases costs and administrative burden
Non-advised disaster relief fund	Can provide assistance in a broader array of disasters and personal tragedies and hardships	Not taxable	Deductible	Offers no employer control and little administrative burden; costs can be higher than other options