



Applying an Old Statute During the COVID-19 Pandemic

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Previous alerts and communications from Bennett Thrasher have been focused on the legislative measures currently being taken by the government to respond to the COVID-19 pandemic, but businesses may possibly turn to a preexisting tax provision to help support their employees facing health and financial challenges during this emergency. In general, an employer cannot make a “gift” to an employee because any payment made is treated as taxable compensation. However, Section 139 of the Internal Revenue Code, enacted following the September 11th attacks, permits an employer to make a tax-free payment to an employee “to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster.” Such payments excluded from taxable wages will still be deductible by the employer.

Section 139, added to the Code by the Victims of Terrorism Tax Relief Act of 2001, provides that gross income does not include any amount received by an individual as a “qualified disaster relief payment”. IRS Revenue Ruling 2003-29 states that a qualified disaster includes an event declared to be a major disaster or an emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. The president made such an emergency declaration on March 13, 2020 in response to the ongoing COVID-19 pandemic, and therefore the provisions of Section 139 do apply to the current COVID-19 emergency.

Section 139 has generally been used during natural disasters such as hurricanes and has previously not been utilized for a national pandemic. However, the provision was used in 2014 in response to the Ebola virus outbreak by employers with personnel in the West African nations of Guinea, Liberia and Sierra Leone. The IRS issued guidance confirming that the Ebola outbreak was a “qualified disaster” within the meaning of Section 139 because the event was determined by the IRS to be of a catastrophic nature. Therefore, payments of qualified disaster relief to assist victims affected by the outbreak were excludable from the recipients’ income.

There is no specific guidance as to what expenses might meet the definition of “qualified disaster relief payments” in the context of a national health crisis, and practitioners do not expect such guidance to be forthcoming. However, the following payments for employee expenses directly related to the COVID-19 pandemic should reasonably be treated as deductible to the employer and tax-free to the employee:

- Medical expenses not compensated for by insurance; for example, an employee’s deductible and out-of-pocket expenses;
- The cost of over-the-counter medications and hand sanitizer;
- Funeral costs of an employee or member of an employee’s family;

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- The costs associated with enabling teleworking throughout the pandemic, including the cost of a computer, cell phone, printer, supplies and increased utility costs of the employee; and
- The cost of an employee's child care or tutoring for family members due to school closures during the pandemic.

Note that qualified payments cannot cover expenses later reimbursed by insurance or replacement for lost wages, and therefore payments of sick or family leave remain fully taxable to the employee.

The statute itself does not include a requirement for the employer to maintain a formal plan or documentation. In Revenue Ruling 2003-12 the IRS determined that an employer's grants to pay or reimburse employees for medical, temporary housing and transportation expenses incurred due to a flood were excluded from income. While employees were not required to provide proof of actual expenses to receive a grant payment, the program did contain requirements to ensure that the grant amounts were reasonably expected to be commensurate with the amount of unreimbursed reasonable and necessary medical, temporary housing and transportation expenses attributable to the disaster.

We recommend that employers document their intention to make payments covered by Section 139, that the payments cannot be for expenses that will be covered through an insurance policy, and the following:

- The amounts paid and to whom;
- The start and end date of any Section 139 "program";
- A listing of the expenses that will be paid or reimbursed; and
- The maximum amount, if any, that will be paid per employee.

Pursuant to the above IRS guidance employers do not need to require employees to document their actual expenses but should consider obtaining statements from employees that they have incurred qualified expenses that will not be paid for through insurance.

Contact Us

If you have any questions regarding utilizing the provisions under Section 139, please contact your Bennett Thrasher tax advisor by calling [770.396.2200](tel:770.396.2200).