DISASTER RELIEF: GUIDANCE FOR DONORS AND CHARITIES

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Determining how to contribute to disaster relief efforts requires careful consideration by individuals, employers, and nonprofit organizations with respect to regulatory compliance and the efficient use of charitable dollars.

In the aftermath of Hurricanes and Tropical Storms Harvey, Irma, and Maria, many individuals, employers, and nonprofit organizations mobilized to provide assistance to those affected by these natural disasters. Seeking to help individuals and businesses affected by natural disasters is commendable. However, all donors and grant-makers should consider the following when undertaking disaster relief efforts:

Donate with caution

Scam artists. Unfortunately, there are always scam artists looking to take advantage of the goodwill and charity that follow a natural disaster. Sometimes this is in the form of a phony charity that solicits contributions, or in the theft of a donor's identity by using his or her personal financial information. The IRS has published a list of tips donors can follow to avoid inadvertently giving to these criminals.[1]

Donations via online crowdsourcing platforms. Donors who give via online crowdsourcing platforms should be aware that their donations may not always be tax deductible. Websites such as GoFundMe provide a powerful platform to raise money, and donors may be drawn by the personal nature of these fund-raising efforts due to the focus on a specific person, family, or business. However, no donation made through GoFundMe (or any other crowdsourcing platform) is tax -deductible unless it is made to a charitable organization that is qualified to receive income tax deductible contributions.[2] (A donor who funds a campaign that benefits a specific person would likely not be entitled to an income tax deduction but the amount would likely not be income to the recipient and, as long as the donation is under the annual exclusion amount,[3] there should not be any adverse gift tax implications on the donor making the transfer.)

Donations to foreign charities. It is important to know that different rules and considerations apply when donating to a charity overseas, such as charities providing assistance to those affected by the earthquake in Mexico in November 2017. The IRS has approved specific countries—including Mexico[4]—for charitable tax deductions to foreign charities in those countries, assuming the donation qualifies under U.S. law. However, charitable donations to foreign charities in countries not approved by the IRS are not deductible.

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Disaster relief support by an existing charity

One-time fund-raising for disaster relief. Existing charities may participate in one-time disaster relief activities without obtaining prior permission from the IRS, even if the organization was not specifically organized to provide disaster relief and such activities were not specified in its application for exemption. However, the organization must report this new activity on its annual return and may want to report a change in its activities to the IRS Exempt Organizations Determinations Office.[5]

Consider an existing disaster relief platform. Rather than engaging in disaster relief directly, it may make sense to partner with an established charitable organization with a historic focus on disaster relief. Such organizations are often able to administer relief programs more proficiently than charities which have recently set up a disaster relief fund. These organizations, such as local branches of the Red Cross or United Way, often have the benefits of access to their headquarters' resources and familiarity with the region, which can ensure that funds are dispensed where needed most. Donors can rest assured that contributions to qualified charities may be earmarked for flood relief, hurricane relief, or other disaster relief, even though contributors may not usually earmark funds under federal tax law.[6]

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Ongoing disaster relief programs. To operate an ongoing series of disaster relief programs, an existing charity first should confirm that the charity's stated corporate purposes in its certificate of incorporation includes the proposed activities. It may be desirable to establish resolutions authorizing the disaster-related activities and adopting an updated mission statement and guidelines for distributing funds if the organization plans to distribute funds directly.[7]

A new charity intending to operate in this way will also need to apply to the IRS for recognition of the organization's tax-exempt status. Although expedited processing is possible, it will be necessary for the organization to show that it has an immediate need and that without expedited processing the organization's ability to assist will be materially adversely impacted.

It may be tempting to establish a new charitable organization for disaster relief efforts, but this can be an inefficient use of time and resources. Partnering with an existing charity may be the most expeditious way to provide immediate relief.

Needs-based test. Charities distributing disaster relief funds directly, whether on a one-time or ongoing basis, should be aware of the needs-based test. Generally, this test requires an assessment that a recipient of aid is financially or otherwise in need. This assessment may be easy to make in the aftermath of a disaster, when all residents of a particular area are in need of basic provisions such as food and shelter. However, as time goes on and people are able to call on their individual resources, it may become increasingly appropriate for charities to conduct detailed individual financial needs assessments,[8] and to have procedures in place to determine when assistance should be discontinued.

Charitable class. The "charitable class" of recipients must be broad enough to ensure that the entire community benefits from the charitable assistance. This can be done by providing benefits to a sufficiently large group, such as all individuals living in a particular area. If a charity intends to limit benefits to a smaller group, such as the employees of an employer, the group must be indefinite. This is achieved by an "open ended" program, meaning that relief will be provided to employees for the current disaster, as well as for future disasters.

Documentation. Charities must maintain sufficient records to establish that disaster relief payments further the charitable purposes of the organization by serving needy or distressed victims. Charities must also maintain records sufficient to show that they have made appropriate needs-based assessments before providing funds.

Employer-provided disaster relief

Qualifying disaster payments directly made to individuals. Congress enacted legislation in the aftermath of the terrorist attacks of 9/11/01, when challenges ensued in allocating disaster relief resources to those affected by the attacks. The Victims of Terrorism Tax Relief Act[9] (the Act) significantly changed rules for the tax treatment of distributions made by charities, corporations, and other disaster relief programs. It established that employers may provide liberal and broad assistance, including assistance catered to psychological and economic needs, when funds are paid to individuals in connection with "qualified disasters."

The Act provided that these payments can be made without having to undertake a specific assessment of need, even following the immediate aftermath of a disaster, so long as the organization makes the payments in good faith, using a reasonable and objective formula that is consistently applied. Notably, because these disaster relief payments are treated as payments related to the organization's exempt purpose, employer-sponsored private foundations can make distributions to affected company employees and their survivors without incurring excise tax liability.

Furthermore, "qualifying disaster programs" are not taxable as income and are not subject to employment taxes or withholding.[10] A Presidential declaration is one way for a disaster to be a "qualified disaster." Qualifying disaster payments can include reasonable and necessary living or funeral expenses, and expenses required for repair of a personal residence or replacement of its contents. That being said, qualified disaster relief payments do not include payments for expenses that have been reimbursed by insurance or income replacement payments, like lost wages.[11]

Employer-sponsored disaster relief charities. Employers often wish to establish charitable organizations to help employees cope in the aftermath of a disaster. These entities must serve the public interest (and not only a private interest) and a charitable class. In addition, special rules apply to employer-sponsored charities because these programs arguably enhance employee recruitment and retention, conferring a benefit on the employer and raising concern that employers had undue influence over the recipients who were selected to receive aid. Today, the types of benefits that can be provided through an employer-sponsored assistance program depends on whether the organization is established as a public charity, donor advised fund, or private foundation.

Public charity. If an employer anticipates being able to attract a broad amount of public support, it might establish a public charity to operate an assistance program to help with disaster relief or an employee's emergency, assuming the related employer does not have excessive control over the program. The class of beneficiaries of the program must qualify as a charitable class, recipients must be selected on an objective needs-based basis, and an independent selection committee must select recipients.[12] If these requirements are met, the payments from the charity to affected employees will not be taxable compensation to them.

Donor advised fund. These funds are typically a separate fund or account maintained by a community foundation or public charity where donors have advisory, investment, or distribution privileges. Generally, donor advised funds cannot make grants to individuals. However, an exception applies to funds or accounts specifically set up to benefit employees and their families who are victims of a qualified disaster, as defined by federal law.

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The employer-sponsored donor advised fund can make grants to individual recipients if the program meets the same requirements as employer-sponsored public charities and if no payment is made to any person related to the sponsoring organization or members of the fund's selection committee. Finally, adequate records must be maintained that demonstrate the donees' needs for the assistance provided.[13]

Private foundation. If an employer intends to fund the program and does not intend to solicit public support, it can establish a private foundation to operate a disaster relief program. Private foundations are subject to a stricter regulatory scheme than public charities or donor advised funds. Unsur-

1 "Beware of Fake Charity Scams Relating to Hurricane Harvey.' IR-2017-137 (8/29/17), https://www.irs.gov/newsroom/beware-of-fake-charity-scams-relating-to-hurricane-harvey.

2 "'Is my donation tax-deductible?'" https://support.gofundme.com/hc/en-us/articles/203604684-Is-my-donation-tax-deductible.

3 Effective 1/1/18, the annual exclusion amount has increased to $15,000.

4 United States-Mexico Income Tax Convention (1994).

5 IRS Publication 3833 (Rev. 12/14): "*Disaster Relief, Providing Assistance Through Charitable Organizations*." (2014), https://www.irs.gov/pub/irs-pdf/p3833.pdf.

6 *Id.*

7 "'Providing Disaster Relief.'" Lawyers Alliance for New York,. http://www.lawyersalliance.org/pdfs/news_legal/Disaster_Relief_Sandy_Operating_DR_Program.pdf.

8 Id., Note 5, *supra.*

9 P.L. No. 107-134 (1/23/02).

10 Section 139.

11 Section 139(b).

12 *Id.*, Note 5, *supra.*

13 *Id.*

prisingly, private foundations that are employer-sponsored typically provide assistance only to employees and their families affected by a "qualified disaster."

Like the employer-sponsored public charity and donor advised fund, the program must benefit a charitable class, with an objective determination of the recipients' needs. An independent selection committee must be appointed to select recipients, which helps ensures that any benefit to the employer is incidental and not significant. Assuming these requirements are met, payments are treated as part of the private foundation's charitable purpose and do not de facto result in self-dealing. The IRS has advised that it has authority to review the facts and circumstances of each case to determine that employer benefits are incidental when these payments are made, even if a private foundation meets all the required presumptions.[14]

Leave-based donation programs. Many employers also participate in special leave-based donation programs designed by the IRS whereby employees opt not to take vacation, sick, or personal days in exchange for cash payments the employer makes to charitable organizations providing relief to victims of a disaster. The donated leave is not included in the employee's income or wages and the employer may deduct the cash payment as a business expense.

Tax relief for disaster victims

Those individuals impacted by a disaster should consider whether any specific tax relief may be available. For example, the IRS may provide extensions of the time to file individual and/or business tax returns, and to make certain tax payments.

In addition, the Bipartisan Budget Act of 2018[15] specifically provides that the early withdrawal tax of 10% on distributions from a qualified retirement plan or individual retirement arrangement (IRA) will not apply to withdrawals of up to $100,000 for "qualified wildfire distributions" (QWDs). QWDs are defined as any distribution made between 10/8/17 and 1/1/19 to an individual whose principal place of abode from 10/8/17 to 12/31/17 is located in a California wildfire disaster area and who has, by reason of a wildfire, sustained economic loss. The QWD may be repaid to the retirement plan within three years of the withdrawal.

Conclusion

Charitable assistance to individuals and businesses who have been adversely affected by natural disasters can have a great impact; many in Florida, Georgia, Houston, and Puerto Rico continue to rebuild lives toppled by tropical storms, and Californians face daunting costs to repair the effects of wildfires that have torn across the state. The inclination to give is a worthy and noble one. However, determining how to contribute to disaster relief efforts requires careful consideration by individuals, employers, and nonprofit organizations with respect to regulatory compliance and the efficient use of charitable dollars. ■

14 *Id.*
15 P.L. No. 115-123 (2/9/18).