

Morgan Lewis

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March 12, 2020

Michael Desmond
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20006

Re: Considerations and Recommendations Regarding Taxpayers Affected by COVID-19

Dear Mr. Desmond:

As you know, the outbreak of the 2019 Novel Coronavirus (COVID-19) has generated myriad questions and compliance challenges for businesses in the United States and across the globe. The actions that businesses and taxpayers are taking in response to these challenges have tax implications.

Morgan Lewis has been working with businesses across the globe to navigate this evolving public health crisis. We have identified a series of challenges and associated actions taxpayers are taking that have tax administration implications. Enclosed is an outline of these issues and our comments and recommendations for your consideration.

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We hope our comments and recommendations will be of help as you consider actions that the IRS should take to provide guidance to taxpayers who are adapting to new daily norms in response to COVID-19. We welcome the opportunity to discuss these issues with your office and to provide additional information and insight as the COVID-19 health crisis continues to unfold.

Sincerely,



Jennifer E. Breen



Steven P. Johnson

Cc: Sunita Lough, Deputy Commissioner for Services and Enforcement, IRS
Drita Tonuzi, Deputy Chief Counsel (Operations), Office of Chief Counsel, IRS
Victoria Judson, Associate Chief Counsel (Employee Benefits, Exempt Organizations,
and Employment Taxes), Office of Chief Counsel, IRS
Carol Weiser, Benefits Tax Counsel, Department of the Treasury

I. Background

Morgan Lewis is a global law firm with more than 2,200 lawyers and specialists in 31 offices across North America, Asia, Europe, and the Middle East. Our clients range from established global 100 companies to enterprising start-ups, tax-exempt organizations, and state and local governments. Additionally, through our pro bono legal services, our lawyers help economically disadvantaged individuals and families in communities where we live and work.

In considering specific actions directed at responding to the COVID-19 threat, our clients have begun to identify tax-related consequences of those actions. Below, we identify some of the most pressing issues that taxpayers – regardless of industry, sector, geographic location, size, or sophistication – are now confronting in their efforts to deal with the COVID-19 pandemic. Where appropriate, we offer possible administrative solutions to address the issues.

II. Tax Issues Arising from Actions Taken to Respond to COVID-19 and IRS Response Recommendations

Upcoming Federal Tax Filing and Tax Payment Deadlines

- Issue:

COVID-19 may impact the ability of taxpayers, free tax preparation sites such as VITA clinics and low-income tax clinics, and other tax professionals to meet upcoming filing and payment deadlines. Affected taxpayers are not limited to individuals but also include corporations, partnerships, and non-profits, whose own employees and external tax professionals may not be available due to COVID-19-related exigencies.

- Proposal:

- Extend deadlines that apply to filing tax returns, paying taxes, and performing certain other time-sensitive acts for taxpayers (individuals and entities) affected by COVID-19-related exigencies.
- Provide automatic relief to taxpayers that file untimely returns, make untimely elections or make late payments due to COVID-19-related exigencies. The Service offered similar guidance with respect to untimely returns caused by the enactment of the Surface Transportation Act in Notice 2017-47.

Dependent Care Assistance

- Issue:

The number of weeks-long school district closures continues to rise, leaving parents with substantial additional and unexpected child-care costs. Families who opt for more in-home or private care assistance as a way to reduce an elderly or dependent family member's exposure to large crowds will also generate substantial additional dependent-care expenses.

- Proposal:
 - Increase the annual exclusion-from-gross-income cap for IRC 129-qualifying dependent care assistance (currently \$2,500/year if married filing separately, \$5,000/year otherwise). Issue guidelines that set COVID-19-related qualification standards for the increased dependent care assistance annual exclusion (e.g., employees with children subject to a mandatory work-from-home policy; employees with children enrolled in school districts closed on account of the COVID-19 outbreak; employees working or residing in a local, state, or federal government-declared COVID-19 containment area).
 - Liberalize the qualifying dependent standard under IRC 129 to include family members who are at “higher risk” of getting very sick from COVID-19, which the CDC defines as older adults and individuals who suffer with serious chronic medical conditions such as heart disease, diabetes, or lung disease. Deem “higher risk” individuals to qualify for IRC 129 dependent care assistance, without regard to whether they are otherwise able to physically or mentally care for themselves.
 - Allow employees to make mid-year changes to IRC 129 dependent care flexible spending account (FSA) elections, even though outside the limited open enrollment period.

COVID-19-Related Medical Care Expenses

- Issue:

As the U.S. response to COVID-19 continues to develop, new and novel prevention, diagnostic and treatment methods are likely to arise. Guidance is needed that recognizes broad standards for identifying COVID-19-related “medical care”.
- Proposal:

Issue guidelines concerning medical care expenses that the IRS deems to be attributable to COVID-19 prevention, diagnoses, and treatment, and therefore deductible from income under IRC 213 or excludable from income under IRC 105(b). Examples to consider include, preventative disinfectants, face masks, and COVID-19 screening costs. Employer-reimbursement for travel cancellation fees should also be considered for qualification under IRC 213(d) as preventative medical care expenses. The Service has offered similar guidance with respect to employer-provided wellness programs in CCA 201622031.

COVID-19-Related Health Benefits

- Issue:

For many, COVID-19 has brought great uncertainty to planning for out-of-pocket healthcare spending. Suspension of certain limitations will allow more flexibility to address changing circumstances.

- Proposal:
 - Increase annual health flexible spending account (FSA) contribution limits (currently \$2,750 for 2020). Liberalize FSA use-or-lose expense reporting standards for 2020.
 - Permit employers to extend free testing to employees and dependents who are otherwise not covered under the employer's group health plan, without penalty.
 - Allow employees to make mid-year changes to IRC 125 health FSA elections (generally limited to open enrollment period).

Retirement Plan Loans, Hardship Distributions, and Deferred Compensation Distributions

- Issue:

Many individuals impacted by COVID-19 will face economic hardship caused by periods of unemployment, whether due to sickness or office closure. For individuals with retirement accounts and other deferred compensation arrangements, streamlined, penalty-free access to these funds can alleviate cash shortages during a time of crisis.
- Proposal:
 - Authorize employer-sponsored retirement plans (e.g., IRC 401(k), 403(b), and 457(b) plans) to make loans and hardship distributions available immediately to individuals affected by COVID-19. Streamline related loan procedures and liberalize hardship distribution rules, similar to the guidance provided in News Release 2018-236 for Hurricanes Michael and Florence.
 - Relax individual retirement account (IRA) distribution rules and procedures for individuals affected by COVID-19.
 - Waive the IRC 409A excise tax on early deferred compensation distributions to individuals affected by COVID-19. Alternatively, treat distributions to individuals affected by COVID-19 as having occurred following the "occurrence of an unforeseeable emergency" per IRC 409A(a)(2)(A)(vi).
 - Eliminate the 10% additional tax on early distributions from qualified retirement plans (e.g., IRC 401(k), 403(b) and 457(b) plans) for expenses associated with COVID-19.
 - The funding relief first provided by MAP-21 (and extended by HATFA 2014 and BBA 2015) is set to expire in the near future with the phase-out of the discount rate $\pm 10\%$ corridor in 2021 and the phase-in of the discount rate $\pm 30\%$ corridor by 2024. This implementation of the $\pm 30\%$ corridor is beginning during a period of extreme volatility and an unexpected and rapid return to a period of historically low interest rates, which present conditions similar to those that first precipitated MAP-21. Provide defined benefit funding relief in the form of continued application of the $\pm 10\%$ corridor and other smoothing of the funding requirements.

Employee Leave Donations

- Issue:

Office closures due to COVID-19 have placed a substantial economic hardship on many hourly workers who are only paid if they work. Additionally, individuals who contract COVID-19 can take many weeks to fully recover.

- Proposal:

- Treat payments made by employers to qualifying charitable organizations in exchange for donated employee vacation, sick, or personal leave (by forgoing use or payout of any donated leave) as not constituting income or wages to beneficiary employees. Relatedly, provide that employees who donate leave will not be treated as receiving income or wages on the donated leave. See, for example, Notice 2005-68 (Hurricane Katrina), Notice 2012-69 (Hurricane Sandy), and Notice 2014-68 (Ebola victims in Guinea, Liberia, and Sierra Leone).
- Issue guidance concerning employee income and wage exclusion/inclusion standards attributable to major-disaster employer-sponsored leave-sharing programs. See, for example, Notice 2006-59 (Presidentially declared disasters; employer-sponsored leave-sharing program standards).
- Permit employers to deduct under IRC 162 (and not IRC 170) payments made to qualifying charitable organizations in exchange for donated employee leave. See, for example, Notice 2001-69, setting employer-sponsored leave-sharing program standards in response to the 9/11 terrorist attacks.

Home-Office Expenses

- Issue:

A growing number of companies have imposed mandatory work-from-home policies for employees working in cities where confirmed cases of COVID-19 have been reported. Voluntary extended tele-work arrangements have also increased dramatically in recent days. Often, however, personal residences are not adequately outfitted for employees to effectively perform their jobs remotely on a full-time, possibly long-term basis.

- Proposal:

- Issue guidance clarifying the standards under which an employer can provide home-office-related property and services to affected employees as working condition fringe benefits, excludable from wages and income under IRC 132(a)(3). Examples of home-office-related property and services include: home internet and home phone; remote conferencing video cameras; computer equipment and hardware (e.g., monitors, cables, docking stations, power adapters, printers) and related software/support; workspace furniture (e.g., desk and chair); enhanced network/IT security services; office supplies (e.g., printer cartridges); and cleaning and disinfectant supplies.

- Clarify that incidental personal use of any qualifying home-office-related property or services will be treated as de minimis, excludable from income and wages under IRC 132(a)(4), similar to the Service’s treatment of employer-provided cell phones as working condition (business use) and de minimis (personal use) fringe benefits in Notice 2011-72.
- Identify working condition fringe substantiation safe harbor standards for employers to provide qualifying home-office-related property and services, through expense reimbursement, advance payment, or direct provision of property and services.

Commuting Expenses

- Issue:

Employees that commute to work via mass transit systems are at increased risk of coming into close contact (defined by the CDC as approximately 6 feet) with an individual who is infected with COVID-19 due to the relative high volume of users of mass transit. In an effort to mitigate this risk, some companies are reimbursing or providing capped monthly allowances to cover employee costs associated with ride-sharing (e.g., Uber, Lyft), ride-hailing taxi services, and parking.

- Proposal:

Liberalize the IRC 132(a)(6) definition of “qualified transportation fringe” to include employer payment of employee ride-sharing and ride-hailing commuting expenses. Namely, broaden the Treas. Reg. § 1.132-9 Q&A 2 definition of “commuter highway vehicle” to include vehicles with a seating capacity lower than 6 adults (excluding the driver). In addition, increase the aggregate monthly cap for qualified transportation and qualified parking above the current \$270/month benefit level.

Away-from-Home Travel Expenses

- Issue:

Some companies have contemplated relocating entire offices out of high-risk areas to lower-risk areas as a precaution against COVID-19 exposure. Additionally, for companies with employees who frequently travel, there is heightened risk that employees who have been or may have been exposed to COVID-19 will be placed under quarantine in and away-from-home location.

- Proposal:

Liberalize away-from-home travel expense reimbursement standards for employees who are subject to a mandatory COVID-19-related relocation policy or who are placed in quarantine while away from home due to possible COVID-19 exposure. In particular:

- Issue guidance that employees who are subject to employer-mandated relocation or away-from-home quarantine qualify to receive, on a tax-free basis, reimbursement of or allowance for duplicated expenses due to the relocation or quarantine, whether

business-related or personal in nature. Stated differently, deem all duplicated expenses to be reasonable and necessary in the conduct of the employer's business and directly attributable to such business, per Treas. Reg. § 1.162-2(a).

- Increase the maximum GSA per diem rates for cities where confirmed cases of COVID-19 have been reported, to account for unforeseen price spikes in lodging and incidental expenditures.
- Suspend the IRC 162(a)(2) one-year trigger on indefinite assignment status. Deem employees to be on temporary assignment despite realistically expecting to remain (or in fact actually remaining) in a single away-from-home location for longer than 1 year due to COVID-19-related exigencies (e.g., employer-mandated relocation policy, quarantine).
- Extend the "reasonable period of time" within which employees must substantiate under the accountable plan rules travel expenses associated with cancelled or rescheduled business travel.
- Apply a temporary moratorium on application of the rule requiring taxation of travel expenses after 12 months in a single travel location, in any instance when travel has been extended due to COVID-19 reasons.

Meal Delivery

- Issue:

In areas with confirmed cases of COVID-19 reported, positive correlation exists between time spent in public places like grocery stores and restaurants and risk of exposure. In turn, occasional provision of meals delivered to tele-working employees at their residences can fight the spread of the outbreak.

- Proposal:

Identify a reasonable monthly limit that covers the cost of a set number of meals (including delivery fees) delivered to employee residences. Deem monthly reimbursements or allowances to be de minimis fringes excludable from income and wages under Treas. Reg. § 1.132-6(d)(2) for "occasional meal money".

Additional Relief Considerations

- Temporary Unemployment: Relax temporary unemployment benefit eligibility rules for individuals who are unable to work due to quarantine, workplace closures, or other COVID-19-related exigencies.
- Employment Tax Withholding, Information Reporting, and Tax Deposits: Issue guidance conforming employment tax withholding, information reporting, tax deposit, and business expense deduction standards arising from any relief provisions the Service adopts. Adopt related penalty relief provisions.

- Administrative Relief Under IRC 139 (Disaster Relief Payments): Fill any gaps not addressed by the above relief proposals under the authority of IRC 139, including relaxing or suspending administrative and procedural rules. Issue guidance identifying under what conditions receipt of a qualified disaster relief payment from an employer will qualify under IRC 139, similar to the reasonable and necessary personal, living, and family expenses at issue in Rev. Rul. 2003-12, Situation 3.
- State Resident and Nonresident Employment Tax: As a growing number of employees are being required or encouraged to work remotely, state and local tax issues arise when teleworking employees do so from a tax jurisdiction different from the primary office tax jurisdiction. A coordinated effort between the IRS, affected state and local tax authorities, and possibly Congress, is needed to harmonize state employment tax withholding and reporting standards for employees working in multiple tax jurisdictions as a result of COVID-19. Legislation aimed at addressing similar workforce mobility issues has been introduced before, albeit not with a global health crisis as the backdrop. Most recently, Senate Bill 604, the Mobile Workforce State Income Tax Simplification Act of 2019, was introduced but not enacted.