

# President Trump's National Emergency Declaration Triggers Ability to Make Tax Free Relief Payments

Internal Revenue Code (the Code) Section 139 provides that an individual may receive a tax free "qualified disaster relief payment" from anyone (including an employer). Under Section 139(d), a qualified disaster relief payment is not taxed as a wage or as self-employment earnings, meaning the payment is not income to the recipient and is not reported on a Form W-2 or Form 1099.

For a payment to qualify as a disaster relief payment under Section 139, a two part test must be met: (1) a "qualified disaster" must have occurred; and (2) the payment must meet the definition of a "qualified disaster relief payment."

On March 13, 2020, President Trump issued a proclamation declaring a national emergency concerning the novel coronavirus (COVID-19) outbreak. The proclamation states that the ongoing COVID 19 pandemic warrants an emergency declaration under Section 501(b) of the Stafford Act. As such, the COVID 19 pandemic is a "federally declared disaster," as defined by Code Section 165(i)(5)(A). Thus, the President's proclamation triggered the possibility for providing tax-free relief under Code Section 139.

A "qualified disaster relief payment" is defined by Code Section 139(b) to include any amount paid to or for the benefit of an individual to reimburse or pay reasonable and necessary personal, family, living or funeral expenses incurred as a result of a qualified disaster. On March 31, 2020, the IRS updated its list of frequently asked questions (FAQs) and confirmed that the President's proclamation met the requirement for declaring a national disaster for purposes of Code Section 139. The IRS FAQ No. 58 explains that sick leave wages and family leave that are paid under the [Families First Coronavirus Response Act](#) are *not* excluded from gross income as "qualified disaster relief payments." The IRS, however, implied that other payments made due to the COVID-19 pandemic do qualify as Code Section 139 disaster relief payments.

The IRS FAQs make it clear that Section 139 is not a means to simply pay employees on a tax-free basis. For example, qualified leave wages are not excludible qualified disaster relief payments because qualified leave wages are intended to replace wages or compensation that an individual would otherwise earn, rather than to serve as payments to offset any particular expenses that an individual would incur due to COVID 19.

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There are, however, certain payments that do meet the requirements of Section 139. In the past, the IRS has issued guidance which explains whether a payment meets the requirements of Code Section 139. Qualified disaster relief payments within the meaning of Section 139 include payments received (regardless of the source) for the following expenses:

- Reasonable and necessary personal, family, living or funeral expenses incurred as a result of a qualified disaster;
- Reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence due to a qualified disaster (a personal residence can be a rented residence or one you own); and
- Reasonable and necessary expenses incurred for the repair or replacement of the contents of a personal residence due to a qualified declared disaster.

Qualified disaster relief payments do not include:

- Payments for expenses otherwise paid for by insurance or other reimbursements; and
- Income replacement payments, such as payments of lost wages, lost business income or unemployment compensation. See [IRS Publication 3833 \(Rev. 12-2014\)](#).

Thus, a payment made to an employee for reasonable family expenses caused by a disaster would qualify as a Code Section 139 payment and the worker would not pay tax on the payment. Specific examples of such payments include additional medical costs; the cost of setting up and maintaining a home office; increased child care expenses that result from school closures; hand sanitizer and home disinfectant costs; and transportation expenses due to work relocation costs, such as taking a taxi or a ride booked through a ride share app, as opposed to taking the city bus.

Payments for lost wages or costs covered by insurance would not qualify.

If an employer pays amounts under Section 139, it is recommended that the employer have a written Section 139 plan. The plan document would provide the following:

- A list of expenses that the employer will pay;



- The amount of expense the employer will be willing to pay per employee;
- The method for seeking reimbursement for an expense (for example, the employee could be required to fill out a short application form);
- The duration of the program;
- A description of who is eligible to take advantage of the program; and
- An explanation of the purpose of the program.

For the employer, Section 139 payments should still be deductible. Section 139 was not intended to change the deductibility of payments made by an employer; thus, if the payment to the employee would normally be deductible to the employer as compensation, the fact that Section 139 excludes the payment from income does not change the deductible nature of the payment.

If you have any questions about whether payments made to employees qualify as tax-free relief payments, please contact your Reinhart attorney.

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