

Nonprofit Alert: COVID-19 – Frequently Asked Questions about Nonprofits Providing Disaster Relief

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The novel coronavirus pandemic has upended nearly every facet of American — and global — life, and in doing so is exacting a massive toll on the economy. While the full measure of the effects of this crisis will not be known for some time, clearly individuals and businesses everywhere are experiencing an array of unanticipated and unmet needs, and existing socioeconomic inequities are being magnified. Although the structural and environmental disruptions of a hurricane or a wildfire are not present, we are nonetheless in the midst of a large-scale disaster. Naturally, grant-making foundations and other charities are considering what disaster relief they can provide in these circumstances while continuing to comply with the requirements of their tax-exempt status. This alert discusses some frequently asked questions regarding disaster assistance.

Can our organization provide assistance directly to individuals?

Yes. Charitable organizations, whether classified as public charities or private foundations, may provide assistance in the form of funds, goods or services to individuals to help meet basic human needs such as food, shelter, clothing and medical care (including mental and behavioral health care). Individuals qualify as potential recipients of charitable aid if they are "needy or distressed," which encompasses a variety of circumstances beyond chronic poverty. "Needy" of course includes long-term financial need, but also includes temporary distress or lack of resources due to illness (including COVID-19), trauma, natural disaster or sudden and severe personal or family crisis (e.g., a house fire, a debilitating accident).

Generally, the charitable organization is expected to make an objective assessment that a recipient of aid is in need, and to match the form of the aid to the type and scope of the need at the time the aid is given. In the immediate wake of a disaster — or during a disaster such as the unfolding pandemic — the needs may be so evident as to not require any formal assessment. Close in time to the disaster, it is also likely that people of very different financial means will experience similar distress — a hurricane may flatten a large house as well as a small one, and a virus will sicken rich and poor alike. Charities can respond to such immediate distress by funding or providing emergency assistance, crisis counseling and the like without regard to the financial resources of the recipient.



Emergency aid should not, however, be rendered on an ongoing basis unless an objective needs assessment is performed, since over time affected individuals can be expected to draw on their individual resources. In published guidance on disaster relief, the IRS has said, for example, that if a charity intends to provide three to six months of financial assistance to families to pay for basic housing because of a disaster or emergency hardship, it would be required to make an assessment of financial need before disbursing aid, so that charitable resources are not spent on those who have adequate resources.

What is involved in a needs assessment? How do we document it?

Consistent with the definition of "needy or distressed," a needs assessment should evaluate the potential recipient's physical, mental and emotional well-being in addition to their financial situation. The IRS expects documentation to include the following: a description of the aid provided; the purpose of the aid; costs associated with providing the aid; the charity's objective criteria for identifying eligible recipients; a description of the selection process, including the composition of the selection committee; and each recipient's name, address and amount of aid provided. Recipients of aid should not include directors, officers, key employees or substantial contributors to the charity.

The above documentation requirements are relaxed somewhat in the case of short-term emergency aid. In such circumstances, the IRS does not expect a charity to include the names and addresses of persons served — only when and where the aid was delivered and the approximate number of persons served. A charity should still keep records of the type of assistance provided (e.g., medical supplies, meals), the cost of the assistance and the charitable purpose intended to be accomplished.

Can we limit our assistance to specific individuals, like our affected employees?

It depends. Charities must use their resources for the benefit of the public. The group of people eligible for assistance must be sufficiently *large* or *indefinite* to constitute a "charitable class." A charitable class is essentially the cross-section of the public you intend to serve. Efforts to assist a pre-selected co-worker or their family members would not be charitable in the technical tax sense, since the group of people served would be both too small and too definite to make up a charitable class. (It would still be a good thing, just better suited to a supportive platform like GoFundMe.)

Similarly, "all employees of Company A who contract COVID-19" is likely to be too small or too definite to constitute a charitable class. On the other hand, an employer could set up an employee assistance fund designed to assist employees who experience hardship due to the COVID-19 pandemic *and all future disasters*. In that case, the group of eligible recipients is sufficiently indefinite, or open-ended, to constitute a charitable class.



Note that any employer-sponsored employee assistance program would need to meet additional requirements to ensure that the program is not primarily for the benefit of the employer (for example, in its recruitment and retention of key employees). Recipients must be selected based on an objective determination of need by an independent selection committee to ensure that any benefit to the employer is incidental and tenuous. The charity's selection committee is independent if a majority of the members of the committee consists of persons who are not in a position to exercise substantial influence over the affairs of the related employer.

If your organization has an employee assistance fund that is classified as a private foundation, distributions to individuals are *only* permitted in the case of a "qualified disaster" as defined in Internal Revenue Code Section 139. Because there has been a federally declared disaster in connection with COVID-19, distributions to individuals for pandemic-related relief are permitted for employee assistance funds classified as private foundations.

Disaster relief isn't really part of our mission — can we still provide it without seeking permission from the IRS?

Yes. Your organization need not be the Red Cross or World Relief in order to respond to a crisis with the types of assistance discussed here. You will, however, need to report your activities and expenditures on your annual Form 990.

A lot of businesses are hurting due to the pandemic — can businesses be recipients of charitable funds?

Yes, with some cautions. A charity can provide assistance to businesses *if* doing so is a reasonable means of accomplishing a charitable purpose, and any benefit to private interests is incidental to accomplishing the charitable purpose. In general, this means that permissible types of assistance are likely to benefit the business sector more broadly, as opposed to specific individual businesses.

There are a few IRS-recognized charitable purposes that might motivate assistance to the business sector. First, combating community deterioration is a charitable purpose; thus, for example, assistance to rebuild infrastructure needed for businesses to survive in a particular area would be charitable. Second, lessening the burdens of government is charitable, so if a local, state or federal government has identified specific services to the business sector as its burden and a charity can alleviate that burden, a charitable purpose is served. Finally, aid to individual business owners who are financially needy or otherwise distressed would be charitable if the same kind of objective needs assessment described earlier in this alert is applied.

As with individuals, once a business or a business sector is viable again, it is no longer an appropriate recipient of charitable assistance. If your organization desires to provide this kind of assistance during the



COVID-19 crisis, it should develop criteria and procedures that will allow it to conduct an objective needs assessment very similar to what is required for assistance to individuals, and help it to determine when assistance should be discontinued.

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Lathrop GPM regularly assists public charities and private foundations with the establishment and operation of disaster relief and other assistance programs. For more information, please contact Lathrop GPM's tax-exempt and nonprofit organizations team.