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Frequently Asked Questions: Providing Disaster Relief During the COVID Crisis

As New York City’s and the nation’s nonprofit sector mobilizes in response to the coronavirus pandemic, Lawyers Alliance for New York is ready to assist. With nearly two decades of disaster relief experience, Lawyers Alliance has helped nonprofits engaged in disaster relief with a wide range of legal matters, including those related to fundraising and grant-making, program expansion and downsizing, tax-exempt organizations law, borrowing and lending, and real estate contingencies. This set of FAQs provides information for community-based and other nonprofit organizations that are organizing and distributing disaster relief, such as food, medical supplies, support for homebound seniors, telehealth, and financial or volunteer assistance to relieve human suffering caused by the COVID crisis.

Information about other legal issues that nonprofits face during the coronavirus crisis, including those related to nonprofit operations and finances, is available on Lawyers Alliance’s website at <https://lawyersalliance.org/coronavirus-information>

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Existing Charitable Organizations

1. Does an existing charitable organization need to take any special legal steps to establish a disaster relief program or engage in disaster relief activity?

If the disaster relief program will be ongoing, rather than a one-time fundraiser to benefit a local disaster relief program, the Board of Directors or Executive Director should check the organization’s certificate of incorporation to ensure that the planned activities fall within the organization’s current corporate purposes. If not, the organization may need to amend its certificate to change or add to the purposes, which for a New York charitable not-for-profit corporation requires action by the members or Board and approval by the state Attorney General’s Charities Bureau.¹ The Board may also adopt resolutions authorizing disaster-related activity. If the organization plans to distribute funds for disaster relief, the Board should adopt resolutions establishing such a disaster relief program, an appropriate mission statement, and guidelines for distributing funds. Most organizations have the authority to organize a one-time disaster relief program, such as a drive up collection of canned food items to benefit local food pantries, without amending organizational documents.

2. How does an organization determine who is eligible for charitable assistance?

As a general rule, charitable organizations support individuals who are financially needy or otherwise distressed. During and in the immediate aftermath of a crisis, it may not be necessary for charitable organizations to conduct a needs-based assessment. By way of example, the IRS has noted that all victims of flooding will need dry clothing and food in the days immediately following the event. Likewise, it is reasonable to assume that vulnerable people confined to their homes during the coronavirus emergency will need help obtaining food and prescriptions. As time passes, however, and individuals with financial means are able to use their own resources to recover from the disaster, charitable organizations’ resources should be directed towards those without sufficient resources to help themselves.²

¹ New York Not-for-Profit Corporation Law § 804. For guidance on the steps for amending the corporate purposes of a New York not-for-profit corporation, see the Attorney General Office’s publication at <https://charitiesnys.com/pdfs/Procedures-for-Forming-and-Changing-NFP.pdf>.

² See IRS Pub. 3833, Disaster Relief: Providing Assistance Through Charitable Contributions, www.irs.gov/pub/irs-pdf/p3833.pdf.

3. Can a charitable organization provide support to a local business affected by the coronavirus emergency?

Charitable organizations are able to provide emergency-related relief to businesses when aid is provided to individual business owners who are financially needy or otherwise distressed, to combat community deterioration, or when the aid lessens the burdens of government. For example, if businesses were vandalized while they were closed for the coronavirus emergency, a charitable organization could provide economic support to clean them up. Ongoing charitable support for a viable business would not be appropriate, however. Charities that aid businesses should have criteria and procedures in place to determine who is eligible and when aid should be discontinued.³ They also should take steps to ensure such assistance is a reasonable means of accomplishing their charitable purpose and does not result in improper private inurement.

4. What type of documentation does our organization need to maintain relating to disaster relief?

An organization distributing short-term emergency aid should track the type of assistance provided, distribution criteria, estimated number of victims helped, date and place of distribution, expenses, and intended charitable purpose. Nonprofits involved in longer term relief and response should maintain more detailed records, including information about how their services furthered their charitable purposes, the identity of the recipients, criteria and process used to establish that recipients are needy, and any relationship between aid recipients and related parties.

The Form 990 and Form 990-EZ, which public charities file annually with the IRS, expects organizations to describe their disaster relief activities in the Statement of Program Service Accomplishments if this is one of the three largest program areas based on incurred expenses. Form 990 Schedule I records grants or other assistance to individuals.⁴

5. Our agency is providing direct cash assistance in excess of \$600 to victims of the coronavirus emergency. Do we have to issue a 1099 to document those payments?

No, assuming the person to whom the cash assistance is being given is a member of a charitable class entitled to assistance, and the assistance is not being provided in exchange for providing services or goods, a 1099 does not have to be issued. That is because the obligation to issue a 1099 for payments in excess of \$600 is premised on the payments being

³ See IRS Pub. 3833, Disaster Relief: Providing Assistance Through Charitable Contributions, www.irs.gov/pub/irs-pdf/p3833.pdf.

⁴ See IRS website for information on annual filing, at <https://www.irs.gov/charities-non-profits/required-filing-form-990-series>. Instructions for Form 990 Return of Organization Exempt From Income Tax are at <https://www.irs.gov/pub/irs-pdf/i990.pdf>.

includible in the recipient's gross income,⁵ and a charity's gift to a member of a charitable class is excluded from the recipient's gross income even if that gift is in excess of \$600.⁶

6. Will recipients of our cash assistance grants have to pay federal income tax on the funds they receive from us?

Probably not. The Internal Revenue Code excludes gifts from income.⁷ The IRS has recognized that need-based payments by charities are excludible from income as gifts.⁸ Further, Internal Revenue Code section 139 excludes "qualified disaster relief payments" from income. Such payments include amounts paid to an individual to reimburse or pay reasonable living expenses for housing, food, clothing, transportation, medical care and funeral expenses. Payments must be made on account of a Presidentially declared disaster, one triggered by terrorism or military action, or one declared under state or local law. There is no dollar limit on the amount that can be excluded under this provision, nor a restriction on who may be the payer. However, to be eligible a payment cannot be reimbursed by insurance or otherwise.

Newly Forming Charitable Organizations

7. How can I form a new charitable organization to provide relief to victims of the coronavirus emergency and apply for federal tax exemption?

First, at the state level, the organization must be created in the form of a nonprofit corporation, trust or unincorporated association. In New York, charitable organizations generally must register with the state's Charities Bureau (in the Attorney General's office) before soliciting funds for charitable purposes.⁹ It may also be necessary to register in other states where the organization will raise charitable funds. As legal entities, nonprofit organizations must have a properly elected Board of Directors, adopt bylaws to set forth governance procedures, and implement an appropriate conflict of interest policy.

The organization also must qualify to do business in any state (other than the state of incorporation) in which it intends to do business. So, for example, if you form a corporation

⁵ Internal Revenue Code 6041(a).

⁶ IRC sec. 102(a). For instance, the IRS ruled that a charity did not need to issue a 1099 to recipients of funding to pay for unreimbursed costs incurred as the result of a flood. IRS, Rev. Rul. 2003-12. Likewise, the IRS has determined that a nonprofit did not have to issue Form 1099's to the recipients of rehabilitation and respite care, because the value of that care was excludible from the recipients' gross income. IRS, Private Ltr. Ruling 9314014 (Jan. 6, 1993).

⁷ IRC sec. 102(a).

⁸ IRS, Rev. Rul. 2003-12.

⁹ See www.charitiesnys.com for the Attorney General Office's information on the registration statement and annual financial reports to be filed by charitable organizations operating in New York. For guidance on the steps to create a new not-for-profit corporation in New York, see the Attorney General Office's publication at <https://charitiesnys.com/pdfs/Procedures-for-Forming-and-Changing-NFP.pdf>.

in New York but expect to provide services in New York, New Jersey and Connecticut, it will be necessary to qualify to do business in New Jersey and Connecticut.

At the federal level, the entity must submit an application to the IRS for recognition of its tax exempt status on Form 1023 or 1023-EZ, and it must seek classification as a public charity or private foundation. To qualify as exempt under Section 501(c)(3) of the Internal Revenue Code, the organization, among other things, must be organized and operated for charitable purposes and serve public, rather than private, interests. Generally, disaster relief programs are exempt on the ground that they are formed for the relief of the distressed, but an organization also may seek to establish that is charitable on other grounds. Disaster relief organizations also must have in place a set of objective criteria to make distributions. In addition, the organization must serve a large or indefinite group rather than particular, pre-selected individuals. See the answer to Question 2 above for a discussion of the guidelines that a 501(c)(3) tax exempt organization must follow to determine who is eligible for charitable assistance.

8. How can our organization receive expedited review of its Form 1023 application for recognition of tax-exempt status?

It can take several weeks or months for the IRS to review an application, although the IRS usually reviews the shorter Form 1023-EZ quickly. In response to prior disasters, the IRS has instituted a special expedited review and approval process for new organizations seeking tax-exempt status to provide disaster and hardship relief to victims. Check the IRS website, <https://www.irs.gov>, before filing the application for federal tax exemption.

9. Where can I get more background information about forming a disaster relief organization?

Check the IRS homepage at <https://www.irs.gov> and IRS webpage on Disaster Relief Resources for Charities and Contributors, <https://www.irs.gov/charities-non-profits/charitable-organizations/disaster-relief-resources-for-charities-and-contributors>, for updates, and review the IRS Disaster Relief publication available at www.irs.gov/pub/irs-pdf/p3833.pdf.

Charitable Contributions

10. When is a contribution to help in disaster relief efforts tax-deductible?

An individual or corporation that itemizes deductions will be eligible to claim a federal income tax deduction for contributions made to an organization deemed “charitable” within the meaning of Section 170(c)(2) of the Internal Revenue Code (“IRC”). These are deemed “qualified” organizations. This only includes some, but not all, organizations that are exempt from federal taxes. It includes organizations exempt under IRC sections 501(c)(3) (charitable organizations), 501(e) (cooperative hospital service organizations), 501(f) (cooperative service organizations of certain educational organizations), and 501(k) (nonprofit childcare organizations). It does not include, for example, organizations exempt

under IRC section 501(c)(4) (advocacy, lobbying, and political organizations) or 501(c)(5) (labor unions and agricultural associations).¹⁰

Question 11 discusses changes in federal law, in light of COVID-19 economic relief package adopted by Congress in March 2020, to allow for a deduction by non-itemizers and raise the cap on how much is deductible.

Organizations claiming exemption under section 501(c)(3) must seek recognition of their exemption by filing Form 1023 with the IRS and will receive a “determination letter” confirming exempt status. Churches, temples, synagogues, mosques and certain other religious organizations are not required to seek recognition of exempt status from the IRS to qualify to receive deductible contributions. A donor will also be eligible to claim a tax deduction for charitable contributions made to a state or local government. However, a donor will not be able to claim a tax deduction for a gift made directly to the family of a victim of the coronavirus emergency, or a fund established to benefit a specified individual or family, because a gift to a specified individual or family is not “charitable” within the meaning of the federal tax law.¹¹

Exempt organizations should maintain their determination letters on file for inspection by donors, especially those who will need confirmation of that exempt status for their records (e.g., private foundation grantors). Donors can check the IRS’ Tax Exempt Organization Search page at <https://apps.irs.gov/app/eos/> to see whether an organization is listed as “On Publication 78 Data List,” indicating that it is eligible to receive tax deductible contributions.

11. What changes does the COVID economic stimulus package make for taxpayers seeking a tax deduction for charitable donations?

On March 27, the President signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act.¹² Among its many provisions are a few related to charitable giving. Taxpayers who do not itemize may claim a deduction, from their gross income, of up to \$300 in cash contributions made in 2020 to a qualified charity. This new above-the-line deduction can be claimed on tax forms next year. The law removes the cap on deductible contributions for individuals who itemize, which is 60 percent of adjusted gross income (AGI) for 2019 donations, making it 100 percent of AGI for taxable years starting January 1, 2020.

For corporations, the CARES Act changes the annual limit from 10 percent to 25 percent. Deduction for food inventory donations from corporations would be available up to 25 percent of AGI, up from the current 15 percent cap.¹³

¹⁰ IRS Pub. 526, Charitable Contributions, p. 2, <https://www.irs.gov/pub/irs-pdf/p526.pdf>

¹¹ IRS Pub. 526, Charitable Contributions, pp. 2, 5, <https://www.irs.gov/pub/irs-pdf/p526.pdf>

¹² For a copy of the 854-page CARES Act, see <https://www.congress.gov/116/bills/hr748/BILLS-116hr748eas.pdf>.

¹³ See Sections 2204 and 2205 on pages 168-172 of the CARES Act for the language on charitable giving incentives.

12. What are a not-for-profit organization’s obligations regarding documentation of charitable contributions?

Taxpayers may not deduct individual contributions of \$250 or more unless they have received a contemporaneous written acknowledgment from the exempt organization that received the donation. The obligation is imposed only upon the donor, not the exempt organization, to request and obtain the acknowledgment for charitable contributions over \$250. However, charities are often compelled to initiate documentation in the interest of good donor relations. For quid pro quo contributions (that is, contributions in exchange for which the donor receives some benefit), the charitable organization must give the donor a written statement if the payment is over \$75 and is partly a contribution and partly in exchange for goods or services.¹⁴

The acknowledgment must be written and should include: the amount contributed if cash, or a description of the property if non-cash; the date; a statement as to whether the charity gave anything in exchange for the contribution; and a description and good faith estimate of the value of any goods or services provided by the charity in exchange for the contribution. Additional procedures apply for non-cash contributions with a fair market value greater than \$500. In addition, the written statement to donors making a quid pro quo payment over \$75 must include a statement that the donor can deduct only the amount by which the contribution exceeds the value of any goods or services received.¹⁵

13. Is there a gift tax if someone gives a gift directly to an individual or through an organization that cannot accept tax-deductible contributions?

As explained above in response to question 10, an individual or corporation will be eligible to claim a federal income tax deduction only if the contributions are made to an organization deemed “charitable” within the meaning of Section 170(c)(2) of the Internal Revenue Code. Donors may still choose to give gifts through other types of organizations, or directly to individual victims, even though such assistance does not qualify as a tax-deductible contribution. People and entities that provide gifts directly to individuals may be subject to gift tax if the value of the gift exceeds \$15,000 to a single person in the 2020 tax year.¹⁶ The amount of the exclusion may differ in other years, because it is periodically adjusted for inflation. As explained above in response to question 6, individual recipients of gifts usually are not subject to tax on the value of the gift, unless an employer provides the assistance for the benefit of an employee.

14. Our organization has ramped up our volunteer network. Will our volunteers be entitled to claim a tax deduction for their donated time and services?

¹⁴ Internal Revenue Code §170(f)(8).

¹⁵ IRS, Pub. 1771, Charitable Contributions: Substantiation and Disclosure Requirements, <https://www.irs.gov/pub/irs-pdf/p1771.pdf>

¹⁶ Internal Revenue Code § 2503; IRS, FAQs on Gift Taxes, <https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-gift-taxes>

No, donated time and services are not tax-deductible. Although those who voluntarily provide assistance without charge to COVID victims cannot deduct the value of their time or services, they may be able to deduct certain unreimbursed out-of-pocket expenses incurred while donating these services to a qualified organization, and they should consult with their own tax advisor about specifics.¹⁷

This alert is meant to provide general information only, not legal advice. Lawyers Alliance for New York may be able to help eligible nonprofit organizations update governance documents to allow the organization to engage in disaster relief activities, or to develop a legally compliant protocol for providing and documenting relief to those affected by COVID. Existing and prospective clients can reach out Legal Director Hedwig O'Hara for assistance at hohara@lawyersalliance.org. Information about becoming a new client of Lawyers Alliance is available at <https://lawyersalliance.org/becoming-a-client>.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations and social enterprises that are improving the quality of life in New York City neighborhoods. Our network of pro bono lawyers from law firms and corporations and staff of experienced attorneys collaborate to deliver expert corporate, tax, real estate, employment, intellectual property, and other legal services to community organizations. By connecting lawyers, nonprofits, and communities, Lawyers Alliance for New York helps nonprofits to develop and provide housing, stimulate economic opportunity, improve urban health and education, promote community arts, and operate and advocate for vital programs that benefit low-income New Yorkers of all ages.

¹⁷ IRS Publication 526, Charitable Contributions, at <https://www.irs.gov/pub/irs-prior/p526--2019.pdf>.