Organ Donor Employer Credit

Tax Expenditure Evaluation • December 2023 • 2023-TE18

OFFICE OF THE STATE AUDITOR
COLORADO

The Organ Donor Employer Credit is available to Colorado employers that provide an employee with a paid leave of absence for purposes of organ donation. The credit is equal to 35 percent of the employer's expenses incurred for paying the employee for up to 10 working days during their leave of absence and for the cost of any temporary replacement help. Statute states that the purpose of the credit is "to support living donors and the companies that employ them" [Section 39-22-540(1)(b), C.R.S.].

As of Tax Year 2020, the Organ Donor Employer Credit did not support living donors or their employers because the credit was not being used. If the current version of the credit is extended beyond Tax Year 2024, it may provide some support to a small number of living donors and employers, but it is unlikely to make a significant impact because they may not be aware of the credit, and donors and employers must meet a number of specific requirements in order for the employer to qualify for the credit.

Specifically, we found:

- For those who are aware of the credit, statutory requirements likely significantly reduce the number of living donors and employers whose situations would qualify for the credit.
- The restriction on taking annual leave or sick days in order to donate may cause confusion for employers about whether they qualify for the credit.
- There may be other, more cost-effective options available to living donors and their employers.

Policy Considerations

If the General Assembly decides to extend the Organ Donor Employer Credit beyond its current expiration date of December 31, 2024, the General Assembly could assess whether the credit is available to the intended population of donors and, if necessary, consider making changes to statute.

Tax Type:	**Income**	Year Enacted:	**2018**
Expenditure Type:	**Credit**	Repeal/Expiration date:	**December 31, 2024**
Statutory Citation:	**Section 39-22-540, C.R.S.**	Revenue Impact (2020):	**$0**

Purpose given in statute or enacting legislation? **Yes**

Organ Donor Employer Credit

Background

The Organ Donor Employer Credit (Organ Donor Credit) is available to Colorado employers that provide an employee with a paid leave of absence for purposes of organ donation. The credit amount is equal to 35 percent of the employer's expenses incurred for paying the employee for up to 10 working days during their leave of absence and, if applicable, for the cost of any temporary replacement help during this period. For example, an employer who pays an employee $2,000 over the course of 10 days while they are taking a leave of absence for organ donation would receive a $700 credit.

In order for the employer's expenses to qualify, the employee's wages and benefits must be less than $80,000 during the income tax year in which the leave of absence is taken. The credit is not refundable but can be carried forward for up to 5 tax years after the first year in which the credit is claimed. The credit is available for Tax Years 2020 through 2024.

Technical Note:

Statute [Section 39-22-540(2)(b), C.R.S.] provides that the credit is not available for any period of time "during which [the organ donor] employee utilizes any annual leave or sick days that the employee has been given by the employer."

Statute states that the purpose of the credit is "to support living donors and the companies that employ them" [Section 39-22-540(1)(b), C.R.S.]. Between 2013 and 2022—the most recent 10-year period for which data is available from the Organ Procurement and Transplantation Network—an average of 136 Coloradans per year became living donors. The need for donated organs in the United States exceeds the number of organs available from deceased donors. For example, in 2022, a total of 167 Coloradans were removed from the national transplant waiting list because they died before receiving an organ or became too sick for an organ transplant to be successful. Organ donation from living donors can help address this need, and transplanted organs from living donors often work longer when compared to organs from deceased donors.

Under the National Organ Transplant Act of 1984, it is illegal to accept compensation or other items of value, like gifts or vacations, in exchange for donating an organ, although donors are permitted to receive reimbursement for some expenses related to their donation. The organ recipient's health insurance typically covers the medical expenses for the living donor, like medical testing, surgery, and post-operative care, but other expenses for organ donation may not be covered, such as lost wages, travel, lodging, and dependent care. Donors may be able to receive financial assistance for some of these costs from national programs; the transplant recipient or their family; the transplant hospital; or charities.

In order to determine whether the credit is meeting its purpose, we assessed the extent to which the credit is being used by employers with employees who have donated organs.

Evaluation Results

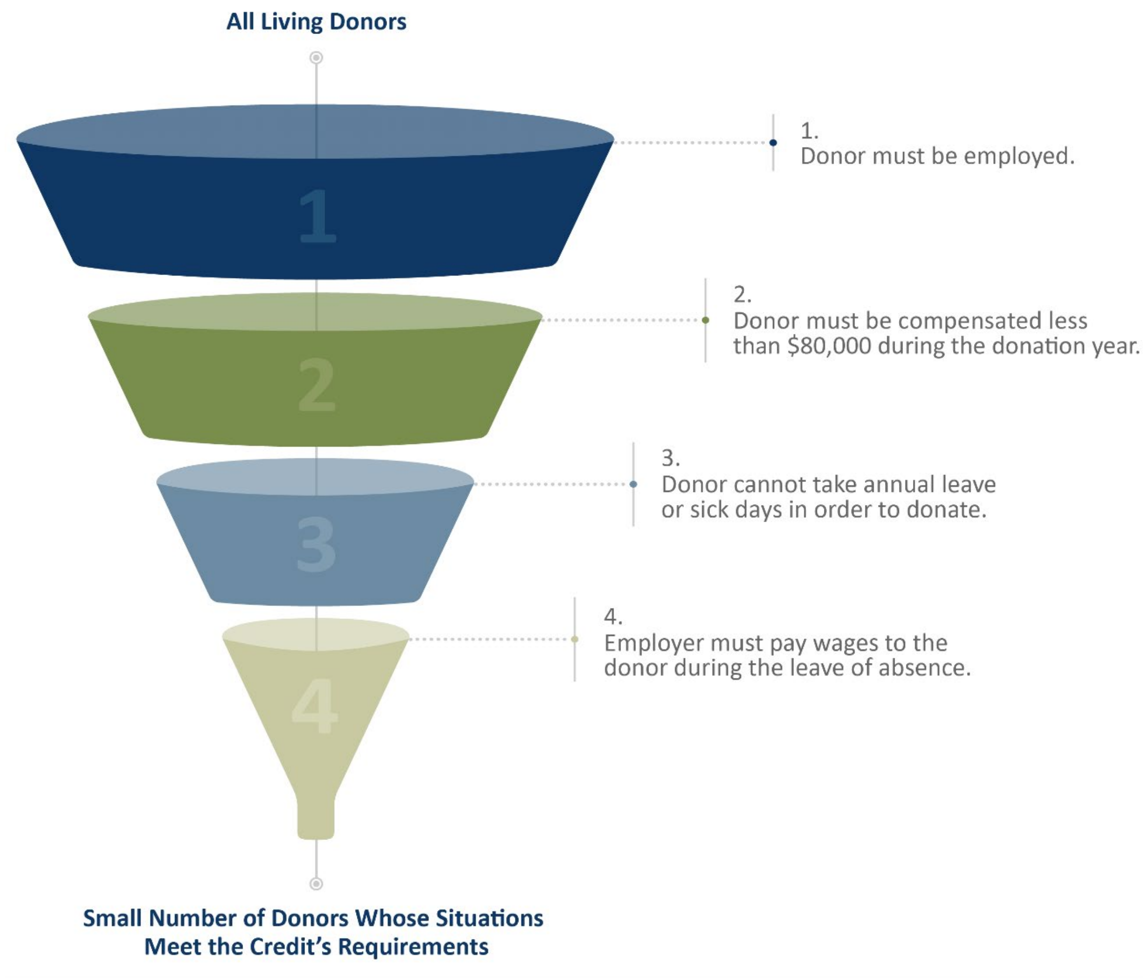
As of Tax Year 2020, the Organ Donor Credit did not support living donors or their employers because the credit was not being used. If the current version of the credit is extended beyond Tax Year 2024, it may provide some support to a small number of living donors and employers, but it is unlikely to make a significant impact because they may not be aware of the credit, and donors and employers must meet a number of specific requirements in order for the employer to qualify for the credit.

In Tax Year 2020—the only year for which data is available from the Department of Revenue—no employers claimed the credit for wages paid to living organ donors, despite the fact that 118 Coloradans became living donors that year. Although we were unable to determine definitively why none of the employers of these living donors claimed the credit, we identified a number of factors that may have contributed to the credit's low use.

Living donors and their employers may not be aware of the credit. We spoke to four Colorado professionals who work with living donors, and only one of them was aware of the credit. Since these individuals work with living donors on a regular basis and are aware of the challenges facing donors, including the need for time off from employment and the financial difficulties of forgoing wages, the fact that most of them are not aware of the credit suggests that the credit is not well known.

For those who are aware of the credit, statutory requirements likely significantly reduce the number of living donors and employers whose situations would qualify for the credit. The credit's requirements are summarized in Exhibit 1. As shown, the living donor must be employed; must be compensated less than $80,000 in the year of their donation; cannot take annual leave or sick days in order to donate; and must receive wages from their employer during their leave of absence.

Exhibit 1
Statutory Requirements Reduce the Number of Credit-Eligible Employers



Source: Office of the State Auditor analysis of Section 39-22-540(2)(b), (3)(a), and (4), C.R.S.

Although we were unable to determine the extent to which these requirements reduce the number of donors whose situations would qualify for the credit, each requirement is likely to prevent some donors from qualifying. For example, if employment patterns among organ donors are consistent with statewide employment patterns, only about 67 percent of the 160 Coloradans who donated an organ in 2022, or about 107 donors, would have been employed during the year. We do not know how many donors qualified under the credit's $80,000 compensation limit. Based on wage data from the U.S. Bureau of Labor Statistics, over half of the employed donors in 2022 may have earned less than $80,000 in wages. However, since the credit's compensation limit includes both wages and benefits, some of these donors may have received a total compensation of $80,000 or more and thus would not have met the credit's compensation requirement.

Finally, the third and fourth requirements may be particularly restrictive because employed donors are likely to fall into at least one of the following categories, none of which would be eligible for the credit:

- The employer provides paid leave to employees as a matter of standard policy. Examples may include sick days, annual leave, vacation time, or paid time off (PTO). If the living donor takes sick days or annual leave, their employer would not be eligible for the credit and, as discussed below, it is unclear whether other types of paid leave would qualify for the credit.

- The employer does not provide paid leave to employees but is subject to the Family Medical Leave Act (FMLA), which requires employers with at least 50 employees to provide job-protected time off for up to 12 work weeks. Since FMLA leave is unpaid, the living donor's employer would not be eligible for the credit.

- The living donor works for an employer that does not provide paid leave and is not subject to FMLA requirements. If the employer chooses to provide paid leave to the donor as a one-time benefit, this may qualify for the credit. However, the employer may also choose to hire someone else in the donor's position in order to avoid lost productivity. This category can also include living donors who are self-employed.

The restriction on taking annual leave or sick days in order to donate may cause confusion for employers about whether they qualify for the credit. Specifically, statute allows the credit under circumstances in which the employer "provides a paid leave of absence to an employee for the purpose of organ donation" but specifies that this "does not include a period during which [the] employee utilizes any annual leave or sick days that the employee has been given by the employer" [Section 39-22-540(2)(b), C.R.S.]. Notably, statute does not define the terms "annual leave" or "sick days" for purposes of the credit, and employers may use a variety of terms for and provide a number of different types of paid leave to employees for the employees' personal use, such as vacation time or PTO. As a result, employers may be confused about whether an employee can take only certain types of paid leave or, indeed, any type of paid leave that the employer provides to employees as a matter of standard policy. Additionally, employers that do not offer any type of standard paid leave to employees may not be clear as to whether a period of paid leave provided under a special arrangement for purposes of organ donation would be considered "sick days" under current statute. We did not have data to estimate what percentage of employees who donate an organ have one or more of the above types of leave. However, all of the stakeholders that we talked to about the requirement that the organ donor not take annual leave or sick days either expressed confusion about the requirement or thought that this requirement was likely too restrictive for the credit to apply to most donors' situations.

There may be other, more cost-effective options available to living donors and their employers. There are several national programs that provide reimbursement for lost wages and other donation-related expenses to living donors, including the National Living Donor Assistance

Center (NLDAC), which covers expenses up to $6,000, and Donor Shield, which is available through the National Kidney Registry and covers expenses up to $18,000. These programs have different eligibility requirements, but both reimburse living donors for all of the donor's lost wages and other expenses, including dependent care and travel expenses. In contrast, the credit only affects the donor's wages and does not account for any donation expenses; it also reimburses employers for their expenses rather than reimbursing donors. Additionally, these two reimbursement programs are both available for longer leaves of absence—up to 4 weeks and up to 6 weeks, respectively—than the credit, which is only available to employers for 10 working days, or 2 standard work weeks. Exhibit 2 shows the estimated amount of recovery time needed for living donors to return to normal activities after undergoing surgery to donate a kidney or part of a liver, which are the two organs that are typically donated by living donors. As shown, living donors may require a longer recovery period before returning to work than what the credit covers, depending on how physical their job is.

Exhibit 2
Estimated Amount of Time for Living Organ Donors to Return to Pre-Donation Activities

	Kidney Donors	Liver Donors
Return home from surgery and inpatient recovery	2-3 days	5 days
Drive a car	2 weeks	2-4 weeks
Lift heavy items	6-12 weeks	8-12 weeks

Source: Adapted from information provided by the Organ Procurement and Transplantation Network.

Employers may also have more cost-effective options than paying a donating employee's wages and claiming the credit. For example, large employers that are subject to FMLA could elect to provide the living donor with unpaid leave rather than paid leave, which would reduce the cost of the donor's leave of absence from 65 percent of the wages paid (with the credit) to $0. The living donor may also be able to receive short-term disability benefits during their leave of absence, which would provide them with a specified percentage of the unpaid wages without additional cost to the employer. Finally, depending on how quickly they can fill the donor's position, employers may also choose to let go of the donor and hire someone else instead.

Policy Consideration

If the General Assembly decides to extend the Organ Donor Credit beyond its current expiration date of December 31, 2024, the General Assembly could assess whether the credit is available to the intended population of living donors and, if necessary, consider making changes to statute. As discussed above, the credit had not been claimed by any employers as of Tax Year 2020, and we identified a number of factors that likely significantly reduce the number of living donors and employers whose situations would qualify for the credit, including the statutory employment, compensation, and paid leave requirements. Additionally, living donors and their employers may be confused about the credit's requirements regarding which types of paid leave are and are not eligible. The General Assembly may want to address one or more of these issues in order to improve the credit's effectiveness if it chooses to extend the credit to additional tax years.

The General Assembly could also consider providing a credit or deduction to living donors instead of to their employers. We identified 24 other states that offer a tax expenditure for expenses related to living organ donation. Of these, four states, similar to Colorado, allow a credit or deduction to employers of living donors, generally based on the wages paid to donors during the time spent away from work as a result of the donation. Additionally, 22 states provide a credit or deduction to living donors themselves, generally based on unreimbursed expenses related to the organ donation, such as lost wages, travel expenses, and lodging expenses. Most of these states allow for a deduction for up to $10,000 in unreimbursed expenses. However, a tax incentive provided directly to individuals may not provide timely financial support to living donors. Several stakeholders indicated that many potential donors do not have the savings necessary to pay their living expenses for several weeks while not making money, so a credit or deduction that they only receive once they file their taxes, which might be several months or even a year after their donation, might not address their immediate financial needs.

OFFICE OF THE STATE AUDITOR

State Auditor	**Kerri L. Hunter, CPA, CFE**
Deputy State Auditor	**Michelle Colin, JD**
Evaluation Managers	**Trey Standley, JD** **James Taurman, MPA**
Evaluation Supervisor	**Jacquelyn Combellick**

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