Legal Developments

A Round-Up of IRS Qualified Plan Relief Provisions Following Hurricane Sandy

In the wake of Hurricane Sandy, we take a look back at the relief provisions available for qualified plan sponsors and affected participants that have been issued by the Internal Revenue Service. To date, this includes several news releases and Announcement 2012-44, which are summarized below.

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The first step is to determine if you (or your participants) are an impacted taxpayer. Typically, this includes the following taxpayers, among others:

- Any individual whose principal residence is located in the covered disaster area;
- Any business entity whose principal place of business is located in the covered disaster area;
- Any individual whose principal residence, and any business entity whose principal place of business, is not located in the covered disaster area, but whose records necessary to meet a filing or paying deadline are maintained in the covered disaster area;
- Any estate or trust that has tax records necessary to meet a filing or paying deadline in a covered disaster area;
- Any individual, business entity, or sole proprietorship not located in the covered disaster area, but whose records necessary to meet a deadline for a specified act are located in the covered disaster area; and Any other person determined by the IRS to be affected by a Presidentially-declared disaster.

[*See* Treasury Reg. § 301.7508A-1(d)(1)]

The covered disaster area for Hurricane Sandy relief includes such impacted taxpayers who are located in one of the following counties:

- **Connecticut**: Fairfield, Middlesex, New Haven, and New London Counties, and the Mashantucket Pequot Tribal Nation and Mohegan Tribal Nation located within New London County;
- **New Jersey**: Atlantic, Bergen, Burlington, Camden, Cape May, Cumberland, Essex, Gloucester, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Salem, Somerset, Sussex, Union, and Warren counties;
- **New York**: Bronx, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Sullivan, Suffolk, Ulster, and Westchester counties;
- **Rhode Island**: Newport and Washington counties.

Extended Deadlines

Next, we look at the qualified plan-related relief provided to affected taxpayers. Code Section 7508A, and the regulations thereto, give the Service the authority to postpone the deadlines for up to a year for specified acts otherwise required to be met under the Code for taxpayers affected by a Presidentially-declared disaster. This includes acts by a pension or other employee benefit plan or by a plan sponsor, administrator, participant, beneficiary, or other person. Moreover, Revenue Procedure 2007-56 [2007-34 IRB 388 (8/20/07)] expands the list of acts that the Service has determined may be postponed under Code Section 7508A.

For Hurricane Sandy, the Service has issued several news releases that activate this benefit-related relief for the qualified plan community. [IR-2012-83, NY-2012-47, NJ-2012-47, CT-2012-48, and

RI-2012-30. *See also http://www.irs.gov/uac/Newsroom/IRS-Provides-Tax-Relief-to-Victims-of-Hurricane-Sandy;-Return-Filing-and-Tax-Payment-Deadline-Extended-to-Feb.-1,-2013*.]

Specifically, these new releases extend the deadlines for filing tax returns and submitting tax payments that would otherwise be required to be met on or after October 26-27, 2012 (depending on the location) for taxpayers located in the areas struck by Hurricane Sandy until February 1, 2013. Moreover, they extend the deadlines for all of the employee benefit-related acts listed in Treasury Regulation Section 301.7508A-1(c)(1) and Revenue Procedure 2007-56 (see Section 8) that were otherwise due on or after October 26-27 (depending on the location) until February 1, 2013. Regarding qualified plans (and IRAs), this includes the deadline for:

- Making contributions to a qualified retirement plan;
- Returning contributions made to an IRA to a taxpayer;
- Recharacterizing Roth IRA contributions;
- Making rollovers to a tax-qualified retirement plan, a tax-deferred annuity under Code Sections 403(a) and 403(b), and an IRA;
- Plan loan repayments;
- 72(t) relief for (i) distributions from a qualified retirement plan as part of a series of substantially equal payments to be made at least annually, (ii) certain first-time home purchases for IRA distributions, and (iii) repayment for distributions from a retirement plan to an individual called to active duty;
- Contribution to an IRA;
- Required minimum distribution under Code Section 401(a)(9);
- ESOP investment/diversification election;
- Distribution of excess deferrals;
- Remedial amendment period;
- Distribution of excess contribution and excess aggregate contributions, and related excise tax;
- Indirect rollover period;
- Timing of deductible contributions;
- Distribution of ESOP dividends;
- Distribution of nondeductible contributions in order to avoid 10 percent penalty under Code Section 4972;
- ESOP put options/employer repurchase requirements, ESOP distributions, and qualified replacement property;
- Filing Forms 990, 5498, and 5500; and
- Correction period for self-correction of operational failures, and special provisions for certain transferred assets.

Hardship and Loan Relief Provisions

Lastly, Announcement 2012-44 provides important hardship (or emergency withdrawals) and loan relief for tax-favored retirement plans, but the relief does not extend to increase the amount of the eligible distribution, or to avoid any of the tax consequences related to such distributions.

The relief, which is optional by the Plan sponsor, is summarized below:

Types of Plans. 401(a), 403(a), 403(b), and governmental eligible deferred compensation plans described in Code Section 457(b). However, defined benefit and money purchase plans may permit such in-service hardship distributions only if the amounts are withdrawn from a separate account in the plan, if any, containing employee contributions or from rollover contributions that are separately accounted for under Rev. Rul. 2004-12.

Who Is Eligible. Employees and former employees whose principal residence or place of employment on October 26, 2012, was located in one of the counties or Tribal Nations in Connecticut, New Jersey, New York, and Rhode Island that have been or are later designated as federal disaster areas by the President (see list above). In addition, a participant is eligible for a loan or hardship distribution if his or her spouse, dependent, or lineal ascendants or descendants had a principal residence or place of employment on October 26, 2012, within the covered disaster area.

Amount of Distribution. Any distributions paid under this relief are limited to amounts that could otherwise be distributed as a loan or hardship (or emergency) distribution under the Code and regulations. Thus, for a loan, the amount must comply with the requirements set forth in Code Section 72(p) (e.g., not more than $50,000). For a hardship distribution, only funds otherwise available for a hardship distribution can be distributed (e.g., QNEC and QMACs are not eligible), but the funds can be used for any hardship arising from Hurricane Sandy (i.e., not limited to medical, education, foreclosure, etc., for safe harbor loan provisions).

Timing of Distribution. The loan or hardship must be made on or after October 26, 2012, and no later than February 1, 2013.

Ordering of Distributions. Typically, loans and other available plan distributions are required to

be taken before a hardship distribution. Under the guidance, it is unclear whether a plan sponsor or plan administrator must consider whether a participant can take a plan loan (or other plan distributions) before a hardship distribution can be made. But the IRS issued informal "Frequently Asked Questions" on its Web site on November 30, 2012, that provides some helpful relief:

> **3. Is a plan participant required to obtain a plan loan before requesting a Sandy-related hardship distribution from a qualified plan?**
>
> It depends on plan terms. A plan is not required to add loan provisions in order to make Sandy-related hardship distributions. Generally, a participant must take available plan loans before being eligible for a hardship distribution of elective deferrals from a 401(k) plan, but if requiring such loans would be impractical under the circumstances, Sandy-related hardship distributions may be made from the plan between October 26, 2012, and February 1, 2013, without requiring such loans. *http://www.irs.gov/Retirement-Plans/Hurricane-Sandy-Relief-FAQs-Retirement-Plan-Loans-&-Distributions*

Flexible Administrative Guidelines. To ease administrative burdens, the Announcement allows plan administrators to rely on representations from affected employees or former employees as to the need for and amount of a hardship distribution, unless the plan administrator has actual knowledge to the contrary. Although plan administrators may suspend their normal procedural requirements (e.g., supporting documentation) during this relief period, they must make a good faith effort to comply with those requirements. Further, if required documentation is not obtained at the time of the distribution, the plan administrator must make a reasonable attempt to obtain such documentation as soon as practicable thereafter. The Announcement provides an example as follows:

> If spousal consent is required for a plan loan or distribution and the plan terms require production of a death certificate if the employee claims his or her spouse is deceased, the plan will not be disqualified for failure to operate in accordance with its terms if it makes a loan or distribution to [an eligible recipient] in the absence of a death certificate if it is reasonable to believe, under the circumstances, that the spouse is deceased, the loan or distribution is made no later than February 1, 2013, and the plan administrator makes reasonable efforts to obtain the death certificate as soon as practicable.

The Announcement states that plans are not required to suspend contributions for up to six months for participants receiving a hardship distribution.

Plan Amendment Deadline. Plans that do not currently have loans or hardship provisions have until the end of the 2013 plan year to adopt a plan amendment to institute them. Presumably, this same deadline applies for plan sponsors that want to clarify the plan's existing loan or hardship provisions to reflect the steps taken to provide Sandy relief in accordance with Announcement 2012-44. However, importantly, the IRS FAQs clarified that a plan that currently provides for loan and hardship distributions does not need to adopt any amendment in order to make Sandy-related loans or distributions under Announcement 2012-44. And although the guidance is silent on the impact of safe harbor 401(k) plans, presumably these plans can also provide the relief, despite the fact that these plans are generally precluded from making mid-year amendments.

Reporting and Withholding. No special rules should apply to report the hardship distribution, or a deemed distribution of the loan, and no special distribution codes are applicable on Form 1099-R. For example, the 10 percent tax for distributions prior to age 59½ shall continue to apply, along with applicable federal income tax withholding. However, Congress is well aware that more generous relief was provided as part of Katrina legislation, which could be similarly enacted for Sandy in the "lame duck" session. Such relief would liberalize the statutory rules for pension distributions and/or plan loans. For example, the legislation could raise the loan limits, waive the 10 percent penalty tax, and relax tax withholding requirements. Whether Congress can squeeze this in while it works on avoiding the "fiscal cliff" and some compromise on the Bush-era tax cuts remains to be seen.

Conclusion

Plan sponsors looking for Hurricane Sandy relief for themselves or their participants should carefully consider the relief provided in Revenue Procedure 2007-56 (and related news releases) regarding the extended February 1, 2013 deadline for a number of employee-benefit related acts, and Announcement 2012-44 for qualified plan distributions and loans (and be on the lookout for any additional legislative relief). ■