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Federal Agencies Provide Pension and Other Relief in the Wake of Hurricane Harvey

This week, the IRS, the DOL, and the PBGC all released helpful guidance intended to assist the many persons and organizations affected by Hurricane Harvey. For example, IRS Announcement 2017-11 (Aug. 30, 2017) provides liberal rules for loans and hardship distributions from tax-favored employer plans to taxpayers affected by Hurricane Harvey. This guidance generally mirrors helpful disaster guidance issued by the IRS in the past, most recently with Hurricane Matthew. We summarize the new guidance below.

In addition to the retirement plan relief described below, the IRS issued a news release which extends the deadlines for filing tax returns and submitting tax payments that would otherwise be required on or after August 23, 2017 for taxpayers located in the areas impacted by Hurricane Harvey (see IRS News Release TX-2017-09 (8/29/17)). This release extends certain tax filing deadlines until January 31, 2018, including individual income tax, excise and employment tax returns, and filing of the Form 990 for tax-exempt organizations. Moreover, the effect of release is to extend a host of other benefits-related deadlines, listed in Section 8 of Rev. Proc. 2007-56 until January 31, 2018, which includes:

- Filing Form 5500s;
- plan loan repayments;
- 83(b) elections;
- certain 72(t) relief - 10% early withdrawal tax
- cafeteria plan elections under Code section 125;
- written requirement for establishing preestablished performance goals under Code section 162(m);
- timing of indirect rollovers;
- required minimum distributions under Code section 401(a)(9);
- distribution of excess deferrals, and corrective distributions for excess contributions/excess aggregate contributions;
- remedial amendment period;
- distribution of nondeductible contributions to avoid the 10 percent penalty under Code section 4972.

It is important to note that taxpayers considered to be "affected taxpayers" eligible for the postponement of time to file returns, pay taxes and perform other time-sensitive acts are those taxpayers listed in Treas. Reg. § 301.7508A-1(d)(1), and include individuals who live, and businesses whose principal place of business is located, in the covered disaster area. Taxpayers not in the covered disaster area, but whose records necessary to meet a deadline listed in Treas. Reg. § 301.7508A-1(c) are in the covered disaster area, are also entitled to relief.

We note that the following Texas counties have been declared federal disaster areas: Aransas, Bee, Brazoria, Calhoun, Chambers, Colorado, Fayette, Fort Bend, Galveston, Goliad, Hardin, Harris, Jackson, Jasper, Jefferson, Kleberg, Liberty, Matagorda, Montgomery, Newton, Nueces, Orange, Refugio, Sabine, San Jacinto, San Patricio, Victoria, Waller and Wharton.

Scope of IRS Relief and Eligible Plans – Announcement 2017-11 permits certain hardship or emergency withdrawals and loans from tax-favored retirement plans to employees or former employees whose principal residence or place of employment on August 23, 2017 was located in one of the counties of Texas that have been or are later designated as federal disaster areas by the President. A loan or hardship distribution made in accordance with this guidance will only qualify for relief if it is made on or after August 23, 2017, and no later than January 31, 2018. Further, 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. This guidance covers Internal Revenue Code (“Code”) section 401(k) and 403(b) plans as well as governmental eligible deferred compensation plans described in Code section 457(b). Defined benefit and money purchase plans may only permit such in-service hardship distributions 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.

It is important to note that, in addition to hardship distributions and loans to affected participants, the Announcement provides potential relief for Harvey-related hardships of lineal ascendants or descendants of plan participants as well as spouses and dependents. In other words, if the plan allows it, a plan participant who lives in another part of the country can assist a son, daughter, parent, grandparent or other dependent who lived or worked in the affected areas by taking out a plan loan or hardship withdrawal under the guidance.

Plan Amendment Rules Relaxed – Plans are not required to take advantage of this guidance and may adopt some of the liberalizations, and not others. Under the Announcement, plans may make loans to affected employees or former employees whether or not the plan documents currently allow for such loans to be made, so long as the requirements of Code section 72(p) are met. Similarly, the plan does not currently need to provide for hardship distributions for affected employees or former employees to receive a hardship distribution. However, if participants are permitted to take loans or hardship distributions in accordance with this guidance, plans that do not currently provide for loans or hardship distributions must be amended to do so by the end of the 2018 plan year.

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 the following example –

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 January 31, 2018, 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 6 months for participants receiving a hardship distribution. However, it is unclear whether a plan sponsor or plan administrator must consider whether a participant can take a plan loan before a hardship distribution can be made (consideration of whether a loan can be taken is another “safe harbor” condition under the 401(k) regulations). Prior informal discussions with Treasury officials indicated that if a plan allows loans to participants, the plan administrator must make the participant take a loan before a hardship distribution can be made. If the plan does not allow loans, however, the plan administrator does not appear to be required to determine whether other sources may satisfy the need, and the plan administrator may make a hardship distribution pursuant to the good-faith relief under the Announcement. Later guidance has not clarified this issue.

DOL Relief – The IRS Announcement expressly provides that the Department of Labor has indicated that it will not treat any person as having violated the provisions of Title I of ERISA solely because the person complied with the IRS guidance. In addition, the DOL has released its own guidance on certain issues under Title I of ERISA – along with a series of FAQs directed primarily to plan participants in affected areas (<https://www.dol.gov/newsroom/releases/ebsa/ebsa20170830>). The DOL compliance guidance addresses matters such as remitting participant contributions and loan payments, blackout notices, and group health plan deadlines. In general, the DOL will not take enforcement action if there is a temporary delay, but expects plan administrators to act “reasonably, prudently and in the interest of employees” in carrying out their responsibilities in these areas.

PBGC Relief – On August 29, the PBGC issued Disaster Relief 17-09 to address matters within its purview. The announcement provides a blanket extension to January 31, 2018 for affected persons to make PBGC premium filings due during the period August 23, 2017 and January 31, 2018, for certain single-employer plan termination filings, and for reportable “post-event” notices.

On the other hand, a “case-by-case” approach generally applies to matters such as filings of ERISA 4010 notices/information, for reportable events where advance notice is not waived under PBGC’s reportable event rules, and for Form 200 (large missed contribution) filings.

Tax-Free Qualified Disaster Relief Payments - Employers and other entities may provide direct tax-free relief to employees and individuals affected by a Presidentially declared disaster by making “qualified disaster relief payments” to such affected employees or individuals. Specifically, Code section 139 provides that qualified disaster relief payments are not taxable to the recipient. In addition, the payments are not subject to withholding or employment taxes. Moreover, such payments made by an employer or related entity are deductible despite the excludability of the payments by the recipients. This relief, however, does not include payments for any expenses compensated by insurance or otherwise.

A “qualified disaster relief payment” generally includes any amount paid to an individual:

- to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a “qualified disaster”;
- to reimburse or pay reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence (including a rented residence) or repair or replacement of its contents to the extent that the need for that repair, rehabilitation, or replacement results from a “qualified disaster”;
- by a person who provides or sells transportation as a common carrier because of the death or personal physical injuries arising from a “qualified disaster”; or

- if the amount is paid by a federal, state, or local government, or an agency or instrumentality of those governments, in connection with a “qualified disaster” in order to promote the general welfare.

A “qualified disaster” means, among others, a Presidentially declared disaster (as defined under Code section 1033(h)(3)).

Employer Leave-Based Donation Programs - The Service recently issued Notice 2017-48 (9/5/2017), as with other hurricane, allowing employers to adopt leave-based donation programs. Specifically, the notice provides that amounts an employee elects to forego which are otherwise payable as vacation, sick, or personal leave and which are subsequently paid to a charitable organization involved in relief efforts for victims of Hurricane/Tropical Storm Harvey will not be taxable to the employee. Employees making the donations will not be able to claim a charitable deduction on their tax return. Employers may take a deduction for the contributions under Code section 162 (i.e., the limitations on corporate charitable donations under Code section 170 do not apply). The Notice extends this favorable tax treatment to donations made before January 1, 2019.

Stay tuned for additional guidance from the Agencies and perhaps Congress.