Employee Benefits Corner

IRS Loan and Hardship Distribution Relief in the Wake of Hurricanes Irma and Harvey

By David N. Levine and Elizabeth Thomas Dold

In the past, some have complained that the IRS does not move fast enough when a natural disaster strikes. Now, the IRS often leads the pack in providing retirement plan relief when a natural disaster strikes. Most recently, this speedy action was reflected in guidance that the IRS, along with the Department of Labor and Pension Benefit Guaranty Corporation, that provides a relatively comprehensive package of relief following Hurricanes Irma and Harvey. While some additional relief, similar to that provided in the Katrina Emergency Tax Relief Act of 2005, might also be provided by Congress from time to time, the IRS now clearly has a standard game plan ready when disaster strikes.[1]

This agency relief is welcomed relief for plan sponsors, recordkeepers and participants. This relief includes extending a number of plan-related deadlines (including funding deadlines) through January 31, 2018 (including Form 5500 filings), providing liberal loan and hardship distributions through such period, and providing tax-free leave donation programs. Below is a summary of the guidance on the rules for loan and hardship distributions from qualified plans.

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Hurricane Harvey

IRS Announcement 2017-11[2] provides liberal rules for loans and hardship distributions from tax-favored employer plans to taxpayers affected by Hurricane Harvey during the period of August 23, 2017, through January 31, 2018. This guidance largely tracks prior disaster guidance issued by the IRS and is purely optional.

Plans Impacted

401(k) plans, 403(b) plans, and governmental 457(b) plans. (Defined benefit plans and money purchase pension plans can be impacted if they provide for loans or otherwise maintain a separate account that permits hardship distributions.)

Participants Impacted

The following participants are eligible for this relief:

- 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 ("Impacted Participants");
- Lineal ascendants or descendants of Impacted Participants; and
- Spouses and dependents of such Impacted Participants.

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.

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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.

Relief Granted

Hardship or emergency withdrawals and loans from tax-favored retirement plans can be made on or after August 23, 2017, and no later than January 31, 2018, with relaxed procedures. These changes include the following:

- Plan administrators can 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.
- The hardship request can be any hardship reason of the participant, it does not need to meet one of the listed "safe harbor" reasons. For example, a distribution for food and shelter is sufficient.
- Plan administrators may suspend their normal procedural requirements (*e.g.,* supporting documentation or summary documentation) during this relief period, provided a good faith diligent effort under the circumstances is made to comply, and as soon as practicable thereafter reasonable efforts are made to obtain such documentation.
  - For 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 Impacted Participant 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.
- Plan administrators are not required to suspend contributions for up to six months for participants receiving these hardship distributions.

Note that this does not otherwise expand the amount of the loan or hardship that could otherwise be paid under the Code and regulations thereto, and the spousal consent rules (if applicable) continue to apply. Nor does this guidance provide any tax relief for a hardship distribution, which is generally taxable in the year of distribution, and is subject to an additional 10% early withdrawal tax. Congressional relief would be needed for such additional relief.

Plan Amendment Required

If the Plan document does not currently permit loans or hardship distributions (or emergency withdrawals for governmental 457(b) plans), then a plan amendment to add such provisions will be needed by the end of the 2018 plan year.

DOL Relief

This guidance 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 this relief.

Hurricane Irma

IRS Announcement 2017-13[3] provides liberal rules for loans and hardship distributions from tax-favored employer plans to taxpayers affected by Hurricane Irma during the period of September 4, 2017, through January

31, 2018. This guidance largely tracks prior disaster guidance issued by the IRS with Hurricane Harvey above and is purely optional.

Plans Impacted

Same as above.

Participants Impacted

The following participants are eligible for this relief:

- Whose principal residence or place of employment on September 4, 2017, was located in one of the counties of Florida that have been or are later designated as federal disaster areas by the President ("Impacted Participants");
- Lineal ascendants or descendants of Impacted Participants; and
- Spouses and dependents of such Impacted Participants.

The following Florida counties have been declared federal disaster areas: Alachua, Baker, Bradford, Brevard, Broward, Charlotte, Citrus, Clay, Collier, Columbia, DeSoto, Duval, Flagler, Gilchrist, Glades, Hardee, Hendry, Hernando, Highlands, Hillsborough, Indian River, Lake, Lee, Levy, Manatee, Marion, Martin, Miami-Dade, Monroe, Nassau, Okeechobee, Orange, Osceola, Palm Beach, Pasco, Pinellas, Polk, Putnam, Sarasota, Seminole, St. Johns, St. Lucie, Sumter, Suwannee, Union, and Volusia.

Also, the following municipalities of Puerto Rico (but replace September 4 with September 5, 2017): Canovanas (Municipio), Culebra (Municipio), Loiza (Municipio), and Vieques (Municipio). And the islands of St. John and St. Thomas (but replace September 4, 2017, with September 6, 2017).

The areas identified for individual assistance by FEMA can be found on FEMA's website at *www.fema.gov/disasters*. Note that the reference herein to September 4, 2014, is replaced with the beginning of the incident period.

Relief Granted

Hardship or emergency withdrawals and loans from tax-favored retirement plans can be made on or after September 4, 2017, and no later than January 31, 2018, with relaxed procedures. These changes include the same changes as noted above for Hurricane Harvey.

Plan Amendment Required

Same as above.

DOL Relief

Same as above.

Action Steps

For plan sponsors that have impacted participants from these storms, consider relaxing your loan and hardship distribution procedures to help those in need. This relief is available through January 31, 2018.

ENDNOTES

1 As of the time this column was drafted, legislation has been introduced to provide some hurricane relief, and similar relief described herein was extended to Hurricane Maria.

2 Announcement 2017-11, IRB 2017-39 (Aug. 30, 2017).

3 Announcement 2017-13, IRB 2017-40 (Sept. 12, 2017).

