

Reproduced with permission from Pension & Benefits Daily, 189 PBD, 10/2/17. Copyright © 2017 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Plan Administration

View From McDermott: Hurricane Survival Guide for Employee Benefit Plans and Employers

By DIANE M. MORGENTHALER AND RICK STEPANOVIC

According to U.S. News & World Report, estimates for the cost of Hurricane Harvey's damage have come in as high as \$190 billion, and damage estimates for Hurricane Irma are still rolling in, but range up to \$100 billion. To assist taxpayers affected by these devastating storms, the Internal Revenue Service (IRS), Department of Labor (DOL), and Pension Benefit Guaranty Corporation (PBGC) have granted multiple forms of relief to taxpayers impacted by Hurricane Harvey, Hurricane Irma, and other disasters enumerated by the Federal Emergency Management Agency (FEMA), which are listed at this link: <https://www.fema.gov/disasters>.

This new disaster relief affects health plans, retirement plans, and employers. The disaster relief from these governmental agencies includes the following.

- The IRS extended the deadline for certain disaster-area plan sponsors to file their annual returns for employee benefit plans on Form 5500.

Diane M. Morgenthaler is a partner and member of the leadership team in the employee benefits practice group of McDermott Will & Emery. Her practice focuses on all elements relating to the strategic design and legal compliance of employee benefit plans, with a practice emphasis on retirement plans. She is a frequent speaker at conferences sponsored by the American Bar Association and is a nationally recognized and ranked attorney by both Chambers U.S.A. and The Legal 500. She is based in the firm's Chicago office.

Rick Stepanovic is an associate attorney in the employee benefits practice group of McDermott Will & Emery. Rick is based in the firm's Chicago office.

- The DOL also relaxed its enforcement of certain contribution and election deadlines for disaster-area health plans and defined contribution plans.

- The IRS relaxed the defined contribution plan rules for loans and in-service hardship distributions for certain disaster-area participants.

- The PBGC extended minimum contributions and premium payments for disaster-area defined benefit plans, but some PBGC filings will not be extended automatically.

- The IRS did not extend the deadlines for Form W-2 and employment tax deposits, but the IRS will allow employees to make tax-free leave donations for disaster relief and allow employers to make tax-free disaster relief payments to employees.

Hurricane Rules For All Employee Benefit Plans

As part of the flurry of hurricane relief, the IRS postponed the deadline for any Form 5500 previously scheduled to be filed between August 23, 2017 and January 31, 2018 by a Texas plan sponsor affected by Hurricane Harvey, and between September 4, 2017 and January 31, 2018 by a Florida plan sponsor affected by Hurricane Irma. Other IRS relief dates apply to plan sponsors affected by Hurricane Irma in Georgia, Puerto Rico, and the Virgin Islands. In all cases, the new Form 5500 deadline is January 31, 2018. This relief generally covers plan sponsors whose principal place of business is located in a listed disaster area listed by FEMA. A business outside the covered area, but whose needed records for Form 5500 filings are in the covered area, are also entitled to the extended deadline. The Form 5500 extension applies automatically to plan sponsors with an IRS address of record in a listed disaster area.

Hurricane Rules For Group Health Plans

As a result of the disasters, participants and beneficiaries in group health plans may encounter difficulties in meeting certain deadlines for filing benefit claims, completing change in status elections, forwarding health care plan payments, and electing continuing health care coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). For affected participants and beneficiaries in FEMA areas, the DOL indicated that group health plans should make reasonable accommodations to prevent the loss of health coverage and to minimize the possibility of individuals losing benefits because of a failure to comply with established statutory and regulatory timeframes. For instance, after a qualifying event, a qualifying beneficiary normally has 60 days to elect COBRA health coverage. If the 60-day COBRA deadline occurs on August 30, 2017 and a qualifying beneficiary affected by Hurricane Harvey returns an election of COBRA coverage on September 15, 2017 the group health plan could consider this COBRA election as timely made.

Hurricane Rules for Defined Contribution Plans

In addition to relaxed rules for group health plans, the DOL indicated relaxed enforcement of certain rules for defined contribution plans that involve payroll contributions. Generally, retirement contributions withheld from wages by an employer constitute plan assets. These plan assets must be forwarded to a defined contribution plan on the earliest date such amounts can reasonably be segregated from an employer's general assets, but no later than the fifteenth business day of the month following the month in which contributions were withheld from wages. Also, the DOL will allow a delay in delivery of blackout notices to plan participants and beneficiaries, where a defined contribution plan must provide 30-day advance notice of any suspension or limitation on distributions, loans, or investment directions of more than three days. For both the delayed payroll contributions and blackout notices, the DOL will provide a reasonable accommodation for a failure to comply with the established regulatory timeframes.

Likewise, the IRS signaled its relaxed enforcement of certain tax deadlines relating to defined contribution plans for taxpayers located in FEMA disaster areas. Those deadlines include timing relief for indirect rollovers, early withdrawal taxes, minimum distributions, return of excess deferrals and contributions, and distribution of nondeductible contributions.

The IRS also provided relaxed rules for disaster-area participants in defined contribution plans covered by Code sections 401(k), 403(a) or (b), and 457(b) with respect to available plan loans and hardship distributions. If the eligible defined contribution plan currently does not provide for either loans or hardship distributions, then to utilize the IRS relief, the plan sponsor must amend its plan to permit such loans or hardship distributions no later than the end of the first plan year beginning after December 31, 2017 (an amendment deadline of December 31, 2018 for a calendar-year plan).

Hardship Distributions

The IRS has relaxed the rules for a hurricane hardship withdrawal to include an employment location and

to cover certain family members who are not considered tax code dependents. Specifically, to qualify for the relief, the plan participant either must have: (i) a principal residence on August 23, 2017 (for Hurricane Harvey) or September 4, 2017 (for Hurricane Irma) in one of the counties identified for individual assistance by FEMA, (ii) a place of employment located in one of these counties on this date, or (iii) a lineal ascendant or descendant, dependent, or spouse with a principal residence or place of employment in one of these counties on that date. For a qualified disaster-area participant, an eligible defined contribution plan may make any type of hardship distribution (not just the types listed in IRS regulations), based on the participant's representations as to the required hardship amount, unless the plan administrator has actual knowledge to the contrary. The IRS guidance appears to expand permitted reasons for a hardship distribution, such as a hardship distribution for amounts to purchase necessities as a result of the storm, as long as the distribution is not in excess of the amount required to satisfy the need. The IRS guidance also permits plan administrators to suspend normal hardship substantiation and documentation requirements, provided that the plan makes a good-faith and diligent effort under the circumstances to comply with required plan hardship documentation procedures as soon as possible. To qualify for this relief, the hardship distribution must be made on or after August 23, 2017 for Hurricane Harvey, or for Hurricane Irma, on or after September 4, 2017 for Florida, on or after September 5, 2017 for Puerto Rico and the Virgin Islands, and on or after September 7, 2017 for Georgia. In all cases, the plan must process the hardship withdrawal no later than January 31, 2018.

In addition, the defined contribution plan does not need to impose the normal post-distribution contribution restrictions. For example, the participant may continue to make pre-tax elective deferrals under Code section 401(k) without a 6-month contribution delay. If an eligible defined contribution plan makes a hardship distribution to a qualified disaster-area participant, the normal tax rules still apply: (i) the amount of the hardship distribution is still limited to the maximum amount that would be available for hardship distributions under the plan, the Code, and regulations, (ii) the hardship distribution is still included in taxable income and generally subject to the 10% early distribution tax under Code section 72(t), and (iii) the hardship distribution cannot include amounts from a qualified nonelective contribution (QNEC) account or a qualified matching contribution (QMAC) account. However, new legislation is pending in the U.S. House of Representatives that would permit participants impacted by the hurricanes to receive a hardship distribution without paying the 10% early distribution tax.

Loans

An eligible defined contribution plan also may loan money to a qualified disaster-area participant if the plan makes a good-faith diligent effort under the circumstances to comply with required plan loan documentation procedures. For example, if a spousal consent is required for a plan loan, the plan will not be disqualified for making a plan loan without a death certificate if it is reasonable to believe under the circumstances that the spouse is deceased. Other than relaxed documentation, the normal Code requirements for plan loans still apply,

and as soon as possible, the plan administrator must try to assemble any missing loan documentation.

Hurricane Rules for Defined Benefit Plans

While the IRS and DOL addressed relief for defined contribution plans, the PBGC provided relief for defined benefit plans. Specifically, the PBGC extended premium payments and related filings for defined benefit plans. For pension plan sponsors affected by Hurricane Harvey or Hurricane Irma, the PBGC extended any premium payments and corresponding filings required by a single or multiemployer pension plan between August 23, 2017 and January 31, 2018 for Texas plan sponsors affected by Hurricane Harvey, and between September 4, 2017 and January 31, 2018 for Florida plan sponsors affected by Hurricane Irma. Although other beginning extension dates apply for Georgia, Puerto Rico, and Virgin Island plan sponsors affected by Hurricane Irma, all extensions end on January 31, 2018.

In addition, the PBGC also extended deadlines for minimum contributions due by a single-employer “affected plan” following the disasters until January 31, 2018. A defined benefit plan is an affected plan if any of the below are located in a FEMA disaster area due to Hurricane Harvey or Hurricane Irma.

- The principal place of business of the employer that maintains the plan;
- The principal place of business of employers that employ more than 50% of the active participants;
- The relevant office of the plan or the plan administrator;
- The relevant office of the primary record keeper serving the plan; or
- The office of the enrolled actuary or other advisor, who was previously retained by the plan or employer to make funding determinations with a due date that falls between August 23, 2017 and January 31, 2018 for Texas counties affected by Hurricane Harvey, or between September 4, 2017 and January 31, 2018 for Florida counties affected by Hurricane Irma. Other relief dates apply to plan sponsors affected by Hurricane Irma in Georgia, Puerto Rico, and the Virgin Islands. In addition to certain delayed minimum contributions, the PBGC delayed certain required notices by affected plans, including participant notices of benefit restrictions, post-event reportable event notices, standard or distress termination notices, and post-distribution certifications. Moreover, the PBGC delayed the timetable to apply for a minimum funding waiver and to make certain elections relating for the affected plan’s prefunding balance or funding standard carryover balance. For an affected plan, all of these notices, waivers, and elections are delayed until January 31, 2018.

However, the PBGC did not grant disaster relief for many of its filings. For example, the PBGC will not provide relief for certain filings where there may be a high risk of substantial harm to participants or the PBGC insurance program, such as notices of large missed contributions under section 302(f) of Employee Retirement Income Security Act of 1974 (ERISA), advance notice of reportable events under ERISA section 4043, and annual financial and actuarial information from certain

controlled groups under ERISA section 4010. If a disaster-area plan administrator or plan sponsor is required to provide annual financial and actuarial information under ERISA section 4010 for a large underfunding, missed contributions, or funding waiver, then the PBGC will consider reporting relief only on a case-by-case basis.

Hurricane Rules for Employers

With the flurry of new hurricane guidance for employee benefit plans comes new hurricane guidance for employers, too. That new guidance involves Form W-2 and employment tax reporting as well as providing employers and employees with flexibility to provide tax-free disaster relief payments.

Employer Reporting

Although the IRS has extended some taxpayer deadlines, the IRS relief did not extend to required information reported by employers on Form W-2 or to employment tax deposits. However, the IRS is waiving late penalties for employment tax deposits due on or after August 23, 2017 and before September 7, 2017 for Texas employers affected by Hurricane Harvey, and employment tax deposits due on or after September 4, 2017 and before September 19, 2017 for Florida employers affected by Hurricane Irma, as long as these tax deposits are made by September 7, 2017 by affected Texas Hurricane Harvey employers, and by September 19, 2017 by affected Florida Hurricane Irma employers. Again, other relief dates apply for disaster-area employers in other states and territories.

Employer Relief Payments to Employees

Even though the IRS has provided little relief for employer reporting and employment tax deadlines, Code section 139 does allow an employer to provide tax-free disaster relief to its employees if the payments constitute “qualified disaster relief payments.” To qualify for the tax-free treatment, the qualified disaster relief payment must be paid to, or for the benefit of, an individual and be used for one of the following.

- To reimburse or pay reasonable and necessary personal, family, living or funeral expenses incurred as a result of a qualified disaster; or
- To reimburse or pay reasonable and necessary expenses incurred for the repair or rehabilitation of a rented or owned personal residence (or to repair, rehabilitate or replace its contents) damaged by a qualified disaster.

Of importance, qualified disaster relief payments exclude any income replacement payments, such as payments of lost wages, lost business income, or unemployment benefits. In addition, although an employee is not required to substantiate that the qualified disaster relief payments are related to a qualified disaster, the employer may exclude such payments from the employee’s income only to the extent that insurance does not otherwise compensate the employee for the loss. There is no dollar limit on qualified disaster relief payments.

While qualified disaster relief payments assist employees, the payments also provide tax benefits to the employer.

- Qualified disaster relief payments are not subject to federal income or employment taxes; and

■ Qualified disaster relief payments are not subject to withholding and reporting requirements. Given the benefits of tax-free status for qualified disaster relief payments, employers that choose to provide such payments should consider adopting an administrative system that validates such payments meet Code requirements. Such a system can include a short application form for assistance that validates the disaster for which relief is sought, contains an affirmative statement from the employee that the requested funds are necessary for expenses and repairs incurred as a result of the disaster, and confirms that such expenses are not reimbursable by insurance.

Leave Donation Relief Payments

To encourage disaster relief payments, the IRS allows employees to forgo their vacation or sick or personal leave in exchange for cash payments the employer makes to charitable organizations that provide relief for disaster victims. Under this relief, the donated leave will not be included in the employee's taxable income or wages, but the employee also may not claim a charitable contribution for the donated leave. Employers can deduct these cash payments as business expenses. To qualify, the payments must be made to a charitable organization for the purpose of providing relief to victims of Hurricane and Tropical Storm Harvey, or Hurricane and Tropical Storm Irma, before January 1, 2019.