



For your information

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## Employee benefits in the aftermath of Hurricane Sandy

As the Northeast slowly crawls out from under and assesses the wide-ranging devastation wrought by Hurricane Sandy, efforts to regroup, “power-up,” and “gas-up” will yield to getting back to business and financing recovery. Employers and employees eager to help colleagues get back on track have a number of things to consider.

With Hurricane Sandy likely to weigh in as the second most costly US storm—estimated at \$30 billion to \$50 billion (compared to \$108 billion for Hurricane Katrina)—the Internal Revenue Service (IRS), the Department of Labor (DOL), and the Pension Benefit Guaranty Corporation (PBGC) issued some filing extensions and financial assistance guidance. In addition, it is possible that employers may see relief similar to that provided after Hurricane Katrina (i.e., the Katrina Emergency Tax Relief Act of 2005 and the Gulf Opportunity Zone Act of 2005). Those laws eased the retirement plan distribution and loan rules and offered employee retention credits to employers who paid workers while shut down from the storms. The IRS, DOL and PBGC may provide additional relief, extending deadlines for complying with certain regulatory requirements.

### Ways to help affected employees

Employers dealing with the aftermath of Hurricane Sandy want to know what they can do to make their employees' lives easier. Here are some actions an employer can take:

*Make qualified disaster relief payments to employees.* Qualified disaster relief payments made by an employer to employees affected by Hurricane Sandy are not included in the employees' income. Qualified disaster relief payments include amounts necessary to cover the following types of expenses, to the extent not covered by insurance: necessary personal, family, living, or funeral expenses and expenses for repairing or rehabilitating personal residences or repairing or replacing their contents.

In addition, because Hurricane Sandy was designated as a qualified disaster, an employer-sponsored private foundation may either provide disaster relief directly to affected employees or include employees in the pool of individuals eligible for grants from the foundation without affecting its tax-exempt status.

*Offer leave-sharing plans.* Employees may be permitted to contribute vacation, sick, or personal leave to an employer-sponsored leave bank for use by other employees who are absent from work as a result of a federally declared major disaster. If the conditions set out in IRS [Notice 2006-59](#) are satisfied, the value of the donated leave will be included in the leave recipient's income and not in the income of the leave donor.

*Offer leave donation programs.* An employer may permit employees to forgo vacation, sick, or personal leave in exchange for a cash donation by the employer equal to the value of the forgone leave to charitable organizations providing relief to victims of Hurricane Sandy. IRS [Notice 2012-69](#) provides that cash donations made by an employer before January 1, 2014 are not includable in the leave donor's income and that employees' election opportunity will not result in the constructive receipt of income. Cash donations made to the charitable organization are deductible by the employer as a business expense.

*Offer 401(k) hardship withdrawals and loans.* Many 401(k) and other defined contribution plans offer plan loans and hardship withdrawals to active employees. Plan sponsors may wish to consider adding or expanding plan provisions to offer greater access to plan funds to help employees address storm damage not covered by other resources to the extent their plans are not currently offering the maximum amount permitted. For Hurricane Katrina, many of the usual plan limits were modified by Congress to provide expanded access—and the Code Section 72(t) 10 percent premature distribution tax was excused. Employers should wait for similar action before pushing beyond current legal limits.

*Extend the deadline for Section 409A deferral elections.* Employees may be given until December 31, 2012 to elect to defer receipt of 2013 compensation.

*Extend the annual enrollment period for health and other welfare plans.* Affected employees may be given additional time to complete their annual enrollment. The only requirement is that their elections be made before the first day of the plan year to which they relate.

*Arrange exceptions to in-network provider and other health plan limitations.* This could include treating all providers caring for affected employees as "in-network" and waiving prior authorization, precertification, or referral requirements. Limitations on prescription drug refills or replacement of eyeglasses could also be waived.

*Extend the time limits for employee notices or payments.* Employees whose lives have been disrupted may be unable to provide timely notice of change-in-status or COBRA qualifying events or to make timely COBRA elections. They may also have missed COBRA premium payment deadlines. Employers may want to provide these employees with a limited grace period for completing these actions so that they are not adversely affected.

*Remind employees of Family and Medical Leave Act (FMLA) options.* Employees are entitled to leave under the FMLA for a serious health condition caused by the disaster. Employees who must care for a child, spouse, or parent with a serious health condition may also be entitled to leave because of

Hurricane Sandy. For example, an employee might need to care for a family member who requires refrigerated medicine or medical equipment that is inoperable because of a power outage.

*Remind employees about employee assistance programs.* Employee assistance programs can provide employees with important information about available resources. They can also provide employees and their family members with counseling, if necessary.

*Establish lines of communication.* Employees need a source of reliable information from their employer. Because many employees may be dislocated or may still not have power, the employer should set up a hotline or other centralized information source that employees can access by phone.

## Relief from benefit plan filing deadlines

On November 2, the IRS announced extensions of certain tax filing and payment deadlines for taxpayers in designated counties in [New York](#), [New Jersey](#), and [Connecticut](#). Other locations may be added later on the basis of damage assessments by the Federal Emergency Management Agency (FEMA). In addition, the IRS will work with any taxpayer who resides outside the disaster area but whose books, records, or tax professional are located in an area affected by Hurricane Sandy.

The tax extensions give affected taxpayers until February 1, 2013 to file and pay the specified returns. The relief includes the filing of a Form 5500 series return, but does not extend the deadline for information returns in the W-2, 1098, or 1099 series, or for Form 1042 or 8027.

Separately, the PBGC [announced](#) extensions and penalty waivers for the same counties as the IRS. PBGC relief does not cover notices of missed contributions on PBGC Form 200, advance notices of reportable events, or annual financial and actuarial information from certain controlled groups under ERISA Section 4010 other than on a case-by-case basis. Among the deadlines eligible for a February 1, 2013 extension are:

*Premium filings.* The PBGC will waive penalties, but not interest, on late single-employer or multiemployer premium filings if the filing is made by February 1, 2013.

*Plan terminations.* The deadline for standard and distress termination notices (Forms 500 and 600) and for completing the distribution of plan assets is extended to February 1, 2013.

*Reportable event notices.* The deadline for post-event notices is extended to February 1, 2013 (or later if the deadline is 30 days after a plan's Form 5500 due date).

*Annual financial and actuarial information reporting.* Although ERISA 4010 filing extensions will be subject to case-by-case determinations, for actuarial information due 15 days after the Form 5500 due date, the deadline will follow from the disaster deadline for the Form 5500.

*Multiemployer deadlines.* Penalties will not be assessed for missing multiemployer plan deadlines for making filings with the PBGC, issuing notices to other persons as required by PBGC regulations, and taking other actions during the period ending on February 1, 2013.

## ERISA plan funding requirements

The IRS extension announcements noted above do not extend any contribution deadlines applicable under the ERISA minimum funding standards. An extension of an ERISA plan's contribution deadline requires authorization by all three agencies: the IRS, the PBGC, and the DOL. This happened in 2005, when the three agencies announced a two-month extension for the Hurricane Katrina disaster in IRS [Notice 2005-60](#). This was subsequently extended to six months in [Notice 2005-84](#) to reflect legislative relief in the Katrina Emergency Tax Relief Act of 2005 (KETRA). For the PBGC's part, the notices allowed delayed contributions to be taken into account for premium as well as reporting and disclosure obligations.

### “Wish list” for additional relief

[Revenue Procedure 2005-27](#) lists a number of time-sensitive acts whose deadline may be extended or postponed for taxpayers affected by presidentially declared disaster areas pursuant to Code Section 7508A. These acts span almost the entire reach of the Code. For any of the listed acts to be postponed, the IRS must issue a notice or other guidance describing the relief offered for a particular presidentially declared disaster area.

In the absence of further guidance from the IRS, employers struggling with storm clean-up should be aware of all the deadlines identified in the revenue procedure. Here are some key deadlines from that source, as well as more recent requirements, that are imminent for calendar-year plans:

*November 14:* Deadline for the initial quarterly disclosures of fees and expenses actually deducted from participant accounts in participant-directed individual account plans.

*November 14:* Deadline for the multiemployer plan 2011 summary report for participating unions and contributing sponsors due (assuming October 15 Form 5500 extension applied)

*December 2:* Standard due date for calendar plan year 30-day advance 401(k) safe harbor notice. Also, due date for automatic contribution and qualified default investment alternative notices, as applicable.

*December 14:* Deadline for distribution of summary annual report for health and welfare plans, defined contribution plans, and non-PBGC-covered plans (if an October 15 Form 5500 extension applied).

*December 31:* Deadline for qualified retirement plan amendments for calendar plan years to address discretionary changes during 2012 and interim amendments for required changes such as the addition of Code Section 436 benefit restrictions to plan language. If a previously adopted amendment specified the segment rates to be used in determining funded percentages, an amendment to incorporate the MAP-21 rates may be needed. Employers sponsoring plans covering employees in Puerto Rico may need to make changes to conform to 2011 amendments to the Puerto Rico Code.

*December 31:* Last day to finalize corrective distributions for failed 2011 ADP and ACP nondiscrimination tests.

*December 31:* Last day to take corrective action for dependent care assistance programs that fail the 55% average benefit discrimination test.

*December 31:* Last day for ERISA defined benefit plans to finalize AFTAP certifications if using a “range certification” or if a recertified MAP-21 AFTAP is needed. Also, last day to modify certain funding carryover or prefunding balance elections due to MAP-21.

*December 31:* Last day to make retirement plan minimum distributions.

*December 31:* Deadline for amending nonqualified plans that condition the receipt of severance payments on the execution of a release or similar agreement. [IRS [Notice 2010-80](#)]

*December 31:* Deadline for FICA early inclusion estimates to avoid an increase in the Medicare tax.

*January 11, 2013:* If the Form 5500 due date with extension was October 15, 2012, last day to post select sections of the form on the company’s intranet.

Links to additional hurricane relief information:

IRS: <http://www.irs.gov/uac/Newsroom/Help-for-Victims-of-Hurricane-Sandy>

FEMA: <http://www.fema.gov/sandy> and <http://www.fema.gov/disasters>

Consolidated disaster information from 17 federal agencies:  
<http://www.disasterassistance.gov/>