

## Agencies Relax Rules for Hurricane Irma Victims

In September 2017, Hurricane Irma devastated parts of Florida, Puerto Rico and the U.S. Virgin Islands. On the heels of similar guidance on Hurricane Harvey, IRS will allow retirement plan sponsors to temporarily relax standards for processing hardship withdrawals and loans for participants who lived or worked in the affected counties. IRS, DOL and PBGC have provided additional relief for certain ERISA deadlines, including Form 5500 and PBGC premium filings.

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### Background

Because the primary aim of qualified retirement plans such as 401(k), 403(b) and eligible governmental 457(b) plans is to serve as a way to accumulate funds for retirement, current tax rules generally discourage tapping into these funds for other reasons. However, plans are permitted to allow participant loans on a limited basis and withdrawals for narrowly framed emergencies. For example, plan loans are limited to the lesser of one-half of the participant's account balance or \$50,000, with adjustments for outstanding and recent loans. In-service distributions from elective deferral accounts prior to age 59½ are limited to hardship situations.

An employer seeking to meet the hardship criteria may use safe harbors defined by the IRS. One safe harbor provides a list of situations deemed to meet the "immediate and heavy financial need" criteria; another addresses the requirement that the distribution is necessary to satisfy that need. The requirements for eligible governmental 457(b) plans limit hardship withdrawals to "unforeseeable emergencies." With or without the safe harbors, participants are limited to withdrawing just their elective contributions (minus previous withdrawals). They may not withdraw earnings, qualified nonelective contributions (QNECs) or qualified matching contributions (QMACs).

Plan documents must state the rules used for administering the hardship withdrawal and participant loan features of the plan. If the sponsor chooses to make a change, the plan must be amended by the end of the plan year. Later changes may be permitted if there is a legal requirement to make a change.



To discourage early distributions, the Internal Revenue Code (Code) generally imposes a 10% early distribution penalty when participants tap into their retirement nest eggs before age 59½. Over time, limited exceptions to the penalty have been added to the Code for medical expenses, qualified reservist distributions, first time home purchases, and higher education expenses – depending on whether the source is an employer plan or an individual retirement account (IRA).

Puerto Rico and the U.S. Virgin Islands each are U.S. possessions that have their own tax system – administered by the local equivalent of the IRS. The income tax system of the U.S. Virgin Islands is identical to that of the U.S. (except that tax is paid to the local taxing authority). Puerto Rico's tax code is similar to, but not exactly the same as, the U.S. Internal Revenue Code. Some employers cover residents of these possessions in their U.S. qualified plan, and need to meet the requirements of both the U.S. Code and the tax code of the possession(s) to avoid negative tax consequences for participants and beneficiaries who are residents of these territories; other employers that have employees in these possessions maintain separate plans for them that are only qualified under the local tax code.

## IRS Allows Expedited Processing

In [Announcement 2017-13](#), the IRS offers relief from a number of the usual distribution restrictions to allow plan sponsors to quickly offer access to retirement plan funds for disaster needs. The relief is almost identical to that announced for Hurricane Harvey, and in 2016 for victims of Hurricane Matthew and the Louisiana flooding. (See our [September 6, 2017](#), [November 2, 2016](#) and [September 2, 2016](#) *For Your Information* publications.)

**Comment.** The current guidance mimics the relief IRS issued for Hurricane Sandy in 2012. After the Hurricane Sandy guidance was issued, additional informal guidance was provided and is collected in this [Fall 2012 Edition of Retirement News for Employers](#). Presumably, similar responses would apply to the current situation. For example, FAQ #3 explains that a plan loan would still need to be obtained in advance of a hardship distribution if the plan offers loans and it is practical to do so.

**Affected individuals.** The relief applies to participants whose principal residence or place of employment was in Florida on September 4, 2017, or in one of the municipalities in Puerto Rico, or in one of the U.S. Virgin Islands on September 5, 2017 that were identified by FEMA as [eligible for individual assistance due to Hurricane Irma](#). It also applies to a participant with a lineal ascendant, lineal descendant, dependent or spouse who had a principal residence or place of employment in one of these areas. For example, a participant in New York would be able to take a hardship distribution to help a child rebuild her home in the disaster area.

### Who's eligible?

The relief is available not only to participants who lived or worked in the affected areas, but also to participants with lineal ascendants or descendants, spouses or dependents who lived or worked in an area impacted by the disaster.

**Comment.** The relief also extends to individuals in additional counties (or county equivalents such as *municipios* in Puerto Rico or islands in the U.S. Virgin Islands) that are added to [FEMA's list](#) of those eligible for individual assistance related to Hurricane Irma after September 4. The individual would have to live or work in the affected area on the date that FEMA specifies as the beginning of the incident period. Even if FEMA eventually expands individual assistance in connection with Tropical Storm Irma (as opposed

to Hurricane Irma), it appears that affected individuals would not be eligible for relief unless IRS provides additional guidance encompassing the Tropical Storm Irma areas.

For qualified retirement plans in Puerto Rico or the U.S. Virgin Islands, it remains to be seen whether the local taxing authorities will follow suit and issue their own relief that mirrors that of the IRS.

**Affected plans.** The relief is targeted at the types of plans and accounts that are permitted to make loans and hardship withdrawals. This includes profit-sharing plans, stock bonus plans, 401(k), 403(a), 403(b) and eligible governmental 457(b) plans. It generally does not include money purchase plans or defined benefit plans unless there is a separate account for employee contributions or rollover amounts.

**Hardship withdrawals.** The announcement allows withdrawals to be made for any hardship arising from Hurricane Irma, not just those enumerated in the Code and regulations. For purposes of a governmental 457(b) plan, a distribution for any hardship arising from the hurricane is considered to be made due to an “unforeseeable emergency.” In addition, the announcement permits the withdrawal without the need for a post-distribution contribution restriction such as the six-month restriction in the 401(k) regulatory safe harbor. It does not allow for withdrawals from QNEC and QMAC accounts or from earnings on elective contributions.

**Plan loans.** Plan loans are required to meet the tax limitations in Code Section 72(p), such as the five-year repayment requirement (unless eligible for the home loan exception) and the maximum loan limit.

**Procedural requirements.** The announcement allows the plan to disregard procedural requirements normally followed for processing plan loans and hardship withdrawals as long as the plan administrator makes a good-faith, diligent effort under the circumstances to comply. Plan administrators may rely upon representations from the participant about the need for and amount of a hardship withdrawal, unless the plan administrator has actual knowledge to the contrary. As soon as practicable, the plan administrator must make a reasonable attempt to assemble any foregone documentation, such as spousal consent.

**Plan amendments.** Plans that do not currently offer loans or withdrawals must be amended to memorialize the allowances made for the Hurricane Irma distributions. The amendment should be made by the end of the first plan year beginning after December 31, 2017.

**Comment.** Although the announcement does not appear to require plan amendments to refine eligibility or suspension details in situations where the plan currently contains a loan or hardship provision, it is advisable to amend the plan in any situation where the plan is operating differently than in accordance with its specific terms.

**Timeframe for distributions.** Announcement 2017-13 applies to loans and/or distributions made on or after September 4, 2017 and no later than January 31, 2018.

**Uncertainty on whether relief applies to plans locally qualified in Puerto Rico and U.S. Virgin Islands.** Though the rules for administering hardships and loans for qualified plans in these U.S. possessions are

#### Relief from Minimum Funding Deadline

**IRS Notice 2017-49** extended the September 15, 2017 deadline for making minimum funding contributions to January 31, 2018 for those affected by Hurricanes Harvey and Irma. See our **September 13, 2017 FYI**.

Since local taxing authorities in Puerto Rico and U.S.V.I. are not subject to IRS jurisdiction, sponsors of plans that are qualified in Puerto Rico or the U.S.V.I. should confirm that the local taxing authorities would not disqualify their plan for acting on the IRS relief.

nearly identical to those that apply to U.S. qualified plans, since their tax systems are not administered by IRS, the local taxing authorities in Puerto Rico and the U.S.V.I. are not bound by the IRS hurricane relief, though they may issue their own hurricane relief. This means that for retirement plans subject to local qualification rules in these U.S. possessions (including plans that are also qualified in the U.S.), they may jeopardize their local tax qualification if they take advantage of the IRS relief without confirming that the local taxing authorities have provided similar relief.

## DOL Follows Suit

On September 15, 2017, [DOL announced](#) that they are extending the same relief to Hurricane Irma that was issued in their [guidance about Hurricane Harvey](#) on August 30, 2017. In that release, the [DOL announced](#) that in addition to affirming what IRS had issued about relaxing verification procedures for plan loans and hardship withdrawals, the DOL would not pursue ERISA violations solely because a plan administrator follows the IRS guidance in processing payments.

Ordinarily, the DOL regulations require that participant contributions or loan repayments withheld from wages be forwarded to the plan on the earliest date on which such amounts can reasonably be segregated from the employer's general assets, but in no event later than the 15th business day of the month following the month in which the amounts were paid to or withheld by the employer for a retirement plan. The DOL acknowledges that there may be temporary delays in depositing participant contributions and loan repayments due to the storm. The agency will not pursue ERISA enforcement action for delays in processing these amounts where employers and their service providers act reasonably, prudently and in the interest of employees to comply as soon as practicable under the circumstances. The DOL reports that the IRS will not seek to assess prohibited transaction excise taxes resulting solely from such a temporary delay.

**Comment.** While the news release doesn't specifically mention the special deadline for employers of fewer than 100 employees to remit participant contributions and loan repayments (not later than the seventh business day following the day on which such amounts are received by the employer), there is no reason to believe that the relief does not also extend to such employers. Also, the relief does not seem to extend to the contribution deposit deadline for welfare benefit plans (90 days from the date they are paid to the employer or withheld from wages).

## Blackout Notices

DOL's release also relaxes deadlines for blackout notices, COBRA and claims processes in keeping with the 2016 relief. Ordinarily, the administrator of an individual account plan is required to provide 30-day advance notice to participants and beneficiaries when services will be temporarily suspended, limited or restricted by a blackout period. An exception is provided for events that are beyond the reasonable control of the plan administrator and a fiduciary so determines in writing. The DOL says that blackouts due to Hurricane Irma are eligible for the exception even in the absence of a written determination.

## Group Health Plans

The DOL's news release acknowledges the health plan administrative delays that can face participants, beneficiaries and plan administrators when a disaster strikes. The DOL suggests that plan fiduciaries make reasonable accommodations to prevent the loss of benefits and minimize loss of coverage for individuals affected by the hurricane. They also suggest that employers may want to provide affected employees additional time for making COBRA elections and paying premiums so that they are not adversely affected. The DOL also encourages granting additional time for filing benefit claims.

For plans and insurers, the DOL's approach to enforcement will include grace periods and other relief for situations where the disaster impacted the plan or service provider's ability to comply with established timeframes for evaluating claims or providing disclosures.

In addition to the guidance for plan sponsors, the DOL provided [FAQs for plan participants and beneficiaries](#).

**Comment.** Although selective requirements seem to have been singled out in the DOL news release, the language suggests that a reasonable and practical approach to compliance and enforcement of other ERISA notice and timing requirements may be expected as well.

## Other Disaster Relief

The relief described above supplements the array of relief the agencies generally provide for disaster situations. IRS disaster relief is provided under Code Section 7805A and was announced for these areas starting on [September 4](#). That guidance generally allows these storm victims until January 31, 2018 to file certain individual and business tax returns and to make certain tax payments. The relief includes the filing of Form 5500.

PBGC also [announced disaster relief](#) for victims of Hurricane Irma similar to that issued for Hurricane Harvey. Designated persons responsible for meeting PBGC deadlines that are located in the disaster area have additional time based on the January 31, 2018 deadline established by IRS. For example, this includes premium due dates, post-event reportable event notices, and plan termination filing deadlines. For late premium payments, the PBGC waives the applicable penalty, but not the applicable interest charge. Additional relief will be considered on a case-by-case basis.

## What More Can an Employer Do?

Employers with significant populations in the affected areas may wish to take additional steps to make things easier for affected employees. Here are some actions an employer can take:

**Make qualified disaster relief payments to employees.** Qualified disaster relief payments made to employees affected by the disaster are not included in their 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.

**Offer leave-sharing or leave donation 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

because of a federally declared 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.

On September 14, [IRS](#) also extended Notice 2017-48 to Hurricane Irma and Tropical Storm Irma. [Notice 2017-48](#) provides that until December 31, 2018, employers can let employees donate their vacation, sick or personal leave in exchange for the employer donating the cash compensation associated with their leave to certain charitable organizations providing relief to victims of the hurricane or tropical storm. When employees donate their leave, the value of amounts donated would be excluded from their gross income and wages (for income, Social Security and Medicare tax purposes), but would still be deductible to the employer as a trade or business expense (as would be the case if the employer had paid those amounts to the employees). Such amounts would not be deductible as a charitable contribution by either the employee or the employer, although the tax treatment provided above is generally more favorable.

**Extend 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.

**Remind employees of FMLA options.** Employees are entitled to leave under the Family and Medical Leave Act (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 the flooding. 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 not have power, the employer should set up a hotline or other centralized information source that employees can access by phone.

## In Closing

Plan sponsors can use the relaxed distribution rules to offer some immediate relief to affected employees. This type of relief has been made available for individuals affected by several different weather-related disasters, and seems to be the new standard for handling such events. Along with the relief from DOL and PBGC on ERISA deadlines, this is probably the full extent of assistance that will be available to affected individuals and plan sponsors. Congress took action in 2005 to exempt distributions from the 10% premature distribution penalty and increase the maximum loan limit in the aftermath of Hurricane Katrina and it remains to be seen whether they will take similar action for Hurricanes Harvey and Irma.

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