

Lessons Learned from Katrina and Hurricane Harvey Relief Guidance to Date for those Affected by Hurricane Harvey

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Following Hurricane Katrina (“HK”), excellent minds in the government worked to provide helpful guidance on relief that employers could elect to utilize to assist employees impacted by that hurricane or other disasters either under their existing retirement plans or under new arrangements and to provide relief from impending deadlines. The Internal Revenue Service (“Service”) started quickly to provide deadline filing relief and released the first piece yesterday. I am confident the other governing agencies will also consider responding to Hurricane Harvey (“HH”).

Deadline for Filing Certain Tax Returns Extended for Certain Persons and Businesses

The Service issued the delays under the authority it has under section 7508A of the Code Individuals who reside and businesses located in the following counties in Texas: Aransas, Bee, Brazoria, Calhoun, Chambers, Fort Bend, Galveston, Goliad, Harris, Jackson, Kleberg, Liberty, Matagorda, Nueces, Refugio, San Patricio, Victoria and Wharton **may** qualify for the extension of certain deadlines. The extension of the deadlines applies to deadlines that fall on or after August 23, 2017 and before January 31, 2018. Those that qualify will have additional time to file tax returns that would have been due during that period until January 31, 2018, so for example if a calendar year plan had extended the due date for filing its Form 5500 to October 15, 2017 and the plan sponsor qualifies for relief because its principal place of business is located in one of the counties listed above, its deadline is now extended to January 31, 2018. This extension also applies to quarterly estimated income tax payments due on September 15, 2017 and to quarterly payroll and excise tax returns normally due on October 31, 2017.

Penalties on payroll and excise tax deposits due on or after August 23, 2017 and before September 7, 2017 will be abated **provided** the deposits are made by September 7, 2017 It is important to remember this extension is for **businesses whose principal place of business is located in one of the specified disaster areas** and to date those areas are the ones specified above. It is important to note that the extension of time to file does not apply to the following Forms: W-2, 1094, 1095, 1097, 1098, or 1099 series. Since this includes the series, that means the deadlines for filing and furnishing Forms 1095-C and 1095-B for the 2017 year are not extended.

Alternatives for Assisting HH Affected Employees

Employers frequently look for ways to assist employees affected by disasters such as Hurricane Harvey and employers can now use the tax tools that we learned about following HK. Some of the tools for HK were enacted as part of the relief legislation for HK and were of limited duration and those will not be discussed. This will only be a high level discussion of the tools that are currently available to keep this to a readable length and not too deep in the Code or in technical provisions.

Leave Sharing Program

Aside from creating an employer or employee controlled foundation to assist employees affected by HH which will require substantial time and expense, there are other ways an employer can assist its employees by offering its employees a way to assist their fellow affected employees. In the past some employers have permitted employees to donate their paid time off or leave to a pool that can be used by the affected employees. Donation of leave is possible as long as one carefully structures the leave donation program in compliance with existing guidance so that there is no constructive receipt of the donated leave by the donating employee. Failure to properly structure the program could result in the employee donating his leave also being taxed on the leave he thought he had given to others.

Qualified Disaster Relief Program

Employers can establish a disaster assistance funds and provide certain limited assistance for qualifying expenses of their employees who live or reside in a Presidentially declared disaster area. If the payments are to qualified individuals for qualified expense, these funds can be paid to the employee without taxing the employees on the assistance as income. These are established under a provision added to the Code following 9/11.

A qualified disaster relief program can be designed in a tax favored manner in the event of a presidentially declared disaster, but employers are often concerned with whether if they build it, will the employees use it or will it be abused. There are provisions under the Code that permit an employer to exclude from an employee's income an amount paid as a "qualified disaster relief payment." This can permit a program to make a payment to an individual to reimburse or pay reasonable and necessary personal, temporary family, living or funeral expenses incurred as a result of a qualified disaster. Such relief payments may be used to reimburse or pay reasonable and necessary expenses incurred for the repair or rehabilitation or replacement of a personal residence or its contents attributable to a qualified disaster, but ONLY IF such expense is not otherwise compensated for by insurance. This only applies to Presidentially declared disasters if all of the requirements of the applicable section apply. Employers should carefully design such a program to guard against abuse and to satisfy the statutory requirements. Employers need to carefully communicate the program to the affected employees and explain how to request assistance to facilitate use by the affected employees .

HKWR Disaster Relief

The disaster relief from the government agencies following HKWR included relief from a number of notice requirements provided by the U.S. Department of Labor ("DoL") and extension of election timing for individuals and for special enrollment periods. The extension of special enrollment periods will be important as it permits employees to enroll in health plans at other employers; however, it will be important to watch to see if the Department of Health and Human Services will respond to HH to extend the special enrollment periods on the ACA Insurance Marketplaces, as those were not addressed following HKWR because they did not exist at the time of HKWR. The guidance post HKWR also permitted longer election periods for COBRA coverage by individuals, thus, everyone with affected employees will need to watch to see what will be extended as the governing agencies work through the current requirements and consider the addition of legislative requirements enacted since HKWR, such as the Pension Protection Act of 2006 and the Patient Protection and Affordable Care Act, and other pieces of legislation.

Following HKWR, the Service also provided relief with respect to participant loans and hardship withdrawals for the affected individuals as well as relief for the minimum required funding contributions for defined benefit pension plans that were due shortly after HKWR hit the Gulf Coast. We will need to watch to see what other relief we might see for HH.

Other Employer Considerations

There are many things an employer must consider when its operations are impacted by a disaster and much planning that should be done before a disaster such as evacuation plans, access to business assets and operations, the integrity of the facilities, business emergency preparedness plans, back up facilities, emergency response teams and how to locate employees and retirees. Once a disaster hits, Employers may shift their focus to employee support and assistance in terms of relocating the employees and families, temporary housing, home repairs/ restoration/sales, and support of daily needs such as food, water, clothing, shelter, medical care, dealing with regular bills, and disaster related financial obligations as well as emotional and trauma support. Employers next turn to the business of compliance and missing records, access to systems such as vendors, accountants and persons with records, the U.S. Postal service, deadlines, notices, filings and employees access to benefits. Employees without access to communications or important records (e.g., displaced employees in shelters who were unable to take their health plan identification card or their employee identification card with them and who have no access to the employer's system or even U.S. Mail) will need to be located to begin to be able to assist. Social media may prove helpful in locating people not only for rescues in a disaster, as we have seen, but also after the emergency has subsided, but remember to consider there may be other legal concerns related to searching social media records on your employees and the information you might discover in such a search.

Congressional Assistance Following HKWR

Following HK, there were a number of provisions of relief enacted in a series of legislation that followed HK, as well as Hurricanes Wilma and Rita ("HKWR"). However, many of those changes were specific relief for persons affected by HKWR and unless Congress acts to extend these to persons affected by HH, they will not apply.

Summary

At this point in time, we are at the early stage of dealing with HH and we will likely see more guidance that will apply. The purpose of this alert was to provide information about the extension that was issued and the types of relief that employers

can provide now under existing guidance and alert employers to some of the issues they may face if their principal place of business is located in one of the affected areas.

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