

# First Round of Hurricane Harvey Relief Guidance

08.31.17

No good deed goes unpunished and as soon as I hit send on the last alert on Hurricane Harvey relief, three more pieces of relief guidance relevant to employers and their employee benefit plans were released.

## *IRS Guidance on Hardship Withdrawals and Retirement Plans Loans to Participants*

The Internal Revenue Service (the “Service”) issued an announcement providing relief from verification of the qualification of an individual’s request for a hardship withdrawal or a loan in order for a person to obtain the hardship withdrawal or loan. It is important that there is no relief from the additional 10% tax that can apply to a hardship withdrawal distribution. Hardship withdrawals are still limited to only the funds within a plan that have been eligible for hardship withdrawals under the current law. The relief permits an employer’s qualified retirement plan (401(k), 403(b), 403(a) or 457(b)) to process a hardship withdrawal request or a loan for a need arising from Hurricane Harvey based upon the representations of qualified individuals who are employees or former employees without needing to verify the representations made or the amount of the hardship distribution, as long as the plan administrator does not have information contrary to the representations made by the individual. An individual is qualified for this relief on hardship withdrawal and loan documentation if:

- the employee or former employee had his principal residence on August 23, 2017 located in one of the Texas counties identified for individual assistance by the Federal Emergency Management Agency (“FEMA”) because of Hurricane Harvey, or
- the employee or former employee’s place of employment was located in one of the FEMA designated counties on that date, or
- if the individual had a lineal ascendant or descendant, dependent, or spouse who had a principal residence or place of employment in one of the designated counties.

The designated counties can be found at <https://www.fema.gov/disasters>. For a hardship distribution provided under this relief, the employer is not required to stop the employee receiving the hardship distribution from making elective deferrals for six months as is required for other hardship withdrawals. In order for a loan or hardship to be eligible for this relief, it must be made on or after August 23, 2017 and no later than January 31, 2018 and it must be made on account of a hardship that results from Hurricane Harvey.

A retirement plan will not be disqualified if it relies on this guidance and disregards procedural requirements of plan loans in its document for loans issued on or after August 23, 2017 and through January 31, 2018. However the plan is required to attempt to gather the required documentation for loans as soon as possible, such documentation would include spousal consents to the distribution or loan. There is a discussion of the alternatives in the event a spouse is represented to be deceased without providing a death certificate.

## *DOL Guidance Applies to Both Retirement Plans and Health Plans*

U.S. Department of Labor (“DoL”) weighed in next with two pieces. One is a set of FAQs which are directed to employees, former employees and retirees which directs them to look for certain information in their records to prove their rights to benefits and instructs them about ways to maintain health coverage if there might be issues in its continuation after Hurricane Harvey. Employers should be ready for an increase in requests for copies of summary plan descriptions from employees located in the areas affected by Hurricane Harvey and also for a potential increase in contacts from the DoL, particularly if you have affected employees and you do not have an alternate way for individuals to contact your business office, if Hurricane Harvey may have rendered your normal office non-functioning.

## *Deposit of Payroll Deductions*

The DoL’s guidance applies generally to employee benefit plans, plan sponsors, employers, employees and their service providers who are located in a county identified for individual assistance by FEMA. The compliance guidance reminds that *amounts deducted from employees’ pay as plan contributions are plan assets and must be promptly deposited in the plan*. It then recognizes that there may be issues with making such timely deposits due to Hurricane Harvey and *if the*

*failure is solely on the basis of and attributable to Hurricane Harvey*, the DoL will not assess a penalty if such contributions are forwarded to the benefit plan as soon as practicable under the circumstances.

#### ***Blackout Notice Requirement Relief***

The DoL recognizes that Blackout Notices for periods when participants are not able to engage in transactions in their retirement plan account investments is required to be provided at least 30 days in advance, and if there is an inability to meet the 30 day requirement the plan administrator was required to make a determination in writing in advance of the blackout period commencing. The DoL recognizes that Hurricane Harvey may result in a plan not being able to issue this notice in a timely manner or to make the required advance determination as the result of Hurricane Harvey and the DoL for a failure solely because the plan sponsor did not make the written determination required to not meet the 3230 day advance notice of the Blackout period as required.

#### ***ERISA Plan Claim Procedure Deadlines and COBRA Election Deadlines***

The DoL next recognized that plan participants and beneficiaries may have difficulty in meeting the deadlines under the ERISA claim and appeal procedures to be able to pursue claims for benefits and also have difficulty in making COBRA elections in a timely manner. The DoL states that plan administrators should make reasonable accommodations to prevent the loss of benefits in such cases and to minimize the possibility of individuals missing benefits due to failure to meet the standard deadlines for elections or pursuit of claims or appeals. The DoL also recognized that they will emphasize compliance assistance, grace periods and relief where appropriate when physical disruption to a plan or its service provider makes timely compliance with requirements, including disclosures impossible.

#### ***HIPAA Privacy Waiver Only Applies to Certain Hospitals***

The Department of Health and Human Services ("HHS") also issued a Limited Waiver of HIPAA Privacy sanctions and penalties during a Declared Emergency. The waiver only applies in the emergency area and for the emergency period identified in the public health emergency declaration to hospitals who implement their disaster protocol. The guidance clarifies permitted disclosures in identified areas. However, it is targeted at hospitals and not health plans and penalties and sanctions are only waived for the eligible hospitals, so no employer sponsored health plan should rely on this Waiver by HHS. Group health plans should continue to operate in accordance with their HIPAA Privacy policies and procedures and the regulations.

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