

# Hurricane Hardship and Loan Relief Also Extended to Hurricane Irma, Pension Relief and a Cybersecurity Update

09.13.17

## IRS Guidance on Hardship Withdrawals and Retirement Plans Loans to Participants Extended to Hurricane Irma

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 and now from Hurricane Irma 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 had his principal residence on September 4, 2017 located in one of the Florida counties identified for individual assistance by the Federal Emergency Management Agency (See the areas identified by FEMA for individual assistance at <https://www.fema.gov/disasters> ), 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 final bullet point above means that employers who sponsor 401(k), 403(b) and 457(b) plans may receive these requests and can choose to provide this relief even though the employer and its plan are not located in one of the affected areas, because the relief is extended to employees and former employees who have lineal ascendants (parents or grandparents, descendants (children and grandchildren) who had a principal residence or place of employment in one of the designated counties. 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 for Harvey victims and made on or after September 4, 2017 and no later than January 31, 2018 for Irma victims 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.

## Pension Plan Guidance

Many calendar year pension plans (defined benefit, including all of the variations of such plans such as cash balance and pension equity plans, and money purchase plans) face a deadline this Friday on September 15, 2017 for making a minimum funding contribution or a required quarterly minimum funding contribution, among other deadlines. Because the Internal Revenue Service (“Service”), the U.S. Department of Labor (“DoL”) and the Pension Benefit Guaranty Corporation (“PBGC”) all regulate and have requirements related to minimum funding requirements and certain related requirements, those three agencies collaborated on a notice providing some disaster relief for certain qualifying plan sponsors. This alert will only address the relief for single employer pension plans and will not address multiemployer plan issues. The relief is only provided to “Affected Plans”. To be entitled to utilize this relief, one of the following must be located in one of the areas designated by FEMA as eligible for individual relief on the FEMA website identified above in either Texas or Florida:

1. The principal place of business of the employer that maintains the plan must be in the Affected Area (this is determined without considering certain controlled group rules under the Internal Revenue Code);
2. The principal place of business of employers that employs more than 50 percent of the active participants covered by the plan is located in the Affected Area (if the plan covers more than one employer’s employees, it is determined without considering certain controlled group rules);
3. The relevant office of the plan or plan administrator is located in the Affected Area;
4. The relevant office of the primary record keeper serving the plan is in the Affected Area; or
5. The office of the enrolled actuary or other advisor that previously had been retained by the plan or by the employer to make funding determinations or certifications for which the due date falls between the date of the Hurricane (August 23, 2017 or September 4, 2017 for Texas and Florida respectively) and January 31, 2018.

The “office” in items 3-5 above means the worksite of the relevant individuals and the location of any records necessary to determine the plan’s funding requirements for the relevant period.

If an employer sponsoring an Affected Plan described in items 1 through 5 above, then if that employer’s pension plan or money purchase pension plan has a minimum required contribution (under Code section 430(j)(1)) that is due between the date the hurricane hit for that Affected Plan and January 31, 2018, such minimum required contribution is now not due until January 31, 2018.

If an employer sponsoring an Affected Plan described in items 1 through 5 above and if that employer’s pension plan is required to make quarterly minimum funding contributions (under Code section 430(j)(3)) then the deadline for making such quarterly contributions that are due between the date of the respective hurricane and January 31, 2018 is postponed to January 31, 2018.

For employers sponsoring an Affected Plan that has a prefunding balance or funding standard carryover balance and the deadline for making the election as to whether to use or increase such balances is the deadline for making the required minimum funding contribution to the plan (September 15 for calendar year plans) and if such deadline falls in the time period between the dates of the hurricane for the Affected Plan’s area and January 31, 2018, the deadline for making such election is January 31, 2018.

For employers sponsoring an Affected Plan whose deadline for its actuary to certify the Affected Plan’s funding status falls between the respective dates for the two hurricanes and January 31, 2018, the deadline for such certification is January 31, 2018.

An Affected Plan that is required to give a notice to its employees because the Affected Plan’s funding status either (1) has declined so that the funding status based restrictions on benefit forms and benefit payments apply, or (2) the adjusted funding target attainment percentage is below 60 percent, and such notice was due between the date of the respective hurricane for the Affected Plan and January 31, 2018,

The Affected Plans whose minimum funding contribution deadline was extended in the hurricanes Harvey and Irma guidance who make the minimum required contributions by the extended deadlines will be able to count those minimum contributions in determining their PBGC variable rate premium if the minimum required contribution is made before the date the Affected Plan’s premium is filed.

The relief also addressed multiemployer plans and Cooperative and Small Employer Charity Plans and Notice 2017-49 should be reviewed if you have questions on such plans.

## PBGC Relief

The PBGC has also provided some relief on its website. It is important to note that some of the PBGC's relief will be provided on a case by case basis, such as for reportable event notices (e.g., for large missed contributions or advance notices of reportable events and annual financial and actuarial information). THE PBGC relief is found on the PBGC website at <https://www.pbgc.gov/prac/other-guidance/>. The PBGC guidance provides instructions for claiming disaster relief on any filing and the correct relief announcement needs to be referenced. In some cases when a filing is late on premiums, the penalty for the late filing will be waived for qualifying parties, but it will not waive the applicable interest charge on the late premium payment. So use of the extension on the PBGC premium payments for persons who qualify for the delay will need to pay the interest on the late premium payment as part of the price of the delay.

## Cybersecurity Update

In an alert issued earlier this year, I discussed the importance and ERISA based reasons for retirement plan data needing to be maintained securely from cybersecurity attacks. As a litigation risk management tool, this should also be more important. Following the U.S. Supreme Court's decision in 2016 in *Spokeo, Inc. v. Robins*, addressing what can be considered an "injury in fact" to provide someone with the legal ability to make a claim for relief in court (Article III standing), two Circuit courts have recently permitted claims for negligence, breach of contract and violation of state privacy laws and for violations of the Fair Credit Reporting Act to proceed based on the theft or loss of personal data from two insurers' offices based on the claim that they were now subject to an increased risk of identity theft. Both of these involved health insurers, but both were based on violations of other laws; thus the protection of information that could result in identity theft can put an employer at risk for defending a class action from a theft of personal data. As an update, 48 out of 50 states have enacted breach notification laws. Thus, cybersecurity is important to try to protect against litigation costs.

### **Contacts:**

#### **Greta Cowart**

214.745.5275

[gcowart@winstead.com](mailto:gcowart@winstead.com)

#### **Marsha Clarke** (Admitted in MO and IL)

214.745.5877

[mclarke@winstead.com](mailto:mclarke@winstead.com)

#### **Nancy Furney**

214.745.5228

[nfurney@winstead.com](mailto:nfurney@winstead.com)

#### **Lori Oliphant**

214.745.5643

[loliphant@winstead.com](mailto:loliphant@winstead.com)

*Disclaimer: Content contained within this news alert provides information on general legal issues and is not intended to provide advice on any specific legal matter or factual situation. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this information without seeking professional counsel.*