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Retirement Plan Relief After Hurricane Harvey

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Hurricane Harvey has devastated much of Texas, with losses of lives, homes, and infrastructure. The IRS has already issued two relief declarations affecting retirement plans. The first, TX-2017-09, provides IRC §7508A relief, postponing numerous deadlines to January 31, 2018. The second, Announcement 2017-11, simplifies and streamlines loans and hardship distributions in the wake of Harvey. This *asap* summarizes the IRS relief and the related DOL announcement.

The American Retirement Association sent the IRS a letter formally requesting retirement plan relief. The relief granted includes all of the issues the Association requested.

IRC §7508A relief

IRC §7508A gives the IRS broad authority, in federally declared disasters, to postpone deadlines normally required for tax compliance. Revenue Procedure 2007-56 lists the various requirements are postponed which includes retirement plan issues. This postponement does not happen automatically; the IRS generally issues a news release outlining the disaster area and explaining the dates covered by the postponement.

TX 2017-09 grants §7508A relief for those affected by Hurricane Harvey. It applies to taxpayers with a home or place of business in impacted counties (listed on the IRS web site and periodically updated). Only counties in Texas are presently listed but it is possible that counties in other states may be added. The notice extends until January 31, 2018, the time for performing numerous tax-related acts that would otherwise be due between August 23, 2017, and January 31, 2018. For example, personal tax returns extended to October 15, 2017 will be timely if filed by January 31, 2018. (The tax payment deadline, however, which was April 18, 2017, is outside the relief period and not extended.)

The notice specifically mentions that the deadline for filing 5500-series forms is extended for affected employers to January 31, 2018. Suppose a business in Harris County, Texas extended its 2016 Form 5500 to October 15. The deadline is now January 31, 2018. Affected employers include not only those in the disaster area, but also those who are "unable to obtain on a timely basis information necessary for completing the forms from a bank, insurance company, or any other service provider because such service providers' operations are located" in the disaster area.

The relief in §7508A goes far beyond that. The following examples illustrate the relief available:

1. Anne took out a participant loan in 2016, which requires monthly payments for five years. All payments due between August 23 and January 31 are timely if paid by January 31, 2018. If the plan allows a grace period for late payments, the grace period starts January 31.
2. A profit sharing plan must pay Bob a required minimum distribution by December 31, 2017. The deadline is extended to January 31, 2018.
3. A 401(k) plan with a June 30 plan year end must refund ADP/ACP corrections by September 15 to avoid a 10% penalty. For affected plans the deadline is January 31, 2018.
4. An employer's 2016 tax return had an extended due date September 15, 2017m but IRC §7508A postpones it to January 31. This extends the

deadline for the employer to make deductible contributions for 2016 to January 31, 2018.

Generally, when the IRS grants 7508A relief, the PBGC extends that relief to many time-sensitive filings under its jurisdiction, and has done so for Hurricane Harvey.

Special hardship and loan relief

Some disasters are so far-reaching that the IRS extends special relief regarding distributions and loans. In the last decade, that relief has been granted to victims of Hurricane Sandy in 2012, Louisiana storms and flooding in 2016, and Hurricane Matthew in 2016. Announcement 2017-11 grants the same relief to persons affected by Hurricane Harvey.

Persons eligible for relief
The relief applies to participants (including active and former employees) whose principal residence on August 23, 2017, was in the federally-declared Hurricane Harvey disaster area. This includes specified counties in Texas. If some Louisiana counties are approved for individual assistance, they will also qualify for the relief. The relief also applies to participants whose place of employment was in the disaster area on that date, or who had an ascendant (parent or grandparent), descendent (child or grandchild), dependent, or spouse who had a principal residence or place of employment in the disaster area on that date. Thus, a plan in Idaho, for example, could apply the relief to a local participant because the participant had a child residing in the disaster area.

Timing
The relief applies to loans and distributions made between August 23, 2017, and January 31, 2018.

Hardship distribution relief

Plans eligible for relief: The relief related to hardship distributions applies to any plan which, under the Code, is allowed to offer hardship distributions. For example, pension plans cannot provide for hardship distributions (other than from separate accounts), and, therefore, do not qualify for the hardship distribution relief. However, the relief otherwise applies to qualified plans (including 401(k) plans) and to 403(b) plans. The relief also applies to governmental 457(b) plans, which the law permits to make distributions for unforeseeable emergencies. Eligible plans qualify for the relief regardless of whether the plan document currently provides for hardship or emergency distributions.

Relief: Hurricane Harvey is a hardship and an unforeseeable emergency for the participants eligible for relief. The participant does not need to have the particular types of hardships specified in the regulations (such as medical, funeral, or casualty loss). Plan administrators may rely on participant representations as both the fact of the need and the amount needed for distribution (unless the employer has actual knowledge to the contrary). The typical 6-month suspension of employee deferrals need not apply.

The amount eligible for distribution as a hardship distribution under these rules is subject to normal legal limitations. Thus, hardship distributions are not available from:

- safe harbor contributions,
- QMACs,
- QNECs,
- employer contributions held in 403(b) custodial accounts, or
- amounts in elective deferral accounts exceeding the participant's deferrals (i.e., the earnings on deferrals).

Loan and distribution documentation relief

Plans eligible for relief: The documentation relief applies to all types of plans eligible to make plan loans, including qualified plans, 403(b) plans, and governmental 457(b) plans. The provisions related to distributions also apply to IRAs.

Participant documentation: The IRS will not treat an applicable plan as failing to follow its terms because it makes a loan or distribution to a participant eligible for relief without complying with the plan's procedural requirements for the loan or distribution. The plan administrator must make good-faith, reasonable efforts to obtain the documentation as soon as practical thereafter.

Example: Plan terms require spousal consent for a plan loan or distribution and the plan terms require production of a death certificate if the employee claims his or her spouse is deceased. The loan or distribution will not violate plan terms if the plan makes the loan or distribution to a participant eligible for relief in the absence of a death certificate if:

- It is reasonable to believe the spouse is deceased,
- The loan or distribution is made no later than January 31, 2018, and
- The plan administrator makes reasonable efforts to obtain the death certificate as soon as practical.

Plan provisions: Plans that do not permit loans or hardship distributions may nonetheless distribute or lend based on Hurricane Harvey if the plan is amended to include such loan or hardship provision by end of the 2018 plan year (for calendar year plans, December 31, 2018). If the plan provides for hardships and/or loans, there is no need for a plan provision related to Hurricane Harvey, even if the plan terms would not otherwise permit the distribution. The DOL will not treat a person as having violated Title I of ERISA because that person executed a loan or distribution in accordance with the IRS announcement

Relief not granted

The Announcement does not provide any relief for 457(b) plans sponsored by tax-exempt organizations. While the Announcement does not expressly mention 409A plans, it is likely that the IRS would find that Harvey is an unforeseeable emergency permitting distributions under those plans.

Participants receiving hardship distributions are subject to the normal tax consequences attending those distributions. That includes ordinary income taxes and a 10% penalty for those under age 59½, with few exceptions. Except for the waiver of documentation requirements, plan loans are still subject to the taxation rules of IRC §72(p) and the prohibited transaction exemption rules.

DOL announcements

The DOL issued a press release outlining several points relating to Hurricane Harvey:

- Defined contribution plans must normally provide a blackout notice if there will be a temporary suspension for more than 3 business days of participant rights to direct investments, or receive loans or distributions. The requirement to provide advance notice is waived if the failure is due to events beyond the administrator's control and the administrator so determines in writing. Harvey was obviously beyond the administrator's control, and the DOL will not require a written finding.

- The DOL will not treat the failure to timely deposit deferrals and loan repayments as a fiduciary breach or a prohibited transaction if:
    - either the employer or the employer's service provider (e.g. payroll processor) was in the disaster area,
    - the failure is attributable to Harvey, and
    - the employer and/or service provider acts "reasonably, prudently and in the interest of employees to comply as soon as practicable under the circumstances."

- The IRS will not assert a prohibited transaction penalty tax arising out of the late deposit, as discussed above.

The DOL has also published an 8-page set of FAQs for participants and beneficiaries of health or retirement plans affected by Harvey.