

CLIENT ACTION Bulletin

Employee Benefits

Disaster Relief Issued for Employee Benefit Plans

SUMMARY The IRS, the Department of Labor (DoL), and the Pension Benefit Guaranty Corporation (PBGC) have released guidance to ease some of the rules applicable to benefit plan sponsors and participants affected by Hurricanes Harvey, Irma, and Maria. The new pieces of guidance provide relief separate from the IRS's normal tax-related disaster relief (e.g., IRS [Revenue Ruling 2003-12](#), which permits employers to provide tax-free cash or benefits to help employees in a Presidentially declared disaster; or IRS announcements postponing tax return filing or payment deadlines for individuals and businesses). In general, the new relief is similar to that provided in 2012 under Hurricane Sandy (see [Client Action Bulletin 12-10](#)).

This *CAB* provides an overview of the federal agencies' employee benefit plan-related guidance to date, along with a summary chart. Although the guidance offers relief to those directly in the covered disaster areas, it also applies some relief to retirement plans with participants in other parts of the country with relatives in the disaster areas.

DISCUSSION **Qualified Disaster Relief**

Following the terrorist attacks on Sept. 11, 2001, the "Victims of Terrorism Tax Relief Act" (P.L.107-134) added tax code section 139, which allows employers to make "qualified disaster relief payments" to or for the benefit of individuals for certain expenses in connection with a "qualified disaster," including a Presidentially declared disaster or an event that the Treasury Secretary determines to be of a catastrophic nature. Such amounts are not treated as compensation and thus are not subject to employment taxes or withholding; the amounts also are generally deductible by an employer.

The law also permits the Treasury Secretary to postpone certain deadlines due to a disaster. For Hurricanes Harvey, Irma, and Maria, the IRS announced extensions of various individual and business tax filing and payment deadlines until Jan. 31, 2018, and a waiver of related penalties (e.g., annual employee benefit plan return/report (Form 5500), quarterly payroll and estimated tax payments, excise taxes, participant loan payments, required minimum distributions, nondiscrimination test corrections).

Employers, benefit plan sponsors, and employees/plan participants – particularly (but not exclusively) in the disaster areas declared for several states, counties, and territories (see the specific areas listed by the [Federal Emergency Management Agency](#)) – should monitor the IRS, DoL, and the PBGC for developments and updates. In general, the DoL and the PBGC coordinate with the IRS when dispensing guidance to benefit plan sponsors.

Relief for Plan Loans and Hardship Distributions

The IRS's guidance permits 401(k), profit-sharing, stock bonus, 403(a), 403(b), and eligible governmental 457(b) plans to make loans and hardship distributions under relaxed rules for participants and certain family members adversely affected by the hurricanes. Besides applying to participants who live or work in the disaster area, the relief allows a participant outside the disaster area to obtain a plan loan or hardship distribution to help a qualified family member living or working in the disaster area. In addition, although in-service hardship distributions generally are not permitted from defined benefit or money purchase pension plans, amounts attributable to employee contributions or rollover contributions that are separately accounted for within such a plan may be distributed upon an employee's request. To qualify for the relief, loans and hardship withdrawals must be made between the starting date of the declared disaster and Jan. 31, 2018.

Although the announcement does not waive the 10% early distribution penalty, Congress, as it has done for previous disasters, approved and sent to the President on Sept. 28 the “Disaster Tax Relief and Airport and Airway Extension Act” (H.R.3823) that does so. The IRS also still applies the normal rules that limit loans to the maximum amount available under the terms of the plan, the tax code, and related regulations, that prohibit hardship distributions from earnings on elective deferrals or accounts holding qualified nonelective contributions (QNECs) or qualified matching contributions (QMACs). The normal spousal consent rule also continues to apply for plans that require it. In addition, a plan must be amended by the end of the plan year that begins after Dec. 31, 2017, to permit loans or hardship distributions under the relaxed hurricane relief guidance if the plan does not currently allow for loans or hardship distributions.

The DoL guidance provides relief in the following key areas:

- **Participant contributions or loan repayments** – Affected employers and their service providers that are unable to forward participant payments and withholdings to retirement plans in a timely manner will not face penalties for temporary delays in forwarding the amounts, as long as they act reasonably, prudently, and in the interest of employees to comply as soon as practicable. The DoL states that the IRS will not assess the prohibited transaction excise tax due solely to such a temporary delay.
- **Blackout notices** – If, due to the hurricanes, an individual account retirement plan experienced a blackout period during which participants could not direct their investments or obtain a loan or other distributions, the DoL will not allege a violation of the required 30-day advance notice of the blackout period.
- **ERISA group health plan benefit claims and COBRA elections** – Recognizing that group health plans and insurance issuers may not be able to fully comply with certain timeframes for claims decisions or disclosures, the DoL’s enforcement approach will entail compliance assistance, along with grace periods and other relief where appropriate. In addition, plan fiduciaries should make reasonable accommodations to prevent the loss of benefits for plan participants and beneficiaries who may have difficulties meeting certain deadlines.

Relief for Defined Benefit Plans

The federal agencies extend the funding deadline for single-employer defined benefit plans and the certifications or improvement/rehabilitation plan adoption for endangered or critical status multiemployer pension plans from the start of the disaster declaration to Jan. 31, 2018. The PBGC also announced disaster relief extensions and penalty waivers covering: premiums; single-employer plan terminations; reportable events filing and notices; annual financial and actuarial information reporting; and multiemployer plan filing and notification deadlines.

Leave-Based Donation Programs

The IRS also provides guidance designed to support programs that allow employees to donate their vacation, sick, or personal leave in exchange for cash payments to charitable organizations providing relief for individuals affected by the hurricanes. The employer must make the donations by Jan. 1, 2019. Under this special relief, the donated amounts are not included in the employees’ income or wages and employers may deduct the cash payments as business expenses.

ACTION Employers that sponsor employee benefit plans should review the guidance from the federal agencies (see the chart beginning on p. 3) and determine whether to apply the relief to their various programs. Although sponsors in the covered disaster areas can be expected to avail themselves of the relaxed rules, others – particularly retirement plan sponsors in other parts of the country – might want to apply the loan and/or hardship withdrawal provisions of the new guidance. Plan sponsors also should monitor the agencies’ web sites for updated information on Hurricane Harvey, Irma, and Maria disaster areas and relief.

For additional information about the relief provided by the IRS, the DoL, and the PBGC, please contact your Milliman consultant.

Federal Agency Guidance: Hurricane Relief for Benefit Plan Sponsors and Plan Participants

(current through Sept. 30, 2017)

NOTE: The relief applies to plans/sponsors/participants located in specific areas that have been declared a “disaster” area by the Federal Emergency Management Agency (FEMA): <https://www.fema.gov/>. Individuals may enter an address at [Disasterassistance.gov](https://www.disasterassistance.gov) to see if a specific area has been declared eligible for individual assistance.

The IRS, DoL, and the PBGC maintain updated websites to provide information specific to the disasters. In general, the DoL and the PBGC coordinate with the IRS when providing guidance to plan sponsors.

- IRS: <https://www.irs.gov/newsroom/tax-relief-for-victims-of-hurricane-harvey-in-texas> for Hurricane Harvey, and <https://www.irs.gov/newsroom/help-for-victims-of-hurricanes-irma-and-maria> for Hurricanes Irma and Maria
- DoL/EBSA: <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief>
- PBGC: <https://www.pbgc.gov/prac/other-guidance/dr/updates>
- Department of Health and Human Services (DHHS/CMS/CCIIO) (Note: Through 9/30, no information posted applies specifically to employer-sponsored healthcare coverage): <https://www.hhs.gov/about/news/hurricane-response/index.html> and <https://www.cms.gov/About-CMS/Agency-Information/Emergency/index.html>

HURRICANE/TROPICAL STORM HARVEY, Aug. 23, 2017, and later dates, affecting Houston and other parts of Texas and Louisiana

HURRICANE IRMA, Sept. 4, 2017, and later dates, affecting the U.S. Virgin Islands, Puerto Rico, Florida, and Georgia

HURRICANE MARIA, Sept. 16, 2017, and later dates, affecting the U.S. Virgin Islands and Puerto Rico

Federal Agency Guidance Providing Disaster Relief, updated through 9/30/2017	
Guidance	General Scope
IRS Notice 2017-49	<p>Single-employer defined benefit plan funding: extension to Jan. 31, 2018, if a relevant date for the following falls between the “initial relief date” (i.e., beginning of the incident period) and Jan. 31, 2018</p> <ul style="list-style-type: none"> ▪ Annual and quarterly contributions due dates ▪ Date for making a plan’s prefunding and funding standard carryover balance elections AFTAP certifications ▪ Participant notices of funding-based restrictions ▪ CSEC (Cooperative and Small Employer Charity) plan annual funding restoration certifications and adoption of funding restoration plans ▪ Timeliness of contribution to be credited to prior year for ERISA Title IV purposes, such as PBGC premium calculations and ERISA 4010 determinations ▪ Date for submitting funding waiver requests <p>Multiemployer defined benefit plans: extension to Jan. 31, 2018, if a relevant date for the following falls between the “initial relief date” (i.e., beginning of the incident period) and Jan. 31, 2018</p> <ul style="list-style-type: none"> ▪ Endangered and critical status certifications (but does not extend the 240 days for reacting with a funding improvement or rehabilitation plan based on the extended relief date) ▪ Endangered and critical status improvement or rehabilitation plan adoption (for dates based on earlier certifications that fall in the relief period)

Federal Agency Guidance Providing Disaster Relief (cont'd.), updated through 9/30/2017	
Guidance	General Scope
<p>PBGC Disaster Relief 17-09</p> <p>DR 17-10</p> <p>DR 17-11</p> <p>DR 17-12</p> <p>DR 17-13</p> <p>DR-17-14</p> <p>DR 17-15</p> <p>DR-17-16</p>	<p>Single-employer and multiemployer defined benefit plans: waiver of certain penalties and extension of certain deadlines to Jan. 31, 2018, to “designated persons” (e.g., plan sponsor or contributed employer) in cases where the IRS provided extensions for various tax filing and payment deadlines (see separate entry below); affects: premiums; single-employer plan terminations; reportable event notices; annual employer reporting; and multiemployer plan deadlines</p>
<p>IRS Announcement 2017-13</p> <p>Announcement 2017-11</p>	<p>401(k), 403(b), governmental 457(b) plan loans and hardship distributions permitted before the plan is formally amended; permit plans to ignore reasons normally applicable to hardship distributions (e.g., allowing for food and shelter); allow plans to relax certain documentation before a distribution is made</p>
<p>IRS TX-2017-09</p> <p>FL-2017-04</p> <p>GA-2017-02</p> <p>VI-2017-01</p> <p>PR-2017-01</p>	<p>Extension of various tax filing and payment deadlines until Jan. 31, 2018, for individuals and businesses, and waiver of penalties (e.g., annual employee benefit plan return/report (Form 5500), quarterly payroll and estimated tax payments, excise taxes, participant loan payments, required minimum distributions, ADP/ACP nondiscrimination test corrections)</p>
<p>IRS Notice 2017-52</p> <p>Notice 2017-48</p>	<p>Leave-based donation programs: Permit employees to forgo their vacation, sick or personal leave in exchange for cash payments the employer makes, before Jan. 1, 2019, to charitable organizations providing relief for the Harvey and Irma victims, excluding the amounts from employees' wages and permitting employers to deduct the amounts as business expenses</p>
<p>DoL News Releases 17-1334-NAT</p> <p>17-1255-NAT (9/21)</p> <p>17-1297-NAT</p> <p>17-1255-NAT (9/12)</p> <p>17-1216-NAT</p> <p>Also, see DoL's FAQs for Participants and Beneficiaries (applicable to Harvey, but presumably to Irma and Maria as well)</p>	<p>Retirement plans and group health plans: Temporarily waives certain requirements and deadlines; affects: participant contributions and loan repayments; blackout notices; and group health plan compliance</p> <p>Labor organizations, labor relations consultants, and affected employers: The DoL's Office of Labor-Management Standards (OLMS) plans to issue a special enforcement advisory that would temporarily ease reporting and other regulatory burdens</p>
<p>CMS Memo and QsAndAs and CCIIO Memo on Medicare and Exchange enrollment</p>	<p>Affected Medicare or individuals purchasing insurance on the federal health insurance exchanges are provided special enrollment periods, through the end of 2017, due to Hurricanes Harvey, Irma, and Maria.</p>