



## Employee Benefits & Executive Compensation ADVISORY ■

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### Dealing with Disaster: Issues and Relief for Employee Benefit Plans

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In the period following natural disasters such as Hurricanes Harvey and Irma, employer plan sponsors will be faced with any number of hardship-related employee benefit plan administration issues. Many of these involve critical questions for employees and employers, such as whether and/or how health coverage continues if an employer is closed or employees are otherwise unable to come to work, and meeting required plan-related deadlines. While many issues need to be considered on a case-by-case basis depending on the employer's plan and the situation, the IRS and other regulatory agencies have provided helpful guidance in some areas, including issues relating to retirement plans and leave donation programs. The availability of relief depends on a number of factors, including whether the business or individual (as relevant) is located within a designated disaster area.

This advisory provides a brief discussion of common issues and a high-level overview of the types of relief that may be available. Due to the fact-specific inquiries applicable to these issues, plan sponsors should consult with benefits counsel in addressing disaster-related situations.

#### **Health Plan Coverage Issues**

Ensuring continued health care coverage is a critical issue for many employees (and their spouses and dependents) impacted by disaster in the face of business closures and absences from work. The Department of Labor (DOL) has published [FAQs](#) for plan participants that provide general information regarding health coverage issues that may arise. In announcements relating to Hurricanes [Harvey](#) and [Irma](#), the DOL has also encouraged health plan fiduciaries to make reasonable accommodations to prevent the loss of coverage following a disaster and to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes. The DOL has acknowledged that there may be instances when full and timely compliance by group health plans and issuers may not be possible and that their approach to enforcement will be marked by an emphasis on compliance assistance and include grace periods and other relief where appropriate, including when physical disruption to a plan or service provider's principal place of business makes compliance with pre-established timeframes for certain claims decisions or disclosures impossible.

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In addressing many health plan issues, the health insurer or third-party administrator (TPA) will be heavily involved. In other cases, employers/plan sponsors will need to make judgment calls on a case-by-case basis. Issues such as the following will arise: if the business is temporarily closed and payroll is delayed, how long can/should coverage continue; if specific employees cannot return to work, can coverage continue during an unpaid leave, and if so, for how long; can substantiation requirements for health and FSA claims be relaxed, and to what extent; can enrollment or qualified election change periods be extended or waived; can COBRA election periods be extended? In every case, the employer/plan administrator should carefully review its insurance and contract documentation and work carefully with impacted plan administrators and carriers (including stop-loss carriers) and confer with legal counsel when necessary.

## Retirement Plan Issues

The IRS, DOL, and Pension Benefit Guaranty Corporation (PBGC) have provided guidance in a number of areas, including the following:

- **Streamlined loan procedures and liberalized hardship distribution rules** apply to 401(k) plans and similar employer-sponsored retirement plans for victims of Hurricanes Harvey and Irma under IRS guidance. This relief is similar to relief previously provided for other disasters. See [IRS Announcement 2017-11](#) for information relating to Hurricane Harvey and [IRS Announcement 2017-13](#) for information relating to Hurricane Irma.
- Relief from certain **funding-related deadlines** for single-employer and multiemployer plans affected by Hurricane Harvey or Irma was provided by the IRS, DOL, and PBGC in [Notice 2017-49](#). See also PBGC [Disaster Relief #17-09](#), which provides relief from certain deadlines and penalties for plans affected by Hurricane Harvey.
- The DOL has announced that it will not take enforcement action in certain circumstances for failure to meet otherwise applicable deadlines, including deadlines relating to **participant contributions and blackout notices**. [Compliance Guidance for Employee Benefit Plans Impacted by Hurricane Harvey](#); [Compliance Guidance for Employee Benefit Plans Impacted by Hurricane Irma](#).

## Tax Filing Deadlines (Including Employee Benefit Plan Deadlines)

The IRS as an established procedure ([Rev Proc 2007-56](#)) for waiving certain tax filing and payment deadlines for taxpayers affected by presidentially declared disasters. The deadlines waived through this process include a number of deadlines relating to employee benefit plan matters, including the deadline for filing Forms 5500. The availability of the relief is triggered by the IRS through a press release or other announcement relating to a specific event.

The IRS has announced in [IR-2017-135](#) that this relief is available to Hurricane Harvey victims in certain parts of Texas. As a result of this relief, affected taxpayers (including businesses and individuals), will have until January 31, 2018, to file certain returns and pay certain taxes that were originally due on or after August 23, 2017. This relief also applies to certain business and individual taxpayers with valid filing extensions that run out on September 15 (for businesses) and October 16 (for individuals).

The IRS extended similar relief to parts of Florida and elsewhere in [IR-2017-150](#) as a result of Hurricane Irma. The relief generally applies to filing and payment deadlines that occurred starting on September 4 in the case of Florida and on September 5 in the case of Puerto Rico and the Virgin Islands. The relief for Florida was expanded to additional areas in [IR-2017-155](#).

## Leave Donation Programs

Employers may assist their employees to help others cope with disaster through a leave donation program. As a general rule, employees would be taxed on the full value of any leave they donate under long-standing tax concepts. However, if certain requirements set forth by the IRS are met, the taxation shifts to the recipient of the donated leave. There are three different options available: (1) leave donation programs that allow employees to transfer leave to employees who are absent from work as a result of a presidentially declared major disaster; (2) leave donation programs through which the employer makes contributions to a charitable organization; and (3) leave donation programs that allow employees to transfer leave to employees who are absent from work as a result of a medical emergency.

### ***Leave donation to employees adversely affected by a presidentially declared major disaster***

After providing guidance on leave donation programs in response to various disasters, the IRS provided permanent guidance on such programs in [Notice 2006-59](#) in the case of major disasters as declared by the President that warrant individual assistance or individual and public assistance from the federal government. Both Hurricanes Harvey and Irma have received such a designation. A disaster-related leave program of this nature allows employees to deposit leave for transfer to employees who are adversely affected by a major disaster. An employee is considered to be adversely affected by a major disaster if the disaster has caused severe hardship to the employee or a family member of the employee that requires the employee to be absent from work.

If IRS requirements are satisfied, the employee donating the leave is not taxed on the value of the leave (and also is not entitled to a charitable or loss deduction for the leave). Instead, the leave is treated as compensation to the recipient, including for payroll tax (FICA and FUTA) and income tax purposes. The employer is entitled to a deduction for the payment of wages to the leave recipient (just as it would have been if the donating employee had taken the leave) and is responsible for payroll taxes and wage withholding on such amounts. In most cases, an unfunded leave-sharing program will not be subject to ERISA.

Among the requirements for such a program are the following:

- It must be in writing.
- Donors cannot deposit leave for transfer to a specific recipient. Rather, the donated leave must be redistributed based on the provisions of the bona fide plan.
- The amount of donated leave must be limited to the maximum amount of leave the donor accrues during a single year (i.e., there cannot be donations of multiple years of accrued leave).
- The recipient must exhaust all paid leave available before using the leave bank.
- The recipient must request paid leave in writing, and the employer must approve the leave. Thus, a request and claims review process must be established and administered.

- The recipient must receive the paid leave at his or her normal rate of compensation (and not at the donor's rate).
- The leave must be used for purposes related to the major disaster.
- There must be a reasonable limit on the period of time after the event in which the leave can be deposited into the bank and used by recipients. For major disasters, leave deposited for one major disaster may only be used for that disaster. (An exception applies, however, for small amounts that make accounting unreasonable or administratively impracticable.) Any leave not used after the time limit must be returned to the donors (who still are employees) on a prorated basis (amount donated in proportion to the total amount of leave donated on account of the disaster).
- There cannot be a cash-out feature for the donated leave, but: (1) recipients may use leave to eliminate a negative balance that arose from leave that was advanced to the recipient; and (2) recipients may substitute leave received under the plan for leave without pay used because of the major disaster or medical emergency.
- The amount of leave available under the plan to individual recipients must be reasonable and based on need.

### ***Charitable donation disaster-related leave programs***

The IRS has provided guidance on leave programs under which employees elect to forgo vacation, sick, or personal leave in exchange for cash payments that the employer makes before January 1, 2019, to charitable organizations for the relief of victims of Hurricanes Harvey and Irma (IRS [Notice 2017-52](#)). Such payments are not includible in the income or wages of the donating employees, employees may not claim a charitable contribution for such payments, and the employer may deduct the payments as a business expense rather than a charitable contribution. Although Notice 2017-52 does not itself contain specific guidance on administration of such leave donation programs, employers adopting such a program will need to ensure they have adequate recordkeeping and other systems in place for the program.

### ***Leave donation to employees with a medical emergency***

IRS guidance on leave donation programs that allow employees to transfer leave to employees experiencing a medical emergency dates back to the 1990s. Under such a program, employees may transfer leave to other employees experiencing a medical emergency. Many employers may have already adopted such programs; the medical emergency need not relate to a disaster. A "medical emergency" is a medical condition of the employee or a family member of the employee that will cause prolonged absence from work. The requirements for such a program and the tax consequences are generally similar to those relating to programs that allow employees to transfer leave to other employees adversely impacted by a disaster, although there are some differences.

## **Additional Resources and Where to Look for Agency Updates**

### ***Department of Labor***

- [Compliance Guidance for Employee Benefit Plans Impacted by Hurricane Harvey](#)
- [Compliance Guidance for Employee Benefit Plans Impacted by Hurricane Irma](#)
- [Employee Benefits Security Administration Disaster Relief Information](#)

**IRS**

- [IRS Hurricane Irma Information Center](#)
- [IRS Hurricane Harvey Information Center](#)

**PBGC**

- [PBGC Disaster Relief Announcements](#)

**Conclusion**

Employers will continue to face many employee benefit related issues during the aftermath and rebuilding process following Hurricanes Harvey and Irma. Federal regulatory agencies have provided relief that may apply in a variety of circumstances. Determining what is needed and what relief may be available will nevertheless often require a case-by-case analysis and consultation with appropriate plan advisors, including benefits counsel.

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