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Hurricane Harvey Relief for Employees

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Following Hurricane Harvey and its resulting destruction, many employees are in need of financial assistance and/or early access to retirement funds. We will highlight how employers can make direct financial assistance payments to their affected employees on either a taxable or tax-free basis, and how the IRS has made it easier for employer-sponsored retirement plans to give loans and hardship distributions to victims.

Employer Payments to Employees

Employers can make either non-taxable “qualified disaster relief payments” to employees or other direct hardship payments that are taxable income and subject to employment taxes and withholding. Generally, all amounts received by an employee from an employer are included in gross income. However, Internal Revenue Code (Code) Section 139 provides that “qualified disaster relief payments” from an employer to an employee reimbursing or paying certain expenses in connection with a “qualified disaster” are not taxable as income and are not subject to employment taxes or withholding. In addition, the employer may take a tax deduction for these payments. Hurricane Harvey is a “qualified disaster” with respect to individuals who live in areas listed on the disaster declaration page of the FEMA website (www.fema.gov/disasters). Under Code Section 139, a “qualified disaster relief payment” includes payments to employees for the following reasonable and necessary expenses due to a qualified disaster: (i) personal, family, living, or funeral expenses, (ii) expenses incurred for the repair or rehabilitation of a personal residence (rented or owned), and (iii) expenses incurred for the repair or replacement of the contents of a personal residence, but only to the extent any such expense is not otherwise compensated for by insurance or otherwise. Qualified disaster relief payments do not include income replacement payments, such as payments of lost wages, lost business income, or unemployment compensation.

Employers desiring to make tax-free qualified disaster relief payments should consider adopting a policy with an application system to verify that the payments satisfy the requirements under Code Section 139. This could include an application form that includes statements from the employee that the requested amount is necessary for allowable expenses incurred as a result of Hurricane Harvey, and that the expenses are not reimbursable by insurance or otherwise.

Relaxed Rules for Plan Loans and Hardship Withdrawals

Internal Revenue Service Announcement 2017-11 loosens the requirements for loans and hardship distributions from qualified retirement plans (including 401(k), 403(b) and 457(b) plans) for participants who have been affected by Hurricane Harvey.

Under the Announcement, a plan will not be out of compliance with the Code if the plan makes a loan or a hardship distribution to any employee or former employee whose principal residence or place of employment is in one of the counties identified by FEMA for individual assistance because of damage related to Hurricane Harvey, or whose lineal ascendant or descendant, dependent, or spouse has a principal residence or place of employment in one of those counties.

Plans that do not have provisions allowing for loans or hardship distributions will be permitted to make loans or hardship distributions before being formally amended to provide for such features, provided the plan could make loans and/or hardship distributions if it contained enabling language and the plan is amended no later than the end of the first plan year beginning after December 31, 2017. The relief applies to any hardship of the employee and is not limited to the types of hardship listed in the regulations, and plans are not required to impose the six-month suspension of employee contributions that normally applies to hardship distributions. To qualify for the relief, a hardship distribution must be made on account of a hardship resulting from Hurricane Harvey and must be made no later than January 31, 2018.

In addition, procedural requirements for plan loans and distributions are relaxed until January 31, 2018, provided the plan administrator makes a good-faith diligent effort under the circumstances to comply with those requirements and, as soon as practicable, the plan administrator makes a reasonable attempt to obtain any documentation not obtained prior to making the loan or distribution.

The members of the Employee Benefits/ERISA Group continue to think about our clients, colleagues and friends in Houston and across the Gulf Coast region. Our main concern now is for the safety of you and your families and the efforts underway to recover and rebuild in all areas affected by Hurricane Harvey. As business begins to resume, we plan to monitor and provide updates on the resources and flexibility provided by government and other agencies with an aim toward helping companies rebound.

Please do not hesitate to reach out to us if we can assist you.