

Hurricane Harvey and Tropical Storm Harvey: What Kind of Relief May Employers Offer to Affected Employees? What About Hurricane Irma?

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September 2017

Employers with employees and operations impacted by Hurricane and Tropical Storm Harvey are asking what type of compensation, employee benefits, and tax relief may be available to them and their affected employees. There are existing provisions of the Internal Revenue Code of 1986, as amended (the “Code”), and guidance that permit employers to provide direct employee assistance on a tax-favored basis, as well as assist employees in making donations to their affected co-workers and families. The Internal Revenue Service (“IRS”), the Department of Labor (“DOL”), and the Pension Benefit Guaranty Corporation (“PBGC”) have also moved quickly to provide retirement plan disaster relief guidance for affected employers and their employees.

These same types of compensation, employee benefits, and tax relief should be available to employers if President Trump declares Hurricane Irma a federal disaster.

Qualified Disaster Relief Payments

In response to the terrorist attacks on September 11, 2001, Congress adopted Section 139 of the Code, which allows employers to pay or reimburse employee expenses that qualify as “qualified disaster relief payments” in connection with a “qualified disaster.” Such payments or reimbursements are not taxable as income, not subject to employment taxes or withholding, and generally deductible by the employer. A “qualified disaster” is a disaster that (i) results from terrorist or military actions, (ii) results from an accident involving a common carrier, (iii) is a presidentially declared disaster, or (iv) is an event that the Secretary of the Treasury determines is catastrophic. On August 25, 2017, Hurricane Harvey was named a presidentially declared disaster in the designated counties affected in Texas, retroactive to the date that the storms began on August 23, 2017. On August 28, 2017, Tropical Storm Harvey was named a presidentially declared disaster in the designated counties affected in Louisiana, retroactive to August 27, 2017. Based on historical precedent, President Trump is likely to declare Hurricane Irma a disaster depending on the severity and impact of the storm, and such declaration is likely to be retroactive to the date that the storm first impacts a region.

“Qualified disaster relief payments” include payments received (regardless of the source) for the following expenses: (i) reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster; (ii) reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence due to a qualified disaster (a “personal residence” can be rented or owned); and (iii) reasonable and necessary expenses incurred for the repair or replacement of the contents of a personal residence due to a qualified disaster. The rules on substantiation of expenses are not as strict as other types of expenses as an accommodation to the expediency that an employee may need to obtain immediate shelter and personal items. Qualified disaster relief payments do not include expenses that are otherwise reimbursed through insurance or Federal Emergency Management Agency (or “FEMA”) grants and do not include any income replacement payments, such as payments for lost wages or unemployment compensation.

Paid Leave and Working Condition Fringes

Employers generally may adopt temporary paid-time-off (“PTO”) policies for employees affected by a qualified disaster. Such PTO will continue to be treated as wages for income and employment tax purposes.

Employers may also be able to provide reimbursement for certain expenses that could be considered working condition fringes, such as transportation to a temporary emergency working site, evacuation assistance, or similar types of expenses. These expenses should, however, be reviewed on a case-by-case basis to determine whether the working condition fringe rules are satisfied.

Charitable Contributions

Employers may make charitable contributions to unaffiliated public charities or private foundations, and they may provide “matching contribution” programs that match an employee’s donation to such public charities or private foundations.

Employers also may provide donations through their own sponsored public charities, donor-advised funds through a public charity, or the employers’ own sponsored private foundation. Each of the different approaches applies separate tax rules.

In general, for an employer-sponsored public charity, the employer may not exercise too much control over the charity, and donations to aid the employer-sponsor’s employees in a disaster must provide, among other things, that affected employees be selected by an independent selection committee and adequate substantiation is provided to show that any benefits to the employer are incidental and tenuous.

Employers may use donor-advised funds to make grants to affected employees, provided that the purpose is relief for a qualified disaster under Section 139 of the Code (as described above) and additional requirements are met, including, among other things, that recipients of aid are selected by an independent selection committee and

adequate substantiation is provided to show that any benefits to the employer are incidental and tenuous.

Finally, an employer-sponsored private foundation may provide assistance to employees affected by a qualified disaster under Section 139 of the Code. The same general rules for employer-sponsored public charities and donor-advised funds apply, with the additional conditions of ensuring that there is no self-dealing with the private foundation's officers or other interested persons and that no other conflict of interest exists that could subject the private foundation to excise taxes under the private foundation rules of the Code.

Leave Sharing Programs

Employers may offer leave sharing programs to their employees permitting employees to donate vacation, sick leave, or PTO. There are two types of programs: (i) one in which employees offer leave directly to co-workers impacted by a presidentially declared disaster and (ii) another in which employees donate leave to an employer-designated public charity or private foundation.

Under IRS Notice 2006-28, leave donated to a co-worker will not be taxable to the donor but, rather, taxable to the recipient when the leave is taken, if made under a "major disaster leave sharing program," which is triggered when there is a major disaster declared by the president under the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act") or a major disaster or emergency affecting a sufficient number of federal employees. This is a different definition than a "qualified disaster" under Section 139 of the Code. On August 25 and August 28, 2017, President Trump declared Hurricane Harvey and Tropical Storm Harvey, respectively, major disasters under the Stafford Act.

To take advantage of the favorable tax treatment, the leave sharing program must be in writing and state the following:

- Leave is donated for use by other employees who have been adversely affected by a major disaster. An employee is considered to be "adversely affected" by a major disaster if it has caused severe hardship to the employee or a family member of the employee who requires the employee to be absent from work.
- The plan does not allow a leave donor to donate leave to a specific leave recipient.
- The amount of leave that a leave donor may donate in any year generally may not exceed the maximum amount of leave that he or she normally accrues during the year.
- A leave recipient may receive paid leave (at his or her normal rate of compensation) from donated leave. Each leave recipient must use this leave for purposes related to the major disaster.

- The plan adopts a reasonable limit, based on the severity of the disaster, on the period of time after the major disaster occurs during which a leave donor may donate, and a leave recipient must use, the donated leave.
- A leave recipient may not convert leave received under the plan into cash in lieu of using the leave. However, a leave recipient may use leave received under the plan to eliminate a negative leave balance that arose from leave that was advanced to the leave recipient because of the effects of the major disaster.
- The employer must make a reasonable determination, based on need, as to how much leave each approved leave recipient may receive under the plan.
- Leave donated due to one major disaster may be used only for employees affected by that disaster, with certain de minimis exceptions, and unused leave needs to be returned to the donors.

If the above requirements are not met, the leave sharing program may still be used, except that the leave donated is taxable to the employee donating the leave.

On September 5, 2017, the IRS published IRS Notice 2017-48, which specifically provides that if employees contribute leave that the employer pays to a charitable organization to benefit victims of Hurricane Harvey, the IRS will not treat the cash payments as income to the employees. The employer may also take a business deduction for the payments made to the charitable organization. To take advantage of this tax relief, the charitable organization must be qualified under Section 170(c) of the Code.

Traps for Employers

Both the DOL and the IRS have provided warnings to the public regarding Hurricane Harvey charity scams. To take advantage of the tax relief, employers should carefully follow the rules described in the IRS and DOL guidance in any program providing benefits to affected employees. The tax-exempt status of any unaffiliated public charities or private foundations should be confirmed.

It may seem easy for an employer to contribute to a “gofundme” page or similar vehicle set up by an affected employee. Any type of vehicle established to benefit one individual cannot qualify as a charitable organization under Section 501(c)(3) of the Code because it does not provide a “public benefit.” Such contributions are generally treated as gifts for tax purposes between unrelated individuals. Since financial transactions between employers and employees are generally considered taxable (unless a specific exception applies), a specific donation to an individual through a “gofundme” page or similar vehicle should be reported as income to the employee recipient, even if an employee’s relative, and not the employee, is the beneficiary of the donations. To avoid issues over income tax treatment, an employer could instead make qualified disaster relief payments to an employee or member of the employee’s family (as described above).

Retirement Plan Relief

IRS. In response to Hurricane and Tropical Storm Harvey, on August 31, 2017, the IRS provided in Announcement 2017-11 retirement plan relief to taxpayers who have been adversely affected by Hurricane Harvey. The IRS announced that it will ease procedures in order to allow employees to access their retirement plan funds:

- A qualified employer plan is allowed to provide an employee or a former employee with a loan, or a hardship distribution, for a need arising from Hurricane and Tropical Storm Harvey. If the employee asserts that there is a financial need as a result of Hurricane and Tropical Storm Harvey, then there is no need to receive any further documentation and the distribution will be treated as a hardship distribution for federal tax purposes.
- A “qualified employer plan” means a plan or contract meeting the requirements of Section 401(a), 403(a), or 403(b) (and a Section 457(b) plan maintained by an eligible employer under Section 457(e)(1)(A)), and, for purposes of the hardship relief, that could, if it contained enabling language, make hardship distributions. Any hardship arising from Hurricane and Tropical Storm Harvey is treated as an “unforeseeable emergency” for purposes of distributions from such plans. The maximum amount available for hardship distribution has not changed.
- The IRS provided relief in connection with filing extensions for Form 5500 series returns as a result of the disaster for taxpayers who reside or have a business in the disaster area. The relief generally extends from August 23, 2017, through January 31, 2018.

DOL. The DOL is providing disaster relief regarding certain verification procedures required under retirement plans with respect to plan loans to participants and beneficiaries, hardship distributions, and other pension benefit distributions:

- Under 29 CFR § 2510.3-102, employers are required to forward plan assets on the earliest date on which such amounts can reasonably be segregated from the employer’s general assets, but in no event later than the 15th business day of the month following the month in which the amounts were paid to, or withheld by, the employer. The DOL will not, in case of a failure attributable to Hurricane and Tropical Storm Harvey, seek to enforce these provisions to the extent that affected employers, and service providers, act reasonably, prudently, and in the interest of employees to comply as soon as practical under the circumstances.
- Section 101(i) of the Employee Retirement Income Security Act of 1974 (or “ERISA”) and the regulations issued thereunder, at 29 CFR § 2520.101-3, indicate that the administrator of an individual account plan is required to provide 30 days’ advance notice to participants and beneficiaries whose rights under the plan will be temporarily suspended, limited, or restricted by a blackout period (i.e., a period of suspension, limitation, or restriction of more than three consecutive business days on a participant’s ability to direct investments, obtain loans, or obtain other distributions from the plan). With respect to blackout

periods related to Hurricane and Tropical Storm Harvey, the DOL will not allege a violation of the blackout notice requirements solely on the basis that a fiduciary did not make the required written determination.

- The DOL recognizes that plan participants and beneficiaries may encounter difficulties in meeting certain deadlines for filing benefit claims and Consolidated Omnibus Budget Reconciliation Act (or “COBRA”) elections. The guiding principle for plans must be to act reasonably, prudently, and in the interest of the workers and their families who rely on their health plans for their physical and economic well-being. Plan fiduciaries should make reasonable accommodations to prevent the loss of benefits in such cases and should take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames.

PBGC. The PBGC is waiving certain penalties and extending certain deadlines in response to Hurricane and Tropical Storm Harvey for designated persons. A “Designated Person” is any person responsible for meeting a PBGC deadline that is located in the disaster area for which the IRS has provided relief in connection with filing extensions for Form 5500 series returns, or cannot reasonably obtain information or other assistance needed to meet the deadline from a service provider, bank, or other person whose operations are directly affected by the severe storms and flooding from Hurricane and Tropical Storm Harvey. The PBGC relief includes the following:

- If the plan administrator of a plan is a Designated Person, PBGC will, for purposes of assessing any late payment or late information penalty, treat as timely any premium filing required to be made for the plan beginning for the period starting on August 23, 2017, to January 31, 2018, if the filing is made by January 31, 2018. In that case, PBGC will waive the applicable penalty, but not the applicable interest charge.
- If the administrator of a plan that is terminating in a standard termination is a Designated Person, any of the following plan termination deadlines for the plan that fall on or after August 23, 2017, and on or before January 31, 2018, are extended to January 31, 2018:
 - the deadline for filing the standard termination notice (Form 500),
 - the deadline for completing the distribution of plan assets, and
 - the deadline for filing the post-distribution certification (Form 501) without penalty.
- If the deadline for requesting a review of a PBGC determination under PBGC’s regulation on Rules for Administrative Review of Agency Decisions falls on or after August 23, 2017, and on or before January 31, 2018, the deadline is extended to January 31, 2018.

All employers with employees and operations impacted by Hurricane and Tropical Storm Harvey directly or indirectly should take immediate action to review the relief

available for their business and employees. In addition, further developments should be monitored by employees with employers and operations that may be impacted by Hurricane Irma and subsequent disasters.

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