

Hurricane Sandy Relief

Announcement 2012-44

Purpose

This announcement provides relief to taxpayers who have been adversely affected by Hurricane Sandy and have retirement assets in qualified employer plans they would like to use to alleviate hardships caused by Hurricane Sandy. In addition, this announcement provides relief from certain verification procedures that may be required under retirement plans with respect to loans and hardship distributions. The relief provided under this announcement is in addition to the relief already provided by the Service pursuant to News Release IR-2012-83 under § 7508A of the Internal Revenue Code ("Code") for victims of Hurricane Sandy. (See the regulations under § 7508A and Section 8 of Rev. Proc. 2007-56, 2007-34 I.R.B. 388, for a listing of employee benefit-related acts currently postponed until February 1, 2013, because of the disaster.)

Background

The laws relating to qualified employer plans impose various limitations on the permissibility of loans and distributions from those plans. For example, § 401(k)(2)(B)(i) of the Code provides that in the case of a § 401(k) plan that is part of a profit-sharing or stock bonus plan, elective deferrals may be distributed only in certain situations, one of which is on account of hardship. Section 403(b)(11) provides similar rules with respect to elective deferrals under a § 403(b) plan. Section 457(d)(1)(A) provides that a plan described in § 457(b) may not permit distributions before the occurrence of certain enumerated events, one being when the participant is faced with an unforeseeable emergency. Certain other types of plans or accounts are not permitted to make in-service distributions (distributions to a participant who is still an employee) even if there is a hardship. For example, in-service hardship distributions are generally not permitted from pension plans or from accounts holding qualified nonelective contributions ("QNECs") described in § 401(m)(4)(C) or qualified matching contributions ("QMACs") described in § 401(k)(3)(D)(ii)(I). However, Rev. Rul. 2004-12, 2004-7 I.R.B. 478, holds that if amounts attributable to rollover contributions are separately accounted for within a plan, those amounts may be distributed at any time, pursuant to the employee's request. Section 72(p) imposes certain requirements relating to plan loans. Unless those requirements are satisfied, a loan is treated as a distribution under the plan.

In order to make a loan or distribution (including a hardship distribution), a plan must contain language authorizing the loan or distribution. Also, except to the extent a distribution consists of already-taxed amounts, the distribution will be includible in gross income and generally subject to the 10-percent additional tax under § 72(t). Similar rules relating to income inclusion and taxation apply to a distribution from an IRA.

Plan provisions and regulations under certain Code sections establish verification procedures that a plan must follow before loans or distributions can be made from the plan. For example, the regulations under § 401(k) set forth certain criteria an employee must meet in order to receive a hardship distribution. A plan may contain procedures designed to confirm that the criteria have been satisfied.

Relief

As described below, a qualified employer plan will not be treated as failing to satisfy any requirement under the Code or regulations merely because the plan makes a loan, or a hardship distribution for a need arising from Hurricane Sandy, to an employee or former employee whose principal residence on October 26, 2012, was located in one of the counties or Tribal Nations that have been identified as covered disaster areas because of the devastation caused by Hurricane Sandy or whose place of employment was located in one of these counties or Tribal Nations on that date or whose lineal ascendant or descendant, dependent or spouse had a principal residence or place of employment in one of these counties or Tribal Nations on that date. Covered disaster areas are identified as federally declared disaster areas in the News Releases issued by the IRS for Victims of Hurricane Sandy, which are found on IRS.gov at: -- <http://www.irs.gov/uac/Newsroom/Help-for-Victims-of-Hurricane-Sandy>. Plan administrators may rely upon representations from the employee or former employee as to the need for and amount of a hardship distribution, unless the plan administrator has actual knowledge to the contrary, and the distribution is treated as a hardship distribution for all purposes under the Code and regulations.

For purposes of this announcement, a "qualified employer plan" means a plan or contract meeting the requirements of § 401(a), 403(a) or 403(b), and, for purposes of the hardship relief, which could, if it contained enabling language, make hardship distributions. For purposes of this paragraph, a "qualified employer plan" also means a plan described in § 457(b) maintained by an eligible employer described in § 457(e)(1)(A), and any hardship arising from Hurricane Sandy is treated as an "unforeseeable emergency" for purposes of distributions from such plans. For example, a profit-sharing or stock bonus plan that currently does not provide for hardship or other in-service distributions may nevertheless make Sandy-related hardship distributions pursuant to this announcement, except from QNEC or QMAC accounts or from earnings on elective contributions

(see below for plan amendment requirements). A defined benefit or money purchase plan, which generally cannot make in-service hardship distributions, may not make hardship distributions pursuant to this announcement, other than from a separate account, if any, within the plan containing either employee contributions or rollover amounts.

The amount available for hardship distribution is limited to the maximum amount that would be permitted to be available for a hardship distribution under the plan under the Code and regulations. However, the relief provided by this announcement applies to any hardship of the employee, not just the types enumerated in the regulations, and no post-distribution contribution restrictions are required. For example, regulations under § 401(k) provide safe harbor hardship distribution standards under which a hardship is deemed to exist only for certain enumerated events, and after receipt of the hardship amount, the employee is prohibited from making contributions for at least 6 months. Plans need not follow these rules with respect to hardship distributions for which relief is provided under this announcement.

To make a loan or hardship distribution, a qualified employer plan that does not provide for them must be amended to provide for loans or hardship distributions no later than the end of the first plan year beginning after December 31, 2012. To qualify for the relief under this announcement, a hardship distribution must be made on account of a hardship resulting from Hurricane Sandy and be made on or after October 26, 2012, and no later than February 1, 2013. Plan loans made pursuant to this announcement must satisfy the requirements of § 72(p).

In addition, a retirement plan will not be treated as failing to follow procedural requirements for plan loans (in the case of retirement plans other than IRAs) or distributions (in the case of all retirement plans, including IRAs) imposed by the terms of the plan merely because those requirements are disregarded for any period beginning on or after October 26, 2012, and continuing through February 1, 2013, with respect to distributions to individuals described in the first paragraph under "Relief", above, provided the plan administrator (or financial institution in the case of distributions from IRAs) makes a good-faith diligent effort under the circumstances to comply with those requirements. However, as soon as practicable, the plan administrator (or financial institution in the case of IRAs) must make a reasonable attempt to assemble any forgone documentation. For example, if spousal consent is required 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 plan will not be disqualified for failure to operate in accordance with its terms if it makes a loan or distribution to an individual described in the first paragraph under "Relief" in the absence of a death certificate if it is reasonable to believe, under the circumstances, that the spouse is deceased, the loan or distribution is made no later than February 1, 2013, and the plan administrator makes reasonable efforts to obtain the death certificate as

soon as practicable. Taxpayers are reminded that in general the normal spousal consent rules continue to apply. For purposes of this announcement, "retirement plan" has the same meaning as "eligible retirement plan" under § 402(c)(8)(B).

The Department of Labor has advised Treasury and the Internal Revenue Service that it will not treat any person as having violated the provisions of Title I of the Employee Retirement Income Security Act solely because that person complied with the provisions of this announcement.

Drafting Information

The principal author of this announcement is Eric Slack of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this announcement may be sent via e-mail to RetirementPlanQuestions@irs.gov.