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Hurricane Relief Legislation for Retirement Plans

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We addressed hurricane relief for retirement plans offered by the IRS and other agencies in previous blog posts (covered here and here). While the IRS relief allows for easier access to retirement funds on account of losses due to the recent hurricanes, the IRS could not on its own alleviate the adverse tax impacts of obtaining a hardship distribution. But with the Disaster Tax Relief and Airport and Airway Extension Act (the "Act"), Congress has provided both for hardship distribution tax relief and more generous participant loan rules for participants whose principal abodes were in one of the declared disaster areas for Hurricane Harvey, Hurricane Irma or Hurricane Maria (the "Hurricane Disaster Areas") at the time that the respective hurricane hit ("Qualifying Participants").

Hardship Distribution Relief

Hardship distributions for economic losses of up to $100,000 from a 401(k) plan, 403(b) plan or governmental 457(b) plan taken by Qualifying Participants are entitled to the following relief under the Act:

- *Excise Tax Relief*. The 10% excise tax for distributions before age 59-1/2 does not apply for qualifying distributions.
- *Spreading of Income Tax*. Unless the participant elects otherwise, distributions are taken into account as taxable income ratably over a 3-year period.
- *Re-contribution Option*. Participants can elect to re-contribute their qualifying distributions to a plan or IRA within three years of the distribution date. In addition, participants who obtained a hardship distribution to purchase a principal residence in a Hurricane Disaster Area between February 28, 2017 and September 21, 2017, but who were not able to purchase or construct the residence on account of the applicable hurricane, can repay the distribution to the plan until February 28, 2018. Amounts repaid will be treated as if they have been rolled over in a tax-free transaction.
- *Withholding*. Qualifying distributions are not subject to the 20% withholding that is ordinarily applicable to eligible rollover distributions.

The hardship distribution relief is available until December 31, 2018.

Plan Loans

The Act also provides special plan loan provisions, including:

- *Amount of Loan*. The maximum plan loan may be 100% of the participant's balance, up to $100,000,

as compared to the normal limits of 50% of the account balance, up to $50,000.

- *Deferral of Repayment*. Qualified Participants with loan payments due between the date of the respective hurricane affecting the Qualified Participant and December 31, 2018, may have their loan payments delayed a year. Interest may still accrue during the period of delay.

As with the hardship distribution relief, the special loans provisions are available until December 31, 2018.

Plan Amendments. Plan amendments must be adopted to incorporate the relief under the Act. The Act provides for an amendment deadline of the last day of the plan year beginning on or after January 1, 2019 (e.g., December 31, 2019, for calendar year plans), with an additional two years for governmental plans to adopt required amendments. However, the IRS has discretion to delay the amendment deadlines. The IRS has generally provided that plan amendments to reflect law changes will not be required to be adopted until the last day of the second plan year after an amendment is included on the IRS's Required Amendments List. (See our prior Legal Alert.)

Relation to Prior IRS Hurricane Relief

It should be noted that the participants eligible for the relief under the Act are not identical to those eligible under the IRS's hardship relief. Only participants who reside in one of the Hurricane Disaster Areas qualify for relief under the Act, while other participants with children, parents or certain other family members or dependents in a Hurricane Disaster Area qualify for the IRS hardship relief. This is an important distinction and a potential source of confusion because the special tax relief for hardship distributions is not available for participants who do not reside in one of the Hurricane Disaster Areas, even if they obtain a hardship on account of losses due to a hurricane.

The IRS is expected to issue guidance addressing questions under the Act. We note that the Act provides similar relief to what was provided under the Katrina Emergency Tax Relief Act of 2005 (KETRA) for victims of Hurricane Katrina in 2005. Accordingly, we anticipate that this guidance will be similar in many ways to Notice 2005-92, which provided guidance under KETRA.