

Employee Benefits Update

September 2019

IRS Releases Final Regulations Regarding Hardship Distribution Rules

Executive Summary

The IRS recently issued final regulations relating to the hardship distribution rules for 401(k) and other employer-sponsored retirement plans, such as 403(b) plans. The final regulations are substantially similar to the proposed regulations that were released on November 14, 2018 in response to changes required by the Bipartisan Budget Act of 2018, although some minor changes were made.

What You Should Do

Work with your ERISA counsel, recordkeeper or other third-party service provider to make any necessary or desired changes to your plan documentation, Summary Plan Descriptions, and plan operations in a timely manner.



I. *Final Regulations for Hardship Distributions*

On September 19, 2019, the IRS released final regulations on hardship distributions from 401(k) and other retirement plans. The final regulations deviate very little from the proposed regulations released in November 2018 (which we previously summarized [here](#)). However, the final regulations provide clarification on the following:

- **Natural Disaster Relief:** The new safe harbor hardship withdrawal for natural disasters differs from prior disaster-related relief provided by the IRS in that only disaster-related expenses and losses of an employee who lived or worked in the disaster area will qualify for the hardship withdrawal, not expenses and losses of the employee's relatives or dependents. In addition, there is no deadline for when a request for a disaster-related hardship distribution must be made.
- **Employee Representations as to Financial Need:** The final regulations clarify that an employee's verbal representation about his or her financial need via telephone can be used as long as the conversation is recorded. Furthermore, the Preamble to the final regulations clarifies that an employee can make a representation that he or she has insufficient cash or liquid assets that are reasonably available to satisfy the financial need, even if the employee does have some cash or other liquid assets available, as long as those assets are earmarked to pay for expenses in the near future, such as rent.

Important Dates

October 1:

- Notice of individual HRAs that are newly-permitted for 2020 must be provided for calendar year open enrollment effective January 1, 2020

October 14:

- Distribute Medicare Part D notice

November 15:

- Confirm that 401(k) plan recordkeeper has provided 3rd quarter benefit statements to participants
- Distribute Summary of Benefits and Coverage for each group health plan option offered
- File Form 990 returns for tax-exempt trusts or VEBAs (if Form 8868 was filed)
- Distribute 401(k)/403(b) Plan Safe Harbor Notice and Automatic Enrollment Notices
- Distribute Notice of Qualified Default Investment Alternative ("QDIA") for Defined Contribution Plans

- **Prohibition on Suspension of Deferrals:** The final regulations clarify that the prohibition on suspending deferrals for 6 months after an employee obtains a hardship distribution applies only to a tax-qualified plan, a 403(b) plan, and an eligible 457(b) deferred compensation plan maintained by an eligible employer. The prohibition against the suspension of deferrals does not apply to deferred compensation plans subject to Section 409A or ineligible 457(f) plans, so employers may choose to retain or remove suspension language in such plans as they see fit.
- **Additional Conditions May be Imposed:** The final regulations provide that plan sponsors may (but are not required to) impose a broad range of conditions on hardship distributions, such as requiring that a participant obtain any permissible loan from a plan or imposing a minimum dollar amount for a hardship distribution, provided that the amount is nondiscriminatory. Plan sponsors may want to consider such minimums or other conditions if they are concerned about leakage of assets from their retirement plans and preserving their participants' retirement readiness.

II. Effective Dates and Deadlines

The final regulations are effective for plan years beginning after December 31, 2018. Operationally, mandatory changes that are required to comply with the final regulations must be implemented by January 1, 2020 and the related amendment will need to be *effective* no later than January 1, 2020. However, the deadline for actually executing any necessary plan amendments will depend upon the type of plan:

- **Non-Governmental Individually-Designed 401(k) and Other Qualified Plans:** The deadline to amend a “disqualifying provision” is generally the end of the second calendar year following the year of publication on the IRS Required Amendments list (e.g., amendments for items on the 2019 Required Amendments list generally must be adopted by December 31, 2021).
- **Pre-Approved Plans:** The deadline for adopting a required amendment related to hardship distribution provisions (as well as any integrally related amendment) for a pre-approved plan varies depending on a number of factors, such as the plan year and whether the hardship amendment includes only the required changes (such as removing the 6-month suspension of employee deferrals), or whether it also includes optional changes (such as the natural disaster loss rules or requiring a minimum dollar amount). Generally, though, the amendment deadline will be the plan sponsor’s tax-filing deadline (plus extensions) for 2020, even if the plan sponsor made the optional changes effective in an earlier year.
- **403(b) Plans:** As of now, the deadline to amend 403(b) plans is March 31, 2020, but the IRS may extend this deadline in the future.



If you have any questions about the hardship distribution regulations or would like to discuss any other employee benefits issues, please feel free to contact any member of our Employee Benefits group below.



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