

# Compensation and Benefits Insights

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## Retirement Plan Relief for Victims of Hurricanes Harvey, Irma, and Maria and the California Wildfires

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In the wake of Hurricanes Harvey, Irma and Maria, the Disaster Tax Relief and Airport and Airway Extension Act of 2017 (the “**Act**”) was passed to assist individuals and businesses that were affected by the storms. In addition to other targeted tax relief, the Act provides that distributions from IRAs and qualified plans, and loans from qualified plans, to individuals affected by the hurricanes are subject to special tax treatment. In addition, the IRS issued guidance (IRS Announcements 2017-11, 2017-13, and 2017-15) (the “**IRS Guidance**”) with respect to victims of the hurricanes and of the recent wildfires in California. In general, the IRS Guidance permits employers to waive certain restrictions usually applicable to loans and hardship distributions from qualified plans. The following is a summary of the relief granted by the Act and the IRS Guidance.

### Qualified Hurricane Distributions

The Act allows victims of the hurricanes to take “**Qualified Hurricane Distributions**” of up to \$100,000 (less any prior withdrawals treated as qualified hurricane distributions) from their 401(k) plan, 403(b) plan, 457(b) plan, or IRA. To qualify, such distributions must be made to a Qualified Individual after the Applicable Disaster Date, but before January 1, 2019. A “**Qualified Individual**” means a person whose principal place of abode on the Applicable Disaster Date is located in the FEMA-designated disaster area for the applicable hurricane and who has sustained an economic loss by reason of the hurricane. “**Applicable Disaster Date**” means August 23, 2017 for Hurricane Harvey, September 4, 2017 for Hurricane Irma, and September 16, 2017 for Hurricane Maria. Qualified Hurricane Distributions receive the following special tax treatment:

- Section 72(t) of the Internal Revenue Code imposes a 10% early withdrawal penalty on distributions to a participant who has not reached age 59½. This 10% early withdrawal penalty will not apply to Qualified Hurricane Distributions.

### Our Practice

We advise public, private, taxable and tax-exempt clients on a wide variety of issues related to the design, preparation, communication, administration, operation, merger, split-up, amendment and termination of all forms of employee benefit plans and executive compensation programs and related funding vehicles. The firm has defended clients in significant high-profile ERISA litigation matters, including 401(k) plan “stock drop” cases and other breach-of-fiduciary-duty class actions.

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- The Act permits taxpayers to elect that the Qualified Hurricane Distributions be included in income (i) ratably over the three-tax year period beginning with the year in which the distribution is received, or (ii) in the year received.
- Any portion of a Qualified Hurricane Distribution may be re-contributed to any eligible retirement plan (i.e., a 401(k) plan, 403(b) plan, 457(b) plan, or IRA) at any time within the three-year period after the distribution is received. The repayments do not have to be made to the distributing plan. Repayments should be treated as after-tax rollover contributions since the distribution was previously subject to tax.
- Qualified Hurricane Distributions are not subject to the mandatory 20% income tax withholding applicable to qualified plan distributions that are not directly rolled over to a retirement plan or IRA.

## Special Rules for Plan Loans

The Act provides that plan loans made to Qualified Individuals during the period beginning on September 28, 2017, and ending on December 31, 2018 are subject to the following more flexible rules:

- The loan amount can be up to the lesser of \$100,000 or 100% of the participant's vested accrued benefit in the plan. (By comparison, the plan loan rules normally limit plan loans to the lesser of \$50,000 or 50% of the participant's vested accrued benefit).
- With respect to an outstanding plan loan that has repayments due during the period beginning on the Applicable Disaster Date and ending on December 31, 2018, (i) such repayments are delayed for one year, with the remaining payments and interest adjusted to reflect the delay, and (ii) the delay is disregarded in determining the statutory maximum loan term.

## IRS Guidance Applicable to Plan Hardship Distributions and Loans.

The IRS Guidance relaxed certain rules for hardship distributions and loans that are made to alleviate the disaster-related financial needs of (i) a participant who had his or her principal residence or place of employment on the Applicable Disaster Date located in the FEMA-designated disaster area for Hurricane Harvey, Irma, Maria or the California wildfires, or (ii) a participant's lineal ascendant, descendant, dependent or spouse who had their principal residence or place of employment on the Applicable Disaster Date located in such FEMA-designated disaster area. To qualify for this relief, the hardship distribution or loan must be made after the Applicable Disaster Date and no later than January 31, 2018. The relaxed rules provided by the IRS Guidance include:

- Hardship distributions are not restricted to the "immediate needs" listed in the regulations, and can be made with respect to any hardship of the employee related to the applicable disaster—for example, expenses for food or shelter, or for repair of a home.
- The employer may rely on the participant's representations as to the need for and amount of a hardship distribution unless the employer has knowledge to the contrary.

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- A plan does not need to impose the six-month contribution suspension that would typically apply in the event of a hardship withdrawal.
- A plan will not be treated as failing to follow procedural requirements imposed by the terms of the plan merely because those requirements are disregarded for plan distributions and loans made pursuant to the granted relief, so long as the plan administrator makes a good-faith effort to comply and, as soon as practicable, makes a reasonable attempt to assemble any necessary documentation.

However, the IRS Guidance clarifies that except to the extent the distribution consists of after-tax amounts, such distribution will be includable in gross income and subject to the 10% early withdrawal penalty. In addition, if otherwise applicable, the normal spousal consent rules will continue to apply.

## Plan Amendments.

Amendments to provide for Qualified Hurricane Distributions must be adopted on or before the last day of the plan year beginning on or after January 1, 2019. To the extent an employer elects to take advantage of the relief outlined in the IRS Guidance, plan amendments incorporating such relief must be adopted by the end of 2018 (December 31, 2018 for calendar year plans).

King & Spalding would be pleased to answer questions regarding the disaster-related relief provisions and assist you in making any required amendments to your plan documents.

## December 2017 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

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Employers and plan sponsors must comply with numerous filing and notice deadlines for their retirement and health and welfare plans. Failure to comply with these deadlines can result in costly penalties. To avoid such penalties, employers should remain informed with respect to the filing and notice deadlines associated with their plans.

The filing and notice deadline table below provides key filing and notice deadlines common to calendar year plans for December 2017. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is generally delayed until the next business day. Please note that the deadlines will generally be different if your plan year is not the calendar year. Please also note that the table is not a complete list of all applicable filing and notice deadlines (including any available exceptions and/or extensions), just the most common ones. King & Spalding is happy to assist you with any questions you may have regarding compliance with the filing and notice requirements for your employee benefit plans.

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Deadline	Item	Action	Affected Plans
December 1 (at least 30 but no more than 90 days before the beginning of the plan year)	Safe Harbor Notice	Deadline for plan administrator to distribute a notice of intent to use a safe harbor formula to participants and beneficiaries. This notice must be provided within a reasonable period of time before the beginning of the plan year. The regulations provide a safe harbor of not less than 30 days but not more than 90 days before the beginning of the plan year.	401(k) and 401(m) Plans
	Contingent Safe Harbor Notice	Deadline for plan administrator to distribute a notice to participants and beneficiaries specifying that the plan may be amended during the following plan year to include a 3% employer non-elective safe harbor contribution.	401(k) and 401(m) Plans
	Auto-Enrollment Notice	Deadline for plan administrator to provide annual auto-enrollment notice for plans with qualified automatic contribution arrangements (QACA) or eligible automatic contribution arrangements (EACA). This notice must be provided sufficiently early so that the employee has a reasonable period of time after receipt to make QACA or EACA elections. The preamble to the regulations notes that this timing requirement is deemed to be satisfied if the notice is given at least 30 days but not more than 90 days before the beginning of each plan year.	401(k) Plans with QACA or EACA
December 1 (at least 30 days before the end of the plan year)	Qualified Default Investment Alternative (QDIA) Annual Notice	Deadline for plan administrator to provide annual QDIA notice to participants or beneficiaries.	Defined Contribution Plans with participant-directed investments
	Safe Harbor Follow-Up Notice	Deadline for plan administrator to distribute a notice to participants and beneficiaries informing them that the 3% employer non-elective safe harbor contribution will be made for the current plan year. This notice may be combined with the Contingent Safe Harbor Notice for the following plan year.	401(k) and 401(m) Plans

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Deadline	Item	Action	Affected Plans
December 1  (at least 30 days prior to the first day of the new plan or policy year)	Summary of Benefits and Coverage for Health Plans that Automatically Renew Coverage	Deadline for group health plan administrator (for self-insured plans) or group health plan administrator or insurer (for fully insured plans) to provide a Summary of Benefits Coverage (SBC) if coverage automatically renews each year.	Group Health Plans and Health Insurance Issuers
December 1  (no later than 30 days before participant becomes eligible to diversify employer stock)	Diversification Notice	Deadline for plan administrator to provide diversification notice to participants who will first be eligible to divest employer securities on January 1.	Defined Contribution Plans with participant-directed investments in employer stock
December 15  (2 months after the extension for filing Form 5500)	Summary Annual Report (SAR)	Deadline for plan administrator to distribute SAR for prior year to participants and beneficiaries, if the IRS granted a 2-month extension for Form 5500 on or before the original Form 5500 deadline.	Defined Contribution Plans
December 31  (last day of plan year following plan year for which contributions were made)	Correction of Excess Contributions & Excess Aggregate Contributions	Deadline for plan administrator to make corrective employer contributions or distribute excess contributions (ADP test failure) and excess aggregate contributions (ACP test failure) for the prior year.	401(k) and 401(m) Plans
December 31  (last day of plan year)	Discretionary Amendments	Deadline for plan sponsor to adopt discretionary plan amendments for calendar-year plans.	Qualified Retirement Plans*

\* Qualified Retirement Plans include all defined benefit and defined contribution plans that are intended to satisfy Internal Revenue Code §401(a).

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Deadline	Item	Action	Affected Plans
	Adjusted Funding Target Attainment Percentage (AFTAP) Certification	Deadline for actuary to certify a specific AFTAP if a range certification was previously issued.	Defined Benefit Plans
December 31 (at least annually)	ERISA §404(c) Disclosures	Deadline for plan administrator to distribute notices to participants and beneficiaries if the employer wants to limit fiduciary liability for participant-directed investment decisions.	Defined Contribution Plans with participant-directed investments
	Annual Fee Disclosure to Participants	Deadline for plan administrator to make annual disclosure of certain fees for participant directed individual account plans to be provided to participants and beneficiaries.	
	Pension Benefit Statements	Deadline for plan administrator of a defined benefit plan using alternative notice for pension benefit statements to notify participants of availability of a pension benefit statement and instructions on how to obtain it.	Defined Benefit Plans
December 31  (at least annually as a part of any yearly informational packet)	WHCRA Notice	Deadline for group health plans to distribute Women's Health and Cancer Rights Act (WHCRA) notice for new plan year to all participants and beneficiaries advising them of available mastectomy benefits under WHCRA and any deductibles and co-insurance limits applicable to such benefits.	Health and Welfare Plans
	Children's Health Insurance Program Reauthorization Act (CHIPRA )  Notice	Deadline for employer to notify employees of potential opportunities for premium assistance from the state in which the employee resides.	Group Health Plans in states that provide premium assistance under Medicaid or CHIP

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Deadline	Item	Action	Affected Plans
	Wellness Program Notice	Although no specific deadline is provided, the notice must be provided before employees provide any health information for the program and with enough time to decide whether to participate in the program.	Group Health Plans offering wellness programs
December 31	Required Minimum Distributions	Deadline for plan administrator to distribute current year's required minimum distributions under IRC §401(a)(9).	Qualified Retirement Plans