



ERISA Group Benefits Newsletter November 20, 2018

2019 Maximum Salary Reduction for Flexible Spending Accounts

The IRS has increased the maximum salary reduction for flexible spending accounts (FSAs) for 2019 to \$2,700. The limit for 2018 was \$2,650.

IRS Issues Guidance on Hardship Distribution Rules for Plan Years Beginning in 2019

Earlier this year, the Bipartisan Budget Act of 2018 (the "Budget Act") made a number of changes to the hardship distribution rules for section 401(k) and 403(b) plans for plan years beginning in 2019 (as described in our April 2018 Newsletter). The Budget Act directed the IRS to issue new regulations with respect to some of the changes to the hardship distribution rules within 1 year. On Friday, November 9th, the IRS did so in the form of proposed regulations (the "Proposed Regulations") which modify the hardship distribution rules as follows:

- Remove the Six-Month Suspension Requirement on Participant Contributions

Under current hardship rules, employees who take hardship distributions are generally required to be suspended from making participant contributions for at least six months following receipt of the hardship distribution. The Proposed Regulations would remove this six-month suspension requirement for plan years beginning on or after January 1, 2019. However, plans may continue to apply, as an optional plan design feature, the suspension of participant contributions as a prerequisite for hardship distributions made through the end of calendar year 2019. That said, the Proposed Regulations state that, for hardship distributions made on or after January 1, 2020, a plan may not provide for the suspension as a condition to obtaining the distribution, (i.e. it becomes mandatory that the suspension no longer be required).

Finally, for plans with employees who are in six-month suspensions on January 1, 2019, plans may end the suspension periods on January 1, 2019 or continue operating as is with the suspension periods running their normal course, as long as the decision is applied consistently across the entire plan.

- Remove the Requirement to Take Available Plan Loans Prior to Hardship Distribution

Under current hardship rules, employees are generally required to take all available non-taxable plan loans prior to obtaining a hardship distribution. The Proposed Regulations would remove this requirement effective for hardship distributions made on or after January 1, 2019. However, this elimination of the loan requirement is not mandatory. Therefore, plans could continue requiring an employee to take all available plan loans prior to obtaining a hardship distribution as an optional plan design feature.

- Expand the Sources Available for Hardship Distribution

The Proposed Regulations would expand the sources available for hardship distributions, effective as of January 1, 2019, to include qualified nonelective contributions (QNECs), qualified matching contributions (QMACs), including safe harbor contributions, as well as the earnings on elective deferrals, QNECs, and QMACs. Under the Proposed Regulations, the expansion of the sources available for hardship distributions is not mandatory; therefore plans may continue to restrict the sources available for hardship distributions as an optional plan design feature.

Note on 403(b) Plans: For 403(b) Plans, under the Proposed Regulations, earnings on elective

deferrals continue to be a prohibited source for hardship distributions. Further, QNECs and QMACs that are held in a custodial account in a 403(b) Plan continue to be ineligible for hardship distributions, but QNECs and QMACs and all earnings thereon that are not in a custodial account may, like under a 401(k) plan as described above, be utilized for hardship distributions.

- **Expand the "Safe Harbor" Hardship Definitions**

The Proposed Regulations would make the following additions and changes, generally effective as early as January 1, 2018, to the six safe harbor hardship definitions:

- An employee may take a hardship distribution to pay for expenses pertaining to qualifying medical, educational, or funeral expenses of an employee's primary beneficiary under the plan, in addition to those of an employee. This change incorporates the prior guidance issued by the IRS in Notice 2007-7.
- A new seventh safe harbor hardship definition would be added for expenses incurred following a federally declared disaster as long as the employee's home or principal place of business at the time of the disaster was located in an area designated for federal assistance.
- Following changes made by the 2018 Tax Cuts and Jobs Act (the "Tax Act") to the casualty loss deduction under Code Section 165, there was some confusion as to whether a casualty loss to a principal residence that did not arise from a federally declared disaster area could still qualify as a permissible hardship event. The Proposed Regulations clarify that the Tax Act change regarding the casualty loss deduction does not apply to hardship distributions (i.e. a hardship distribution for damages to the principal residence is not tied to a federally declared disaster).

- **New Employee Representation of Financial Need**

The Proposed Regulations would require that the employee certify in writing or electronically that he or she has insufficient cash or liquid assets to satisfy the financial need. The plan administrator may rely on such representation as long as the plan administrator has no actual knowledge to the contrary. The employee certification is not required until January 1, 2020, but plan sponsors may implement beginning January 1, 2019.

Required Amendments and Best Practices to Reflect the New Hardship Distribution Rules

Plan amendments will be required to reflect the new hardship distribution rules following finalization of the Proposed Regulations. However, the due date for those required amendments is not currently set. The general rule is that the deadline for adopting the amendment is the end of second calendar year beginning after the issuance of the IRS Required Amendments List for the changes which won't be issued until 2019 at the earliest. Regardless of the due date, amendments should be available sometime in 2019 to address the new hardship distribution rules.

While amendments are not immediately required, plans will need to address how they plan to implement the new rules administratively beginning January 1, 2019. Vendors may be, or already have been, in contact with plan sponsors regarding how they intend to implement the changes in the form of best practices and providing the plan sponsor with optional elections that may be made by the plan sponsor.

Plan sponsors who have not been contacted by their vendors regarding implementing the new regulations may want to consider reaching out before year end. In particular, if a plan sponsor wants to stop suspensions for recent hardship distributions, steps should be taken to address how participant deferrals will be reinstated in January 2019.

IRS Extends 2017 Hurricane Relief to Those Affected by Hurricanes Florence and Michael

In addition to the changes discussed above, the preamble to the Proposed Regulations also provides for long awaited relief for victims of Hurricanes Florence and Michael. The preamble states that the loan and hardship relief set forth in IRS Announcement 2017-15 (the "Relief") regarding Hurricane Maria is extended to victims of 2018 Hurricanes Florence and Michael. The relief extends through March 15, 2019, and is to be applied using the incident dates specified by FEMA for Hurricanes Florence and Michael. The Relief permits plans to make loans and hardship distributions for needs arising from the hurricanes as long as the employee or the employee's lineal ascendant, descendant, dependent, or spouse had a principal residence or place of employment in one of the disaster areas identified for individual assistance by FEMA on the applicable FEMA specified

incident dates.

Please see our September and November 2017 Newsletters for more detailed description of the Relief.

If you have questions or would like additional information, please contact a member of our Employee Benefits and Executive Compensation Practice.



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