

# Client Alert

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## How Employers Can Aid in Hurricane Irma Recovery

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Hurricane Irma made landfall in Florida on September 10, 2017. The damage caused by Irma will be well into the billions of dollars. In the wake of the storm, the IRS announced several relief programs that are intended to help affected employees with the recovery from Irma. In order to take advantage of these programs, however, employers will need to act. Following is a summary of each of the opportunities that employers can use to help in the recovery.

### Additional Hardship Withdrawals from 401(k) Plans

Most 401(k) plans give participating employees the right to withdraw their 401(k) contributions upon an economic hardship if it results from the need to pay certain expenses such as medical expenses, the purchase of a primary residence, or expenses to repair damage to a principal residence. Qualifying types of expenses are listed in the Treasury Regulations (the "Regulations") under Internal Revenue Code ("Code") Section 401(k). Nearly all plans which offer a hardship withdrawal right limit withdrawals to the types of expenses listed in the Regulations. The amount of the withdrawal can be no more than the amount necessary to relieve the financial hardship, plus any taxes that are expected to result from the withdrawal. If a participating employee takes a hardship withdrawal, he or she is suspended from making additional employee contributions to the plan for a period of six months after the withdrawal.

Under IRS Announcement 2017-13, employees who have a primary residence or principal place of employment in one of the Florida counties identified by FEMA for

individual assistance (the list of counties is available on FEMA's website at <https://www.fema.gov/disaster/4337>) as a result of Irma may be eligible for a special hardship withdrawal right. Under these rules, any financial hardship incurred as a result of Irma – not just the expenses listed in the Regulations – may be treated as a financial hardship for which a withdrawal is available. This may include, for example, temporary housing or shelter incurred in the wake of the hurricane. In addition, the six-month suspension on employee deferrals that normally follows a hardship withdrawal is not required. The special withdrawal right may be made available to covered employees until January 31, 2018. These additional withdrawal rights also may be applied to plans established under Code Sections 403(b) and 457(b), which may also have hardship withdrawal rights similar to those permitted in 401(k) plans.

The income tax consequences that apply to "regular" hardship withdrawals also apply to withdrawals under these special rules. If the withdrawal consists of pre-tax contributions, the amount withdrawn is taxable income to the participating employee and if the employee is under age 59½, the additional 10% excise tax on early withdrawals from tax-qualified plans will apply.

Announcement 2017-13 also relaxes the procedural requirements for covered employees who wish to obtain hardship withdrawals or obtain loans from a 401(k) plan or other qualified retirement plan. The employer or its plan administrator must make a good faith attempt to obtain the necessary documentation for a hardship withdrawal or loan from the plan, and as soon as practicable after the distribution, make a reasonable attempt to assemble any forgone documentation. For example, if spousal consent is required for a loan or hardship withdrawal, it may be obtained *after* the amount is distributed.

Employers who want to offer this special hardship withdrawal opportunity to affected employees will need to amend their plans in order to do so. If an employer wishes to add the special Hurricane Irma hardship withdrawal feature, it must amend its plan no later than the end of the first plan year beginning after December 31, 2017 – for calendar year plans, this deadline is December 31, 2018.

### **Leave-Based Donation Programs**

Under a leave-based donation program, employees who want to help with disaster relief can elect to forego vacation, sick, or personal leave in exchange for cash payments that the employer makes to a charitable organization. Normally, an employee's right to elect to immediately receive amounts under a leave or paid time off program or to donate those amounts will be considered to result in taxable income to the employee under the constructive receipt doctrine.

In Notice 2017-52, the IRS stated that if an employer establishes a leave-based donation program and donations are made to qualified charities for Hurricane Irma relief, and those payments are made by January 1, 2019, the IRS will not assert that those amounts are wages to employees, nor will it assert that the constructive receipt doctrine applies.

The payment by the employer will be treated as a regular business expense, meaning that it is not subject to the limits that normally apply to donations made to charitable organizations.

Employers that do not have a leave-based donation program in place will need to establish one if they wish to provide this opportunity to employees.

### **Section 139 Disaster Relief Programs**

Although not new because of Hurricane Irma, a little-known way in which employers may provide cash assistance directly to affected employees on a tax-free basis is a disaster relief program under Code Section 139.

Code Section 139 provides that an individual's gross income does not include a "qualified disaster relief payment." A qualified disaster relief payment includes, among other items, amounts paid to reimburse or pay "reasonable and

necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster" and "reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence or repair or replacement of its contents to the extent that the need for such repair, rehabilitation, or replacement is attributable to a qualified disaster." A qualified disaster under Code Section 139 includes any federally-declared disaster area.

In Revenue Ruling 2003-12, the IRS approved the use of a Code Section 139 disaster relief program by an employer that established a program to provide qualified disaster relief payments to its employees. The program provided payments for medical, temporary housing, and transportation expenses that the affected employees incurred as a result of the disaster that were not compensated for by insurance or otherwise. The program did not reimburse the cost of nonessential, luxury, or decorative items and services. Employees were not required to provide itemized receipts for their expenses, but the program contained requirements to ensure that the grant amounts were reasonably expected to be commensurate with the amount of unreimbursed reasonable and necessary expenses.

If an employer wishes to provide these types of disaster relief payments to affected employees, it should establish a written program document and application materials that resemble the program described in Revenue Ruling 2003-12. Fortunately, this type of program is not subject to all of ERISA's mandates for employee benefit plans, including its fiduciary duties. As a result, a program document and application materials do not need to be lengthy or complicated. An employer can deduct payments under a disaster relief plan and, since the payments are not treated as wages, tax withholding is not required.

For more information on using or establishing any of these programs, please contact the Shumaker attorney in our Tampa and Sarasota offices you normally rely on for advice on employment and tax issues, or John Burgess in our Tampa office at [jburgess@slk-law.com](mailto:jburgess@slk-law.com), Eric Britton in our Toledo office at [ebritton@slk-law.com](mailto:ebritton@slk-law.com) or Jennifer Compton in our Sarasota office at [jcompton@slk-law.com](mailto:jcompton@slk-law.com).