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Client Alert: Congress Provides More Hurricane Relief for Employees and Employers

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Jennifer B. Compton

MEDIA CONTACT

Wendy M. Byrne
wbyrne@shumaker.com

On September 29, 2017, President Trump signed the Disaster Tax Relief and Airport and Airway Extension Act of 2017 (the "Act"). In addition to extending the funding for the Federal Aviation Administration, the Act contained several provisions that will aid in recovery for victims of recent hurricanes, including Hurricane Harvey, Hurricane Irma and Hurricane Maria. We discussed several relief measures that were announced by the IRS in a Client Alert on September 25. The Act provides additional relief options and improves the tax consequences of qualifying hardship withdrawals from qualified retirement plans. This alert will discuss the provisions of the Act that can help employees recover from the hurricanes, along with a new special tax credit that is available for employers in the disaster zones.

Hardship Withdrawal Provisions

The Act contains several disaster relief aspects that apply to hardship withdrawals from qualified plans. These provisions apply to a "qualified hurricane distribution," which is any distribution made from a qualified plan on or after August 23, 2017 (for Hurricane Harvey), September 4, 2017 (for Hurricane Irma) or September 16, 2017 (for Hurricane Maria), and before January 1, 2019, to a participant whose principal residence was located in the applicable hurricane disaster area and suffered an economic loss as a result of the hurricane. An individual can take up to $100,000 in qualified hurricane distributions. The Act includes significant changes to the taxation of these distributions.

First, for a qualified hurricane distribution, the Act waives the 10% excise tax that would otherwise apply to a financial hardship withdrawal from a qualified plan prior to the date the participant reaches age 59½.

Second, while a qualified hurricane distribution will still be subject to income tax, a participant is permitted to spread the income inclusion from this distribution ratably over up to three tax years, beginning in the year that the distribution would normally be included in income. Therefore, if a participant takes a qualified hurricane distribution in 2017, the income inclusion can be split ratably between the taxpayer's 2017, 2018 and 2019 years. The 20% federal income tax withholding that normally applies to hardship distributions will not apply to qualified hurricane distributions.

In addition, a taxpayer who takes a qualified hurricane distribution can repay all or part of the distribution to the plan for up to three years after taking the distribution. This repayment would result in the amount not being subject to income tax. A participant who repaid the distribution after reporting it as income in a prior year would need to file an amended return to reduce his or her taxable income and obtain a refund of the taxes that were paid.

Finally, an employee who took a hardship withdrawal between February 28, 2017 and September 21, 2017 for a home purchase or construction and had the home purchase or construction cancelled as a result of one of the hurricanes is permitted to return the distribution to the plan by February 28, 2018. Doing so will avoid the imposition of income tax (plus the 10% excise tax, if applicable) on the distribution.

Expanded Availability of Plan Loans

The Act provides a greater opportunity for participants affected by the hurricanes to obtain loans from a plan. Normally, the maximum amount that a participant may have outstanding as a plan loan is the lesser of (a) $50,000 or (b) 50% of the present value of the participant's vested benefit in the plan. For individuals who are eligible to take qualified hurricane distributions, the loan limit is increased to $100,000, and the 50% of the vested balance limit is removed. This maximum applies until December 31, 2018. The Act also allows for loan repayments (including repayments on existing loans) for individuals affected by one of the hurricanes to be delayed for one year, with the normal five-year maximum loan repayment period also extended for an additional one-year period. Interest would continue to accrue on any loan that has repayments delayed under this provision.

Employee Retention Credits

The Act provides a new "employee retention credit" for employers who were affected by the hurricanes. This credit applies to employers who conducted an active trade or business in one of the hurricane disaster zones that was rendered inoperable for one or more days before January 1, 2018 as a result of one of the hurricanes. The credit is 40% of up to $6,000 of "qualified wages" for each employee whose principal place of employment was in one of the hurricane disaster zones. Therefore, a credit of up to $2,400 per employee is available. "Qualified wages" include wages paid to qualifying employees from the first date the business became inoperable until the date on which the business resumed significant operations, even if the employee performed no services on those dates, performed services before the business resumed significant operations or performed them at a different place of employment.

Next Steps for Employers

Employers who want to make the added hardship withdrawal or loan provisions available to their employees will need to amend their plans to incorporate the new rules. The deadline for making this amendment is the last day of the first plan year beginning on or after January 1, 2019 – therefore, the deadline for calendar year plans is December 31, 2019. Of course, because of the limited time frame in which participants can take advantage of these provisions, any changes will need to be communicated to participants as soon as the employer decides to implement them, even if the amendment to the plan is made later.

For more information, 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@shumaker.com, Eric Britton in our Toledo office at ebritton@shumaker.com, or Jennifer Compton in our Sarasota office at jcompton@shumaker.com.