

Compliance Alert: Disaster Relief Guidance for Health Plans

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Since August, Hurricane Harvey hit Texas and Louisiana, followed by Irma in Florida and the Caribbean, and Hurricane Maria in Puerto Rico. In addition to the human tragedy, these hurricanes have caused significant disruptions to employer-sponsored health and welfare plans in the impacted regions. Employers will face challenges reaching and tracking down displaced participants, who may not be able to receive mail, return to work, or even begin to think about potential deadlines for health plan coverage.

In response, the federal regulatory agencies issued guidance to address some of the issues faced by both employers and employees affected by these disasters. The guidance to affected employers applies broadly to provide relief on plan-related deadlines, encouraging employers to act reasonably, prudently, and in the best interests of the impacted employees and their families in order to prevent any delay in the provision of crucial benefits to hurricane victims. Given the urgency of the situation, employers should take immediate action to help participants (e.g., extending enrollment or claims deadlines, offering special benefits, getting important information to employees) and address any related plan issues after the fact. In addition, the IRS provided guidance on leave-based donation programs, which employers may want to consider as another vehicle to help hurricane victims.

On a larger scale, the agencies' approach is not just limited to hurricane relief. Although some of the specifics discussed in this article only apply to hurricane relief, employers should consider applying many of the same general principles to help affected employees gain access to health coverage in other situations, like the Northern California wildfires that began in early October.

DOL's Emphasis on Reasonableness for Plan Sponsors

On August 30, 2017, the Department of Labor (DOL) announced Hurricane Harvey relief in a news release, [EBSA Release Number 17-1216-NAT](#). On September 15, 2017, the DOL extended the relief to victims of Hurricane Irma in [EBSA Release Number 17-1297-NAT](#). Relief is limited to those employee benefit plans, plan sponsors, employers and service providers that are located in a county identified for individual assistance by the Federal Emergency Management Agency (FEMA).

The DOL guidance advises plan fiduciaries to make reasonable accommodations to prevent plan participants who miss deadlines for filing benefit claims and COBRA elections from losing benefits. The DOL also recognizes that full compliance by group health plans may not be possible in

a disaster situation. Employers should prioritize helping participants, even if that means temporarily relaxing certain rules.

Employer Takeaways

The following examples apply the DOL's approach — that plan fiduciaries should “*act reasonably, prudently, and in the interest of the employees and their families*” — to some common scenarios that may arise for employers¹:

- ***Updated Contact Information:*** Plan administrators should take steps to obtain temporary contact information for displaced employees and maintain an up-to-date list to keep in touch with participants about their benefits. If an employer has established temporary work quarters, that contact information needs to be provided to participants as well.
- ***EAP Information:*** Employee Assistance Programs (EAPs) provide a range of counseling and support services. An EAP can provide employees who are experiencing loss and displacement with timely resources to connect with mental health and other specialists. Employers who sponsor EAPs can invite their vendors to the workplace or send out reminders about the available benefits to affected participants.
- ***Reasonable Accommodations with Deadlines:*** The DOL guidance specifically calls for plan fiduciaries to make reasonable accommodations to prevent the loss of benefits for participants who miss deadlines for filing benefit claims and COBRA elections. In light of the guidance, plan administrators might also consider temporarily easing other plan-imposed timeframes (e.g., extending, or even waiving, plan enrollment or election change periods).
- ***HIPAA Special Enrollment:*** HIPAA requires group health plans to provide special enrollment opportunities for certain individuals (regardless of open enrollment). The hurricanes may trigger a HIPAA mid-year special enrollment event (e.g., an employee's spouse or dependent losing other coverage). Because of the challenges hurricane victims will face in meeting tight deadlines like this, employers may consider extending (or even waiving) the enrollment period beyond the minimum 30-day period. This fits into the framework of the guidance, but employers must confirm that their insurers and stop-loss carriers are on board with any extensions.
- ***Form 5500 Filing Extension***²: The IRS automatically extended the filing deadlines for Form 5500s (that were required to be filed on or after September 4, 2017, and before January 31, 2018) to January 31, 2018. The relief does not apply to the filing of Forms 1094-C and 1095-C. Even without explicit relief, a penalty for failure to file these forms may be waivable, if the specific circumstances demonstrate that the failure was due to reasonable cause (26 CFR 301.6724-1).
- ***Plan Amendments:*** If an employer decides to offer a hurricane-related benefit, then it may be necessary to formally amend their plan document. Under ERISA, a plan amendment must be in writing, and the plan document's provisions must be followed in the plan's operation. However, even if an employer is unable to execute

a timely amendment for enhanced benefits, the employer may wish to offer the benefit and then execute the amendment when possible. Under these circumstances, and given that the employer is being more generous to affected employees, a plan could qualify for relief to change its operations prospectively and then adopt a retroactive amendment by the end of the plan year in which the change becomes effective.

- **Participant Disclosures:** As affected employees, employer headquarters or service providers are displaced, mailing required documents, such as Summary Plan Descriptions, could be impossible for employers. The DOL's electronic disclosure regulations for providing ERISA-required documents offer a safe harbor for employers to furnish documents electronically (rather than a paper copy). Where it is not possible to deliver documents by mail or obtain affirmative consent from a displaced individual, the most reasonable approach is to provide the disclosure electronically. To comply with the DOL's safe-harbor rules, it may be necessary for an employer to follow up with a mailing as soon as practicable.
- **Enhanced Hurricane Benefits:** Some providers are offering special programs to ensure hurricane victims have access to medical services, such as offering to characterize all providers as in-network, waiving the application of the deductible for a period of time, or providing free telehealth benefits. However, these hurricane-related benefits may have unintentional consequences that employers should review prior to the end of the year.

For example, if the plan is meant to be a high-deductible health plan (HDHP) that is compatible with a Health Savings Account (HSA), providing medical coverage before the deductible is met may disqualify the individual from being HSA-eligible for that month. To make things easier administratively, employers should check HSA-eligibility before the end of the year to take corrective action prior to the close of the tax year.

Employer-Sponsored Leave-Sharing and Other Donation Programs

Some employers may have already made a lump-sum donation to hurricane victims, but another option is to establish an employer-sponsored donation program for participation by employees. Leave donation programs permit employees to donate vacation days and allow for the recipient to be taxed on the donated leave, rather than taxing the employee who donated the leave. However, the requirements of these programs must be strictly followed in order to avoid adverse tax consequences.

There are three donation program options available: (1) a leave donation program that allows employees to donate leave in exchange for employer contributions to a charitable organization for hurricane relief; (2) a leave donation program that allows employees to transfer leave to affected coworkers (only as a result of a presidential declaration of a major disaster); and (3) a leave donation program that allows employees to transfer leave to affected employees who are absent from work due to a medical emergency.

Leave Donation to Charitable Organizations

On September 5, 2017, the IRS [announced](#) special relief for leave-based donation programs for Hurricane Harvey victims in IRS [Notice 2017-52](#). Parallel relief was [extended](#) to victims of Irma. Under the guidance, employees may forgo their vacation, sick, or personal leave in exchange for cash payments the employer makes, before January 1, 2019, to charitable organizations providing relief for the victims of these disasters. Ordinarily, leave-based charitable donations are included in the donating employee's income. Under this special relief, the donated leave is excluded from the income or wages of the donating employee (and donating employees cannot deduct the value of the donated leave on their tax returns). Employers will be permitted to deduct the cash payments as business expenses.

Leave Donation to Coworkers

Another option is for employers to establish an emergency paid time off (PTO) sharing program or disaster assistance leave-bank donation program (see IRS [Notice 2006-59](#) for the program requirements). This allows employees to donate accrued leave into an employer-sponsored PTO bank for other employees affected by a major disaster,³ such as the recent hurricanes. For purposes of the program, an employee is considered to be adversely affected if the disaster has caused severe hardship to the employee or the employee's family member and that hardship requires the employee to be absent from work.

There are numerous requirements that must be met under IRS Notice 2006-59. Among them are: (1) the program does not allow a leave donor to deposit leave for transfer to a specific affected coworker, (2) the amount of leave that may be donated cannot exceed the maximum amount of leave that a donating employee normally accrues during the year, (3) a leave recipient must receive paid leave from the leave bank at his normal rate of compensation, and (4) the leave recipient must use this leave for purposes related to the major disaster.

If all of the IRS requirements are satisfied, the leave donor is not taxed on the value of the donated leave (and the donor cannot claim a deduction for the leave). Instead, the leave is treated as compensation to the recipient, and the employer is entitled to a deduction for the payment of wages to the leave recipient.

Note that on October 10, 2017, President Trump declared the [Northern California fires](#) major disasters under the Stafford Act, so the guidance regarding leave donation programs provided in IRS Notice 2006-59 could be utilized by employers with employees affected by those fires.

Leave Donation to Coworkers with a Medical Emergency

An employer can establish a leave-sharing program to allow employees who suffer "medical emergencies" to receive donated leave. A "medical emergency" is a medical condition (e.g., heart attack, cancer, etc.) of the employee or a family member of the employee that causes a prolonged absence from work. Among numerous other requirements that must be met, the affected employee must: (1) exhaust all of his paid leave time; (2) complete a written request and authorization form; and (3) have the scheduled time off (or approved leave of absence) to receive the donated leave. The requirements for this type of program are

detailed in IRS [Revenue Ruling 90-29](#), and the tax treatment is similar to the “Leave Donation to Coworkers” section above.

Conclusion

The 2017 hurricane season has been one of the most active yet, and it is not expected to end until after November. Employers and plan participants will continue to face unanticipated issues in the aftermath, but the regulatory guidance will apply in a wide variety of situations: employers should first take care of their employees by preventing any disruptions in coverage and then address any plan concerns later.

Given the possibility of future disasters, employers may wish to develop emergency procedures for their plans, involving appropriate vendors and using the process both to anticipate and respond to employee concerns. From a fiduciary perspective, such disaster planning can be a useful tool in making prudent plan-related decisions.

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[EMAIL GISUE MEHDI](#)

¹ In [FAQs](#) for plan participants, the DOL explained that group health plan coverage generally continues even if an employer’s office has closed due to the hurricane, as long as the employer exists, continues to sponsor a plan, and the individual remains eligible for the plan (or is offered COBRA). The FAQs provide practical advice to plan participants regarding hurricane-related issues and the available resources.

² On October 13, 2017, the IRS also provided [relief](#) to individuals and businesses in seven California counties affected by the California wildfires.

³ A major disaster is defined as either a major disaster or emergency, as declared by the President of the United States under Section 401 of the Stafford Act, or a major disaster or emergency that results in severe adverse effects for a substantial number of federal employees, as declared by the President of the United States pursuant to Section 9004 of Public Law 105-18.