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ERISA AND EMPLOYEE BENEFITS ATTORNEYS

One Embarcadero Center, 12th Floor
San Francisco, California 94111-3617
Tel: (415) 788-3111
Fax: (415) 421-2017
Email: info@truckerhuss.com

633 West 5th Street, 26th Floor
Los Angeles, California 90071-2053
Tel: (213) 537-1016
Fax: (213) 537-1020

www.truckerhuss.com

Compliance Alert: Disaster Relief Guidance for Health Plans

GISUE MEHDI

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.

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Trucker ✦ Huss Recognized in "Best Law Firms" List

Trucker ✦ Huss, APC is pleased to announce the firm was recently recognized as one of the "Best Law Firms" by U.S. News & World Report and Best Lawyers® in the areas of ERISA litigation, employee benefits law and tax law.

National Tier 1
Litigation – ERISA

Metropolitan Tier 1 (San Francisco)
Employee Benefits (ERISA) Law
Litigation – ERISA

The 2018 "Best Law Firms" rankings showcase top firms recognized by clients and peers for delivering professional excellence and for high quality ratings. The rankings indicate a unique combination of quality in practice and legal expertise.

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 employers[1]:

- ***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

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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.

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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

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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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[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.

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FIRM NEWS

On October 10, **Robert Gower** was a panelist in a webinar, *Basics of Benefits*, hosted by the American Bar Association.

On October 25–27, **Robert Gower** spoke at the ERISA Basics National Institute, sponsored by the ABA Joint Committee on Employee Benefits, held in Chicago. Topics he addressed include: ERISA Ethical Issues and Concerns; Benefit Claims: Administrative Procedures; and Spousal Rights Under ERISA Plans: QDRO's and QMCSOs.

On November 14, **Kevin Nolt** will be a panelist in a webinar, *ERISA Pre-Approved and Customized Benefit Plans: Overhauled IRS Procedures and Determination Letter Process,* hosted by Strafford.

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IRS Guidance on Pension Plan Mortality Tables and Funding Methods

KEVIN E. NOLT

Recent guidance by the Internal Revenue Service (IRS) impacts the funding rules applicable to defined benefit pension plans. As described below, the guidance changes the mortality tables used for minimum funding (and other) purposes and the process used to modify a plan's funding methods. We recommend that plan sponsors and administrators evaluate the potential impact of these changes with their plan actuary and third party administrator.

New Pension Mortality Tables

On October 3, 2017, the Department of the Treasury and IRS issued final regulations prescribing the mortality tables to be used by most defined benefit pension plans. These regulations are the result of the Pension Protection Act of 2006, which directed the IRS to review the mortality tables at least every ten years and to update them as needed to reflect actual mortality experience.

The tables specify the probability of survival year-by-year for an individual based on age, gender and other factors. The new tables are derived from the base tables contained in RP-2014 Mortality Tables Report and MP-2016 Mortality Improvement Scale. These mortality assumptions are used (together with the applicable interest rates) to calculate a defined benefit pension plan's minimum funding requirements, funded percentage for benefit restriction purposes, Pension Benefit Guaranty Corporation (PBGC) variable premiums and the cost of lump sum payments. The final regulations mostly apply to single employer pension plans but also have limited application to multiemployer pension plans.

The new mortality tables generally are expected to increase liabilities. While plan sponsors are liable for accrued benefits without regard to the mortality assumptions, the new tables may result in accelerated contributions to meet minimum funding requirements and may have an adverse impact on plans that are close to the 80% or 60% threshold of the benefit restriction rules. The cost of lump sums also is expected to increase, which makes certain de-risking opportunities (e.g., lump sum windows) more costly. PBGC variable premiums also are expected to increase, adding to what is already a significant component of the escalating costs of defined benefit pension plans. The above discussion assumes that other factors remain constant.

The final regulations also provide guidance for plan sponsors to adopt their own substitute mortality tables reflecting their actual participant experience. Plan sponsors that want to apply this option must submit an application to the IRS by February 28, 2018. We understand that some plan sponsors have engaged their actuaries or other consultants to perform mortality studies to determine if adopting substitute mortality tables would reduce the potential cost increase.

The final regulations are effective October 5, 2017, and generally are applicable to plan years beginning on or after January 1, 2018. There is a one-year transition rule that plan sponsors may use to apply the prior mortality tables for 2018 minimum funding requirements (but not for lump sum calculation purposes) if the plan sponsor determines that use of the new tables would be administratively impracticable or would result in an adverse business impact that is greater than de minimis. The plan sponsor also must inform the plan's actuary of its intent to apply this transition rule.

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The IRS also released the following guidance related to these final regulations:

- Notice 2017-60 provides the new mortality table to be used to determine lump sum payments beginning in the 2018 calendar year and the updated mortality tables for 2018 determined under the prior regulations. The updated mortality tables determined under the prior regulations apply to plan years beginning in 2017 with respect to valuation dates occurring in 2018 and to plans that elect the limited transition relief described above.
- Revenue Procedure 2017-55 provides procedures for obtaining approval to use substitute mortality tables for pension funding purposes.

Pension Funding Method Changes

Following its issuance of the final mortality table regulations, on October 10, 2017, the IRS issued updated revenue procedures providing defined benefit pension plan sponsors and administrators guidance on changing plan funding methods.

Revenue Procedure 2017-56 allows automatic approval of certain funding method changes for single-employer pension plans and modifies Revenue Procedure 2000-40 to reflect the requirements of Internal Revenue Code (Code) Section 430. Added by the Pension Protection Act of 2006, Code Section 430 specifies the minimum funding requirements that apply to single-employer defined benefit pension plans pursuant to Code Section 412, which provides minimum funding requirements that generally apply for pension plans. Under Code Section 412(d)(1), a change of funding method for a plan generally may take effect only if the change is approved by the IRS.

This revenue procedure provides automatic approval for three asset valuation method changes, automatic approval for two valuation date changes, and automatic approval for one type of change in the treatment of benefits funded through insurance contracts. It also provides automatic approval for a change in funding method in special situations in which there is a change in the plan's actuary, the plan's actuarial software or the data elements used in the actuarial valuation. Last, it provides automatic approval for a change in funding method for a fully funded terminating plan and in connection with a plan merger if certain conditions are satisfied. The plan sponsor or administrator must indicate on the Form 5500 for the plan year for which the change is effective that it agrees to the change in funding method. Other restrictions also may apply. Revenue Procedure 2000-40 will continue to apply to plans not subject to Code Section 430.

Revenue Procedure 2017-57, which applies to both single-employer and multiemployer plans, provides guidance for plan sponsors and administrators seeking approval of changes to their plan's funding method. These procedures apply to funding method changes not covered by the automatic approval guidelines discussed above. This revenue procedure updates Revenue Procedure 2000-41 to reflect the requirements of Code Section 430.

This revenue procedure provides that a plan sponsor or administrator seeking to obtain approval for a change in funding method must make a written request for that approval that satisfies the general IRS procedures relating to the issuance of rulings, determination letters and opinion letters for employee plans and exempt organizations, the requirements of which are currently set forth in Revenue Procedure 2017-4. Such request generally must be made no later than 2-1/2 months after the close of the plan year in which the change is effective (with additional time if the change is due to a plan merger).

Both revenue procedures are effective for plan years beginning on or after January 1, 2018 but can be applied earlier.

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Retirement Plan Limitations for 2018

SHANNON OLIVER

On October 19, the Internal Revenue Service issued Notice 2017-64, containing the cost-of-living adjustments applicable to retirement plan limitations under the Internal Revenue Code (the "Code"). These changes will take effect on January 1, 2018, and are based on the fact that the Consumer Price Index increased by 2.2% last year. Many of the limitations are being increased, while others remain unchanged. Below is a summary of some of the more important limitations.

Limitations Increased

- The limitation on the annual benefit under a defined benefit plan is increased from $215,000 to $220,000 (Code section 415(b)(1)(A)).
- The annual contribution limitation for defined contribution plans is increased from $54,000 to $55,000 (Code Section (415(c)(1)(A)).
- The annual deferral limit for 401(k), 403(b), most 457 plans and the federal government's Thrift Savings Plan are increased from $18,000 to $18,500 (Code sections 402(g)(1),402(g)(3)).
- The annual compensation limit is increased from $270,000 to $275,000 (Code sections 401(a)(17), 404(l),408(k)(3)(C) and 408(k)(6)(D)(ii)).
- The dollar limitation for determining the maximum account balance in an employee stock ownership plan subject to a 5-year distribution period is increased from $1,080,000 to $1,105,000, whereas the dollar amount used to determine the lengthening of the 5-year distribution period is increased from $215,000 to $220,00 (Code section 409(o)(1)(C)(ii)).
- The limitation concerning the qualified gratuitous transfer of qualified employer securities to an employee stock ownership plan is increased from $45,000 to $50,000 (Code section 664(g)(7)).
- The annual deferral limit for deferred compensation plans of state and local governments, and tax-exempt organizations is increased from $18,000 to $18,500 (Code section 457(e)(15)).
- The compensation threshold pertaining to the definition of "control employee" for fringe benefit valuation purposes is increased from $105,000 to $110,000, and the compensation limitation is increased from $215,000 to $220,000 (Regs. sections 1.61-21(f)(5)(i) and 1.61-21(f)(5)(iii)).
- The dollar limitation on premiums paid with respect to a qualifying longevity annuity contract is increased from $125,000 to $130,000. (Code section 1.401(a)(9)-6 and Regs. section A-17(b)(2)(ii)).
- The threshold used to determine whether a multi-employer plan is systemically important is increased from $1,012,000,000 to $1,087,000,000 (Code sections 432(e)(9)(H)(v)(lll)(aa) and 432(e)(9)(H)(lll)(bb)).

Limitations Unchanged

- The annual compensation threshold for purposes of the definition of "key employee" remains at $175,000 (Code section 416(i)(1)(A)(i)).
- The annual deferral limitation for SIMPLE retirement accounts remains at $12,500 (Code section 408(p)(2)(E)).
- The maximum amount of catch-up contributions that individuals age 50 or over may make to SIMPLE 401(k) plans or SIMPLE retirement accounts remains at $3,000 (Code section 414(v)(2)(B)(ii)).
- The compensation threshold for simplified employee pensions (SEPs) remains at $600 (Code section 408(k)(2)(C)).

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- The maximum amount of catch-up contributions that individuals age 50 or over may make to 401(k) plans, 403(b) plans, SEPs and governmental 457(b) plans remains at $6,000 (Code section 414(v)(2)(B)(i)).
- The maximum amount the can be contributed to an IRA remains at $5,500. The IRA catch-up contribution limit for IRAs remains unchanged at $1,000 (Code section 219(b)(5)(A)).

The following chart is a quick reference guide to key limitations for 2012 – 2018

	2018	2017	2016	2015	2014	2013	2012
401(k)/403(b)/457 Elective Deferral Limit	$ 18,500	$ 18,000	$ 18,000	$ 18,000	$ 17,500	$ 17,500	$ 17,000
Defined Contribution Plan Annual Limit	$ 55,000	$ 54,000	$ 53,000	$ 53,000	$ 52,000	$ 51,000	$ 50,000
Defined Benefit Plan Annual Limit	$220,000	$215,000	$210,000	$210,000	$210,000	$205,000	$200,000
Annual Compensation Limit	$275,000	$270,000	$265,000	$265,000	$260,000	$255,000	$250,000
Catch-Up Contribution Limit	$ 6,000	$ 6,000	$ 6,000	$ 6,000	$ 5,500	$ 5,500	$ 5,500
Highly Compensated Employee Compensation Threshold	$120,000	$120,000	$120,000	$120,000	$115,000	$115,000	$115,000
Key Employee Compensation Threshold	$175,000	$175,000	$170,000	$170,000	$170,000	$165,000	$165,000

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Editor: Shannon Oliver, soliver@truckerhuss.com

In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for the purpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this *Benefits Report*.

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