

Part IV. Items of General Interest

Hurricane Katrina Relief

Announcement 2005-70

Purpose

This announcement provides relief to taxpayers who have been adversely affected by Hurricane Katrina and have retirement assets in qualified employer plans they would like to use to alleviate hardships caused by Katrina. In addition, this announcement provides relief for certain verification procedures that may be required under retirement plans with respect to loans and hardship distributions. The relief provided under this announcement is in addition to the relief already provided by the Service pursuant to News Release IR-2005-96 under § 7508A of the Internal Revenue Code ("Code") for victims of Hurricane Katrina. (See the regulations under § 7508A and Section 8 of Rev. Proc. 2005-27, 2005-20 I.R.B. 1050, for a listing of employee benefit-related acts currently postponed until January 3, 2006, because of the disaster.)

Background

The laws relating to qualified employer plans impose various limitations on the permissibility of distributions and loans from those plans. For example, § 401(k)(2)(B)(i) of the Code provides that in the case of a § 401(k) plan that is part of a profit-sharing or stock bonus plan, elective deferrals may only be distributed in certain situations, one of which is on account of hardship. Section 403(b)(11) provides similar rules with respect to elective deferrals under a § 403(b) plan. Other rules do not permit in-service distributions from certain plans, even if there is a hardship. For example, in-service hardship distributions are generally not permitted from pension plans or from accounts holding qualified nonelective contributions ("QNECs") described in § 401(m)(4)(C) or qualified matching contributions (QMACs) described in § 401(k)(3)(D)(ii)(I). However, Rev. Rul. 2004-12, 2004-7 I.R.B. 478, holds that if amounts attributable to rollover contributions are separately accounted for within a plan, such amounts may be distributed at any time, pursuant to the employee's request. Section 72(p) imposes certain requirements relating to plan loans. Unless those requirements are satisfied, a loan is treated as a distribution under the plan.

In order to make a loan or distribution (including a hardship distribution), the plan must contain language authorizing such loan or distribution. Also, except to the extent a

distribution consists of already-taxed amounts, the distribution will be includible in gross income and generally subject to the 10-percent additional tax under § 72(t). Similar rules apply to a distribution from an IRA.

Plan provisions and regulations under certain Code sections establish verification procedures before distributions or loans will be made from the plan. For example, the regulations under § 401(k) set forth certain criteria an employee must meet in order to receive a hardship distribution. A plan may contain procedures designed to confirm that the criteria have been satisfied.

Relief

A qualified employer plan will not be treated as failing to satisfy any requirement under the Code or regulations merely because the plan makes a loan, or a hardship distribution for a need arising from Hurricane Katrina, to an employee or former employee whose principal residence on August 29, 2005, was located in one of the counties or parishes in Louisiana, Mississippi or Alabama that have been or are later designated as disaster areas eligible for Individual Assistance by the Federal Emergency Management Agency because of the devastation caused by Hurricane Katrina or whose place of employment was located in one of these counties or parishes on such date or whose lineal ascendant or descendant, dependent or spouse had a principal residence or place of employment in one of these counties or parishes on such date. Plan administrators may rely upon representations from the employee or former employee as to the need for and amount of a hardship distribution, unless the plan administrator has actual knowledge to the contrary, and such distribution is treated as a hardship distribution for all purposes under the Code and regulations. For purposes of this announcement, a "qualified employer plan" means a plan or contract meeting the requirements of § 401(a), 403(a) or 403(b), and, for purposes of the hardship relief, which could, if it contained enabling language, make hardship distributions. For purposes of this paragraph, a "qualified employer plan" also means a plan described in § 457(b) maintained by an eligible employer described in § 457(e)(1)(A), and any hardship arising from Hurricane Katrina is treated as an "unforeseeable emergency" for purposes of distributions from such plans. For example, a profit-sharing or stock bonus plan that currently does not provide for hardship or other in-service distributions may nevertheless make Katrina-related hardship distributions pursuant to this announcement, except from QNEC or QMAC accounts or from earnings on elective contributions. A defined benefit or money purchase plan, which generally cannot make in-service hardship distributions, may not make hardship distributions pursuant to this announcement, other than from a separate account, if any, within such plan containing either employee contributions or rollover amounts.

The amount available for hardship distribution is limited to the maximum amount that would be permitted to be available for a hardship distribution under the plan under the Code and regulations. However, the relief provided by this announcement applies to any hardship of the employee, not just the types enumerated in the regulations, and

no post-distribution contribution restrictions are required. For example, regulations under § 401(k) provide safe harbor hardship distribution standards wherein a hardship is deemed to exist only for certain enumerated events, and after receipt of the hardship amount, the employee is prohibited from making contributions for at least 6 months. Plans need not follow these rules with respect to hardship distributions described in the first two sentences in the immediately preceding paragraph.

If the plan does not provide for loans or hardship distributions, the plan must be amended to provide for loans or such emergency distributions no later than the end of the first plan year beginning after December 31, 2005. To qualify for the relief under this announcement, a hardship distribution must be made on account of a hardship resulting from Hurricane Katrina and be made on or after August 29, 2005, and no later than March 31, 2006. In the case of plan loans made pursuant to this announcement, such loans must satisfy the requirements of § 72(p).

In addition, a retirement plan will not be treated as failing to follow procedural requirements for plan distributions (in the case of all retirement plans, including IRAs) or loans (in the case of retirement plans other than IRAs) imposed by the terms of the plan, merely because such requirements are disregarded for any period beginning on or after August 29, 2005, and continuing through March 31, 2006, with respect to distributions to individuals described in the first paragraph under "Relief", provided the plan administrator (or financial institution in the case of distributions from IRAs) makes a good-faith effort under the circumstances to comply with such requirements. However, as soon as practical, the plan administrator (or financial institution in the case of IRAs) must make a reasonable attempt to assemble any foregone documentation. For example, if spousal consent is required for a plan loan or distribution and the plan terms require production of a death certificate if the employee claims his or her spouse is deceased, the plan will not be disqualified for failure to operate in accordance with its terms if it makes a distribution or loan to an individual described in the first paragraph under "Relief" in the absence of a death certificate if it is reasonable to believe, under the circumstances, that the spouse is deceased, the distribution is made no later than March 31, 2006, and the plan administrator makes reasonable efforts to obtain the death certificate as soon as practical. For purposes of this announcement, "retirement plan" has the same meaning as "eligible retirement plan" under § 402(c)(8)(B).

The Department of Labor has advised Treasury and the Internal Revenue Service that it will not treat any person as having violated the provisions of Title I of the Employee Retirement Income Security Act solely because they complied with the provisions of this Announcement.

Drafting Information

The principal author of this announcement is Roger Kuehnle of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this announcement, please contact the Employee Plans taxpayer assistance telephone

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