



Single Employer Benefits & Pension Alert

Final Regulations Regarding Hardship Distributions | October 2019

In December 2018, we sent you an alert regarding proposed regulations issued by the IRS that would change certain rules pertaining to hardship distributions. On September 19, 2019, the IRS issued final regulations. Thus, employers that sponsor 401(k) and 403(b) plans must now make certain changes in their plans and must decide whether to implement other permissible changes. This notice summarizes the new rules.

BACKGROUND

Generally, elective deferrals may not be distributed to an active participant from a 401(k) or 403(b) plan prior to age 59½. There is an exception for a hardship distribution which may be made due to an immediate and heavy financial need to the extent necessary to satisfy that need.

A. APPLICATION TO 401(K) PLANS

1. Elimination of Six Month Contribution Suspension

Effective January 1, 2020, a plan may no longer impose a suspension of elective deferral contributions following a hardship withdrawal.

2. Qualifying for Hardship

Effective January 1, 2020, the regulations eliminate the requirement that a participant take all available plan loans before taking a hardship distribution. However, the plan may continue to require a participant to take a plan loan before receiving a hardship distribution.

The regulations change the rule for determining if a hardship distribution is necessary to satisfy an immediate and heavy financial need. Under the new rule, effective January 1, 2020, prior to taking a hardship withdrawal, a participant must take all available plan distributions (depending on the plan terms this may include plan loans) and must provide

a written or electronic representation that he or she has insufficient cash or liquid assets that are reasonably available to satisfy the relevant financial need. A plan administrator may rely on the participant's representation unless it has actual knowledge to the contrary.

The plan provisions may require that there be a minimum dollar amount for a hardship distribution, provided that the prescribed minimum dollar amount is not significant enough to result in the hardship withdrawal provision not being effectively available to a sufficient number of nonhighly compensated participants.

3. New Sources for Hardship Distributions

The regulations expand the sources available for hardship distributions to include Qualified Nonelective Contributions ("QNECs"), Qualified Matching Contributions ("QMACs"), and the investment earnings attributable to elective deferrals, QNECs, and QMACs.

4. Hardship Circumstances

The regulations identify expenses incurred in connection with certain federally declared disasters as circumstances in which safe harbor hardship withdrawals may be made pursuant to the terms of a plan.

In accordance with a prior change in the law, medical, educational, or funeral expenses of a participant's primary death beneficiary under a plan may be considered circumstances in which safe harbor hardship withdrawals may be made in accordance with the terms of a plan.

B. APPLICATION TO 403(B) PLANS

The regulations apply, for the most part, to 403(b) plans. However, earnings attributable to elective deferrals may not be included in a hardship distribution from a 403(b) plan. In addition, QNECs and QMACs are eligible for hardship distributions under a 403(b) plan only if held under an annuity contract rather than in a custodial account.

C. EFFECTIVE DATES

As noted above, effective for hardship distributions made on or after January 1, 2020, a plan is not permitted to suspend a participant's elective contributions following receipt of a hardship withdrawal. For the plan year that begins in 2019, a plan is permitted, but is not required, to eliminate rules providing for suspensions of elective contributions following hardship withdrawals.

As noted above, effective January 1, 2020, in order to process a hardship distribution from a plan, the plan administrator must ensure that the participant has taken all plan distributions and that a written or electronic representation has been made by the participant regarding his or her need for liquid assets. For the plan year that begins in 2019, a plan is permitted, but not required, to impose a rule that all plan distributions have been made as a condition for determining that a hardship distribution is necessary to meet a financial need. The other changes discussed above – pertaining to the opportunity to have additional funds distributed upon hardship, the opportunity to expand the circumstances in which safe harbor hardship withdrawals may be made, and the ability to discontinue the requirement to take a loan before taking a safe harbor hardship withdrawal – may be implemented at the discretion of the plan sponsor at any time during the plan year that begins in 2019 or a subsequent plan year.

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D. PLAN AMENDMENTS

Plan amendments will be required at a later date in order to reflect the prohibition on the suspension of elective contributions, effective January 1, 2020, and the requirement that, prior to taking a hardship distribution on or after January 1, 2020, all available plan distributions have been made and that there has been a written or electronic representation regarding need. In addition, any such plan amendments must include any changes that are implemented in the plan year that begins in 2019 or a later plan year pursuant to the regulations. We will be monitoring the deadlines applicable to the required plan amendments.

E. NEXT STEPS

Plan sponsors should:

- **decide** whether any required hardship changes (no suspension of deferrals and required certification) will be implemented prior to January 1, 2020;
- **decide** what discretionary hardship changes will be implemented in operation and whether there will be an effective date other than January 1, 2020, for any such discretionary hardship provisions;
- **notify** participants of the changes to the hardship withdrawal requirements by providing an updated summary plan description or a summary of material modifications;
- **revise** hardship withdrawal procedures to incorporate the changes, including the requirements that a participant, prior to taking a hardship withdrawal, receive all available in-service withdrawals, and provide a written or electronic representation that he or she has insufficient cash or liquid assets to meet his or her financial needs; and
- **consider** adopting an amendment to the plan, at this time, so that the plan may be operated in accordance with its terms.

Please let us know if there are any items that you would like to discuss regarding the changes in the rules governing hardship withdrawals.

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