November 20, 2012

IRS Permits Plan Loans and Distributions in Hurricane Sandy Aftermath

On Friday, November 16, the Internal Revenue Service (IRS) issued guidance that provides relief to taxpayers affected by Hurricane Sandy. Specifically, IRS Announcement 2012-44 (http://www.irs.gov/pub/irs-drop/a-12-44.pdf) relaxes procedural and administrative rules for plan loans and hardship requests for taxpayers who have been adversely affected by Hurricane Sandy. In order to qualify for this relief, withdrawals must be made from a "qualified employer plan" on or after October 26, 2012, but no later than February 1, 2013.

1. Who is eligible for relief?

Only participants and certain family members who live or work in localities identified by FEMA for Individual Assistance due to Hurricane Sandy are eligible for relief under Announcement 2012-44. Participants who live outside designated localities may take a loan or hardship distribution to assist their family members who live within localities identified by FEMA for Individual Assistance. For the most up-to-date list of designated localities, please see the "Help for Victims of Hurricane Sandy" page on the IRS website at http://www.irs.gov/uac/Newsroom/Help-for-Victims-of-Hurricane-Sandy.?

2. What is a qualified employer plan?

Announcement 2012-44 provides that qualified employer plans are 401(k) plans, 403(b) tax-sheltered annuities and 457(b) deferred compensation plans for state and local government tax-exempt organizations.

Defined benefit and money purchase plans, which generally cannot make in-service distributions, may not make hardship distributions under Announcement 2012-44 other than from a separate account, if any, within the plan containing either eligible employee contributions or rollover amounts.?

3. Is a plan amendment required prior to making such loans or hardship distributions?

Although a qualified employer plan need not be formally amended prior to providing loans or hardship distributions to taxpayers affected by Hurricane Sandy, the plan must adopt a formal amendment allowing for such features no later than the end of the first plan year beginning after December 31, 2012 (e.g., for calendar-year plans, a formal amendment must be adopted by December 31, 2013).

4. How much may a participant withdraw?

The amount available under a plan loan made under Announcement 2012-44 must satisfy the plan loan requirements of Section 72(p) of the Internal Revenue Code. Although IRA participants cannot take a loan, they may be eligible to take a distribution without being subject to the 10 percent additional tax under Section 72(t) of the Internal Revenue Code.

The amount available for a hardship withdrawal is limited to the maximum amount permitted under the Internal Revenue Code and its corresponding regulations. In addition, the relief under Announcement 2012-44 applies to any hardship, not just the ones listed in the Internal Revenue Code, and no post-distribution contribution restrictions are required. For example, the

six-month prohibition on 401(k) and 403(b) contributions for employees who take a hardship distribution will not apply.

5. How does Announcement 2012-44 relax procedural requirements for plan loans and hardship withdrawals?

Announcement 2012-44 provides that a qualified employer plan will not be treated as failing to follow the procedural requirements for plan loans or distributions imposed by the terms of the plan if it disregards those requirements for any period from October 26, 2012, to February 1, 2013, provided the plan administrator (or financial institution, in the case of IRAs) makes a good-faith, diligent effort to comply with those requirements. However, as soon as practicable, the plan administrator must make a reasonable attempt to assemble any forgone documentation.

If you have any questions about Announcement 2012-44 or any other employee benefits or executive compensation matter, please contact a member of Day Pitney's Employee Benefits group.