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Authors:

[Debbie Reiss Hardesty](#)

IRS Finalizes Regulations on 401(k) Plan Hardship Withdrawals

On September 23, 2019, the IRS issued final regulations regarding hardship withdrawals from 401(k) Plans. The final regulations are very similar to the proposed regulations that were issued in November 2018, which we described [here](#).

What's new?

Here are things that were changed or clarified in the final regulations.

- Only a participant's disaster-related expenses will be eligible for hardship withdrawal, not those of the participant's relatives or dependents.
- In the past, the IRS has issued separate announcements after various major disasters, broadening the availability of a hardship withdrawals to those impacted by the disaster. Now, any time FEMA certifies a future disaster as being eligible for Federal disaster aid, those "impacted" by the disaster will automatically be deemed to have an immediate and heavy financial need.
- Those "impacted" will be participants who either live or work in the area covered by the disaster. That is narrower than in prior announcements, under which hardship withdrawals were also allowed if a participant had relatives or dependents who lived or worked in the disaster area.
- Unlike in prior disaster-relief announcements, there is no specific deadline to apply for a disaster-related hardship and no specific authority to waive or defer the hardship process steps. However, the preamble acknowledges that plan sponsors may be flexible in interpreting the documentation that might be required in such cases.
- When a participant certifies that they do not have other liquid assets available to meet the hardship need, that certification just refers to "reasonably available" assets; cash in the bank

that is needed to pay rent or other specific expenses in the near future can be disregarded.

- The participant may make the certification that no other assets are reasonably available in writing or verbally, as long as that verbal certification is recorded.
- While plan administrators cannot rely on a participant certification as to available other funds if they know it to be false, they have no affirmative duty to make inquiries about the participant's financial situation.
- While a plan cannot make a suspension on future contributions to a tax-qualified, 403(b) or 457(b) plan a condition to obtaining a hardship withdrawal, nonqualified deferred compensation plans that suspend contributions after a participant takes a qualified plan hardship withdrawal need not eliminate that provision.
- For some or all of 2019, plans may still suspend deferrals after a hardship and the participant certification is not yet required. Both are mandated beginning January 1, 2020.

The amendment deadline varies based on the type of plan.

- For adopters of pre-approved plans an amendment must be adopted by the due date of the tax return of the adopting employer for the plan year in which January 1, 2020 falls, even if some or all of the changes allowed by these regulations were implemented in an earlier year;
- For individually designed calendar year plans, the amendment must be in place by December 31, 2021.
- For 403(b) plans amendments for the new hardship rules are currently required by March 31, 2020, but the IRS signaled in the preamble to the final regulations that they would likely issue separate guidance moving that date back.

Action Required

- Keep track of when you or your platform provider make changes in operations based on the new hardship rules.

Amendments will eventually have to include the effective date(s) that you phased in some or all of the new rules.

- By no later than January 1, 2020, be sure all hardship policies, procedures and applications are changed to conform to the new regulations, including:
 - You no longer have an option after this date to suspend elective deferrals after a hardship.
 - You will want to clarify the casualty loss and disaster-related hardship reasons as described in the final regs.
 - You might elect to no longer require a loan to be taken before a hardship.
 - In plans other than 403(b) plans, you will likely want to at least allow earnings on elective deferrals to be available for hardship and might also allow QNEC and QMACs be eligible for hardship withdrawals.

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