This article is published by Ferenczy Benefits Law Center to provide information to our clients and friends about developments. It is intended to be informational and does not constitute legal advice for any particular situation. It also may be considered to be "attorney advertising" under the rules of certain states.

Flashpoint: What's Going on in the World of Retirement Plans?

We realize that we have been off the grid somewhat for the past few months, but are glad to be back in publication and here to catch you up on the happenings in the benefits world.

Hurricane Relief

Attached **here** is a chart outlining the various relief measures taken by the government for victims of Hurricanes Harvey, Irma, and Maria. This is a simple summary of the provisions of the various pieces of guidance and informal governmental announcements. If you would like more information, please let us know.

In our home of Atlanta, we got some of the effects of the storms, but nothing as drastic as suffered by those in Texas, Florida, South Georgia, and the Caribbean. If you have experienced damage to your home or office, please know that our thoughts and good wishes are with you.

As this FlashPoint goes to press, Congress just passed the Disaster Tax Relief and Airport and Airway Extension Act of 2017. In anticipation that it will be signed into law by President Trump, we are including here the provisions of this Act. Naturally, if the President decides to veto the Act, it will not become law.

Distribution Relief

- "Qualified Hurricane Distributions" of up to $100,000 (minus any previous qualified hurricane distributions) in relation to hurricane damage will:
  - Be permitted even if the plan does not or cannot make in-service distributions (including the limitations on distributions from pension plans and on salary-deferral and qualified nonelective contribution amounts under Code Sections 401(k), 403(b) and 457);
  - Not be subject to mandatory income tax withholding or the 10% premature distribution tax under Code Section 72(t), nor is a distribution notice required under Code Section 402(f);
  - Be taxed ratably over a three-year period; and
  - Be permitted to be repaid within three years to any eligible retirement plan (qualified plans, 403(b) plans, annuity plans under Code Section 403(a), 457 plans,

and IRAs) if the plan accepts rollovers. If this is done, the distribution made will not be taxable to the employee, but will be considered to be an eligible rollover distribution that was then transferred to an eligible retirement plan within 60 days of the distribution.

A "Qualified Hurricane Distribution" is one made after August 23, 2017 (for Harvey); September 4, 2017 (for Irma); and September 16, 2017 (for Maria), and before January 1, 2019, to a person whose principal home is in the disaster area, and who sustained an economic loss due to the hurricane.

- Any "Qualified Distribution" taken may be repaid between August 23, 2017, and February 28, 2018, in which case it will be treated as the rollover of an eligible rollover distribution.

A "Qualified Distribution" for this purpose is a hardship distribution from a 401(k) or 403(b) plan received between February 28, 2017, and September 20, 2017 (inclusive), and which was supposed to be used to purchase or construct a principal residence in any of the three disaster areas, but which was not purchased or constructed as a result of one of the hurricanes.

Loan Relief

- New Loans for Qualified Individuals: Beginning on the date on which this Act becomes law, loans may be taken by Qualified Individuals through December 31, 2018, in an amount up to $100,000 (increased from the normal limit of $50,000) or 100% of the participant's vested interest (up from 50%).
- For Qualified Individuals with an outstanding loan on or after the Qualified Beginning Date:
    - Any repayment may be delayed a year (with the payments after the delay to be reamortized to take into account the interim interest); and
    - The five-year period on repayment will disregard the period between the Qualified Beginning Date and December 31, 2018.
- "Qualified Individual": anyone whose principal home is in the disaster area as of the Qualified Beginning Date and who sustained an economic loss due to the hurricanes.
- "Qualified Beginning Date":
- For Hurricane Harvey: August 23, 2017;
- For Hurricane Irma: September 4, 2017; and
- For Hurricane Maria: September 16, 2017.

Required Plan Amendments for Above Rules:

The plan will be considered to be amended timely (and operated in accordance with its terms) if an amendment is adopted on or before the last day of the first plan year beginning on or after January 1, 2019 (January 1, 2021, for governmental plans), is retroactively effective, and the plan was operated during the interim period in accordance with the terms of the ultimate amendment.

Fiduciary Rule

The saga of the "f" word continues. The latest court challenge to the fiduciary rule – *Chamber of Commerce v. Acosta* – has reached the 5th Circuit Court of Appeals (covering Texas, Louisiana, and Mississippi), which is known to be a conservative panel. The judges hearing the case seemed less than enthusiastic about the DOL's position in favor of the rule. Those who would like to see the rule overturned are speculating that this may be the first case in which the court finds that the rule is impermissible. If that happens, the court could vacate all or a portion of the fiduciary rule, or remand the case to the district court to reevaluate the case in light of the appellate court's decision. A decision against the DOL would mean that some courts (although not courts of appeal) favored the rule, while the 5th Circuit ruled against it. This type of split in the courts sets up a possible appeal to the Supreme Court.

The Labor Department (which still lacks an Assistant Secretary for the Employee Benefits Security Administration) has delayed the full application of the Best Interest Contract Exemption (BICE) and the other prohibited transaction exemptions (PTEs) in relation to the fiduciary rules until July 1, 2019. In the meantime, a variation on the transitional rules for the exemptions would apply, under which a practitioner must only act in the best interests of the plan and its participants, not charge unreasonable fees, and not make any misrepresentations about the plan investments. Whereas the transition rules for the BICE originally required that the advisor taking advantage of the exemption confirm in writing that it is a fiduciary, this requirement is not necessary under the extension of time. All that is needed is for the investment advisor to correct any previous statement specifying that it is *not* a fiduciary.

In addition, the DOL has announced in Field Assistance Bulletin 2017-03 that it will not enforce the BICE prohibition on certain terms that may appear in an advisor service contract. In particular, in relation to qualified plans, the prohibition did not permit an advisor contract to prevent participation by investors in a class action or other representative litigation, nor did it permit an advisor to require arbitration of claims. The DOL has affirmatively stated, albeit informally, that it will no longer enforce the prohibition against arbitration requirements. The other prohibitions remain for the meantime.

If you are involved in plan investments – including if you recommend investment advisors to your clients – you should chat with us about whether what you do complies with the current rules. Notwithstanding the delay in the application of these rules and exemptions in full, there is plenty of potential for issues. Better to be safe than sorry …

Tax Reform and Retirement Plans

There has been a lot of discussion over the past several years about tax reform, and that is the current focus of the Administration and Congress. A general description of the joint Administration-Congressional Leadership proposals for reform was released on September 27, 2017. The individual tax portion of the outline centers substantially on reducing the number of individual tax brackets, lowering the rate on the highest bracket, increasing the standard deduction, and eliminating many itemized deductions. The proposal preserves the house mortgage and charitable deductions; it is not clear what else is being proposed. On the business side, the proposal would tax income from unincorporated businesses at 25%, which is a lower rate than the highest individual rate, and the corporate tax rate would be reduced to 20%. Furthermore, the proposal would permit the expensing (rather than depreciation) of certain capital investments for at least five years, and would partially eliminate the business interest expense deduction.

Although a lot of proposals have been made over the past several years, both positive and negative, with regard to retirement plans, the current proposal simply affirms its commitment to retirement plans, and does not outline any concrete changes. Several Washington insiders have discussed the "Rothification" of retirement plans – that is, the conversion of the pre-tax nature of retirement plan contributions and accumulations to a post-tax structure with favorable distribution provisions. However, nothing in the White House release discussed this concept. There was also nothing discussed about any of the simplification reforms that have been proposed over the past several years.

It is important to note that a reduction in tax rates for both businesses and individuals tends to discourage the formation of retirement plans for small businesses. In those businesses, the tax savings experienced by the business owner commonly pays for a significant part of the employee cost, and that tips the balance in favor of sponsoring the plan. Furthermore, if personal income is taxed at a rate higher than business income, the result may be that distributions from a retirement plan are subject to tax at a higher rate than the deduction for those contributions was worth. In other words, the lowering of the business taxation means that the deduction realized by business owners when money goes into the plan would be lower than the tax the business owner would pay on benefits distributed at retirement (assuming no intervening changes in the tax law). The potential of contributing money with a 25% deduction that is ultimately taxed on distribution at 35% is unattractive at best.

As a result, people in the retirement industry are watching the Administration and Congress closely to see what unintended effect tax proposals will have on retirement savings.

403(b) Plan Updates

The IRS has opened the program for updating 403(b) plan documents. If you are a sponsor of a 403(b) program, it is critical that your plan be brought into compliance in the next two years. Please give us a call if you want help making sure you meet these rules. We know that "two years" sounds like a long lead time, but you will be surprised how easy it is to wait until the last minute … or miss the deadline entirely.

Need Education?

We are very pleased to announce that Ilene and Alison will be teaching a DC-1 Review Class for the ASPPA Benefits Council of Atlanta that will be available for live streaming by anyone anywhere. If you or people in your office are intending to take the DC-1 examination at the end of this year, or are just looking for a good refresher class worth ASPPA and NIPA CEs, this is a great opportunity for a leg up on passing the exam in a very economical way. The class will be held on November 2nd and 3rd from 12:00 p.m. to 4:00 p.m. EST. Attendees will see the speakers and the material on their computer screens and will have the ability to ask questions and get real time answers. (If you are or will be in Atlanta on those days, you can attend in person and get lunch included!)

For more information or registration, go to https://atlantaabc.com/event/dc-1-exam-prep-class/.

FERENCZY
BENEFITS LAW CENTER
We are your ERISA solution™

Ilene Ferenczy • ilene@ferenczylaw.com | Alison Cohen • acohen@ferenczylaw.com
Adrienne Moore • amoore@ferenczylaw.com | Adriana Starr • astarr@ferenczylaw.com
Tia Thornton • tthornton@ferenczylaw.com | Leah Dean • ldean@ferenczylaw.com

2635 Century Parkway Suite 200, Atlanta, GA 30345
T 404.320.1100 | F 404.320.1105 | www.ferenczylaw.com