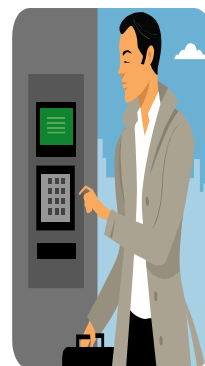


Hardship Distributions

- Optional under terms of plan document
- Plan may use “facts and circumstances” or “safe harbor” reasons
- Must be immediate and heavy financial need
- 401(k) regulations - §1.401(k) – 1(d)(3)



Hardship Distributions

- Amount may not exceed amount needed to satisfy hardship
 - But may be trued up for taxes and penalties



Hardship Distributions



- Safe Harbor definitions:
 - Medical care deductible under Tax Code §213(d)
 - Purchase of principal residence (excluding mortgage payments)
 - Post-secondary education (next 12 months)
 - Prevent eviction or foreclosure from principal residence
 - Funeral expenses
 - Casualty deduction home repairs



Hardship Distributions

- Principal residence
 - IRS has opined:
 - Purchase of residence for family members but **NOT** the employee would not be allowed
 - Purchase of house from an ex-spouse would be allowed
- These opinions were expressed at industry functions and are not part of the regulations



Hardship Distributions

- Beneficiaries who incur hardship may qualify
 - Must be primary beneficiary
 - Must be at time that the hardship occurred (cannot change beneficiary designation after the hardship)
 - Applies to medical, education, funeral expenses



Hardship Distributions

- Suspension of deferrals may apply
 - Plans that use “safe harbor”
 - Must be six months for Safe Harbor match plans
 - May be up to 12 months for other plans
 - Always see the plan document for verification
 - Plans that use “facts and circumstances” do not have to require a suspension

- Note: Proposed Bill – “SEAL Act” would eliminate the suspension



Hardship Distributions

- Proof of hardship
 - Not defined in regulations
 - 2008 ASPPA Annual conference IRS stated that Plan Administrator must have “sufficient information to adjudicate a claim – see regulations relating to Katrina”
 - My advice – paperwork now can save a lot of hassle after the fact if an audit or questions occur



Record Retention

- Employee Plans Newsletter – 2015-4
- It is the employer's responsibility to maintain records
- IRS has found under audit that employer may not have these



Record Retention

- Employee Plans Newsletter – 2015-4
- Per the newsletter – electronic self certification is not adequate



Per The Newsletter

The plan sponsor should retain these records in paper or electronic format:

- Documentation of the hardship request, review and approval;
- Financial information and documentation that substantiates the employee's immediate and heavy financial need;
- Documentation to support that the hardship distribution was properly made in accordance with the applicable plan provisions and the Internal Revenue Code; and
- Proof of the actual distribution made and related Forms 1099-R.



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Hardship Distributions

– Does an immediate and heavy financial need exist?

- For this part of the process a plan administrator may rely on the representations of the employee (and not demand proof)

–Unless “knowledge to the contrary”



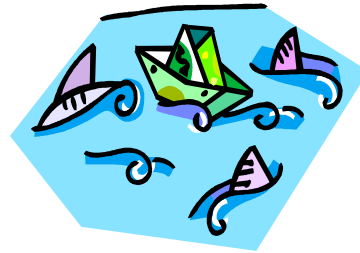
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Hardship Distributions

- Rules require that all other distributions and nontaxable loans from all plans of same employer be taken first



- This does not mean that all plans must have a loan provision



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Hardship Distributions

- Loan does not have to be taken if it will be “Counterproductive”

- If it will increase hardship such as preventing a third party loan (mortgage for primary residence) or take home pay would be lowered too much
- There is no criteria in regulations for this
 - Documentation should be kept



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If You Are the 3(16) Plan Administrator

- It will be your fiduciary responsibility to make sure that the distribution is permissible under the IRS regulations
- Record retention
- How well can you say “no”
- A NAPA survey in August found that “it’s my money and why can’t I have it” is one of the most frustrating questions from participants



Question

- What is your procedure on takeover plans when it comes to the breakdown between earnings and deferrals
- Remember: earnings associated with deferrals are not eligible for distribution



Limitation

- Distributions are limited to the elective deferral amount NOT including earnings
- For subsequent hardships the deferral total is reduced by the TOTAL first withdrawal (no proration of earnings)



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Hardship Distributions – What to do?????

- Participant is 5 months behind in mortgage payments
- Receives letter threatening foreclosure
- Needs \$5,000 for late payments, legal fees and bank fees associated with foreclosure
- Real estate taxes of \$1,800 are due next month
- Can't make next two payments totaling \$1,200
- Question: Can he take one hardship instead of three (to save on distribution expenses)



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Hardship Distributions

- Plan Administrator needs to consider:
 - The 12 month in advance rule that applies to tuition does not apply to other hardship reasons
 - No specific IRS guidance on this matter
 - If you allow two months –where is the line drawn, at three, four, twelve?
 - Need to look at the immediate and heavy financial need. If Plan Administrator is comfortable that documentation will be sufficient in an audit situation
 - Bob's caution – if the foreclosure has not been threatened because of the taxes and future payments the criteria may not be satisfied. How threatening is the letter about future payments?



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Hardship Distributions

Questions



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