

HICKS NOTES

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401(k) PLANS SHOULD BE AMENDED FOR NEW HARDSHIP RULES

On February 9, 2018, the Bipartisan Budget Act of 2018 (the "Act") was signed into law. The Act relaxes the rules for hardship distributions giving 401(k) and 403(b) participants more options when requesting a hardship distribution from their plans. Under the old rules, a participant could only withdraw from the contributions deposited to their employee deferral account (pre-tax or Roth). In addition, they must have exhausted any loan available under the plan and would not be allowed to make contributions to the plan for six (6) months after receiving the hardship distribution.

Under the new rules, these provisions have changed:

- Amounts available for hardship are expanded to include safe harbor contributions, qualified non-elective contributions (QNEC) and qualified matching contributions (QMAC).
- Earnings on available contributions can be included in hardship distribution. This does not apply to 403(b) plans.
- Elimination of requirement to take all available loans under their plans.
- Elimination of six-month suspension period. Participants can continue to make deferrals to the plan

The definition of a hardship distribution is a "heavy and immediate financial need" with no other means to pay for it. The participant must apply for an amount that will alleviate the need, but not more. The plan administrator may rely on the representations in the application unless they know different. Spousal consent may be required. Currently there are seven "needs" outlined in the law as listed below:

- Deductible medical expenses described in Code section 213(d) incurred or necessary for medical care of the participant, his spouse, dependents or beneficiary under the plan;
- Purchase (excluding mortgage payments) of a principal residence for the participant;
- Cost of tuition, related educational fees, and room and board expenses for up to the next twelve (12) months of post-secondary education for the participant, his spouse, dependents or beneficiary under the plan;
- Payments needed to prevent the eviction of, or foreclosure on the participant's principal residence;
- Payments for funeral or burial expenses for the participant, his spouse, dependents or beneficiary under the plan;

- Expenses to repair damage to the participant's principal residence that would qualify for a casualty loss deduction under Code section 165 (determined without regard to Code section 165(h)(5) or whether the loss exceeds ten percent (10%) of adjusted gross income); and
- Expenses and losses (including loss of income) incurred by the participant on account of a disaster declared by the Federal Emergency Management Agency (FEMA) under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, provided that participant's principal residence or principal place of employment at the time of the disaster was located in an area designated by FEMA for individual assistance with respect to the disaster.

A distribution shall be considered as necessary to satisfy an immediate and heavy financial need of the participant only if: (a) The participant has obtained all distributions, other than the hardship distributions, under all plans maintained by the Employer; (b) The distribution is not in excess of the amount of an immediate and heavy financial need (including amounts necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution); and (c) For hardship distributions made on or after January 1, 2020, the participant must represent, in writing, that they have insufficient cash or other liquid assets to satisfy the need.

In order to take advantage of these new rules, plans must be amended by the end of the year in which the provisions are effective. If a client wants to take advantage of these rules in 2019, they should adopt this amendment now. Any plan that currently offers hardship distributions MUST be amended by the end of 2020. The safest approach is to adopt the amendment as of the first day of the plan year to avoid future notice requirements per IRS Notice 2016-16 regarding safe harbor notices.

In addition to the plan, other documents are affected such as the Summary Plan Description (employee booklet) and any Safe Harbor Notices. These disclosures should reflect any change and distributed to plan participants.

We are doing these amendments now and our new plans will contain the new provisions. We will continue to closely monitor these regulations and will communicate important developments as they occur. If you have any questions or need help, give us a call or send us an [email](#).