

## Questions – Hardship Webinar – 10/17/2019

1. With the changes to the "Repairs to Principal Residence" not requiring the principal residence to be in a FEMA Disaster Area. When providing Proof does the participant need to provide something that shows what their home owner's insurance will and will not cover?

*There are two ways for a Plan Administrator to deal with the proof of the need. Either the PA could require that the participant show the information you suggest, i.e., repair bills, insurance denials, etc. Or, the PA could use the IRS's substantiation guidelines, whereby certain information is provided to the participant, and the participant provides certain summary information and agrees to keep records. The IRS memo regarding the substantiation guidelines is on the ERISApedia Government Source Material under "IRS Other" and, then under that "Miscellaneous."*

2. The non-standardized plan document provider I use does not have an option in their amendment for BPA hardship changes, to allow the IRC 165 restriction to be ignored. So in the example of Simon, my plans cannot allow a hardship without amending the plan? There's no way to amend the plan that I can see, the document provider does not allow tack on amendments, provisional change require a restated document. But there is no spec to ignore IRC 165. Is this something you would suggest talking to their attorneys about? I was not aware that an amendment would be required in Simon's situation. I thought that simply the IRS had acquiesced on this issue and we could follow that. Thanks for any help.

*It would surprise me that any mass document provider would not facilitate amending the Plan to conform to the new hardship rules, and they will certainly NEED to conform to the removal of the deferral suspension as of 1/1/20. I would talk to the attorneys at the provider's office about what they are doing in this regard and how they can accommodate your need. If they are not helpful, it may be time to think about using a different document.*

3. If you do not allow hardships for secondary education does it have to be documented? If so how and where?

*It really depends on the wording in the document. If the document specifically permits the use of all safe harbor reasons for hardship (which my review of both the FT William and Relius documents seems to indicate), then it appears that it is difficult for secondary education to be carved out unless there is a modification in the adoption agreement to do so. (There are places in both the FT Williams and Relius Adoption Agreements that could be used for this purpose.) Because hardship distribution rights are not "protected*

*benefits,” the employer could amend the plan to eliminate the secondary education reason for a hardship without having an impermissible cutback. Alternatively, you could use the non-safe harbor approach and have a policy that education is not on the list. However, if your adoption agreement specifies whether you are using a safe harbor/nonsafe harbor definition of hardship, even this change may require an amendment.*

4. So as of 2020 all hardship withdrawals will require a letter?

*If you mean an employee representation, yes. However, the regulations permit the use of electronic media pursuant to Treas. Reg. 1.401(a)-21(e) for the “written” representation. That section permits “web site, electronic mail, telephonic system, magnetic disk, and CD-ROM.” So, it appears that the use of the website or even a recorded telephone conversation might be sufficient for this representation.*

5. Fidelity offers an "e-hardship" certification process. How do these new laws effect this?

*I cannot speak to Fidelity’s system per se, as I am not familiar with it. However, see Q4 above. Also, I believe that Fidelity would likely use the substantiation guidelines for the support of the need. To be clear, the new rules do not change at all the rules regarding substantiation of need. However, the rules do require a new written certification of necessity (lack of reasonably available cash and liquid assets).*

6. We have a lot of Solo k's where the employer is the one taking a hardship. What kind of substantiation should we be requiring for hardship proof?

*While a hardship distribution by a business owner (whether in a solo K or a plan that has other employees) involves the owner (as a participant) talking to him/herself (as an employer or Plan Administrator), it is important to observe the formalities of the process. If the IRS audits, it will be completely unimpressed by a lack of documentation for an owner’s distribution on the basis that the “owner knew” the situation. If anything, a nondocumented hardship distribution is likely to be treated more harshly by the IRS (i.e., as an impermissible distribution that will throw the plan into CAP) than one for a rank-and-file participant. And, obviously, the employer cannot contend that it was unaware that the employee’s written certification of necessity was bogus when the participant is the owner.*

7. Does the participant representation that they do not have reasonably available liquid assets have to be made under penalty of perjury?

*The regulation does not so provide. Having said that, remember that, if the Plan Administrator has actual knowledge that the representation is incorrect, it cannot grant the hardship distribution.*

8. So medical bills are not required to be provided to the Employer/Plan sponsor? Just the participants word that they need the money?

*No, the Plan Administrator no longer needs to collect the medical bills; a summary of the information about the expenses is permitted if the Plan Administrator complies with the additional requirements of the substantiation guidelines. See the Guidelines for more information (available on ERISApedia under "IRS Other" and then under "Miscellaneous." If you do not use the substantiation guidelines, then you do need proof of the expense.*

9. The DOL has historically frowned on the self-certification of participants regarding financial need. Will this change affect that posture of the DOL?

*Hmmm. I think you mean "IRS," because the hardship distribution issue is an Internal Revenue Code concern, not a Labor concern. And, please review the information about the IRS's rules about substantiating a hardship.*

10. What is adoption date for volume submitter plans?

*Volume submitter plans are a type of preapproved plans, and follow the rules we discussed for preapproved plans. And, as discussed in the webcast, we believe that the due date is the later of the last day of the plan year in which the amendment is effective or the due date of the employer's tax return (including actual extensions taken) for the tax year that includes the date on which the amendment is effective.*

11. If a participant wishes to withhold more than the mandatory taxes on a hardship withdrawal can their withdrawal amount be increased to cover these taxes?

*The amount of the distribution can be increased to cover taxes and penalties **on the distribution**. Suppose my hardship need was \$10,000, and I'm in a 25% federal and state tax bracket, and subject to a 10% penalty for early withdrawal. The plan could distribute \$15,385, giving me the \$10,000 plus 35% of the distribution for taxes. The distribution would be subject to ordinary withholding, meaning I would likely receive a check for more than \$10,000. But I couldn't say "I've got a big tax bill this year. Please distribute an extra \$4,000 (above the \$15,385) and withhold that for taxes." That would effectively equivalent to a non-hardship distribution of \$4000. Note that hardship distributions are not eligible rollover distributions and thus the normal 20% withholding rate does not apply.*

12. Can you clarify the casualty loss and federal declared disaster, is it now both?

*A casualty loss is limited to damages to the participant's principal residence caused by an event, such as fire, flood, or earthquake, which would qualify for the casualty loss deduction as it existed in 2017. It need not be in a federal disaster area. The new disaster loss covers expenses related to a federally declared disaster, included residential damage, lost income, or loss of personal property. The two overlap.*

13. On 403(b) plans - is the "no distribution of employer contributions from custodial account/mutual fund 403b programs" a new rule in 2019?

*No. Code §403(b)(7)(A)(ii) prohibits hardship distributions of employer contributions in a custodial account.*

14. Do we still have to have documentation of the hardship...i.e. copies of Medical Bills or just the representation from the participant?

*We still must document the need. Nothing has changed in that regard. You can either use the substantiation guidelines or the employer can retain proof.*

15. Is the adoption date related to the tax return due date of the Plan or the Plan Sponsor?  
*It is the plan sponsor's tax deadline, not the 5500 deadline.*

16. We've had a lot of requests lately for hardships to pay their student loan payments. Has this changed and I've missed it?

*No. Student loan repayments are not within the safe harbor hardship rules.*

17. Can you please clarify the amendment deadline for Individually Designed plans?

*Assuming (and this is a good bet) that the hardship regulations are on the 2019 Required Amendments List, the deadline will be December 31, 2021.*

18. I'm reading the Q and As from the first session. Item 41. Does the comment in the answer "But we don't recommend it" mean that the author suggests substantiation is a better route to follow than asking for proof? Can they expound as to why they think one path is better than the other?

*There are advantages to each approach. The advantage to the substantiation guidelines is that they are much less demanding, with very specific questions that can easily be handled online or via a call center. In addition, it puts a much lesser burden on the employer to evaluate the quality of the documentation provided by the employee.*