

Plan Administration

Disaster Preparedness — It's Not As Simple As It Looks! (Part 2 of 2)*

What steps should plan sponsors take to prepare for natural disasters?

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*Part 1 of this article, entitled "[Emergencies: A Matter of When, Not If](#)," can be found in the Fall 2018 issue of *Defined Contribution Insights*.

In 2005, Hurricane Katrina devastated New Orleans and much of the Gulf Coast. In 2017, Harvey was the first major hurricane to make landfall in the US after 2005 — a record [12-year span](#) between major hurricanes.¹ However, federally declared disasters and emergencies happen all the [time](#)² — affecting employees and their families across the country.

Employer Responses

There are myriad [resources](#) available to help in disaster planning.³ Employers should develop and communicate a plan for evacuating their facilities — communicating, *in advance*, to their employees and other constituents including vendors, customers, first responders, family members, media, etc.

Before addressing technical requirements of their plans and programs, employers need to consider the general needs of their employees, which may include absences due to:

- Personal injury/illness
- Family member injury/illness
- Community damage/quarantine
- School/business closures which cause them to have to be absent from the workplace even if the workplace is not directly affected
- Public transportation closure
- Other travel disruptions

Employee benefits are not the first thing that comes to mind when think-

ing about natural disasters. Nevertheless, maintaining or expanding benefits offers employees assistance during and after disasters.

Start with an assessment of the adequacy of access to health care (including mental health and social services). Then, consider developing a plan for workers and their families who have special needs. Next, consider providing additional, unpaid leave. Other benefits might include expanded access to medical benefits or providing additional counseling or other services. Employers should consider some of those aspects of their plans in advance to avoid *ad hoc* decision making and the potential for misguided decisions made in the harried days during and immediately following an emergency. In addition, consideration of compliance factors will be much easier if the plan is in place in advance of the need.

Compliance Concerns

Employers are generally required to maintain compliance regarding human resource policies, payroll, and benefit plans. For example, ERISA claim and appeals rules require any urgent claims to be reviewed and responded to as soon as possible but no later than 72 hours (29 CFR §2560.503-1).⁴ That timeline will be challenging for plans and administrators, but crucial for plan participants in an emergency.

Similarly, it is not unreasonable to assume that an employee or family member may have a serious health condition resulting from the disaster. Employers subject to the federal FMLA⁵ or state/local leave mandates should be prepared to administer those requirements — including, as necessary, rules for “key employees.” USERRA⁶ rules regarding absences and re-employment may apply where employees or members of their family are members of the military, including making allowances for employees to assist with a spouse, child, or parent serving in the Armed Forces.

COBRA continuation of coverage obligations will apply to workers who quit or take a leave of absence that triggers a loss of health coverage.⁷ Employers need to arrange with plan administrators in advance how the administrators will respond in a timely fashion following a disaster.

Employers cannot assume that the emergency will relieve it from its compliance obligations. The IRS has provided relief in several instances in the last several years. However, the relief was generally targeted and limited in duration. Consider, for example, IRS Announcement 2017-11,⁸ which permits qualified retirement plans to offer liquidity to participants affected directly by Hurricane Harvey.

Congress has, from time-to-time, also provided relief for some, but not all, disasters regarding liquidity provi-

sions and taxation of monies borrowed or withdrawn from tax-qualified retirement plans.

However, neither the federal agencies nor Congress provides relief in every disaster situation, nor is the same relief extended every time relief is provided. As a result, employers will be best positioned to provide assistance to employees where they know the terms of their human resources policies and benefit plans. If the IRS, DOL, and/or Congress provides relief for a specific disaster, that will be all to the good.

Medical Coverage and Services

Employers may also want to include provisions in their health plans designed to deliver services without interruption — such as telehealth and health advocacy counseling. Arrangements should be made with insurance carriers regarding medical coverage and services in the event of displacement — such as in-network reimbursement rates for out-of-network care. To enable employees and their family members to access treatment after a disaster, adjustments may be needed with respect to:

- Network provider limitations (exclusive provider networks, reference-based pricing, direct contracting, etc.),
- Reauthorization or precertification requirements, provider referrals, and
- Limits on retail prescription vendors, as well as advance prescription refill policies.

Where workers and their family members are enrolled in employer-sponsored medical coverage, adding these provisions will typically comply with all ERISA and code requirements. However, a decision to extend services to others not covered by the employer-sponsored plan could create compliance issues.

Qualified Disaster Relief Payments

Some forms of assistance have compliance consequences. Employer-provided funds, shelter, transportation, and other aid will generally be considered income paid to employees. The general rule for employers is that emergency support will be treated as compensation in exchange for services — taxable to employees under Internal Revenue Code Section 61 (IRC §61). So, employers generally must track and report any compensation for employees unless the emergency support meets the requirements of an exception to the general rule.

Cash payments per IRC §139 are the easiest and most tax efficient assistance for employees in a federally declared disaster area (defined by IRC §1033(h)(3)). Even though the general rule under the tax code is that all compensation paid to an employee by an employer is in exchange for services and taxable income, the exception under IRC §139 will permit cash assistance that is free of both income tax and employment taxes. A “qualified disaster relief payment” includes payments made:

1. to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster,
2. to reimburse or pay reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence or repair or replacement of its contents to the extent that the need for such repair, rehabilitation, or replacement is attributable to a qualified disaster, or
3. by a person engaged in the furnishing or sale of transportation as a common carrier by reason of the death or personal physical injuries incurred as a result of a qualified disaster.

Interest Free Compensation Loans


Some employers will lend money to employees at zero or below market interest rates. Generally, foregone interest is taxable to an employee (IRC §7872(c)(1)(B)).⁹ However, if the loan is less than \$10,000, there is a *de minimis* exception for foregone interest (IRC §7872(c)(3)).¹⁰ And, foregone interest on a loan of \$10,000 or more may be tax free under IRC §139.

Paid Time Off in Emergencies

The IRS has provided guidance regarding sharing of paid time off. A written policy is required to ensure the shared leave is taxable to the employee who used the paid time off ([IRS Notice 2006-59](#)).¹¹ The written plan cannot permit the donor to specify the recipient, share more leave than he/she is entitled to, and the leave must be used as a result of the disaster. Leave cannot be converted into cash payments nor carried over to another disaster.

The IRS has also provided ways, via leave-based donation programs¹² for employees to offer their paid leave to charitable organizations in the event of a disaster ([IRS Notice 2017-48](#)).

Conclusion

There are methods employers can use to assist employees in a disaster. To avoid compliance and other concerns, employers should consider what their responses will be, document their decisions, and communicate them to their employees. The time to plan for the next emergency is now. A solid, thoughtful response will help employers gain the trust and ongoing loyalty of employees. 

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