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BLOG

California Wildfires: How Can Employee Retirement Plans Help?

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In recent weeks, fires have devastated communities in and around Los Angeles, California. Then-President Biden declared the fires to be a major disaster, authorizing federal funding to assist recovery and, by extension, making available certain options for taking a distribution from a tax-qualified 401(k) plan, ***provided the plan provides for them***. These options are summarized below.

Qualified Disaster Recovery Distributions. Following enactment of the SECURE 2.0 Act of 2022 (SECURE 2.0), if permitted by a 401(k) plan, a participant (1) whose principal residence is in an area subject to a presidential major disaster declaration and (2) who sustains an economic loss from the disaster may take a distribution of up to $22,000 within 180 days of the event. These distributions are exempt from the 10% penalty tax that could apply to a withdrawal taken before age 59-1/2, and participants may repay these distributions to an eligible retirement plan within three years after the distribution.

Emergency Personal Expense Distribution. Also under SECURE 2.0, if permitted by a 401(k) plan, a participant may take a distribution to meet "unforeseeable or immediate financial needs relating to necessary personal or family emergency expenses." Plan administrators may rely on employees' written self-certification that they meet this requirement. SECURE 2.0 limits these distributions to one per calendar year, and the distribution amount may be up to the lesser of: (1) $1,000 or (2) the participant's vested account balance minus $1,000. Like Qualified Disaster Recovery Distributions, these emergency expense distributions are also exempt from the 10% early withdrawal penalty. A participant may repay these distributions within three years but cannot take another Emergency Personal Expense Distribution during the three-year period before repaying the distribution to the plan.

Hardship Distributions. If permitted by a 401(k) plan, a participant may also take a hardship distribution to meet an "immediate and heavy financial need" that the participant cannot meet with other assets reasonably available. Because FEMA declared the Los Angeles fires to be a major disaster, immediate and heavy financial needs include expenses and losses from the fires, including lost income, if the participant's principal residence or workplace was located in the disaster area designated by FEMA. Plan administrators may rely on employees' written self-certification that they meet the applicable hardship distribution requirements.

- Note that, unlike Qualified Disaster Recovery Distributions and Emergency Personal Expense Distributions, hardship distributions generally are not exempt from the 10% early distribution penalty.

- However, the IRS has clarified in separate FAQs that, so long as a participant meets the requirements of a Qualified Disaster Recovery Distribution or an Emergency Personal Expense Distribution, a participant may treat any distribution they receive from the plan, including a hardship distribution, as a Qualified Disaster Recovery Distribution or an Emergency Personal Expense Distribution on their individual tax return, thereby avoiding the 10% early distribution penalty.

Plan Loans. Finally, if permitted by a 401(k) plan, a participant may take a loan from their vested account balance. In general, a participant may take a loan of up to the lesser of 50% of the participant's vested account balance or $50,000. However, SECURE 2.0 increased the maximum loan amount to the lesser of 100% of the participant's vested account balance or $100,000 (in both cases, reduced for any outstanding loan balances) for a participant living in a qualified disaster area.

NEXT STEPS

Employers wishing to provide relief to participants affected by the Los Angeles fires should review their plans to ensure the desired relief is available and work with counsel and recordkeepers to confirm compliance with legal requirements, including timely amendment of the plan to incorporate the desired relief. Please contact a member of the Winston & Strawn Employee Benefits and Executive Compensation Practice or your Winston relationship attorney for further information.

3 Min Read

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