

# Compensation and Benefits Insights

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## 401(k) Plan Hardship Rules: Recent Changes to Loosen Requirements May Require Plan Amendments

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The Tax Cuts and Jobs Act (the “Tax Act”) and the Bipartisan Budget Act of 2018 (the “Budget Act”) made several changes which impact the 401(k) plan hardship distribution rules, and may require employers to amend their plans and/or administrative practices.

As a review, 401(k) hardship distributions are permitted only to the extent a participant has an “immediate and heavy financial need” and the distribution is “necessary” to satisfy such need. A 401(k) plan must specify how the plan administrator will determine that a participant has met the hardship requirements. The plan administrator can rely on two safe harbors in making the determination:

- *Financial Need Safe Harbor*—the following categories of expenses are deemed to constitute an immediate and heavy financial need:
  1. Medical care expenses for the participant, his/her spouse or dependents.
  2. Costs directly related to the participant's purchase of his/her principal residence (not including mortgage payments).
  3. Amounts necessary to prevent the participant's eviction from, or foreclosure on, the participant's principal residence.
  4. Funeral expenses for the participant, his/her spouse or dependents.
  5. Tuition and related expenses for the next 12 months of post-secondary education for the participant, his/her spouse or dependents.

### Our Practice

We advise public, private, taxable and tax-exempt clients on a wide variety of issues related to the design, preparation, communication, administration, operation, merger, split-up, amendment and termination of all forms of employee benefit plans and executive compensation programs and related funding vehicles. The firm has defended clients in significant high-profile ERISA litigation matters, including 401(k) plan “stock drop” cases and other breach-of-fiduciary-duty class actions.

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6. Expenses incurred to repair damage to the participant's principal residence resulting from a “casualty loss” as defined in Section 165 of the Internal Revenue Code of 1986 (the “Code”).
- *Necessity Safe Harbor*—a distribution is deemed necessary if the following requirements are satisfied:
    1. The withdrawal does not exceed the amount needed to satisfy the participant’s financial need.
    2. The participant first obtains all currently available distributions and nontaxable loans under all plans maintained by the employer.
    3. The participant is prohibited from contributing to the 401(k) plan for six months following the withdrawal.

## **Change to the Definition of Casualty Loss:**

*Existing rule and Tax Act change:* The Tax Act narrowed the circumstances under which a taxpayer may be eligible to take a casualty loss deduction under Code Section 165. The change, which is applicable to losses occurring after December 31, 2017 and before January 1, 2026, limits casualty losses to only those losses attributable to a “federally declared disaster.” Thus, the “financial need” safe harbor for home repairs now appears to be limited to losses attributable to federally declared disasters.

*Employer Actions:* Employers should confirm that all hardship distributions made after January 1, 2018 based on the casualty loss prong of the safe harbor were attributable to losses caused by a “federally declared disaster.” To the extent that any hardship distributions were not processed in compliance with the new rule, an employer may need to take remedial action—for example, by amending the plan to allow the plan administrator to determine eligibility for a hardship based on all the “facts and circumstances. If the IRS revises the “financial need” safe harbor so that losses do not have to be related to federally declared disasters (just as the current hardship regulations disregard the Section 165 income thresholds), then no action will be required.

## **Contribution Suspension Requirement is Eliminated:**

*Existing rule and Budget Act change:* Under the current rules, the “necessity safe harbor” requires that the participant cease making contributions to all employer plans for the six month period following the hardship distribution. However, for plan years beginning on or after January 1, 2019, the safe harbor will be changed to delete the six-month contribution suspension requirement. For most 401(k) plans, an employer can elect to leave the suspension requirement in place. However, with respect to 401(k) safe harbor plans, the change appears to be required.

*Employer Actions:* To the extent the terms of a 401(k) plan specifically provide that contributions will be suspended for six months following a hardship distribution, and the employer wants to eliminate such requirement, then the employer will need to adopt a discretionary amendment by the end of the year in which the change is to be made. In addition, where a 401(k) plan incorporates the “necessity safe harbor” by reference, and the employer wants to continue imposing the six-month contribution suspension, then an amendment will also be required. In any event, safe harbor 401(k) plans must be amended to eliminate contribution suspensions effective January 1, 2019.

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## **Requirement to Obtain A Plan Loan Before Receiving a Hardship Distribution is Eliminated:**

*Existing rule and Budget Act change:* Under current rules, one element of the “necessity safe harbor” is that a participant must first take a plan loan before receiving a hardship distribution. For plan years beginning on or after January 1, 2019, this requirement will be eliminated.

*Employer Actions:* To the extent the terms of a 401(k) plan specifically require a participant to take a plan loan before receiving a hardship distribution, and the employer wants to eliminate such requirement, then the employer will need to adopt a discretionary amendment by the end of the year in which the change is made. Where a 401(k) plan incorporates the “necessity safe harbor” by reference, and the employer wants to continue imposing the loan requirement, then the plan will need to be amended to continue imposing such requirement.

## **Changes to the Types of Contributions Permitted for Hardship Withdrawals:**

*Existing rule and Budget Act change:* The current rules do not allow hardship distributions with respect to earnings on 401(k) plan contributions, qualified nonelective contributions (QNECs) and qualified matching contributions (QMACs). Beginning for plan years on or after January 1, 2019, hardship withdrawals can be made from all funds in the participant’s account, regardless of source.

*Employer Actions:* Since this is an optional provision, if an employer wants to expand the funds available for hardship after January 1, 2019, it will need to adopt a discretionary plan amendment by the end of the year in which the change is effective.

King & Spalding would be pleased to assist you in amending your 401(k) plan to comply with the recent Tax Act and Budget Act changes.

## **August and September 2018 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans**

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Employers and plan sponsors must comply with numerous filing and notice deadlines for their retirement and health and welfare plans. Failure to comply with these deadlines can result in costly penalties. To avoid such penalties, employers should remain informed with respect to the filing and notice deadlines associated with their plans.

The filing and notice deadline table below provides key filing and notice deadlines common to calendar year plans for the next two months. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is usually delayed until the next business day. Please note that the deadlines will generally be different if your plan year is not the calendar year. Please also note that the table is not a complete list of all applicable filing and notice deadlines (including any available exceptions and/or extensions), just the most common ones. King & Spalding is happy to assist you with any questions you may have regarding compliance with the filing and notice requirements for your employee benefit plans.

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Deadline	Item	Action	Affected Plans
August 14 (within 45 days after the close of the second quarter of plan year)	Benefit Statements for Participant-Directed Plans	Deadline for plan administrator to send benefit statement for the second quarter of the plan year to participants in participant-directed defined contribution plans.	Defined Contribution Plans with participant-directed investments
	Quarterly Fee Disclosure	Deadline for plan administrator to disclose fees and administrative expenses deducted from participant accounts during the second quarter of the plan year. Note that the quarterly fee disclosure may be included in the quarterly benefit statement or as a stand-alone document.	
August 15 (the 15th day of the 8th month after the end of the plan year)	IRS Forms 990 and 990-EZ	Deadline for tax-exempt trusts associated with qualified retirement plans and voluntary employee beneficiary associations (VEBAs) to file Forms 990 or 990-EZ with the IRS for prior year if the trustee obtained a 3-month extension by filing a Form 8868.	Qualified Retirement Plans  Voluntary Employee Beneficiary Associations
September 15 (8 ½ months after the end of the plan year)	Minimum Contribution Deadline	Deadline for plan administrator to contribute balance of minimum contributions necessary to avoid a funding deficiency.	Defined Benefit Plans

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Deadline	Item	Action	Affected Plans
September 30 (within 9 months of the end of the plan year)	Summary Annual Report (SAR)	Deadline for plan administrator to distribute Summary Annual Report for prior year to participants and beneficiaries. This deadline may be extended until 2 months following the close of the extension period for filing a Form 5500, if applicable.	Defined Contribution Plans  Health and Welfare Plans  (unfunded welfare plans are exempt)
September 30  (last day of the 9th month following the end of the prior plan year)	Certification of Adjusted Funding Target Attainment Percentage (AFTAP)	Deadline for actuary to certify AFTAP to avoid presumption that AFTAP is less than 60%.	Defined Benefit Plans