



Statement of Assistant Secretary Ann L. Combs

The Department, in conjunction with IRS Announcement 2005-70, provided guidance to facilitate hardship and loan distributions to participants and beneficiaries affected by Hurricane Katrina. In addition to the distribution issues addressed in the IRS Announcement, the Employee Benefits Security Administration has received inquiries concerning the application of rules governing participant contributions and loan repayments and the furnishing of blackout notices to employers and plans in areas affected by the Hurricane.

EBSA realizes that, due to this natural disaster, there may be instances when full compliance may not be possible. The guiding principle must be to ensure that appropriate efforts are made to act reasonably, prudently and in the interest of the workers and their families, who rely on their health, pension and other benefits for their physical and economic well-being.

The guidance provided in this statement applies to employers, plan sponsors, as well as service providers to such employers, and plans located in counties and parishes in Louisiana, Mississippi, or Alabama that have been or are later designated as disaster areas eligible for Individual Assistance by the Federal Emergency Management Agency because of the devastation caused by Hurricane Katrina.

Participant Contributions and Loan Repayments

In accordance with 29 CFR § 2510.3-102, amounts that a participant or beneficiary pays to an employer or amounts that a participant has withheld from his or her wages by an employer for contribution to an employee pension benefit plan constitute plan assets, and thereby are required to be forwarded to the plan, on the earliest date on which such amounts can reasonably be segregated from the employer's general assets, but in no event later than the 15th business day of the month following the month in which the amounts were paid to or withheld by the employer. In Advisory Opinion No. 2002-02A (May 17, 2002), the Department took the position that these same principles apply to amounts paid to or withheld by an employer for purposes of repaying a participant loan to a pension plan.

The Department recognizes that some employers and service providers acting on employers' behalf, such as payroll processing services, located in designated affected areas will not be able to forward participant payments and withholdings to employee pension benefit plans within the prescribed timeframe. In such instances, the Department will not, solely on the basis of a failure attributable to Hurricane Katrina, seek to enforce the provisions of title I with respect to a temporary delay in the forwarding of such payments or contributions to an employee pension benefit plan to the extent that affected employers, and service providers, act reasonably, prudently and in the interest of employees to comply as soon as practical under the circumstances.

Blackout Notices

In general, section 101(i) of ERISA and the regulations issued thereunder, at 29 CFR § 2520.101-3, provide that the administrator of an individual account plan is required to provide 30 days advance notice to participants and beneficiaries whose rights under the plan will be temporarily suspended, limited or restricted by a blackout period (i.e., a period of suspension, limitation or restriction of more than three consecutive business days on a participant's ability to direct investments, obtain loans or obtain other distributions from the plan). The regulations provide an exception to the advance notice requirement when the inability to provide the advance notice is due to events beyond the reasonable control of the plan administrator and a fiduciary so determines in writing.

Natural disasters, by definition, are beyond the control of a plan administrator. With respect to plans affected by Hurricane Katrina, the Department will not allege a violation of the blackout notice requirements solely on the basis that a fiduciary did not make the required written determination.

EBSA will continue to analyze the situation and will consider any additional guidance necessary to assist affected participants, beneficiaries, employers and plan sponsors as they work to recover from Hurricane Katrina, as issues are identified.