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Employee Benefits Update

November 2017

PROPOSED LEGISLATION

Tax Cuts and Jobs Act: The Potential Impact on Your Employee Benefits

From our view in Washington, the House and Senate majorities are motivated to keep tax reform moving at a fast pace. A number of compensation and employee benefits-related provisions will be in the *Tax Cuts and Jobs Act* if it passes. Other provisions remain part of the negotiation and could be offered as potential compromises between the current House-passed and Senate Finance-recommended bills.

Attached is a brief summary we created to keep track of the many compensation and benefits-related provisions in play. Of particular interest:

- Neither the House nor Senate current proposals would change the taxation of non-qualified deferred compensation. Earlier proposals would have attacked longstanding headaches caused by Code Section 409A with a guillotine. In particular, a new proposed Code Section 409B would have significantly curtailed deferred compensation by taxing compensation as soon as the employee has performed the applicable services.
- Public companies will be especially interested in the expansion of Code Section 162(m), which seems likely to stick. The changes would expand the employees (and employers) to whom the deduction limitation applies. In addition, the heavily relied upon exception for "performance-based pay" would no longer be available. Compensation arrangements for top-5 (and beyond) executives could be seriously impacted by these changes.
- Most of the current qualified plan changes are relatively technical and peripheral. For now, Congress backed away from the more consequential design changes, such as "Rothification" of 401(k) contributions.
- Our summary does not yet address the tax planning opportunities that arise from the reduction in corporate income taxes. As occurred in 1986, the bill could open many opportunities for accelerating employee benefits-related expenses, including but not limited to pension plan contributions.

Please reach out to any of our Employee Benefits and Executive Compensation team if you have any questions or areas of particular interest with regard to the tax reform proposals.

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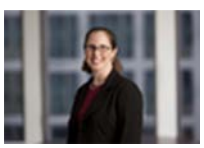

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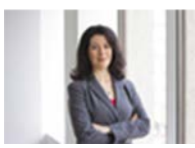

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Qualified Retirement Plans • Executive Compensation • Fringe Benefits • Health and Welfare Plans • Plan Terminations and Bankruptcy • Employment Taxes and Worker Classification

IPB In The News

Ivins selected as one of the Best Law Firms in America for 2018 by U.S. News & World Report (Nov. 2018)

Steve Witmer, Robin Solomon, Ben Grosz and Doug Andre taught an EBEC half-day seminar for the Tax Executives Institute, Los Angeles CA chapter (Nov. 3, 2017)

Robin Solomon and Jodi Epstein spoke on fiduciary best practices at "Best of" Plan Sponsor National Conferences in Chicago IL and New York NY (Oct. 24 & 26, 2017)

Ben Grosz shared insights at the 2017 Healthcare & Retirement Plan Summit in Baltimore MD (Oct. 24, 2017)

Doug Andre presented on global mobility at the TEI Annual Conference in Toronto Canada (Oct. 23, 2017)

Robin Solomon and Jodi Epstein led a panel on IRS/DOL Audits at fifth annual Women, Influence & Power Conference (WIPL) in Washington, DC (Oct. 12, 2017)

Jodi Epstein served as a panelist discussing white label funds at the Pensions & Investments West Coast Defined Contribution Conference in San Diego CA (Oct. 9, 2017)

Ben Grosz addressed the Washington Area Compensation and Benefits Association (WACABA) in Fairfax VA (Sept. 21, 2017)

Ten Ivins attorneys selected as Best Lawyers in America for 2018, including EBEC attorneys Kevin O'Brien, Will Sollee, Laurie Keenan and Jodi Epstein (Aug. 2017)

EB Update Archives

January 2016 EB Update

March 2016 EB Update

May 2016 EB Update: Wellness Plans

June 2016 EB Update: DOL Fiduciary Rule

Sept 2016 EB Update

March 2017 EB Update: HSAs

March 2017: American Health Care Act

Ivins, Phillips & Barker
November 17, 2017

TAX CUTS AND JOBS ACT OF 2017:

THE POTENTIAL IMPACT ON YOUR EMPLOYEE BENEFITS

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FRINGE BENEFITS – *EMPLOYEE* IMPACT

If your company offers…	…then these changes could apply	Code section	House Bill	Senate Finance Bill	Effective Date
Adoption assistance program	Employee tax benefit (income exclusion) would be repealed	137	1406	No	1/1/18
Dependent care assistance program (FSA)	Employee tax benefit (income exclusion) would be repealed in 2023	129	1404; Brady Am.	No	1/1/23
Educational assistance program	Employee tax benefit (income exclusion) would be repealed; individual deduction also would be repealed	127	1204	No	1/1/18
Employee achievement awards (service or safety)	Employee tax benefit (income exclusion) would be repealed	74(c), 274(j)	1403	No	1/1/18
Housing (employer-provided)	Employee tax benefit (income exclusion) would be limited to $50,000 (married) or $25,000 (unmarried), and phased out for highly compensated employees. Would be limited to one residence.	119	1401	No	1/1/18
Moving expense reimbursement	Employee tax benefit (income exclusion) would be repealed; employer deduction also would be repealed	132(a); 217	1405	Yes (2025 sunset)	1/1/18
Qualified bicycling commute reimbursement	Employee tax benefit (income exclusion) would be repealed			Yes (2025 sunset)	1/1/18
Working condition fringe benefits	Unchanged, for employee	262A, 274	1312, 3307	No	1/1/18

FRINGE BENEFITS – *EMPLOYER* IMPACT

If your company offers…	…then these changes could apply	Code section	House Bill	Senate Finance Bill	Effective Date
Child care (employer-provided)	Employer credit would be repealed	45F	3402	No	1/1/18
Entertainment expenses	Employer deduction would be disallowed unless treated as employee pay; this includes associated membership dues	274	3307	Yes	1/1/18
Gym (on-site)	Employer deduction would be disallowed Exempt orgs would pay UBIT on value	274	3307, 3308	No	1/1/18
Meal expenses	50% deduction would remain unchanged [Senate markup would allow 50% deduction for food and beverage expenses associated with operating a trade or business, but would disallow the deduction for meals provided on-premises for the convenience of the employer. Hatch Amendment would delay effective date of change until 2026.]	274(n)	3307	Yes	1/1/18
Membership dues reimbursement	Employer deduction would be disallowed	274	3307	No	1/1/18
Qualified transportation fringe benefit reimbursement	Employer deduction would be disallowed Exempt orgs would pay UBIT on value	274	3307, 3308	Yes	1/1/18
Working condition fringe benefits	Employer deduction would be disallowed for de minimis fringe benefits not directly related to trade or business	262A, 274	1312, 3307	No	1/1/18

401(K) PLANS

If your 401(k) plan offers…	…then these changes could apply	Code section	House Bill	Senate Finance Bill	Effective Date[1]
Pretax contributions	*No change* – Although "Rothification" was rumored to limit pretax contributions, neither bill included these changes		N/A	N/A	N/A
Catch-up contributions	*No change* – Initial Senate bill would have disallowed catch-up contributions to IRAs and employer plans for employees who earned $500,000+ in prior year	414(v)	N/A	N/A	N/A
Hardship withdrawals	Plan could allow participants to continue contributing after taking hardship withdrawal (i.e., no more mandatory 6-month suspension period under regulatory safe harbor)	401k regs	1503	No	1/1/18
	Plan could allow participants to take a hardship withdrawal without first taking a plan loan	401(k)(14) (new)	1504	No	1/1/18
	Plan could allow participants to take a hardship withdrawal of QNECs, QMACs and account earnings	401(k)(14) (new)	1504	No	1/1/18
	Definition of hardship couldn't include deductible casualty losses or medical expenses, as these deductions (165 & 213) would be repealed	165(c), 213	1304, 1308	Yes (casualty only, with 2025 sunset)	1/1/18
Loans	Would prevent plan sponsors from applying a plan loan offset shortly after a participant terminates employment with an outstanding plan loan. Participants would have an extended period in which to rollover the loan to an IRA to avoid a taxable distribution.	402(c)(3) (new)	1505	Yes	1/1/18
Distribution for improper IRS levy	Could allow participants to re-contribute amounts withdrawn due to a wrongful or premature IRS levy		N/A	Yes	1/1/18

[1] Effective date for calendar year plans

Distribution for Mississippi River Delta flooding	Would introduce special distribution rules for participants affected by severe storms and flooding in Louisiana, Texas and Mississippi in 2016. This could give rise to additional distribution events (up to $100,000) exempt from 72(t) and mandatory withholding, which would be taxed ratably over 3 years. Plans also could permit participants to recontribute the amount to the 401(k) plan within 3 years.		N/A	Yes	Enactment

Employment Issues

Other issues	…then these changes could apply	Code section	House Bill	Senate Finance Bill	Effective Date
Sexual harassment claims	Would disallow employer deduction for sexual harassment settlements and attorneys' fees if such payments are subject to a nondisclosure agreement	162	N/A	Yes	Enactment
Worker classification	~~Would create safe harbor classification for service providers treated as independent contractors~~ ~~Would require written contract between the parties.~~ ~~Would impose income tax withholding requirement on contractors, equal to 5% of compensation up to $20,000, and would raise reporting threshold to payments of $1,000~~	3121, 3301, 3401	N/A	No	1/1/18 Reporting 1/1/19

EXECUTIVE COMPENSATION – PUBLICLY TRADED COMPANIES

If you are subject to 162(m) Limit on Company Deduction for Pay > $1 Million…	… these changes could apply	Code section	House Bill	Senate Finance Bill	Effective Date
Performance-based pay exception	Employer deduction would be repealed for *any* compensation paid over $1M, even if performance-based or commission Shareholder approval for equity awards still would be required under SEC rules *Transition unclear:* Senate markup would grandfather compensation paid pursuant to a written agreement as of 11/2/17 and not materially modified, and which is no longer subject to a substantial risk of forfeiture as of 12/31/16.	162(m)	3802(a)	Yes	2018
Covered employers	162(m) deduction limits would be extended to all non-US companies trading on ADRs (to the extent they have “covered employees”). At present, non-US companies rarely are subject to 162(m), unless they are 50% US-owned and meet other requirements.	162(m)(2)	3802(b)	Yes	2018
Covered employees	For 162(m) purposes, “covered employee” would be expanded to include CFO. A covered employee would remain subject to 162(m) even after termination of employment. It also would cover beneficiaries after death.	162(m)(3) & (m)(4)	3802(c)	Yes	2018

EXECUTIVE COMPENSATION – EXEMPT ORGANIZATIONS

If you are an exempt organization…	… then these changes could apply	Code section	House Bill	Senate Finance Bill	Effective Date
Exempt organizations	20% excise tax would apply to any compensation above $1M from exempt organizations	4960 (new)	3803	Yes	1/1/18

DEFERRED COMPENSATION

If your company offers…	…then these changes could apply	Code section	House Bill	Senate Finance Bill	Effective Date
Stock options	Special rule for start-ups would allow participants to make 83(i) election to defer income recognition for five years, if stock is not publicly traded	new 83(i), 409A(d)(7)	3804, 3805 [Brady Am]	Yes	Options exercised after 2017
Restricted stock units	Special rule for start-ups would allow participants to make 83(i) election to defer income recognition for five years, if stock is not publicly traded	new 83(i), 409A(d)(7)	3804, 3805 [Brady Am]	Yes	RSUs settled after 2017
Incentive stock options (ISOs)	Elimination of AMT could make ISOs more attractive to executives. At present, the alternative minimum tax takes into account the spread between ISO exercise price and its fair market value upon exercise.	55	2001	Yes	Tax years after 12/31/17
Nonqualified deferred compensation plans generally	~~Tax deferral would be eliminated; deferrals would be taxed immediately upon vesting. Existing arrangements generally would need to be sunset (and be taxed) by end of 2025 or 2026.~~	409B (new)	No	No	N/A
SERP	~~Employees would be taxed immediately upon vesting. Existing arrangements could be amended to allow distribution of amount equal to tax obligation.~~	409B (new)	No	No	N/A
Stock options – nonqualified	~~Employees generally would be taxed immediately upon vesting~~	409B (new)	No	No	N/A
Stock options – qualified/statutory (ISOs)	~~[Exempt from new 409B]~~	409B(b)(8) 422(b)	No	No	N/A
ESPP	~~Program would require review to ensure exemption from new 409B~~	409B(b) 423(a)	No	No	N/A
Restricted stock or SARs	~~Program would require review to ensure exemption from new 409B~~	409B (new)	No	No	N/A

Health & Welfare Benefits

If your company offers…	…then these changes could apply	Code section	House Bill	Senate Finance Bill	Effective Date[2]
Medical benefits – ACA mandates	ACA individual coverage mandate would be repealed. Without this requirement, it is expected that younger, healthier employees would be less likely to enroll in employer plans. Also, insurer/employer coverage reporting obligations could be unnecessary. Employer offers of coverage still would be necessary to satisfy ACA employer mandate.		N/A	N/A	N/A
	ACA employer coverage mandate (pay or play) would continue unchanged.	4980H	N/A	N/A	N/A
	Employee tax benefit would continue unchanged (income exclusion for employer contributions and value of medical benefits)	105, 106	N/A	N/A	N/A
	ACA Cadillac tax on high-cost medical care would continue unchanged	4980I	N/A	N/A	N/A
Family and medical leave	Employers may be entitled to 12.5% or higher general business tax credit for wages paid during FMLA leave (2019 sunset) to qualifying employees (earning < $72,000 in 2018).	-	N/A	Yes	2018-2019
Archer MSA	Employee tax benefit (income exclusion for employer contributions) would be repealed; employer deduction also would be repealed	106(b)	1311	No	1/1/18

[2] Effective date for calendar year plans

PENSION PLANS

If your company offers…	…then these changes could apply	Code section	House Bill	Senate Finance Bill	Effective Date[3]
In-service distributions	Could allow in-service distributions as early as age 59.5	401(a)(36)	1502	No	1/1/18
Closed plans – nondiscrimination testing	Would enable employers to cross-test DB and DC plans more easily, even if threshold requirements are not satisfied	401(o)	1506	No	Plans closed on or before 4/5/17
Closed plans – participation rules	Would excuse closed pension plans from 401(a)(26) participation rules	401(a)(26)	1506(b)	No	Plans closed on or before 4/5/17
Closed plans – benefits, rights, features	Would enable employers to protect grandfathered benefits, rights and features (BRFs) without violating 401(a)(4)	401(o), 401(a)(4)	1506	No	Plans closed on or before 4/5/17

[3] Effective date for calendar year plans

EXEMPT ORGANIZATIONS – 403(B) AND GOVERNMENTAL 457(B) PLANS

If your entity offers…	…then these changes could apply	Code section	House Bill	Senate Finance Bill	Effective Date[4]
Elective deferrals	Would harmonize elective deferral limits under 457(b), 403(b), and 401(k) plans ($18,500 in 2018). A single aggregate limit would apply.	402(g), 457(b)(3)	N/A	Yes	1/1/18
Annual additions under 415(c)	Would harmonize annual addition limits under a 401(k), 403(b) and 457 plan maintained by the same employer. A single 415(c) limit would apply.	415(c), 402(g)(7)	N/A	Yes	1/1/18
In-service distributions (457(b) plans only)	Could allow in-service distributions as early as age 59.5	457(b)	1502	No	1/1/18
Catch-up contributions	Would repeal the special rules allowing catch-up contributions by employer; would retain the general catch-up rule ($6,000 in 2018)	402(g)(7), 457(b)(3)	N/A	Yes	1/1/18
Catch-up contributions (457(b) plans only)	~~Would disallow catch-up contributions for employees who earned $500,000+ in prior year~~	414(v)	N/A	No	1/1/18
Post-employment contributions (403(b) plans only)	Would repeal the special rule allowing employer contributions up to five years after termination of employment, except for church employees and foreign missionaries	403(b)(3), 415(c)(7)	N/A	Yes	1/1/18
UBIT issue (state/local plans only)	UBIT rules would apply to any exempt trust under 501(a), regardless of whether an exemption applies under 115	115	5001	No	1/1/18
Fringe benefits (all exempt orgs)	Employer would be taxed on the value of fringe benefits by treating the funds as UBIT This includes qualified transportation fringe benefits, on-site gyms, etc.	512(a)(6), 274, 132(f), 132(j)	3308	No	1/1/18

[4] Effective date for calendar year plans

Early distributions (457(b) plans only)	~~Would apply 10% tax on early distributions before age 59.5~~	72(t)	N/A	No	1/1/18
Executive pay	20% excise tax would apply to any compensation above $1M from exempt organizations	4960 (new)	3803	Yes	1/1/18