BENEFITS NEWS

Tax Cuts and Jobs Act of 2017

On December 22, 2017, President Trump signed into law the Tax Cuts and Jobs Act (the "TCJA"), the most comprehensive tax reform passed in decades. The majority of the changes in the TCJA affect individual and corporate income tax returns, but as described below, the TCJA also makes several changes affecting employee benefits that are commonly provided by employers.

Bicycle Commuter Benefits: Qualified bicycle commuting reimbursements are no longer excludable from employees' wages and are taxable to the employee and subject to employment tax withholding for tax years 2018 through 2025. This is an immediate change, because pre-tax payroll deductions are no longer permitted.

Moving Expenses: Other than the special rules that apply to members of the Armed Forces, moving expenses are no longer deductible by individuals, and reimbursements by employers of any such expenses are taxable to the employee and subject to employment tax withholding for tax years 2018 through 2025.

Other Transportation Fringe Benefits: Employee transportation fringe benefits (i.e., mass transit and parking paid by the employer) are no longer deductible by the employer for tax years 2018 through 2025, unless such benefits are necessary for ensuring the safety of the employee. For tax-exempt employers who provide transportation fringe benefits to their employees, the law imposes an unrelated business income tax on the value of any benefit provided. However, the law does not change the effect of these benefits on an individual employee's taxable income. This means that the value of any transportation benefits provided by an employer can continue to be excluded from the employee's income, and employees are still eligible to elect to pay these expenses on a pre-tax basis under a Code Section 132 plan.

Rollover of 401(k) Plan Loan Offsets: An employee who has a plan loan defaulted due to the employee's termination of employment (or due to the plan's termination) is able to avoid taxation on the outstanding loan balance, including the 10% early withdrawal penalty, if the employee repays the defaulted loan into an IRA or a subsequent employer's qualified plan. Prior to the TCJA, employees only had 60 days to make this repayment to avoid default, but beginning in 2018, an employee now has until the due date (including extensions) for filing the employee's tax return for the year in which the loan offset occurs to complete this repayment. Employers may need to amend their loan policies and rollover notices to reflect this rule.

Employee Achievement Awards: "Tangible personal property" given to employees for a length-of-service or safety achievement award can be excluded from the employee's income under certain conditions. In 1989, the IRS issued a proposed regulation defining "tangible personal property," but this regulation was never finalized. The TCJA adopts a definition of tangible personal property from that proposed regulation that officially *excludes* cash, cash equivalents, gift cards and certificates, vacations, meals, lodging, theater and sports tickets, stocks, bonds, and other similar items. It is Congress's position that this is not a change from current law and guidance.

Affordable Care Act Individual Mandate: On January 1, 2019, the penalty for an individual who fails to obtain minimum essential medical coverage will be reduced to $0. The Congressional Budget Office predicts that this change will reduce the number of individuals who obtain subsidized coverage on the Federal Marketplace Exchange. The employer shared responsibility penalties applicable to large employers under the Affordable Care Act still apply; however, the anticipated reduction in Exchange enrollment may reduce an employer's risk that a penalty will be triggered for an employee to whom affordable, minimum value coverage was not offered. Please note that this change does not apply until 2019, meaning that any risk analysis that an employer completed with regard to its exposure to Affordable Care Act penalties is still relevant during 2018.

Executive Compensation for Public Companies: Performance-based compensation and commissions are no longer excluded from the $1 million deduction limitation under Code Section 162(m) for certain employees of publicly traded corporations for tax years 2018 and beyond. Employees who are covered by the $1 million deduction limitation now include the company's CFO. In addition, any employee who was covered in a prior year will remain subject to the limitation in future years, even if the employee ceases to be the CEO, CFO, or one of the other top three paid officers. A transition rule applies to performance-based compensation and commissions that are paid pursuant to a written binding contract that was in effect as of November 2, 2017 (and which is not materially modified on or after that date), but an agreement might not be eligible for this transition rule if payments under that agreement are subject to the employer's discretion.

Executive Compensation for Tax Exempt Entities: The TCJA adds new Code Section 4960, which imposes a 21% excise tax on tax-exempt organizations for compensation that is paid to certain covered employees of those organizations for tax years 2018 and beyond. The compensation to which the excise tax applies includes (a) compensation that is in excess of $1 million for any year (including the value of any compensation that first becomes vested in that year and including any compensation paid to the covered employee by a related entity), and (b) any "excess parachute payments" paid to a covered employee. Excess parachute payments are defined as severance or retirement benefits that exceed a covered employee's average compensation for the preceding five years, but only if the severance or retirement benefits equal or exceed three times the employee's average compensation over such five year period. Payments made under a qualified retirement plan, a Code Section 403(b) plan, or a Code Section 457(b) plan are not included in the calculation of excess parachute payments, but payments made under a Code Section 457(f) nonqualified deferred compensation plan can be included depending on when they vest. Employees who are covered by this new excise tax are the five highest paid employees of a tax-exempt organization in any year. Further, any individual who is included in the five highest paid employees for any year (beginning in 2017 and after) will be permanently treated as a covered employee for purposes of this tax. There is an exception for compensation paid to a licensed medical professional, but this exception is limited to compensation or benefits that relate to the actual performance of medical or veterinary services. The tax is imposed on the organization, not the employee.

Deferred Taxation of Qualified Equity Grants: Employees who participate in qualifying equity plans maintained by non-publicly traded companies may elect to defer taxation on stock received in connection with the exercise of options or settlement of restricted stock units for up to five years for tax years 2018 and beyond. This election is only available if there is a written equity plan that covers at least 80 percent of all employees who provide services to the employer (including related employers). If an employer maintains such a plan, there are new notice and reporting requirements, and a failure to satisfy these notice and reporting requirements could result in significant penalties.

If you are affected by any of the above changes and would like additional information to assist you with administering your benefit plans for 2018 and beyond, we would be happy to help. Please just contact any of the attorneys listed below or your current Cohen & Grigsby relationship attorney.

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