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Tax Reform Will Modify Employee Benefits Landscape

Tax reform continues to be the primary focus of Congress, with the House Ways and Means Committee approving its bill and releasing it to the full House last week and the Senate working on the outline of its bill this week. Significant changes to employee benefits are included—along with a provision to effectively repeal the ACA individual mandate. Other developments on the Hill include legislation advancing on joint employers, retirement plan cashouts, paid leave, and the Children's Health Insurance Program.

Spotlight Remains on Tax Reform

Following on the heels of the introduction of GOP's *Tax Cuts and Jobs Act* as outlined in our November 3, 2017 *FYI Alert*, the House Ways and Means Committee began deliberations last week to refine the proposal. By the end of the week, the committee agreed on the manager's amendment from Chairman Kevin Brady, R-Texas, and sent the bill for a full House vote. In the Senate, last week Finance Committee Chairman Orrin Hatch, R-Utah, released an outline of his version of tax reform and on November 14 released the Chairman's Modification to the Chairman's mark. A significant change to the Senate proposal is the effective repeal of the ACA individual mandate starting in 2019 by making the penalty $0. Multiple amendments have been proposed and will be considered this week. Assuming these bills clear their respective chambers, a conference committee will meet with the objective of pulling together a uniform bill for President Trump's signature by Christmas.

With so much in flux and a great deal of uncertainty, it is impossible to say at this point what will survive in the final legislation. Here are a few key benefit plan items for employers to watch:

Corporate tax changes. Both proposals would clip the corporate tax rate to 20% – the House would start the break in 2018 and the Senate would put it off until 2019; both bills would allow more favorable depreciation expensing. These corporate changes can affect the relative value of funds diverted to benefit dollars.

Minimal 401(k) damages. Aside from reducing the general tax benefit of deferral because of lower current tax rates, both bills generally leave the savings rate untouched and do not introduce so-called "Rothification" requirements. Under the House bill, participants in 401(k) plans would still be able to save $18,500 (in 2018) and $24,500 if eligible to make catch-up contributions. The Senate proposal initially limited catch-up contributions for individuals with wages in excess of $500,000 but struck that proposal on Tuesday. Also hitting the cutting floor was a proposal that would have required catch-up contributions to be in Roth form. Modifications for 403(b) and 457 plans would eliminate their special catch-up rules and harmonize contributions across plan types.

Executive compensation changes. Equity plan and nonqualified deferred compensation severely clipped in the original House bill were generally restored in the manager's amendment; however, the original changes temporarily found a home in Hatch's Senate proposal. Those changes were taken off the table by amendments to the chairman's mark. However, the inclusion of performance-based compensation in the $1M limitation on deductible compensation remained in the Senate amendment, but was modified to exclude compensation vested on or before December 31, 2016 under a contract in effect on November 2, 2017 that is not materially modified thereafter.

Relaxed rules for closed defined benefit plans. Nondiscrimination testing relief for closed defined benefit plans remains in the House bill as described in our *FYI Alert*. Comparable language has not yet been included in the Senate proposal.

Health and welfare benefits. Health and welfare benefits remain intact in the Senate bill. At the moment, no provision in the Senate proposal directly impacts employer-sponsored health and welfare benefits. Amendments to the House bill restore the exclusion for several common employer-sponsored progams:

- The original House bill would have repealed the exclusion for dependent care assistance programs (DCAPs) effective in 2018. But House amendments delay the repeal of DCAPs to 2023. The Senate proposal does not include any provisions that impact DCAPs.
- The House amendments preserve the exclusion for adoption assistance programs that the original House bill would have ended. The Senate does not include any provisions affecting adoption assistance programs.
- The House bill would have repealed the exclusion for employer-provided educational assistance programs and that remains unchanged. The Senate proposal does not include any educational assistance provisions.
- The Senate would not repeal the itemized medical deduction, which the House bill had included.

Other Developments

Tax Reform is not the only game in town. Here are some additional benefit plan topics we are watching:

Joint Employers. On November 7, the House passed the Save Local Business Act (H.R. 3441) by a 242-181 vote, largely along party lines. The bill would amend the National Labor Relations Act (NLRA) to allow the treatment of two or more employers as "joint employers" only when one business exercises direct, actual, and immediate control over the essential terms and conditions of employment of another business' workforce. It would also amend the Fair Labor Standards Act to provide that an entity may be considered a joint employer for its purposes only if it meets the NLRA criteria. If enacted, the bill would effectively reverse the indirect control standard adopted in the NLRB's controversial *Browning-Ferris Industries of California Inc.* decision. (See our August 21, 2017 *Legislate* and September 25, 2015 *For Your Information* for more detail.)

Retirement Plan Cashouts. House Rep. Tim Walberg, R-Michigan, introduced the Retirement Plan Modernization Act (H.R. 4158) on October 26. The bill has bipartisan sponsorship and would increase the cashout limit for retirement plan accounts from $5,000 to $7,600 and provide for future increases indexed to inflation in $50 increments.

Paid Leave. House Rep. Mimi Walters, R-Calif., introduced the Workplace Flexibility in the 21st Century Act (H.R. 4219) on November 2. The bill would exempt employers from state and local paid sick and family leave laws if they provide a minimum amount of paid leave and at least one of the following six workflex options – a biweekly work program, compressed work schedule, telework, job sharing, flexible scheduling, and predictable scheduling. Because the proposed legislation would treat qualified flexible workplace arrangement plans as employee welfare benefit plans under ERISA, they generally would be subject to federal preemption with respect to plan-eligible employees or, in the case of biweekly programs and compressed work schedules, employees who actually enroll in one of those options.

Children's Health Insurance Program. The House passed the Championing Healthy Kids Act (H.R. 3922) on November 3, which includes reauthorization of the Children's Health Insurance Program (CHIP) for five years. The focus on CHIP reauthorization now moves to the Senate, which has been considering its own legislation including the Kids Act of 2017 (S. 1827).

> **Comment.** Members in both the House and the Senate have been working on legislation to enhance Health Savings Accounts (HSAs). A bipartisan group in the Senate is drafting legislation that would do so and potentially delay some ACA taxes (including the medical device and health insurance tax). House Ways & Means Chairman Kevin Brady has indicated that HSA changes could be part of any CHIP negotiations. See our November 6, 2017 *Legislate* for a discussion of the legislation.

Looking Ahead

With a goal of having a tax bill on the president's desk before Christmas, the House and Senate committees will be hard at work on tax reform over the next few weeks to clear their respective chambers.

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