

EMPLOYEE BENEFIT PROVISIONS IN THE HOUSE TAX REFORM BILL

On Thursday, November 2, 2017, Republicans in the House of Representatives released the text and summary of H.R.1, their promised tax reform bill. The short title of the bill is the "Tax Cuts and Jobs Act." It is the first substantive shot fired in the tax reform war that the Republican leadership intends to wage to rewrite and simplify individual, estate and corporate taxes at the federal level. The House Ways and Means Committee began markup of the bill on Monday, November 6. Of course, the final bill, if signed into law, may be materially different from the original proposal.

There are a number of provisions of the proposed bill that directly impact employee benefits. However, the bill is notable for what it does not include. H.R.1 does not include a cap on salary deferral contributions as some had suggested and debated in the days before the bill was released. While the cap could be added to the bill, it is not currently supported by the President and many in Congress.

Among the many changes that H.R.1 would make if enacted is the repeal of the exclusions for both the employer-provided dependent care assistance programs and adoption assistance programs. It would also repeal the employer-provided child care credit.

Other employee benefits-related proposed changes include the following.

- Recharacterization of IRA contributions and conversions from traditional to Roth and vice versa will be eliminated after 2017.
- In-service withdrawals from defined benefit plans, as well as state and local government defined contribution plans, will be permitted beginning at age 59 1/2 after 2017.
- Hardship withdrawal regulations for 401(k) and 403(b) plans will be changed by the IRS to allow those taking a hardship distribution to continue to make salary deferrals rather than be suspended for six months after taking hardship distribution as current regulations require.
- Hardship withdrawals will be permitted from not only contributions but also earnings and employer contributions for years after 2017.
- Employees who separate from service with an employer with outstanding plan loans will be permitted to make up the loan payments until the due date of the tax return plus extensions for the year in which termination occurs.
- Employers who maintain a defined contribution and defined benefit plan will be able to take advantage of a relaxed cross-testing provision for the purposes of the nondiscrimination rules under Code §401(k)(4).
- Employer-paid moving expenses will be taxed as well as tuition reductions offered by schools, colleges and universities.
- Archer medical savings accounts lose their tax-favored status.
- The itemized deduction for medical expenses is repealed.
- Employee achievement awards will be taxed.

H.R.1 greatly changes taxation of nonqualified deferred compensation. The bill would repeal current Code Sections 409A and 457A for 2018 and beyond. It creates a new section 409B to be effective for nonqualified deferred compensation arrangements after 2017. Under the new rule, nonqualified deferred compensation would be taxed as soon as there is no substantial risk of forfeiture as to the deferred compensation. Compensation will be subject to a substantial risk of forfeiture when an individual's right to the compensation is conditioned upon the future performance of substantial services. Covenants not to compete and payment restrictions other than future performance of services would not create a substantial risk of forfeiture. This proposed change narrows the circumstances under which nonqualified deferred compensation avoids current taxation.

Finally, large tax exempt organizations should be aware of the proposed excise tax on compensation of their most highly paid employees. Tax exempt organizations will be subject to a 20 percent excise tax on their top five employees according to pay if they make more than

\$1,000,000. In determining whether the \$1,000,000 threshold has been met, the new law would require payments contingent upon the employee's separation from the employer to be included if the aggregate value of the parachute payments exceed three times the employee's base pay.

If you have questions about the foregoing, please contact **Bill Roberts** at ebplans@hallrender.com or your regular Hall Render attorney.