Published on *The National Law Review* https://natlawreview.com

# The Tax Cuts and Jobs Act – Potential Changes for Qualified Plans and Fringe Benefits

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On November 2, 2017, House Republicans introduced the Tax Cuts and Jobs Act (the "House Bill"). If enacted in its current form, the House Bill would make several changes to the rules governing qualified plans (such as 401(k) plans and pension plans) and fringe benefit plans. These changes would generally apply to plan years beginning after December 31, 2017.

This client alert covers key aspects of those changes. Our alert summarizing the House Bill's proposed changes to executive compensation is available here.

Keep in mind that the Senate is working on its own version of the legislation, which may differ significantly from the House version. In addition, the House Bill is currently in the "mark-up" period, which is likely to result in changes.

## Do any changes affect in-service distributions from qualified plans?

The minimum age for in-service distributions from a tax-qualified plan (such as a defined benefit pension plan, a money purchase pension plan or a profit-sharing plan) or from a governmental 457(b) plan would be reduced from age 62 to age 59½.

## What changes would be made to plan hardship distributions?

The House Bill would ease certain restrictions on hardship distributions as follows:

- Under current law, in order for a hardship distribution to be deemed necessary to satisfy an immediate and heavy financial need under the regulatory safe harbor, the participant must be prohibited from making contributions to the plan for six months following the distribution. The House Bill eliminates this six-month suspension requirement.
- Currently, hardship distributions cannot be made from qualified nonelective contributions, qualified matching contributions and earnings on those contributions. The House Bill eliminates this restriction (thus allowing for hardship distributions from these types of

contributions).

- To be eligible for a hardship distribution under current law, a participant must first take all available nontaxable loans from the employer's plan. The House Bill eliminates this requirement.

**Our Comment:** Whether the hardship distribution changes to 401(k) plans also apply to hardship distributions from 403(b) plans is not entirely clear as currently drafted in the House Bill.

## Are there changes to the plan loan rollover rules?

Under current law, a participant has 60 days to roll over a plan loan offset amount (from a 401(k) or 403(b) plan account) to an eligible retirement plan that accepts the rollover. The House Bill extends this time period until the due date (with extensions) for filing the participant's tax return. This new rule would apply only to plan loan offset amounts resulting from the participant's termination of employment or the employer's termination of the plan.

**Our Comment:** A plan loan offset is a foreclosure on a participant's account that occurs when the participant defaults on a plan loan, such as following termination from employment when a plan states that the loan becomes immediately payable in full. When an offset occurs, the outstanding balance on the loan is paid with funds from the participant's account and the amount of the loan offset is reported to the participant on a Form 1099-R as an actual distribution.

## Is there any easing of the nondiscrimination rules that apply to retirement plans?

Yes, there would be some easing of the nondiscrimination testing rules that apply to frozen defined benefit plans.

The proposed changes would affect defined benefit plans (i) that were frozen prior to April 5, 2017, or (ii) that were in effect for at least five years prior to the freeze date, provided there was no substantial increase in coverage or plan benefits during the five-year period prior to the freeze date (an "Applicable Frozen DB Plan"). These changes are summarized below:

- An Applicable Frozen DB Plan would be considered nondiscriminatory with respect to the composition of the closed class of participants and the benefits, rights and features provided to the closed class if: (i) the plan was nondiscriminatory for the year the plan closed and the two succeeding plan years and (ii) no plan amendment after the freeze date discriminates in favor of highly compensated employees.

- An Applicable Frozen DB Plan could be aggregated with certain defined contribution plans on a benefits basis for nondiscrimination and minimum coverage testing.

## What about the nondiscrimination rules that apply to defined contribution plans?

Similar relief from the nondiscrimination and minimum coverage testing rules would apply to defined contribution plans that provide for nonelective employer contributions that are reasonably calculated to replace some or all of the retirement benefits a participant would have received under a frozen defined benefit plan (or under another defined benefit plan or a 401(k) plan) if the plan had not been frozen.

## What's happened to Rothification?

As a major source of tax revenue to offset tax cuts, the House Committee on Ways and Means had considered changes to the treatment of employee deferrals to 401(k) plans, such as allowing employee deferrals to be made only as Roth contributions (so-called "Rothification") or lowering the annual pre-tax contribution limit. These changes were not included in the House Bill, but may still be on the table as the House Bill moves through the legislative process.

## Are there any changes to the fringe benefit rules?

If enacted in its current form, effective for tax years beginning after December 31, 2017, the House Bill would cause the following benefits to be *included* in the gross income of employees:

- Dependent-care assistance program amounts (currently tax-free up to $5,000 per year or $2,500 if married filing separately). It appears that employees would no longer be able to contribute to a dependent care flexible spending account on a pre-tax basis.

- Employer-provided adoption assistance program amounts (currently tax-free up to $13,570 per child).

- Qualified moving expense reimbursements paid by employers (currently tax-free if certain requirements are met).

- Tuition reimbursements provided by employers through qualified educational assistance programs (currently tax-free up to $5,250 per year).

- Qualified tuition reductions provided by educational institutions to employees and their spouses and dependents (currently tax-free for undergraduate tuition and, in the case of teaching and research assistants, graduate tuition).

- The exclusion for employer-provided housing (which is generally excludable from the employee's income if the housing is provided for the employer's convenience) is limited to $50,000 ($25,000 for a married individual filing a separate return) and to one residence. A further limit would apply to certain highly compensated employees and to 5 percent owners of the employer.

- Employer contributions to Archer Medical Savings Accounts. The House Bill also eliminates the income tax deduction for employee contributions to Archer Medical Savings Accounts.

- Employee achievement awards (awards of tangible property that are given for length of service or safety achievement, that are part of a meaningful presentation, that are not disguised as compensation).

- Employer-provided working condition fringe benefits would continue to be excluded from an employee's gross income, even though the House Bill also repeals the deduction for trade or business expenses incurred by an individual.

**Our Comment:** If the House Bill is enacted as proposed, employers may wish to review the definition of “compensation” in their qualified retirement plans. A plan’s definition of compensation frequently includes fringe benefits based on whether those benefits are taxable to the employee (e.g., the long-form Code Section 415(c) definition of compensation). The House Bill would cause many fringe benefits that were previously not taxable to become taxable.



National Law Review, Volume VII, Number 312