NEXSEN | PRUET

Employee Benefits and the Tax Cuts and Jobs Act

Related Professionals

Jim P. Rourke
803.540.2030
jrourke@nexsenpruet.com

Michael T. Brittingham
803.253.8289
mbrittingham@nexsenpruet.com

Practices

Employment & Labor Law

Employee Benefits Litigation

Employee Compensation and Benefits

Employees and Technology

Employment Immigration

Tax Law

Federal Taxation

04.04.2018

As we move into the second quarter of 2018, now is a good time to remind employers about the significant impact of the Tax Cuts and Jobs Act (TCJA) on employee benefits.

As we move into the second quarter of 2018, now is a good time to remind employers about the significant impact of the Tax Cuts and Jobs Act (TCJA) on employee benefits. While some of these issues may not affect the taxation of employee benefits directly, the new tax treatment of certain employer-provided benefits may limit the provision of those benefits. Like any change in law, the new legislation has brought with it a number of questions.

The following summarizes many of the changes, as well as some of the remaining unresolved issues. Also note that we will be covering these issues (and more) at the upcoming Webinar on April 11 at noon entitled "Employee Benefits Version 2018: The Year Ahead." Please register for the webinar here.

1. Participant Loan Rollovers

Prior to the TCJA, employees with an outstanding plan loan had a 60-day window to resolve the unpaid loan balance. They could either repay the loan to the prior employer's plan or take a rollover distribution and fund the loan with taxable assets to offset the loan, contributing the rolled over amount plus the loan offset to a qualified retirement plan or IRA (a "plan loan offset"). This created a limited period for the employee to avoid the deemed distribution of a plan loan, which resulted in a taxable event and a 10 percent penalty.

The new law extends the deadline to accomplish a plan loan offset to the due date (including extensions) for filing the Federal income tax return for the taxable year in which the distribution or the plan loan offset occurs. This means an employee will have much more time to collect the accrued and outstanding unpaid principal and interest on any plan loan that was earlier extended to him or her, and then pay and roll over such amount to another qualifying plan or IRA. Employers also may see increased interest from new employees seeking to roll over plan loans to their plan. Given this change, employers are advised to work with legal counsel to ensure those rollovers comply with both the law and the plan's terms.

2. Employer Credit for Paid Family and Medical Leave

Effective in 2018, the TCJA now provides a new employer tax credit for wages paid to employees earning less than $72,000 in 2018 during any period in which these employees are on family and medical leave; however, the rate of payment under the program must be at least 50 percent of the wages normally paid to an employee. The available credit is based on the extent to which the leave rate of payment (subtracting for vacation, sick leave, PTO, and other disability pay) exceeds 50 percent of regular pay, and can be between 12.5 percent and 25 percent of the paid leave. Generally, to determine the credit, the employer will multiply the leave percentage by 0.25. So for example, if an employee's leave pay is 75 percent of his normal pay, the credit is 18.75 perfect of the leave pay. The maximum amount of family and medical leave that may be taken into account with respect to any employee for any taxable year is 12 weeks.

For purposes of this new credit, an "eligible employer" is one with a written policy allowing all qualifying full-time employees at least two weeks of annual paid family and medical leave. In addition, part-time employees also must be allowed annual paid leave on a pro rata basis. "Qualifying employees" are those who have been on the job for one year or more and who for the preceding year had compensation of not more than 60 percent of the compensation threshold for highly compensated employees (currently $120,000 in 2018).

3. Repeal of deduction for entertainment, amusement, and recreation

Prior to the change in law, employers were eligible for a 100 percent deduction on entertainments expenses and a 50 percent deduction for expenses related to business meals, so long as an employee of the taxpayer was present. Effective January 1, 2018, however, those entertainment expenses are no longer deductible.

One unresolved issue appears to be whether business meals provided in conjunction with an entertainment event remain 50 percent deductible in light of the new law. Of course, it is common for meals to be served at entertainment events with a client. While no guidance has been published to date, it appears reasonable that separately stated charges for employee meals should remain partially deductible, notwithstanding the fact they are served at an entertainment event.

4. Limitation of deduction for employer-provided business meals

Before the TCJA, employers could deduct 100 percent of meals provided for the convenience of the employer either at no cost or at a discount to employees. But effective January 1, 2018, the employer's deduction is now limited to 50 percent; after 2025, this deduction is eliminated. While the new provision does not affect the taxability of the meal to the employee, employers will need to accurately track these expenses in order to ensure the deduction is properly applied.

5. Repeal of deduction of qualified transportation fringe benefits

Prior to the TCJA, employers could deduct expenses related to the value of providing parking or transit passes. These expenses were deductible as qualified transportation fringe benefits. The new law repeals that deduction. If the employer provides free parking to employees or allows them to pay for parking with pre-tax salary reduction amounts, then those expenses will continue to be nontaxable. However, those expenses are no longer deductible to the employer.

One unresolved issue is whether an employer will be entitled to a deduction to the extent the employee is taxed on the value of parking. The Tax Code provides that parking and transit passes are a nontaxable benefit, so long as the benefit is less than $255 per month. The value above that threshold is a taxable benefit to the employee. For employers providing parking that is valued above that threshold, this issue is whether an employer is entitled to a deduction for the extent to which an employee is partially taxed on the fair market value of parking.

Note that the Internal Revenue Service has previously provided some guidance related to this matter. In cases where an area with ample free parking for employees, clients, contractors and other visitors, for example, where an employer is a tenant in a mall and the mall, as part of the tenancy arrangement, provides free parking to all employees, customers and contractors (with no preferential parking), we suggest clarifying that there is no loss of deduction.

6. Payments for moving expenses now taxable

Prior to the TCJA, certain moving expenses could be treated as nontaxable fringe benefits that could be excluded from an employee's taxable income. In 2018, that beneficial treatment is suspended. That means moving expenses paid or reimbursed by employers are now fully taxable to the employee, subject to both withholding and payroll taxes. Employers should be mindful to review their current offer letters to confirm that those offers properly reflect the new tax law. Employers also may want to consider structuring this benefit so as to limit the tax impact for employees.

7. Narrowed deduction for "employee achievement awards"

The Tax Code allows employers to reward employees for length of service or safety achievements by excluding "tangible personal property" from an employee's taxable income—think, for example, the classic gold watch at retirement. But over the years, some employers have taken aggressive positions regarding the achievements warranting these awards and the types of benefits that can be provided.

The TCJA now limits the definition of "tangible personal property" by excluding cash, cash equivalents, gift cards, gift coupons or gift certificates, vacations, meals, lodging, tickets to theater or sporting events, stocks, bonds, other securities, and other similar items. These changes in law make clear that employee achievement awards cannot be structured to confer these types of cash-equivalent payments to employees.

8. Changes to the Affordable Care Act

The TCJA repealed the individual mandate, which required individuals to maintain health insurance that met certain requirements, or else pay a significant penalty. Because this change in law happened so late in 2017 once open enrollment was completed, employers may see a decrease in participation during the 2018 plan year and beyond. Employers should be mindful of any limitations in their insured health plans that may affect rates and plan eligibility given a drop in participation.

9. Elimination of deduction for settlements subject to nondisclosure agreements paid in connection with sexual harassment

As we covered in a previous post, new Code Section 162(q) disallows an employer deduction for paid settlements and attorneys' fees related to sexual harassment or sexual abuse if the settlement is subject to a nondisclosure agreement. The new provision applies to settlement and attorneys' fees paid after December 22, 2017, even if a settlement was reached prior to that date.

We look forward to covering these issues (and much more) during our April 11 webinar.