Compliance Alert

Final Tax Cuts and Jobs Act Bill Passes Congress

December 20, 2017

By: Brian Gilmore, Lead Benefits Counsel, VP

As of this morning, both chambers of Congress have passed the final Tax Cuts and Jobs Act (TCJA), marking a major overhaul of the Internal Revenue Code on both the individual and corporate side. The bill now heads to President Trump's desk to be signed into law.

Yesterday, the House passed the TCJA by a vote of 227 to 203—strictly on party lines other than 12 Republican votes against (primarily on SALT grounds).

The Senate passed the bill 51 to 48 (strictly party lines) after midnight last night. Senator McCain (R-AZ) missed the vote as he returned home to Arizona to address his medical condition. (If the Republicans had managed only 50 votes, Vice President Pence was on hand to break the tie in favor of passage).

Why Did the House Vote Again this Morning?
The final version of the TCJA that passed the Senate was modified slightly to remove a provision relating to 529 educational savings plans. The provision was added by Senator Ted Cruz (R-TX) in the previous Senate "vote-a-rama" session as part of a dramatic 50-50 tied vote that was broken by Vice President Pence. The Senate parliamentarian ruled that the portion of the addition permitting the use of 529 funds for home-schooling violated the Byrd Rule as insufficiently budget-related—and therefore required 60 votes (rather than a simple majority) to be included.

The Senate held a procedural vote that failed to receive the requisite 60 votes (it was also strictly party lines), which means the addition was removed. The Cruz Amendment provision permitting the use of 529 plans for up to $10,000 per year of K-12 private school educational spending did not violate the Byrd Rule, and therefore is included in the final bill.

The House re-voted this morning to approve the slightly modified version of the TCJA that came out of the Senate without the home-schooling provision.

President Trump is expected to sign the TCJA into law in the coming days once Congress passes a continuing resolution to fund the government.

Procedural Process

- **Step 1: Pass the House**
  Completed November 16, 2017.

- **Step 2: Pass the Senate**
  Completed December 2, 2017.

- **Step 3: Conference**
  Completed December 15, 2017.
  The House and Senate leadership negotiated a compromise bill via conferees from both chambers appointed by GOP leadership.

- **Step 4: Pass Post-Conference Bill**
  Completed December 20, 2017
  The negotiated post-conference bill (the "Conference Report") must be approved by majority vote of the House and Senate. No amendments are allowed to a reconciliation bill that comes out of conference. It is a straight up or down vote.

- **Step 5: President Signs Bill into Law**
  To Be Completed Soon
  After the House and Senate pass the final post-conference bill with identical text, it finally reaches the president's desk. President Trump has 10 days to sign or veto the bill after its passage. He will sign the bill into law in the coming days once the Congress passes a continuing resolution to fund the government.

<u>Notable Employee Benefit Provisions in the TCJA</u>

- **Section 11027: Reduced Medical Expense Deduction Threshold (Effective 2017)**
  The TCJA not only preserves the individual medical expense deduction that was eliminated initially by the House, but it lowers the threshold from expenses exceeding 10% of AGI to expenses exceeding 7.5% of AGI (the pre-ACA threshold). This reduction applies for only for two years (2017 and 2018), likely because it is expected to be addressed again when Congress returns to the ACA repeal/replace debate next year Previous repeal/replace proposals lowered this threshold even further.

- **Section 11047: Tax-Free Bicycle Reimbursement Elimination (Effective 2018)**
  The little tax break that could is no longer. The $20 tax-free employer reimbursement provision for certain bicycle commuting expenses, just added in 2009, is eliminated in the TCJA. The repeal sunsets at the end of 2025.

- **Section 11048: Tax-Free Moving Expense Reimbursement Elimination (Effective 2018)**
  The TCJA eliminates employer-provided tax-free moving expense reimbursement as of 2018. The provision sunsets at the end of 2025.

- **Section 11081: Individual Mandate Tax Penalty Elimination (Effective 2019)**
  In a shocking twist a couple weeks ago, the Senate added repeal of the individual mandate to its version of the bill. The provision remained in the final TCJA. Technically, it reduces the individual mandate penalty to zero rather than fully repeal the law (designed to comply with complex reconciliation rules needed to avoid the filibuster)—but this will have the same practical result as repeal. The individual mandate remains in effect for 2018, before its permanent real (no sunset) as of 2019. It is estimated to save the government more than $300 billion dollars over the initial budget window, resulting from reduced subsidies caused by reduced enrollment on the exchange.

  The repeal of the individual mandate may lead to a small portion of employees choosing to decline coverage. However, the more significant effect for employers will likely be the eventual change to the §6055 ACA reporting rules for self-insured plans (generally Part III of the Form 1095-C). Those reporting requirements are primarily for individual mandate compliance purposes. As a result, employers with self-insured plans will likely have a reduced ACA reporting burden for the 2019 calendar year.

Note that the ACA's employer mandate pay or play rules **have not** been repealed and remain in full effect. Employers have just recently begun to receive the first pay or play penalty notices.

- **Section 13304: Employer Deductions Eliminated or Reduced (Effective 2018)**
  Employers are no longer permitted to deduct certain entertainment expenses, the deduction for tax-free on-site meals provided at convenience of the employer is reduced to 50% (eliminated entirely as of 2026), and employer-provided commuter benefits are no longer deductible.

- **Section 13310: Tax-Free Employee Achievement Award Modifications (Effective 2018)**
  Cash and cash equivalents (e.g., gift cards) will no longer qualify for tax-free treatment for employee achievement awards meeting certain conditions (generally up to $400 in value).

- **Section 13403: Tax Credit for Paid Family Leave (Effective 2018)**
  The TCJA provides an employer credit for providing paid family and medical leave to employees that is equal to a certain percentage of the amount of wages provided to the employee while on a qualifying leave (ranging from 12.5% to 25%). A crucially important provision for San Francisco employers is the credit is not available for any leave payment required by state or local law. This may put intense pressure on San Francisco to repeal the Paid Parental Leave Ordinance (and for other states/localities not to mirror the SF ordinance).

- **Section 13613: 401(k) Loan Repayment Period Extension (Effective 2018)**
  401(k) plans dodged all of the initial proposals that would have significantly reduced pre-tax saving limits and radically diminished retirement savings options for employers and employees. This relatively minor provision extends the loan repayment window upon termination of employment from the current 60-day window to a much longer deadline that extends until individual's tax filing deadline.

Notable Employee Benefit Provisions **NOT** in the Final TCJA

The final bill **did not** retain these provisions from the initial House bill.

- **Dependent Care FSA Elimination as of 2023**
  This provision would have eliminated the Dependent Care FSA as of 2023.

- **Adoption Assistance Program Elimination**
  This provision would have eliminated the ability for employers to provide tax-free adoption assistance to employees (up to $13,570 in 2017).

- **Qualified Education Assistance Program Elimination**
  This provision would have eliminated the ability for employers to provide up to $5,250 in annual tax-free education assistance to employees under a qualified program (no work-related requirement).

Summary
While the TCJA is certainly a major legislative overhaul for vast swaths of the Internal Revenue Code, employee benefits are not significantly affected. It is likely that Congress will return to attempts to repeal/replace the ACA, as well as to address 401(k) and other retirement plan priorities, in the coming year.

Stay tuned!

Disclaimer: The intent of this analysis is to provide the recipient with general information regarding the status of, and/or potential concerns related to, the recipient's current employee benefits issues. This analysis does not necessarily fully address the recipient's specific issue, and it should not be construed as, nor is it intended to provide, legal advice. Furthermore, this message does not establish an attorney-client relationship. Questions regarding specific issues should be addressed to the person(s) who provide legal advice to the recipient regarding employee benefits issues (e.g., the recipient's general counsel or an attorney hired by the recipient who specializes in employee benefits law).