



SIDLEY UPDATE

2017 Tax Cuts and Jobs Act: Comparison of Senate and House Bills on Executive Compensation and Employee Benefits

On December 2, 2017, the United States Senate passed its version of the [Tax Cuts and Jobs Act](#) (the Senate Bill), taking a significant leap forward as lawmakers seek to enact comprehensive reform of the U.S. tax code for the first time since 1986. The Senate vote comes just two weeks after the House of Representatives passed its version of the [Tax Cuts and Jobs Act](#) (the House Bill). The House and the Senate will now attempt to produce a conference bill that will be acceptable to both chambers of Congress.

For resources summarizing the major proposed changes to the U.S. tax code, please see our [U.S. Tax Reform: Developments and Insights](#) webpage.

Below is a summary of the material provisions in each of the House Bill and the Senate Bill that relate to executive compensation and employee benefits. If enacted, these proposed changes will be effective for taxable years beginning after December 31, 2017, unless otherwise noted below. We will continue to monitor this legislation and provide updates of any material developments.

Executive Compensation

Excessive Compensation of Public Company Executives — Section 162(m)

Current Law	House Bill	Senate Bill
<p>Section 162(m) imposes a \$1 million cap on the tax deduction that a public company can take on compensation paid to each of its CEO and three other highest paid executive officers (other than the CFO)—generally, the “named executive officers” included in the annual proxy, other than the CFO.</p> <p>However, most companies rely on an exemption for performance-based compensation, which is fully deductible even if it exceeds \$1</p>	<p>Would eliminate the performance-based compensation exemption that currently allows public companies to avoid the tax deduction limit under Section 162(m) of the Code, causing most compensation payable to senior officers of a public reporting company to be nondeductible.</p> <p>Would expand coverage of Section 162(m) to include all SEC reporting companies (including those with publicly traded debt).</p>	<p>Same as House Bill, except that Senate Bill provides transition relief for any written binding contract in effect on November 2, 2017 and not materially modified after that date.</p>

<p>million.</p> <p>Deduction limit applies only to companies whose common stock is registered with the SEC.</p> <p>Deduction limit applies only if executive is employed as named executive officer on the last day of the taxable year.</p>	<p>Would expand the group of executives who are subject to the deduction limit to include not only the named executive officers during current taxable year (including the CFO), but also any person who ever was a covered executive for any prior taxable year beginning after December 31, 2016.</p>	
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Excise Tax on Excessive Compensation for Executives of Tax-Exempt Organizations

Current Law	House Bill	Senate Bill
<p>Not applicable</p>	<p>Would impose a 20% excise tax on tax-exempt organizations (not the executives) to the extent they pay compensation in excess of \$1 million to any person who is, or was in a prior tax year beginning after December 31, 2016, one of the five highest paid employees of the organization.</p> <p>In addition, if a tax-exempt organization pays severance pay to a covered employee that equals or exceeds three times the executive's average annual wages, then the tax-exempt organization (not the executive) would be subject to a 20% excise tax on the excess of the value of the severance benefit over one times such average wage amount (similar to the calculation of the golden parachute excise tax that applies to corporations upon a change in control).</p>	<p>Same as House Bill.</p>

Deferred Taxation on Option/RSU Shares Issued to Employees of Start-up Corporations

Current Law	House Bill	Senate Bill
<p>Not applicable</p>	<p>Through the addition of a new Section 83(i), non-executive and non-highly compensated employees of a privately held corporation could elect up to a five-year deferral in the taxation of illiquid shares issued to them upon the exercise of nonqualified options or the settlement of restricted</p>	<p>Same as House Bill.</p>

	<p>stock units (RSUs) if certain conditions are satisfied.</p> <p>The options or RSUs must be granted under an equity compensation plan under which at least 80% of all full-time U.S. employees are granted awards with the same rights and privileges. The amounts of the awards may vary by employee, as long as each employee receives more than a <i>de minimis</i> grant.</p> <p>This deferred tax election is not available to the CEO or the CFO (or certain persons related to them) or to any person who in the past 10 years was one of the four highest paid officers of the corporation or a 1% shareholder (“excluded employees”).</p> <p>If an employee makes a tax deferral election, the shares would be included in taxable income on the fifth anniversary of the date the shares became vested or, if earlier, when the shares become transferable or publicly traded, the employee becomes an excluded employee, or the employee revokes the election.</p>	
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Alternative Minimum Tax — Incentive Stock Options

Current Law	House Bill	Senate Bill
<p>Employees who exercise tax-qualified incentive stock options (ISOs) can be subject to alternative minimum tax in the year they exercise the option.</p>	<p>Alternative minimum tax would be repealed. As a result, employees who exercise ISOs would recognize taxable income only when shares are subsequently sold.</p>	<p>Retains existing alternative minimum tax, but increases the exemption amount.</p>

Retirement Plans

Timing of In-Service Distributions – Qualified Defined Benefit Plans

Current Law	House Bill	Senate Bill
The safe harbor minimum age for in-service distributions from qualified defined benefit plans is 62.	Lowers the age to 59½.	Would retain current law.

Timing of In-Service Distributions – Governmental Section 457(b) Eligible Deferred Compensation Plans

Current Law	House Bill	Senate Bill
The permissible minimum age for in-service distributions from IRC §457(b) eligible deferred compensation plans of governmental employers is 70½.	Lowers the age to 59½.	Would retain current law.

Hardship Withdrawals – Resulting 6-Month Suspension

Current Law	House Bill	Senate Bill
Employee contributions must be suspended for six months after a hardship withdrawal from a qualified cash or deferred arrangement (i.e., a 401(k) elective deferral).	Eliminates the suspension.	Would retain current law.

Hardship Withdrawals – Amounts Eligible for Hardship Withdrawals

Current Law	House Bill	Senate Bill
Amounts eligible for hardship withdrawals under qualified cash or deferred arrangements are limited to (i) elective deferral contributions and (ii) related investment earnings credited as of December 31, 1988.	Hardship withdrawals would also be available from qualified matching contributions, qualified nonelective contributions, and earnings on such contributions and on all elective deferral contributions.	Would retain current law.

Hardship Withdrawals – Participant Loans as a Prerequisite

Current Law	House Bill	Senate Bill
Participants must take available loans from qualified plans before taking a hardship withdrawal under a qualified cash or deferred arrangement.	Eliminates this requirement.	Would retain current law.

Rollover Rules as Applicable to Loan Amounts

Current Law	House Bill	Senate Bill
Amounts attributable to plan loans from qualified plans can only be rolled over during the same 60-day period applicable to other amounts.	A loan amount distributed by reason of the plan's termination or the participant's failure to repay due to separation from service may be rolled over prior to the due date for filing the participant's federal income tax return for the year of the termination or separation.	Same as House Bill.

Exclusions from Section 457(f) Deferred Compensation Rules

Current Law	House Bill	Senate Bill
Certain plans for bona fide volunteers are excluded from the deferred compensation rules of IRC §457(f).	Would retain current law.	Would modify the maximum benefit limit for such plans.

Welfare, Fringe Benefit and Leave Changes

As an initial matter, the bills are notable for health items that are not included in the bills—most significant, the bills do not change the exclusion from income of employer-provided health coverage. The bills also do not include proposals related to the Affordable Care Act's employer mandate or Cadillac tax or, except as described below with respect to the individual mandate, otherwise alter the Affordable Care Act's provisions in any material respect.

Affordable Care Act Individual Mandate

Current Law	House Bill	Senate Bill
Subject to limited exceptions, individuals must maintain health coverage to avoid tax penalties.	Would retain current law.	Effectively repeals the individual mandate by reducing the tax penalty for not having coverage to zero, effective for months after December 31, 2018.

Fringe Benefits

Fringe Benefit	Current Law	House Bill	Senate Bill
Dependent Care Assistance Program	Up to \$5,000 per year may be excluded from an employee's income under an employer-sponsored dependent care assistance program established to pay for work-related child care.	Eliminates employee income tax exclusion for taxable years beginning after December 31, 2022.	Would retain current law.
Adoption Assistance Program	An employer may reimburse an employee on a tax-free basis for	Eliminates employee income tax exclusion.	Would retain current law.

Fringe Benefit	Current Law	House Bill	Senate Bill
	up to \$13,570 per child with respect to qualified adoption expenses.		
Educational Assistance Program	An employer may reimburse an employee on a tax-free basis for up to \$5,250 per year with respect to qualified educational expenses under a so-called “Section 127 educational assistance program”.	Eliminates employee income tax exclusion.	Would retain current law.
Moving Expense Reimbursement	Qualified moving expense reimbursements provided to an employee by an employer are excluded from income.	Eliminates employee income tax exclusion.	Eliminates employee income tax exclusion (except for certain military moves) for tax years 2018–2025.
Employee Achievement Awards	Certain employee achievement awards (i.e., recognition for length of service or safety achievement) are excluded from income.	Eliminates employee income tax exclusion.	Prohibits cash, gift cards/certificates, vacations, meals, lodging, theater and sporting event tickets and securities from qualifying as employee achievement awards potentially excludable from employee income.
Qualified Transportation Benefits	Qualified transportation benefits are excluded from an employee’s income and deductible by the employer.	Employers could continue to offer qualified transportation benefits to their employees on a tax-free basis, but if offered on such basis, the expenses would no longer be deductible by the employer.	Employers could continue to offer qualified transportation benefits <u>other than</u> bicycle commuter reimbursements to their employees on a tax free basis. Eliminates employee income tax exclusion for bicycle commuter reimbursements for tax years 2018–2025. Eliminates employer deduction for qualified transportation benefits.
Entertainment and Meals Expenses	Taxpayers are currently allowed a deduction for up to 50% of entertainment and meals expenses directly connected to business activity. Employers can reimburse the full	Eliminates employer deduction for entertainment expenses; deduction generally retained (subject to the 50% limitation) for meals expenses.	Generally same as House bill. However, eliminates deduction for meals provided for the convenience of the employer on/near the

Fringe Benefit	Current Law	House Bill	Senate Bill
	amount, but can only deduct 50% of such reimbursed expenses.		employer's premises for taxable years after 2025.

The House bill also includes other fringe benefit changes that would impact employers and/or employees, such as changes to the tax treatment of *contributions to an Archer Medical Savings Account; on-premises athletic facilities; certain fringe benefits provided by tax-exempt employers; employer-provided child care; and employer-provided housing.*

Paid Leave Credit for Employers

Current Law	House Bill	Senate Bill
Not applicable.	Not included in the bill.	Adds a general business tax credit for eligible employers equal to 12.5% to 25% of wages paid to qualifying employees during certain family and medical leave. To be eligible for the credit, employers must pay employees taking family and medical leave at least 50% of their normal wages, and provide qualifying full-time employees not less than two weeks of annual paid family and medical leave. Would apply to the 2018 and 2019 tax years.

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

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