AN INSIDE LOOK AT THE TAX CUTS AND JOBS ACT OF 2017

QUESTIONS AND ANSWERS

APRIL 25, 2018 WEBINAR

This is a two-part question. First, under the new tax law is there any guidance on how to handle the extended time frame to roll over the amount of a loan, and will it automatically be defaulted by the record keeper and left up to the participant to file something with the following year return?

We haven't received any guidance as yet. But what we are expecting is that loans would be treated as any other distribution that's eligible for a rollover. So, a loan would be reported essentially as a cash distribution, even though there's no cash being received, just a note that's being canceled. And then the participant would have to report it correctly on their tax return as they are paying it back to complete the rollover.

Could please discuss which disability definitions in plan documents are affected by the Tax Cuts and Jobs Act of 2017?

That's a great question. The answer is, potentially all of them. But first, I'd like to point out that the disability claims procedure requirements are controlled by the Department of Labor under regulations that were finalized last year and became effective for disability claims filed after April 1, 2018.

The claims procedures are primarily targeted toward long-term disability plans, not retirement plans. However, the regulation also applies to tax-qualified plans and non-qualified plans—to the extent those plans accelerate benefits, suspend deferrals, provide additional accruals or benefits or accelerated vesting due to disability or if the plan pays differently in the case of disability, a claim could potentially arise.

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The good news for most retirement-type plans is that most plans rely on determinations of disability by third parties, such as the Social Security Administration (SSA). This means the retirement plan administrator would not have to have the new disability claims procedure. Disability claims are also very uncommon under retirement plans. Unlike long-term disability where the benefit will or will not be paid based on the administrator's decision, the retirement benefit will always be paid—it's usually just a question of when and the form of payment.

Disability also tends to overlap with the separation benefits. For example, many plans use the social security definition of disability (non-qualified plans are required to use this definition if it is a payment trigger). The SSA definition is total and permanent disability for any remuneration or an incapacity which is likely to lead to death within 12 months. These are severe, incapacitating disabilities which will almost always lead to separation from service. Separation usually precedes the disability determination, so the participant gets paid his or her separation benefit.

The fact that a plan may or may not have a compliant disability claims procedure as of April 1, 2018, is not fatal to the plan. It is not a requirement for tax-qualification. The issue also comes up only if the claim is denied. Then if the employer does not have a claims procedure that satisfies as disability regulation, it means that the plan participant can bring an action directly in federal court, and the court does not have to defer to any decisions made by the plan's sponsor.

To summarize, the Tax Cuts and Jobs Act of 2017 didn't cover disability directly – it's under a separate Department of Labor regulation – but it is a hot topic. The pressure is off a little bit in terms of having to have a policy in place as of April 1, 2018, but for companies that do expect to have these types of claims, it's absolutely worthwhile to have that amendment added to your plan by the end of this year.

Will the new tax law affect the fiduciary rule? Is it still alive, dead, or delayed?

The Department of Labor controls the fiduciary regulations. It's not really the tax code that does that. The tax code imposes the additional taxes on the prohibited transaction. If there is a conflict of interest under the DOL rules, and the tax applies, they're enforced by the Treasury Department. But as far as guidance on what constitutes a prohibited transaction because of a fiduciary conflict of interest, there's really nothing in the tax code that would speak to that because the jurisdiction for that issue is retained by the Department of Labor.

Recently, there was a Fifth Circuit Court decision that vacated the fiduciary rule. So as of today, we will not know until May 7th whether we have a fiduciary regulation or not, as that is the deadline by which the Department of Labor would have to file an appeal. If DOL decides not to appeal, then the 5th circuit case would be the end of the 2016 fiduciary regulation.

That does not mean the issues around investment advice goes away, however, because the Securities Exchange Commission (SEC) recently published its outline of what it would impose as far as fiduciary obligations for investment advice. It's got a long way to go, in our opinion, but that information has been published and I think that the investment community is trying to get their arms around that. In addition, there are some state initiatives to impose fiduciary standards, which you may have heard about. Those efforts are ongoing, and they're not affected one way or the other by the Tax Act or by the Fifth Circuit decision.

What changes will take place that affect highly compensated? Are there going to be with the ADP and ACP testing rules?

We didn't really pick up on anything that would directly impact the testing. The contribution limits are the same. The ADP/ACP test is the same. The definition of who is a highly compensated employee is the same, with the annual adjustments to the compensation limit. So, when we're talking about executive compensation, it's limited to the 162(m) provisions to the extent that those would potentially impact discrimination testing. Again, we're not seeing anything from the standpoint of compliance with discrimination testing, that has to be adjusted or immediately addressed because of the Tax Act.

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