



Not So Fast: The Tax Reform Act DOES Impact Executive Compensation and Employee Benefits

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Although most of the attention given to the recently enacted Tax Cuts and Jobs Act has focused on business and individual income tax rates and deductions, and although the Act did not produce some of the splashier headlines forecast during Congressional negotiations (like the repeal of Code Section 409A or the Rothification of 401(k) plan contributions), the Act's final provisions do impact executive compensation and employee benefits in some significant ways, including as follows:

1. The Act expands the scope of Code Section 162(m) (relating to the \$1M cap on deductible annual employee compensation paid by publicly held corporations) by eliminating exceptions for certain performance- and commission-based compensation; expanding the definition of employees covered by Section 162(m) to include anyone who served as the CEO or CFO during the year and the next three most highly compensated officers, or who was a covered employee for any year beginning after December 31, 2016; broadening the definition of publicly held corporation to include companies required to report under Section 15(d) of the Securities Exchange Act (including those that issue securities in an SEC-registered offering that are not listed on any securities exchange); and expanding covered employee remuneration to include amounts payable to persons other than the covered employee (e.g., a beneficiary). These changes do not apply to written binding contracts in effect on or before November 2, 2017, that are not modified in any material respect on or after such date.
2. The Act imposes on certain tax-exempt organizations a 21% excise tax on "excessive" compensation paid to any of the five highest compensated employees for the taxable year or for any preceding tax year beginning after December 31, 2016 (in general, excessive compensation includes an amount over \$1M in any tax year, or any

excess parachute payment relating to separation pay).

3. The Act provides that certain employees of certain private companies may elect under new Code Section 83(i) to defer recognition of income on illiquid company stock obtained through the exercise of stock options or settlement of restricted stock units (RSUs) for up to five years after vesting, and clarifies that a Code Section 83(b) election does not apply to RSUs.

4. The Act repeals the ability to recharacterize a Roth IRA conversion.

5. For tax years beginning after December 31, 2017 and before January 1, 2026, the Act suspends the deduction for qualified moving expenses and the exclusions for qualified moving expense reimbursements and qualified bicycle commuting reimbursements; further, the Act eliminates the employer deduction for qualified transportation fringe benefits (such as transit passes and qualified parking) and disallows the deduction for entertainment or recreational activities or membership dues (although the deduction of up to 50% of expenses for food or beverages related to conducting the employer's business is continued).

6. For health coverage status for months beginning in 2019, the Act repeals the individual (but not the employer) mandate under the ACA ("Obamacare").

7. The Act allows employers to claim a business credit under new Code Section 45S for a certain percentage of the amount of wages paid to certain employees when on family and medical leave, for up to twelve weeks during the tax year (but the credit will not apply to wages paid in tax years beginning after December 31, 2019).

For more information, or if you have any questions about this Alert, please contact any one of the attorneys in our [Employee Benefits and Executive Compensation Practice Group](#): [James N. Karas, Jr.](#), [Robert C. Daleo](#), or [Jason D. Navarino](#).

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