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Employee Benefits & Executive Compensation ADVISORY ■

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Year-End Tax and Spending Legislation Includes Employee Benefits Provisions

In a year-end flurry of activity, Congress adopted major tax and spending legislation, which was signed into law on Friday, December 18 by President Obama. The legislation, called the Consolidated Appropriations Act, 2016 (the "Appropriations Act") includes the separately titled Protecting Americans from Tax Hikes Act of 2015 (the "PATH Act"). The PATH Act extends numerous tax provisions that expired at the end of 2014, with extensions varying from two years (2015 and 2016) to permanent extensions. The combined 2,000+ page legislation contains a miscellany of employee benefits provisions. Highlights include a permanent extension of transit and parking benefit parity, retroactive to the beginning of 2015. In addition, the 40 percent excise tax on so-called "Cadillac health plans" is delayed for two years and is also made deductible.

What is *not* included in the final legislation is also of note. In particular, the House spending bill would have prohibited the Department of Labor (DOL) from finalizing its controversial proposed rule relating to the definition of "fiduciary" under ERISA and related conflict of interest issues. The final legislation, however, does not include this provision, so the DOL remains free to finalize the rules, which they have indicated they will do, possibly with some changes.

Transit and Parking Parity—Permanent, Including Retroactive Extension for 2015

Parity between the exclusions for employer-provided transit and parking benefits expired at the end of 2014. Until the enactment of the PATH Act, for 2015 the exclusion for transit benefits has been limited to $130 monthly, while the exclusion for parking benefits has been $250 per month. The PATH Act extends parity permanently, including a retroactive extension to the beginning of this year. Thus, for 2015 the maximum exclusion is $250 monthly for transit and $250 monthly for parking. For 2016, the monthly exclusion will be $255 per month pursuant to cost-of-living adjustments. Other requirements for exclusion for each benefit remain the same, including a requirement that cash reimbursements for transit passes are excludible only if a voucher or similar item that can be exchanged only for a transit pass is not readily available for direct distribution by the employer to the employee.

The retroactive extension of parity to the beginning of this year creates some administrative issues, including issues relating to W-2 reporting and employment taxes. Congress has addressed some of the retroactivity issues in legislative history, which provides the following:

- Expenses incurred for months beginning in 2015 by an employee for employer-provided vanpool and transit benefits may be reimbursed (under a bona fide reimbursement arrangement) by employers on a tax-free basis to the extent they exceed $130 per month and are no more than $250 per month.

- It is intended that the rule that an employer reimbursement is excludible only if vouchers are not available does not apply in the case of reimbursements for vanpool or transit benefits between $130 and $250 for months beginning in 2015.
- Further, it is intended that reimbursements of the additional amount for expenses incurred in 2015 may be made in addition to the provision of benefits or reimbursements of up to the applicable monthly limit for expenses included for months beginning after enactment of the provision.

Other issues remain, however. The same issues arose last year, due to a similar retroactive extension to the beginning of 2014 that was enacted last December. The IRS addressed retroactivity issues from the 2014 legislation in Notice 2015-02. Hopefully the IRS will issue similar guidance under the new legislation soon.

Practice Pointer: The transition relief provided by Revenue Ruling 2014-32 that allows cash reimbursement of transit pass expenses in areas where the only "transit voucher" that is readily available in the area is a terminal-restricted card ends at the end of this year. Beginning January 1, 2016, if the only voucher that is readily available in an area is a terminal-restricted card, cash reimbursement will no longer be available. This is not changed by the new legislation.

Cadillac Tax—Two-Year Delay and Deductibility

The so-called Cadillac tax is the next major issue facing employers under the Affordable Care Act. The tax is 40 percent of benefits in excess of certain dollar thresholds. The amounts for 2018 are $10,200 for self-only coverage and $27,500 for family coverage, subject to indexing. As originally enacted, the tax is not deductible. Although not effective until 2018, the tax has already begun to have an impact on employment-based health plans, as employers and other plan sponsors are looking at what benefit changes are needed to avoid the tax.

The Appropriations Act delays the effective date for two years, until 2020. The indexing will continue while the tax is delayed so that the dollar thresholds in 2020 will be the indexed amounts they would have been had the delay not taken place. This provides a brief reprieve and also allows greater opportunity for further legislative changes. The Act also makes the tax deductible; this permanent change lessens the impact of the tax to some degree, e.g., for employers that are liable for the tax. In the case of fully insured plans, insurers will pass the cost along to employers; making the tax deductible should reduce the amount of any pass-through.

The applicable dollar thresholds may be increased for certain plans due to age and gender adjustments. The benchmark for determining whether age and gender adjustments may be made is the premium cost of the Blue Cross/Blue Shield standard benefit option under the Federal Employees Health Benefit Plan. The Appropriations Act directs the General Accountability Office (GAO), in consultation with the National Association of Insurance Commissioners (NAIC), to conduct a study on the appropriateness of using this plan as a benchmark for the age and gender adjustments and to report their findings to Congress, along with recommendations for any more suitable benchmarks.

Charitable IRA Provision Made Permanent

The exclusion from income for qualified charitable distributions from individual retirement arrangements (IRAs) made by individuals age 70½ and older is reinstated retroactive to the beginning of 2015 and made permanent.

Other Employee Benefits Changes

A handful of other benefits-related provisions are also included in the PATH Act, some of which relate to specific types of plans, including the following:

- Under prior law, only distributions from a SIMPLE IRA could be rolled over into a SIMPLE IRA. The PATH Act allows rollovers into SIMPLE IRAs from other IRAs and employer-sponsored retirement plans (such as a 401(k) plan), if the rollover is made at least two years after the SIMPLE IRA was established. This is the two-year period during which the additional tax on early withdrawals from SIMPLE IRAs is 25 percent (rather than 10 percent, which applies to other IRAs and employer plans). The provision is effective for rollover contributions made after December 18, 2015.
- The PATH Act contains a number of clarifications of the rules applicable to church plans, including controlled group rules, rules relating to retirement plan transfers and mergers, investment of church plan assets in group trusts and rules relating to automatic enrollment.
- The PATH Act also clarifies the special rule for certain governmental plans that provide health benefits for beneficiaries of a deceased participant and makes a technical amendment relating to rollover of certain airline payment amounts.

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