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France: Tax reform: Anticipate immediate impacts for internationally mobile employees

Overview

Several pieces of recently enacted legislation make fundamental changes to certain aspects of the French tax system. This newsflash:

- Summarizes three new laws (Finance Law for 2018, the Amended Finance Law for 2017 and the Social Security Financing Law for 2018);
- Looks at global employment-related measures that affect internationally mobile individuals and their employers; and

- Summarizes the key impacts of the laws and sets out relevant action steps.

Changes that apply in 2018

Introduction of flat tax withholding on investment income

Deloitte view: Employers need to manage the impact of the new flat tax withholding on non-French source investment income received by internationally mobile employees residing in France. In a nutshell, there is a monthly filing and payment obligation, with the first returns due by February 15, 2018.

- Taxpayers who receive non-French investment income have a filing obligation in the month that follows receipt of such investment income.
- At a minimum, internationally mobile employees need to be advised of this obligation and that failure to file a return may result in penalties and could be deemed an election to opt out of the flat tax. The employer needs to quickly take a position as to whether and how it will support international assignees.
- Depending on whether the investment income is equalized, either the employer or the employee should have decreased tax costs.
- Equity-based compensation will necessarily come into the scope of the flat tax, since the tax applies to capital gains or dividends. Employers with such plans also should engage their share plan administrators and advisors to ascertain whether withholding can be implemented. In any event, employers will need to manage communications with, and the expectations of, the share plan beneficiaries.

What changes?: Investment income (*i.e.* dividends, interest and capital gains) is subject to a flat tax rate of 30%, including social surtaxes. The additional contribution for high-income earners (3% or 4%) remains due and is collected through the filing of the annual tax return. However, taxpayers will have the ability to opt out of the flat rate and request the application of progressive tax rates, which may be more favorable in certain cases (*e.g.* if the taxpayer's tax rate is below 12.8% and/or to allow for a 40% deduction on dividends). If taxpayer opts out, that election will apply to all types of investment income, including capital gain income. In other words, it will not be possible to combine the application of the flat tax on certain investment income (*e.g.* interest income) with the application of progressive tax rates on other investment income (*e.g.* dividend income).

How is it implemented?: French-source investment income will be subject to withholding at source, with the tax withheld by the payer if the payer is in France.

If the payer is not in France, or for foreign-source investment income, the individual will be responsible for filing returns and paying taxes in the month following receipt of the income. Failure to meet this requirement is likely to be deemed an election to opt out of the flat tax and may result in penalties.

The French tax authorities will be issuing guidance on the forms that will have to be filed and penalties that will apply for late filing or late payment.

Who does it apply to?: The new rules apply to all French resident taxpayers, including inbound assignees. Taxpayers with investment income paid outside of France will be personally responsible for monthly filing and payment, unless tax was withheld by the payer (see above).

When is it applicable?: The withholding and monthly filing/payment rules apply as from January 1, 2018.

CSG surtax increase

Deloitte view: The increased costs on investment and employment income should be anticipated or reflected in tax costs. Consideration should be given to qualifying CSG as a creditable tax in local jurisdictions to alleviate double taxation.

What changes?: The CSG social surtax is increased by 1.7 points.

How is it implemented?: The CSG social surtax already is withheld at source for certain types of income (*e.g.* employment income, real estate gains), and is part of the flat tax on investment income. The CSG on other types of income (*i.e.* rental income) is collected via a tax assessment received after the annual tax return is filed.

Who does it apply to?: The CSG is applicable to all income received by French residents, regardless of whether the income is passive investment income or professional income. It also is applicable to French-source real estate income received by nonresidents.

When does it apply?: For income subject to current-year withholding, the new rate will apply as from 2018 (*e.g.* employment income, investment income subject to the new withholding rule). For income subject to income tax on a one-year lag basis (*e.g.* rental income), the new rate will apply to income that was received in 2017. The tax will be payable later in 2018, upon assessment.

Fundamental shift in wealth tax

Deloitte view: In a fundamental tax policy shift, annual wealth tax on worldwide assets has been abolished and replaced with a more limited tax based on real estate. Inbound assignees are often exempt from wealth tax on their non-French assets for the first five years of residence in France. Thus, there should not be an overarching impact to fixed-term assignments.

This shift should render France a more tax-attractive location for long-term residents. The intent of the change is to incentivize the diversification of investment away from real estate assets. Any individual with direct or indirect real estate assets will need to re-assess his or her taxable basis.

What changes?:

- The tax base is now limited to real estate and real estate-based holdings.
    - French tax residents are liable to the new tax on their French and non-French real estate assets (inbound expatriates to France may be exempt on foreign real estate assets for five years).
    - Nonresidents are liable to the tax on only their French real estate assets.
- Deductions for debt against taxable assets are limited.
- The tax trigger threshold remains at EUR 1.3 million.
- The tax rates remain the same, *i.e.* 0.50% to 1.5%.

How is it implemented?: Wealth tax reporting obligations are unified for all taxpayers. All filings must be made through the annual French tax return, instead of a separate wealth tax return.

Who does it apply to?: Residents and nonresidents who are not exempt under a specific provision are subject to the tax.

When does it apply?: The new wealth tax applies for net assets held on January 1, 2018. The filing and payment deadlines are aligned with the annual income tax return and tax assessments (the tax return due date is to be announced, and likely will be in May 2018).

Decreased social charges and wage tax

Deloitte view: Social charges due by employers and employees will decrease gradually, with the changes affecting employees starting in January 2018. Financial services companies may benefit due to a decrease in wage tax.

This decrease should be reflected in any costing analyses.

Summary: Employee social charges will decrease by 3.15% during 2018, on a phased basis.

In addition to social charges, a specific wage tax applies to corporations that are not subject to VAT, or where at least 90% of the entity’s annual turnover was exempt from VAT in the previous year. Financial services companies typically are subject to this wage tax. The top tax bracket (*i.e.* the 20% rate) is abolished for salaries paid as from January 1, 2018. The marginal rate is now 13.60% on salaries exceeding EUR 15,572 per annum.

Additionally, employer social charges will decrease by approximately 6% starting in 2019. The decrease will affect wages up to 2.5 times the minimum wage.

Adjustment to French qualified free share plans

Deloitte view: Companies can attract talent and improve employee motivation and retention by qualifying their equity-based plans in France. The applicable taxation depends on a number of factors, and the numerous changes over the years require communication. Operationally, groups need to ensure their reporting is compliant, and anticipate the impact of the new withholding tax on investment income received from equity held by employees. Failure to comply with the new withholding obligations could jeopardize the overall income taxation of an individual's investment income.

Summary: Yet another adjustment to French qualified free share plans brings the company social tax down to 20%, which is due at the time of vesting/release of shares. For employees, taxation remains at favorable rates and is deferred until the shares are sold.

Introduction of income tax withholding for residents in 2019

Deloitte view: A major change to how France collects tax will take place on January 1, 2019. To date, French resident taxpayers have paid their income taxes with a one-year lag. Tax is payable upon an assessment issued by the tax authorities to the individual in the year following the tax year. As from 2019, almost all types of taxable income will be subject to current-year withholding, and employers need to prepare for this change.

A Global NewsFlash specific to this topic will be issued shortly.

Deloitte's view

The finance laws for 2018 provide incentives for both individuals and companies, by lowering tax costs. They also provide measures that should benefit financial investments, and the financial services industry.

Employees and individuals residing in France with overseas investments will need to comply with filing obligations for withholding or current-year advance payments. Companies with internationally mobile employees will need to consider whether to provide support for meeting these obligations.

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Mongolia:
Changes made to personal income tax and social security rules

Overview

Changes to Mongolia's Personal Income Tax Act (PITA) and Social Insurance Act 1994 became effective on January 1, 2018. The flat rate taxation of salary and wages is replaced with progressive rates, new rules are introduced for the taxation of nonresident individuals, savings income in foreign banks now is taxed, and the rates on social security are increased.

Tax rate on salary and wages

The prior flat rate of 10% imposed on salary and wages has been replaced with the following progressive tax rates:

Annual taxable income (MNT)		Marginal tax rate
From	To	
0	18 million	10%
18 million	30 million	15% on income exceeding MNT 18 million
30 million	42 million	20% on income exceeding MNT 30 million
42 million	42 million or more	25% on income exceeding MNT 42 million

Although the final tax on salary and wages is calculated on an annual basis, employees are subject to a monthly tax calculation and payment requirement, followed by the annual settlement.

On December 14, 2017, the Mongolian tax authorities issued guidance on how to calculate the monthly tax payment and released the relevant tax forms. A typical monthly salary tax calculation (before tax break, see later discussions) likely would be made as follows:

Monthly calculation	Income (MNT)	0 – 1,500,000	1,500,001 – 2,500,000	2,500,001 – 3,500,000	3,500,001 or more
	Tax rate	10%	15%	20%	25%
	Calculation methodology		150,000+/15% of amount in excess of 1,500,000/	300,000+/20% of amount in excess of 2,500,000/	500,000+/25% of amount in excess of 3,500,000/
	Tax to be paid (in MNT)	150,000	150,000+max 150,000	300,000+/max 200,000/	500,000+

Tax break

After multiplying taxable income by the tax rate, resident individuals working in Mongolia under an employment contract are further entitled to a credit (*i.e.*, a "tax break") in computing the tax payable. Before January 1, 2018, the tax break was MNT 84,000 per year (*i.e.*, MNT 7,000 per month). However, as of 2018, the tax break will increase annually through January 1, 2021, as follows:

Amount (MNT)	Effective date
120,000	January 1, 2018
160,000	January 1, 2019
200,000	January 1, 2020
240,000	January 1, 2021

New rules on nonresident taxpayers

A new section has been added to the PITA that sets out the rules to determine income derived by nonresidents in Mongolia.

Based on the new rules, the total amount of income earned in Mongolia will be considered taxable income. A Mongolian resident making a payment to a nonresident will be required to withhold tax on the gross amount at a rate of 20%.

In cases involving expatriates who come to Mongolia under an employment contract, it is unclear how the net salary should be calculated and whether social security should be deducted before withholding the 20% tax. Based on a plain reading of the revised PITA, however, it is unlikely that social security should be deducted in determining taxable income since the statutory language specifically states that 20% should be withheld from the gross amount paid to a nonresident.

It is our understanding that if a nonresident qualifies as a Mongolian tax resident, that person will be subject to the progressive rates discussed above. The Mongolian tax authorities have indicated that individuals who become tax residents are required to submit an annual tax return and pay any tax due.

Income earned abroad

The definition of "income earned abroad" has been expanded to include interest on savings. As a result, Mongolian resident taxpayers who earn interest on their savings in a foreign bank are required to report the income and pay a 10% personal income tax.

Social security rates

The social security rates are increased as follows:

Type of social security	2018		2019		2020	
	Employer contribution	Employee contribution	Employer contribution	Employee contribution	Employer contribution	Employee contribution
Pension insurance	8%	8%	8.5%	8.5%	9.5%	9.5%
Benefits insurance	1%	0.8%	1%	0.8%	1%	0.8%
Health insurance	2%	2%	2%	2%	2%	2%
Unemployment insurance	0.2%	0.2%	0.2%	0.2%	0.2%	0.2%
Industrial accidents/ occupational disease insurance	0.8% – 2.8%	-	0.8% – 2.8%	-	0.8% – 2.8%	-
Total	**12% – 14%**	**11%**	**12.5% – 14.5%**	**11.5%**	**13.5% – 15.5%**	**12.5%**

Deloitte view

The Mongolian government or the tax authorities likely will issue further guidance on how to calculate the salary and wages of nonresidents who are in Mongolia under an employment contract.

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Poland:
New tax legislation on equity incentive plans and other bonus schemes for employees

Overview

On November 27, 2017, the Act on Amending Personal Income Tax and Corporate Income Tax Acts (the "Act") was announced and is going to come into force January 1, 2018. Among other changes, the Act provides for a set of new personal income tax provisions on incentive equity plans. The new legislation contains a definition of incentive plans and extends the possibility of tax deferral to shares of companies based in countries with which Poland has concluded double tax treaties. Additionally, there are some new provisions impacting employee cash bonus schemes based on derivatives.

The below alert lists the key implications of the new legislation for companies that have equity incentive plans or cash bonus schemes based on derivatives in place for their employees.

Key provisions impacting equity incentive plans

Personal income tax deferral:

- In case of shares delivered under incentive plans (free of charge or below their fair market value), taxable income is only triggered at the sale of shares received due to participation in an incentive plan (*tax deferral*).
- Any gain realized at the sale of shares received under the plan is taxed *as capital gain at the rate of 19%* (potentially, no social security applies), as opposed to progressive tax rates of up to 32% and including social security charges.
- The tax deferral has been a part of the legislation also before the change; however, the provisions are now differently formulated and the conditions for tax deferrals have slightly changed.

Definition of incentive plan: "Incentive plan" is defined as a remuneration scheme based on shares granted/provided to employees, to individuals engaged under civil law contracts (excluding those who are self-employed), or to members of a company's decision-making bodies. The remuneration scheme needs to be introduced based on a resolution of shareholders, in order to meet the definition of an incentive plan. The shares can be provided directly or indirectly (exercise of derivatives or other financial instruments) under the incentive plan.

Which shares qualify for tax deferral?: The tax deferral should only apply to shares of the following:

- A joint stock company engaging the individuals mentioned above; and
- A joint stock company that is a dominant (parent) entity toward the entity engaging the individuals mentioned above, as per the relevant provisions of the Polish law.

It should also be stressed that the tax deferral applies to shares of companies based in *countries that Poland has concluded double tax treaties with*. Unintentionally, the relevant provision has been formulated in a way that actually excludes shares of Polish companies from the tax deferral. According to information provided by the government, this was not as planned, and we expect an additional amendment during 2018 that will make shares of Polish entities eligible for tax deferral under the new provisions (which has been the case under the current law).

The provisions apply to shares acquired directly, as well as to shares delivered as a result of exercising financial instruments/derivatives.

Key provisions impacting cash bonus schemes based on derivatives

Cash bonus schemes based on derivatives till now: In recent years, the Ministry of Finance issued a number of rulings confirming that, in case of bonus schemes for employees, where the final payout was made in cash, but the amount paid was based on a reference to certain financial indicators (*e.g.*, EBIT, *i.e.* earnings before deducting interest and taxes, value of shares, etc.), the payout would be treated as a capital gain derived from a derivative and taxed at 19%, with no social security fees applicable (instead of progressive taxation and social security charges due on employment income). Eventually, this approach of the authorities has changed and the above-mentioned scheme was even named a potential tax-avoidance scheme by the Ministry of Finance in an official warning.

Cash bonus schemes based after changes: The amended law includes a provision that directly rules out the possibility of treating income from derivatives or other financial instruments as a capital gain, if it is connected with another source of income, such as employment income, personal service contract income, management contract income, etc. Consequently, any cash bonus related to employment will be treated as employment income even if it makes a reference to financial indicators, or is formulated as a derivative/financial instrument.

Deloitte's view

All Polish firms that have either local or global incentive equity plans in place for their employees should review those plans in light of the new provisions. This should also concern those companies that had obtained official tax rulings with regard to the tax treatment of income derived under their share plans, *e.g.*, stating that they are not responsible for tax withholding/reporting on income derived under global equity plans. Such rulings will not be binding after the change of provisions anymore.

The new provisions have widened the group of equity plans that allow for tax deferral. Until now, the group was limited to plans based on shares of EU/EEA companies, while, beginning January 2018, the tax deferral should apply to plans based on shares of companies with their seat in all countries that Poland concluded double tax treaties with, *e.g.*, the United States or Switzerland. Unintentionally, the wording of the new provisions excludes equity plans based on shares of Polish companies from the tax deferral. Nevertheless, we believe this is only temporary, and the provisions will be amended to reinstate this possibility for Polish entities, as well.

With regard to other tax and social security law changes announced for Poland (particularly the abolishment of cap on remuneration subject to social security, which is likely to come into force as of 2019), we believe that remunerating employees in shares may become a viable alternative, offering significant tax and social security savings from the perspective of employees and employers.

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United States:
Impact of Section 162(m) changes and transition relief on excessive compensation

Background

Employers can generally deduct reasonable compensation for personal services as an ordinary and necessary business expense. An explicit exception under Section 162(m) limits the deductibility of compensation expenses by certain applicable employers. The otherwise-allowable deduction for compensation with respect to a "covered employee" of a "publicly held corporation" is limited to no more than $1 million per year unless specific exceptions apply.

Prior law

Before tax reform legislation:

- The $1 million deduction limitation did not apply to certain performance-based compensation and commissions.
- Applicable employers were only entities that were issuers of securities that are subject to the registration requirements of Section 12 of the Securities and Exchange (SEC) Act of 1934 (the "Exchange Act").

- Covered employees included the principal executive officer and next three highest-paid employees, as disclosed in SEC filings, as of the last day of the employer's taxable year. The principal financial officer (*i.e.*, chief financial officer) was excluded from the definition of a covered employee.
- Status as a covered employee was a discrete determination for each taxable year.

New law

Effective for tax years beginning on January 1, 2018, or later, tax reform legislation modifies those rules to:

- Repeal the performance-based compensation and commission exceptions to the Section 162(m) $1 million deduction limitation.
- Expand the definition of an applicable employer to include entities that are issuers required to file reports under Section 15(d) of the Exchange Act.
- Revise the definition of a "covered employee" as follows:
  - The principal financial officer is now included as a covered employee;
  - All individuals who hold the position of either principal executive officer or principal financial officer at any time during the taxable year are now covered employees;
  - Covered employees include officers whose total compensation is required to be disclosed to shareholders by reason of them being amongst the three highest-paid officers (other than the principal executive officer or principal financial officer). This is not an operational change but conforms the statute to IRS Notice 2007-49; and
  - For a "publicly held corporation" that is not required to file a proxy statement, covered employees are determined as if these rules applied.
- Provide that an individual who is a covered employee for any taxable year beginning after December 31, 2016, will continue to be a covered employee for all subsequent taxable years, including years after the death of the individual.

Transition

The provision applies to taxable years beginning after December 31, 2017.

A transition rule applies to remuneration, which is provided pursuant to a written binding contract that was in effect on November 2, 2017.

Additional considerations

Is relief available under the 11/2 Transition Rule?: In general, the transition rules will allow payments to be deductible based on the application of the Section 162(m) rules in effect prior to the change if the payments are made pursuant to a "written binding contract" that was in effect on November 2, 2017, and has not since been materially modified.

Because the transition rule only applies to "written binding contracts," it may not apply in cases where an agreement provides that an employer retains discretion to reduce or eliminate a payment.

Employers should give careful consideration to the impact that the transition rules may have on their existing contracts entered into on or before November 2, 2017, to identify potential benefits and avoid making any modifications to contracts without considering these rules.

Once a covered employee, always a covered employee: Prior to the new Section 162(m) rules, upon certain events, compensation paid to individuals who were covered employees during the year was no longer subject to the Section 162(m) limitations. The new Section 162(m) rule could impact companies in a meaningful way:

- In the event of a merger or acquisition involving public companies, many targets are not required to report summary compensation tables under SEC rules for the short period prior to the change in control (CIC). Such companies would not have covered employees under the old Section 162(m) rules, resulting in significant CIC payments being exempt from the deduction limits of Section 162(m). Under the new Section 162(m) rules, individuals who were previously classified as covered employees will continue to be covered employees

through the transaction. Consequently, deductions associated with CIC payments may be limited. This limit applies in addition to any deduction limit under Section 280G (the "golden parachute" rules).
- In the event of a covered employee termination (or change in status) that occurred before the last day of the fiscal year, the CEO and top paid officers would cease to be covered employees. As a result, all payments (including severance payments and distributions from nonqualified deferred compensation plans) made to these individuals during the fiscal year (and thereafter) were exempt from Section 162(m) and deductible to the company. Under the new Section 162(m) rules, these individuals will remain covered employees and the deductions will be limited.

Deferred tax asset (DTA) considerations:

- DTAs recognized in the financial statement as of the enactment date related to deferred compensation expense and share-based compensation expense should be evaluated to determine if the new Section 162(m) rules would impact the ability to claim a deduction in the future and adjusted accordingly.
- Going forward, a DTA should only be recognized for future compensation expense recognized for deferred compensation plans and share-based awards if a tax deduction is expected under the new rules, taking into account transition, when the deferred compensation is paid to the employee and when the share-based awards are exercised or vested.

Deloitte's view

As a next step, employers should:

- Look for any additional guidance from the Internal Revenue Service on how the new rules are applied;
- Review the population of current and potential covered employees;
- Review existing contracts, plans, and agreements to determine which may qualify for transition relief;
- Calculate value of any lost tax deductions and consider how these changes will impact existing and future DTAs; and
- Revisit executive compensation practices, policies, and programs to determine whether prospective changes are appropriate.

You can read more about Deloitte Tax LLP's insights on US tax reform and the impact on mobility and rewards programs and also view upcoming events online.
URL: https://www2.deloitte.com/us/en/pages/tax/articles/tax-reform-global-mobility-human-resources-considerations.html?id=us:2sm:3na:gis:awa:tax:012618

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United States:
Tax Reform Update: Qualified equity grants by private companies under newly added Section 83(i)

Overview

On December 22, 2017, the US tax reform legislation (formally referred to as "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018") (the "Act") passed, following successful reconciliation of the House and Senate versions of the bill. This NewsFlash provides a summary of the changes to treatment of qualified equity grants by certain private companies under newly created Section 83(i) of the Internal Revenue Code.

Section 83(i) qualified equity grants

Under existing tax rules, nonstatutory stock options (*i.e.*, options that are not incentive stock options or options granted under an employee stock purchase plan) granted at fair market value are generally not taxable until the exercise of the option if the service recipient receives fully vested stock. Additionally, restricted stock units (RSUs) that are exempt from, or comply with, the nonqualified deferred compensation rules under Section 409A are generally not taxable until delivery of fully vested stock.

Under the Act, and in addition to the existing tax rules described in the preceding paragraph, a "qualified employee" may elect to defer the income attributable to a stock option or RSU received in connection with the performance of services for up to five years if the corporation's stock is an "eligible corporation." Instead of including income at exercise of a stock option (assuming fully vested stock is received) or at delivery of fully vested stock as required under current law, if the qualified employee makes a timely "inclusion deferral election," then the employee will be subject to income tax at the earlier of the following dates:

- The date the qualified stock is transferrable;
- The date the employee becomes an "excluded employee";
- The date on which any stock of the employer becomes publicly traded;
- Five years after the employee's right to the stock is substantially vested; and
- The date the employee revokes the election.

A "qualified employee" is generally an individual who is not an excluded employee and who agrees, in the inclusion deferral election, to meet the requirements necessary to ensure the income tax withholding requirements with respect to the qualified stock are met. An "excluded employee" includes the following:

- An individual who becomes a 1 percent owner during the taxable year;
- A 1 percent owner of the corporation at any time during the 10 preceding calendar years;
- The current or former chief executive officer or chief financial officer of the corporation (or an individual acting in either capacity);
- A family member of an individual described above;
- One of the four highest-compensated officers of the corporation during the taxable year; and
- The four highest-compensated officers of the corporation for any of the 10 preceding taxable years.

A corporation is an "eligible corporation" with respect to a calendar year if no stock of the employer corporation (or any predecessor) is readily tradable on an established securities market during any preceding calendar year. Additionally, the corporation must have a written plan under which, in the calendar year, not less than 80 percent of all employees who provide services to the corporation in the United States (or any US possession) are granted stock options or RSUs with the same rights and privileges to receive qualified stock (the "80-percent requirement"). This test must be met with respect to options only or RSUs only, not a combination of the two. Note that the amount granted to each employee need not be identical under the plan.

Under the Act, corporations that are members of the same controlled group are treated as one corporation.

An inclusion deferral election must be made no later than 30 days after the first date the employee's right to the stock is substantially vested or is transferable, whichever is earlier. An election is generally made in the same manner as a

Section 83(b) election. An inclusion deferral election may be made on a statutory stock option (*i.e.*, incentive stock options or options granted under an employee stock purchase plan). If an election is made with respect to a statutory stock option, then the option is not subject to the statutory stock option rules.

With respect to the employer's deduction, if an employee makes an inclusion deferral election, the employer's deduction is also deferred until the employer's taxable year in which or with which ends the taxable year of the employee for which the amount is included in the employee's income. Also, the inclusion deferral election affects only the deferral of income tax and does not affect the timing of FICA (Federal Insurance Contributions Act) and FUTA (Federal Unemployment Tax Act).

The Act includes certain employee notice requirements. Specifically, a corporation that transfers qualified stock to a qualified employee must provide notice to the employee at, or a reasonable period of time prior to, the point qualified stock becomes substantially vested certifying that the stock is qualified stock. Additionally, the employee must be notified:

- That the employee may (if eligible) elect to defer income inclusion with respect to the stock;
- If the employee makes an inclusion deferral election, the income inclusion amount at the end of the deferral period will be based on the value of the stock at the time the employee's right to the stock first becomes substantially vested, notwithstanding whether the value of the stock has declined during the deferral period (including whether the value of the stock has declined below the employee's tax liability with respect to such stock); and
- That the amount of income to be included at the end of the deferral period will be subject to withholding.

Failure to provide the notice may result in the imposition of a penalty of $100 for each failure, subject to a maximum penalty of $50,000 for all failures during any calendar year.

The provision is generally applicable to options exercised, or restricted stock units granted, in 2018 and later taxable years.

The Act includes a transition rule providing that, until regulations or other guidance related to implementing the 80-percent and employer notice requirements is issued, a corporation will be treated as complying with those requirements if it complies with a reasonable good-faith interpretation of the requirements.

Additionally, the provisions related to coordination with Sections 83 and 409A are intended to be limited to the specific issues raised by coordination with Section 83(i).

Deloitte's view

Following the passing of the Act, the most important steps for employers to take immediately include:

- Private corporations with broad-based compensatory stock option or RSU programs should evaluate whether resulting shares are qualified stock for which notification requirement applies:
    - If so, confirm that payroll systems and brokerage accounts properly handle differences in income tax and FICA tax timing, and that proper notice is provided to recipients.
    - If not, determine what is necessary to fall within the qualified stock definition to confirm deferral opportunity for employees.

You can read more about Deloitte Tax LLP's insights on US tax reform and the impact on mobility and rewards programs and also view upcoming events online.
URL: https://www2.deloitte.com/us/en/pages/tax/articles/tax-reform-global-mobility-human-resources-considerations.html?id=us:2sm:3na:gis:awa:tax:012618

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United States:
Update on Payroll Implications of US Tax Reform: IRS issues new withholding guidance

Overview

Following the passage of the US tax reform legislation in December 2017 (formally referred to as "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018") ("the Act"), employers have been eagerly awaiting withholding guidance to be issued by the Internal Revenue Service (IRS) in order to implement the tax rate changes for income tax withholdings via payroll.

On January 11, 2018, the IRS issued Notice 1036 for 2018 (the "Notice"), along with an explanatory statement and FAQs, to provide some important clarifications for employers. However, it is clear from the information released that the impact of tax reform will continue to affect employers and employees for a number of months.
URL: https://www.irs.gov/pub/irs-pdf/n1036.pdf
URL: https://www.irs.gov/newsroom/updated-2018-withholding-tables-now-available-taxpayers-could-see-paycheck-changes-by-february
URL: https://www.irs.gov/newsroom/irs-withholding-tables-frequently-asked-questions

What has changed with withholding rates?

Included in the Notice are highly anticipated changes in supplemental rates:

- The mandatory flat rate for supplemental wage payments exceeding $1 million USD has been confirmed at 37%;
- The sub-$1 million USD wage withholding rate has been reduced to 22%; and
- The backup withholding rate is now 24%.

Withholding tables were adjusted to reflect the 2018 changes in individual income tax rates included in the Act.

Changes are not retroactive and are expected to be applied from the date at which they are implemented by employers, but no later than February 15, 2018.

What about Forms W-4?

The IRS previously stated that any withholding guidance would be designed to work with existing Forms W-4. Further details are provided in support of that original statement:

- Employees will not be required to complete revised Forms W-4 for 2018.
- Employees are encouraged to review their withholding positions to ensure they are accurate.

- A new withholding allowance calculator will be released on the IRS website (IRS.gov) by February 28, 2018, to support employees in reviewing their withholding levels.
- A new Form W-4 will be issued shortly to more fully reflect the new tax law and provide employees more detailed guidance on how to change their tax withholdings.
- In 2019, the IRS anticipates making further changes involving withholdings and has stated it will work with the business community to encourage employees to file revised Forms W-4 in 2019.

Deloitte's view

The confirmation of the position on supplemental rates will be welcome news to employers, withholding agents, and stock plan administrators who are updating systems to reflect the new withholding rates. A diversity in withholding positions for equity and bonuses had begun to surface in early 2018 among vendors and providers prior to the IRS guidance.

The IRS's expectation that changes be implemented by February 15, 2018 may cause challenges, especially considering many employers and payroll providers are also currently engaged in extensive year-end activities for 2017. Employers who rely on third-party payroll providers to implement and execute the changes may have an easier time adapting to the changes than those who handle payroll exclusively in-house. Of course, employees will want to see the changes reflected in their payslips as soon as possible.

Employees whose withholding allowances will be affected by tax reform may have a number of questions about how to adjust their withholding positions. These will be difficult to answer until the IRS's calculator is released at the end of February. Although the IRS has stated employees do not need to complete new Forms W-4 are required to be completed, given the changes to individual tax rates, deductions, and exemptions, it seems likely that employees may want to submit new Forms W-4 to adjust their withholding positions. Implementing the various changes and addressing employees' questions could result in considerable additional work for payroll departments in the months to come.

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Global Rewards Updates
Denmark: Extension of Section 7P of the Danish Tax Assessment Act of share-based payments

Background

According to existing rules in Section 7P of the Danish Tax Assessment Act, an employee can annually receive up to 10% of the yearly salary in shares, conditional share awards, stock options or warrants. Any gains from the sale of the shares is taxed as share income at a rate of 27% up to DKK 52,900 (2018) for individuals (approximately USD 8,500) and 42% for amounts exceeding this threshold (the threshold is doubled for spouses filing together). This means that no salary taxation is triggered at either grant, vesting or exercise; though, on the other hand the employer company will lose the ability to deduct any costs deriving from the grant.

According to a bill released in late December by the Danish Ministry of Taxation in a public hearing, which is based on negotiations between the two governing political parties, the threshold is increased from 10% to 20% of the yearly salary if the incentive scheme meets a certain requirement, *i.e.* that at least 80% of the company's employees are offered to participate in the incentive scheme. If the requirement is not met, the 10% threshold is applicable.

Calculating the 80% requirement

The bill addresses specifically how the 80%-requirement is going to be calculated in practice:

- First of all, the group of employees, which the 80%- requirement is calculated upon, can be limited, subject to general criteria, *i.e.* among others the following employees can be fully excluded from the calculation:
    - Employees with an employment period less than three years;
    - Employees with less than 8 working hours a week; and
    - Managers that are part of another incentive program in the company.
- After the above reduction has been carried out, the employer company can elect freely which 80% of the remaining employees should be offered to participate in the preferential scheme.

An offer to participate in the preferential scheme can be conditional upon each of the participating employees to finance the grant of shares by a reduction in gross salary, as under the current rules, and only the reduced gross salary will be subject to salary taxation. The new rules are intended to enter retrospectively into force as from January 1, 2018.

Please note: A proposal that employees of small enterprises can receive up to 50% of the annual salary as share-based payments under Section 7P of the Danish Tax Assessment Act is not a part of the current bill. This proposal awaits an approval under the EU state aid rules before it can be implemented.

Deloitte's view

If the proposal is adopted by the Danish parliament, it will provide improved opportunities for beneficial tax treatment of share-based incentive schemes. Companies should consider the new possibilities deriving from the bill carefully, *i.e.* whether future grants of stock options and shares could be covered by the new rules, and whether there is a need for adaptations of existing programs in order to meet the requirements.

Please note, in order for the Section 7P of the Danish Tax Assessment Act to apply, including the proposed new threshold, a special agreement must be concluded between the employer and the employee at the date of grant of a share- based incentive.