

# Lawyer's Desk Book Update Notification, HIGHLIGHTS

## Lawyer's Desk Book

### Second Edition

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The *Lawyer's Desk Book*, Second Edition, incorporates recent court decisions, legislation, and administrative rulings. The chapters of this book are organized into parts, dealing with the topics of business planning and litigation, contract and property law, financial and credit law, personal planning, tax issues, civil litigation, criminal law, and law office issues. In addition, the Index has been fully revised to reflect these changes.

#### Highlights of the Second Edition Include:

The “top story” for the second edition is the passage of the Tax Cuts and Jobs Act (TCJA), P.L. 115-97, a comprehensive tax reform package that affects nearly every corner of U.S. tax, financial, and business life.

The TCJA affects both personal and business taxes on an ongoing basis, although most of the business tax changes are intended to be personal, while many of the personal income tax changes are designed to expire January 1, 2026. For an overview of the TCJA's impact on personal income tax, see [§ 18.02\[E\]](#).

The corporate income tax regime for C Corporations has shifted from a graduated tax with a 35% top bracket to a 21% flat tax. Many previously available deductions have been reduced or eliminated. The corporate Alternative Minimum Tax (AMT) has been repealed.

[See [§§ 1.01\[A\]](#), [1.02](#), [3.04\[B\]\[2\]](#), [3.05\[B\]\[2\]](#), [4.01\[D\]](#), [4.01\[D\]\[1\]](#), [4.05\[G\]](#), [20.10](#).]

The TCJA introduces a new category, the Code § 199A “qualified business income” (QBI) deduction. (The deduction is scheduled to expire as on December 31, 2025.) Certain individuals, trusts, and estates will be able to deduct 20% of the QBI they receive from an entity other than a C Corporation. The deduction is limited to the greater of 50% of the wages paid by the qualified business or 25% of wages paid by the business plus 2.5% of the cost of the business' qualified property. The QBI deduction is not available to taxpayers in “specified service businesses” whose income exceeds statutory thresholds (\$157,500 for single filers, \$315,000 for joint returns). A specified service business is one where the business' principal asset is the skill or reputation of its owner(s) or employee(s), where the business consists of performing services in law, health, accounting, consulting, performing arts, athletics, or financial services, or which involves investing, trading securities or commodities, or managing investments. [See [§§ 1.01\[A\]\[1\]](#), [3.01\[A\]](#), [4.01\[C\]](#), [4.01\[D\]\[1\]](#), [4.05\[B\]\[1\]](#), [18.04](#).]

The TCJA extends the class of covered employees under § 162(m) (the \$1 million limitation on the amount of compensation a public corporation can deduct), and provides that any person who ever becomes a covered employee remains a covered employee forever afterwards. Under the TCJA, performance-based compensation and gain on some stock options is included in the \$1 million, although it was excluded pre-TCJA. The TCJA adds § 83(i), allowing rank-and-file employees who receive certain stock options from a non-public corporation to make an election to delay recognition of gain on the options for up to five years. [See [§§ 1.12, 3.01\[A\], 3.08\[A\]\[2\], 4.05\[B\], 5.01, 5.14, 18.05\[C\]](#).]

Employers can claim a tax credit for providing between two and twelve weeks of paid leave (at 50% or more of wages) to employees who earn less than \$72,000 a year (2018 figure). The leave program must allow qualifying employees to access paid leave under all circumstances covered by the Family and Medical Leave Act (FMLA), but eligibility for the credit is not restricted to employers covered by the FMLA. [See [§ 3.14\[B\]](#).]

The TCJA denies a business deduction for any settlement of a sexual harassment claim, or attorneys' fees related to the settlement, if the settlement imposes a confidentiality agreement on the complainant. [See [§§ 3.11\[A\], 3.15, 4.05\[G\]](#).]

As for personal income tax, there is still a graduated tax, with seven tax brackets, slightly lower than the previous rules (e.g., the top rate is 37%). The 3.8% surtax on high investment income remains in effect. [See [§ 18.01\[B\]](#).]

The personal exemption has been eliminated. [See [§ 18.06\[L\]](#).]

The TCJA increases the standard deduction; for the entire period 2018–2025, the standard deduction will be \$12,000 for a single person or married person filing a separate return, \$18,000 for a head of household, and \$24,000 for a joint return or surviving spouse. The additional standard deduction for the elderly and/or disabled is \$1,600 for a single person, or \$1,300 for each spouse in a married couple. [See [§ 18.06\[K\]](#).]

The TCJA makes it harder to deduct mortgage interest: interest can only be deducted on a mortgage up to \$750,000 (versus \$1 million under prior law), and interest on home equity loans is no longer deductible. Before the TCJA, mortgage interest could be deducted on underlying indebtedness of up to \$1 million; this limit has been reduced by the TCJA to \$750,000. The deduction for SALT (State and Local Taxes), including property taxes, is limited to \$10,000 per return. [See [§§ 8.01\[A\], 8.06, 18.01\[D\], 18.06\[B\]](#).]

PPACA's employer "pay or play" requirement remains in effect, but the TCJA eliminates the Individual Shared Responsibility Payment, penalties imposed on people who did not have insurance coverage through their employer, through Medicaid, or by buying health insurance as individuals, and who did not qualify for exemptions. [See [§ 3.07\[N\]](#).]

The TCJA allows qualified plan participants who were affected by presidentially declared major disasters in 2016 to withdraw up to \$100,000 from their retirement plans, without incurring tax penalties that would otherwise have applied. Disaster relief for businesses and individuals are also provided by other statutes. The Disaster Tax Relief and Airport and Airway Extension Act of 2017, P.L. 115-63, provides a tax credit for employers affected by Hurricanes Harvey, Irma, and Maria. It also increases the allowable charitable contribution deduction, for both individuals and corporations, related to disasters. The Bipartisan Budget Act of 2018 (BBA; P.L. 115-123) provides relief for wildfire victims. [[§§ 3.01\[A\], 3.05\[H\], 4.01\[B\], 4.01\[D\]\[2\], 4.08, 18.02\[E\], 18.06\[C\]](#).]

In other developments (unless stated otherwise, these items all refer to Supreme Court decisions):

- The Supreme Court held in mid-2018 that the principle that the Federal Arbitration Act (FAA) requires arbitration agreements to be enforced according to their terms applies to class action

waivers in employment agreements. The Supreme Court held that forbidding class and collective actions does not conflict with the National Labor Relations Act (NLRA) provisions protecting concerted activity by workers. [See [§§ 1.12, 3.02\[D\], 23.05.](#)]

- The Supreme Court held that it was not unconstitutionally unreasonable to use deadly force to prevent the escape of a woman wielding a knife. There was a threat of serious harm to the police and a third person close to her, and the woman did not respond to police demands to drop the weapon. [See [§ 24.01\[B\].](#)]
- The Supreme Court overruled an earlier decision, and now holds that states can require Internet retailers to collect state sales tax whether or not they have a physical presence within the state. [See [§ 4.01.](#)]
- In mid-2018, the Supreme Court rejected the arguments of the suit led by Hawaii, that one of President Trump's travel bans, Proclamation No. 9645, was motivated by anti-Muslim bias. The Court ruled that presidents have extremely broad discretion to control admission to the United States for security reasons. The majority found that an establishment clause challenge to the ban was unlikely to succeed on the merits, finding that excluding people from certain named countries was plausibly related to the legitimate objective of national security. [See [§ 17.01\[A\].](#)]
- The Supreme Court held that the Immigration and Naturalization Act's definition of an "aggravated felony" in the deportation context, as a "crime of violence" for which the potential sentence is at least one year, is unconstitutionally vague. The statute includes a residual clause defining a crime of violence as a felony that, by its nature, creates a substantial risk that physical force will be used to commit the crime. The Supreme Court said this definition is arbitrary and unpredictable, and sows uncertainty as to how to estimate the risks of a crime. Because deportation is such a severe sanction, language must be reviewed strictly. (This decision is the case's second trip to the Supreme Court: the first, after Justice Scalia's death, led to a 4–4 deadlock.) [See [§ 24.02\[H\]\[11\].](#)]
- To convict under the Omnibus Clause of the criminal tax statutes, the prosecution must prove that the defendant was aware of a pending tax proceeding, and used force to try to impede or obstruct due administration of the Tax Code. In early 2018, the Supreme Court reversed a conviction based on failure to establish the defendant's awareness that he was the subject of a tax investigation. [See [§ 24.02\[H\]\[8\]\[d\].](#)]
- A criminal defendant's right to control the defense precludes defense attorneys from conceding the client's guilt against the client's wishes—even if the attorney wanted to adopt this strategy to avoid the death penalty. (The defendant in this case was nevertheless sentenced to death.) [See [§§ 24.03\[D\]\[6\], 24.04\[N\]\[2\]\[c\].](#)]
- Two cases dealt with searches of automobiles. One of them held that a person who was allowed to use a rental car by a friend, who was listed as the renter of the vehicle, is entitled to assert a reasonable expectation of privacy against searches of the rental vehicle. (The driver was eager to exclude the result of the search—body armor and 49 bricks of heroin). The other holds that the protection of curtilage (vicinity of a home) is strong enough to rule out a warrantless search of a motorcycle parked in the curtilage that the police believed to be stolen. [See [§§ 24.03\[B\]\[4\], 24.03\[B\]\[7\].](#)]
- The Supreme Court ruled (for the second time) that automotive service advisors are not entitled to overtime; under the Fair Labor Standards Act (FLSA), they are sales staff. The Court held that, as a matter of statutory construction, the exemptions to the FLSA are interpreted plainly as written, and are not narrowly construed. [See [§ 3.04\[F\].](#)]
- Similarly, the Supreme Court reaffirmed its position that whether retiree health benefits have vested is to be determined under ordinary contract law principles. The Collective Bargaining Agreement's (CBA's) vesting language was not ambiguous when viewed in this light, so extrinsic evidence should not have been considered. [See [§ 3.05\[G\]\[1\].](#)]
- In early 2018, the Supreme Court resolved a circuit split by ruling that a person who merely reports alleged wrongdoing internally (within the corporation) and does not contact the SEC is not considered a Dodd-Frank whistleblower. [See [§§ 3.16\[B\], 5.10\[E\].](#)]
- Two early 2018 patent rulings uphold the validity of post-grant patent proceedings, including the inter partes reviews (IPRs). The Supreme Court held that a patent is a statutory right that is granted by the Patent Trial and Appeal Board (PTAB) and can be extinguished by it. However,

the PTAB cannot decide patentability selectively: it must either review all of the challenged claims or refuse to review any of them. [See [§ 10.06\[H\].](#)]

- The Supreme Court held that there is concurrent federal and state jurisdiction over '33 Act § 11 claims; the Securities Litigation Uniform Standards Act did not repeal the concurrent jurisdiction. As a result of this decision, investors can pursue '33 Act § 11 class actions alleging misrepresentations in registration statements in state courts. The decision places public companies at greater litigation risk, especially in the first three years after an IPO, before the statute of limitations has run on challenges to the S-1 registration statement. [See [§ 5.13\[B\].](#)]
- A unanimous February 2018 decision rules that a pre-petition transfer by a debtor is not protected under the BCode § 546(e) safe harbor if it is made through a financial intermediary that is a mere financial conduit. [See [§ 13.13\[A\].](#)]
- In a slightly later bankruptcy ruling, the Supreme Court held that a Chapter 7 debtor's misrepresentation about one asset can be a statement about the debtor's financial condition that precludes discharge of a debt (the debtor said he would use his tax refund to pay legal fees, but instead used the money for other purposes). [See [§ 13.03\[A\].](#)]
- SEC ALJs were held to be "officers of the United States" as defined by the appointments clause of the U.S. Constitution. The ALJs apply significant discretion to Therefore, to be valid, the appointments must be made by the SEC commissioner, not SEC staff members. Because of the invalidity of the ALJ's appointment, the Supreme Court reversed a \$300,000 civil penalty and ordered a new hearing before a validly appointed ALJ. [See [§ 5.11\[A\].](#)]
- The Supreme Court permitted patentees to recover lost profits and other damages when certain components are exported from the United States and subsequently incorporated into infringing products used outside the United States, because Patent Act § 271(f) focuses on infringement and not on the place where infringement occurs. [See [§ 10.06\[G\].](#)]
- Two cases about water rights were decided in 2018. The first holds that the Waters of the United States (WOTUS) rule lies outside the jurisdiction of a Clean Water Act section involved in the case. The Supreme Court held that challenges to the WOTUS rule must be commenced in district court, not the court of appeals. [See [§ 9.04\[C\].](#)] In the second case, the Court held that the United States can intercede in an action about an interstate water supply agreement to protect federal interests, even if an ordinary litigant would not be permitted to participate in the suit. [See [§ 9.01.](#)]

Other important developments include:

- The Economic Growth, Regulatory Relief and Consumer Protection Act, P.L. 115-174, does not entirely repeal the Dodd-Frank Act, but relieves banks with assets of less than \$250 billion of many regulatory requirements, including satisfying a "stress test" of financial soundness. Oversight of certain large financial institutions, including American Express, is relaxed because they are no longer considered systemically important. [See [§ 5.10\[D\].](#)]
- On April 11, 2018, the Senate confirmed John Ring as a new member of the National Labor Relations Board (NLRB). It was predicted that the Republican majority would overturn many Obama-era NLRB rulings. [See [§ 3.02.](#)]
- An April 2018 legislation, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA, P.L. 115-164) removes Communications Decency Act § 230 immunity from online services that knowingly host third-party content that promotes or facilitates sex trafficking (prostitution of underage persons, or adults who are under compulsion). FOSTA makes it a federal offense to use or operate a website or interactive service to intentionally promote or facilitate sex trafficking, and grants civil remedies for trafficking victim. State attorneys general can bring civil suits against sex traffickers. Section 230 already removed immunity for violations of the U.S. Code. FOSTA eliminates immunity from state criminal charges and civil suits about sex trafficking. [See [§§ 10.03\[F\], 24.02\[H\]\[3\]\[b\].](#)]
- The Fifth Circuit issued a nationwide injunction against enforcement of the DOL fiduciary rule, on the grounds that the rule was arbitrary and capricious, and the Employee Retirement Income Security Act (ERISA) did not grant the authority to promulgate the rule. The Fifth Circuit applied the Administrative Procedure Act to issue a vacatur of the DOL's action, removing the regulations from the CFR. Another federal agency, the SEC, subsequently published a lengthy package of

proposed rules to govern the relationship between investment professionals with retail investors. The proposal includes Reg BI (Regulation Best Interest), guidance about the fiduciary duties of investment advisers. [See [§§ 3.05\[A\]\[1\]](#), [3.05\[E\]](#), [6.01\[A\]](#).]

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