

IRS Extends Time For Compliance With Section 409A

In response to pressure from employers and the Bar, by Notice 2007-86 (issued October 22, 2007), the IRS generously extended the period to achieve final compliance with Section 409A of the Internal Revenue Code from January 1, 2008 to January 1, 2009. In the interim, to avoid penalties, employers must operate all nonqualified deferred compensation plans in accordance with their terms and all guidance under Section 409A, or by applying a reasonable, good-faith interpretation of such guidance if a particular issue is not addressed in it. Until December 31, 2007, employers may meet this good faith standard by relying on the proposed and final regulations issued under Section 409A, and IRS Notice 2005-1. After December 31, 2007, the proposed regulations may no longer be relied on.

Other Important Points Covered in the Notice Include:

- The time and form of payment of deferred compensation may be changed until December 31, 2008 without complying with Section 409A's difficult requirements, provided that the change does not result in either (1) an amount otherwise payable after 2008 being accelerated into 2008, or (2) an amount payable in 2008 being deferred to a later year.
- Discounted stock options or stock appreciation rights ("SARs") (which would be subject to Section 409A) may be replaced by non-discounted options or SARs (which would not be subject to the statute) until December 31, 2008, provided that affected employees do not receive cash or other property in 2008 in connection with the change. Certain executive officers of public companies cannot take advantage of this relief.
- A definition of good reason that does not comply with the safe harbor provided under the final Section 409A regulations may be amended to comply with the safe harbor until December 31, 2008, provided that the compensation provided under the affected arrangement is subject to a substantial risk of forfeiture when the definition is amended.

The further extension will be extremely helpful to employers, particularly those confronted with reviewing and conforming a number of deferred compensation arrangements to the rules. Any member of the Benefits Group may be contacted for assistance on these issues.

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