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E*ZINES
July 2008 Vol. 12

Employee Benefits, ERISA & Executive Compensation
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Important Deadline for Code Section 409A Compliance

Non-qualified deferred compensation arrangements are now subject to a tough new tax regime under Internal Revenue Code Section 409A. Section 409A became effective on January 1, 2005, but, because of the complexity of the issues involved in applying the law, the IRS did not issue final regulations until 2007. As a result, employers have been given until December 31, 2008, to bring plans and agreements into full documentary compliance (i.e., to amend written plans and put unwritten plans into writing).

One of the key requirements is that all arrangements subject to Section 409A must specify in writing no later than the end of 2008 the provisions governing time and form of payment. Publicly traded companies have additional compliance requirements.

If a plan, agreement, contract, or other arrangement provides for a deferral of compensation but does not comply with the Section 409A requirements, the recipient of the compensation (the employee) will be subject to current or prior year income tax, and interest, and a 20% excise tax. The employer may be penalized for failure to withhold or report taxes.

Accordingly, all verbal and written deferred compensation arrangements must be reviewed promptly to determine whether written modification is required before December 31, 2008.

Section 409A is very broad and potentially applies to many types of arrangements, such as the following:

- Bonus plans (both annual and long-term)
- Severance plans and agreements
- Stay bonuses
- Taxable reimbursement arrangements
- Tax equalization agreements
- Employment agreements
- Change of control agreements
- Traditional voluntary deferred compensation plans
- Supplemental Executive Retirement Plans (SERPs)
- Post-termination health, life, and reimbursement benefit plans
- Post-termination in-kind benefits (*e.g.*, outplacement assistance, club dues, etc.)
- Split-dollar life insurance arrangements
- Code Section 457 deferred compensation arrangements
- Stock Appreciation Rights plans (SARs)

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- Restricted stock units
- Phantom stock plans
- Stock options issued at a discount
- Compensation agreements with independent contractors

We have published previous E*Zines to raise awareness of this change in the law, but are making a final push to be sure that employers are aware of the Act and have inventoried their plans and arrangements. Once that is done, employers need to determine whether their arrangements are subject to Section 409A. If so, then they should be reviewed for compliance with Section 409A and, if necessary, revised by the end of 2008 to comply. In addition, transition guidance provides flexibility that will cease to exist after 2008 (such as the ability to change payment form and timing in some cases).

Due to the limited time period for amending documents, employers should take action as soon as possible.

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact any of the attorneys listed below.

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