

Deferred Compensation Alert

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December 31, 2010 Deadline For Deferred Compensation Arrangements

Earlier this year the Internal Revenue Service issued Notice 2010-6. This Notice provides significant tax relief to employers and employees whose nonqualified deferred compensation plans need fine-tuning or other more substantial revisions to comply with the IRS' developing interpretation of Internal Revenue Code ("Code") Section 409A, and/or to correct specified Section 409A failures. The deadline to make these document and/or operational changes with tax forgiveness is December 31, 2010.

Discussion

As previously communicated in our *ERISA Alerts* and *Newsletters*, Code Section 409A imposes an additional complex layer of tax laws on nonqualified deferred compensation plans and arrangements.¹ Your nonqualified deferred compensation arrangement, hopefully, was amended several years ago to comply with Section 409A as it was understood at that time.

Since then, the meaning of this new Code section has developed in certain respects. Furthermore, continued unfamiliarity with the new terrain (sometimes perhaps purposeful blinders) has led to widespread noncompliance.

The consequences from the failure to strictly comply with the new tax requirements applicable to nonqualified deferred compensation plans are very harsh, particularly on the executive or other plan participant (no mercy is shown to the highly compensated employees who mostly benefit from these types of arrangements). At the same time, the rules (like most all ERISA provisions) are extremely complex and intricate. Notice 2010-6 is intended to provide one last opportunity for employers, that have previously attempted compliance, to squarely fall within the new requirements, and thus avoid unintended income tax inclusion and penalties.

Lessons

Notice 2010-6, like its predecessor Notice 2008-113, should heighten employers' and key employees' awareness of the importance of -

- Maintaining a plan document that is compliant with the written document requirements of Section 409A, and
- Operating the nonqualified deferred compensation arrangement in accordance with the plan terms and applicable law.

¹ Although Section 409A applies to your garden variety deferred compensation plan, its net is surprisingly wide and captures a host of other arrangements, including severance and employment agreements. Whenever compensation or other taxable items are deferred from one year to another, Section 409A rears its head.

Deferred Compensation Arrangements – Continued

Like qualified retirement plans and their correction programs, every sponsor of a nonqualified deferred compensation arrangement must be keenly aware of both plan documents and plan operations. The employer and key employee should never hesitate to ask questions before implementing action with respect to the plan.

Action Now

If you are not sure whether you maintain an arrangement that might be governed by Section 409A, you are advised to immediately consult with experienced ERISA counsel.

If you know your plan is governed by Section 409A, but your plan has not been reviewed (and perhaps likely amended) in the last six months, you are similarly advised to immediately seek experienced ERISA counsel. In this latter situation, the particular facts and circumstances will dictate whether your plan requires zero, minor, or major adjustments.

You may find Notice 2010-6 at www.erisalawgroup.com under “Firm Publications.”

For additional information or if you wish our assistance in these regards, contact Jeff Mandell at (208) 342-5522 or 1-866-ERISALAW.

*This alert is intended to provide general information only and does not provide legal advice.
This bulletin does not discuss potential exceptions to the above rules.
The application of ERISA laws can be complex. For information regarding the impact of these developments
under your particular facts and circumstances, please call us.*