

Deferred Compensation 409A Regulations

The nonqualified deferred compensation landscape significantly changed with the enactment of the American Jobs Creation Act— offering greater guidance. On April 10, 2007, the IRS issued final regulations under Section 409A which become effective January 1, 2008.



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Complying with Federal Regulations before 2008

Section 409A applies to all nonqualified deferred compensation arrangements, whether it's a nonqualified 401(k) style make-up plan for hundreds of employees or a single arrangement created for one executive.

Section 409A has generally been viewed to have positively affected nonqualified plans. The American Jobs Creation Act of 2004 was pursued in reaction to perceived corporate abuses in the aftermath of Enron and WorldCom.

Section 409A details how compensation may be deferred, and, once deferred, how and when it can be paid. Under the new rules, deferred compensation may be paid only upon one of six permissible events:

- (1) a fixed time or schedule specified at the time of deferral,
- (2) separation from service,
- (3) disability;
- (4) death,
- (5) unforeseeable emergency, or
- (6) a change in control event, each (other than death) as defined in regulations (including anti-abuse rules to prevent collusive manipulation of the termination date).

The time and form of payment must be set at the time of deferral and may not be changed later except under restrictive rules, generally requiring that any payment after the change be postponed for at least five years and that the change election be made at least 12 months in advance of the prior payment date.

The regulations provide a safe harbor allowing payment as soon as practicable within the same calendar year or within 90 days of the event so long as there is no collusion between employer and employee as to when payment is made. Finally and importantly, a waiting period-- Section 409A prohibits the highest paid 50 officers of a public corporation from receiving deferred compensation on separation from service until at least six months after the separation.

