

News from our Compensation & Benefits Group

Reminder: December 31, 2008 Deadline for Section 409A Documentary Compliance

As discussed in our prior *Cooley Alerts*, December 31, 2008 is the documentary compliance deadline for deferred compensation arrangements subject to Section 409A of the Internal Revenue Code. The rapidly approaching deadline gives employers a relatively brief period in which to bring the documents setting forth plans, arrangements, awards and individual agreements that provide deferred compensation (collectively, "Arrangements") into compliance with Section 409A. The broad categories of Arrangements that may be subject to Section 409A include:

- ▶ Arrangements that pre-date the enactment of Section 409A in October of 2004, since the statute provides for limited "grandfathering"
- ▶ certain stock rights (e.g., deferred compensation settled in shares, restricted stock units, phantom stock, discounted stock options and discounted stock appreciation rights)
- ▶ separation pay arrangements (plans and individual agreements, including employment agreements and change in control agreements providing severance benefits)
- ▶ account balance plans (deferred compensation arrangements expressed in the form of individual account balances, including supplemental executive retirement plans utilizing individual account balances)
- ▶ non-account balance plans (individual arrangements and supplemental

executive retirement plans expressing a benefit in terms of a defined benefit formula)

- ▶ reimbursement plans (plans and individual agreements providing for taxable expense reimbursements)
- ▶ bonus plans

Many companies may still not be aware of the broad application of Section 409A or that the IRS has taken the position that Section 409A compliance "savings clauses" that purport to nullify other non-compliant provisions in an Arrangement generally will be disregarded and deemed ineffective. Therefore, many Arrangements must be amended no later than December 31, 2008 to avoid adverse Section 409A tax consequences, which may include premature taxation, an additional 20% federal income tax (and possibly an additional state tax equivalent, as is the case in California), and an interest-charge tax. The IRS is expected to issue guidance later this year on calculation of the adverse Section 409A tax consequences for non-compliant Arrangements.

As discussed in our prior *Cooley Alerts*, operational compliance with Section 409A has been required since January 1, 2005, and companies should consider whether there have been any operational failures since January 1, 2005 that may need to be corrected before January 1, 2009 pursuant to the transition relief guidance in IRS Notice 2007-100 [www.cooley.com/news/alerts.aspx?ID=000040906820].

The Compensation & Benefits Group is prepared to work with you to identify and, where necessary, amend Arrangements in all of the above categories. However, given the breadth of application of Section 409A and the large number of clients we serve,

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we would like to schedule such work over the remaining months of the year. Therefore, if you would like us to assist you with amendments to Arrangements required by Section 409A, please contact one of the listed attorneys from the Compensation & Benefits Group so that we may begin this process. ■

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