

June 24, 2008

REMINDER: DEADLINE FOR 409A COMPLIANCE APPROACHING

The IRS and Treasury Department previously extended to December 31, 2008, the deadline for complying with the Final Regulations and most of the existing transition relief under Internal Revenue Code Section 409A ("Section 409A"), which governs the taxation of nonqualified deferred compensation arrangements. No further extensions of the deadline or the transitional relief are expected. Therefore, all nonqualified deferred compensation plans must be amended (or documented, if not already in writing) by no later than December 31, 2008. Failure to comply with Section 409A subjects the employee to a 20% penalty tax on any deferred compensation included in income as a result of the Section 409A violation.

With only six months remaining to make plans compliant with Section 409A, we advise employers to focus on their Section 409A review process now. Beginning the process now will allow sufficient time before December 31, 2008, for assessing compliance alternatives, taking advantage of the transition relief opportunities which are available only through December 31, 2008, drafting, approving, and adopting remedial amendments, and establishing operational procedures for compliance.

If it has not already done so, each employer should:

- **Compile a List of Plans, Contracts, Arrangements and Agreements Potentially Subject to Section 409A.** Plans that may be subject to Section 409A include equity, incentive and nonqualified retirement plans, employment agreements, severance arrangements, change in control agreements, offer letters and any other arrangement or agreement that gives the individual a legally binding right to compensation that is or may be payable in a later year.
- **Have Plans Reviewed and Amended.** Plans must be reviewed for compliance with Section 409A, and if they do not comply, must be amended by December 31, 2008. Many unwritten arrangements can be covered by Section 409A, in which case they must be reduced to writing by December 31, 2008. For public companies, there may be form 8-K filing requirements, if there are material agreements or amendments to material agreements.
- **Review Plan Operations.** Section 409A requires operational as well as document compliance, and the operations must match the documents. Therefore, payroll and operating procedures must be reviewed. Ongoing compliance procedures also are necessary in order for employers to take advantage of the correction program developed by the IRS for certain unintentional operational failures, including certain failures to comply with plan provisions that otherwise satisfy the requirements of Section 409A.

- **Review Transition Relief Options.** Each plan has one last chance in 2008 to take advantage of the transition relief provisions, so long as the plan is timely amended and incorporates, as required, the transition relief rules being used. The transition relief can provide alternatives for fixing some of the difficult issues raised by the move to Section 409A's more restrictive regime. Some of the transition relief requires elections to be made by December 31, 2008.

If you have any questions regarding the foregoing, please feel free to contact one of the attorneys listed below.

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