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Good News and Bad News for Deferred Compensation Plans Subject to IRC Section 409A



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On September 10th, the IRS issued Notice 2007-78, the latest installment of guidance covering nonqualified deferred compensation plans subject to IRC Section 409A. The good news for employers is that the deadline for amending or restating plans to comply with Section 409A has been extended until December 31, 2008. The bad news is that the relief provided in this Notice is more limited than what employers and their advisors had requested.

Under the Notice, plans must still designate a Section 409A compliant time and form of payment in writing before January 1, 2008. While the Notice does provide some flexibility about how this designation may be made, the December 31, 2007 deadline remains in place. This means, for example, that where payment elections in supplemental retirement plans are controlled by elections under qualified retirement plans, new procedures for determining the time and form of payment under the supplemental plans must be in place by the end of 2007. A host of other types of time and form of payment provisions – including those in some employment and independent contractor agreements and in some equity-based compensation arrangements – must be revisited by this deadline as well.

The Notice also keeps January 1, 2008 as the effective date for the final Section 409A regulations. Therefore, except in limited circumstances, taxpayers may not rely on IRS Notice 2005-1, the proposed regulations, or a reasonable good faith interpretation of the statute for taxable years beginning on or after January 1, 2008.

Given the limited relief provided by the Notice, employers will need to continue moving ahead with implementing compliant time and form of payment procedures before the end of 2007, and will need to make sure they are in full operational compliance with the final Section 409A regulations beginning January 1, 2008.

Please let us know if we can assist you with any Section 409A compliance issues.