Published on *The National Law Review* https://natlawreview.com

Consider Amending Plans for Proposed Section 409A Regulations

Article By:

Mims Maynard Zabriskie

Regulations recently proposed by the Internal Revenue Service (IRS) under Section 409A of the Internal Revenue Code (Section 409A) include a number of changes to the final Section 409A regulations issued in 2007.

Employers may want to include some or all of these changes in new or existing nonqualified deferred compensation arrangements. Although the changes do not necessarily require amending existing deferred compensation arrangements, employers may want to consider amendments to avoid contractual disputes about the benefits, to the extent that an employer intends to take advantage of the more liberal rules. These changes should be considered for any new deferred compensation arrangements.

The following changes in the proposed regulations may warrant specific language in deferred compensation arrangements.

Beneficiary's Intervening Events

Under Section 409A, a nonqualified deferred compensation plan may not accelerate payments unless certain exceptions apply. One such exception is for payments due to the service provider's death, disability, or unforeseeable emergency. The proposed rules extend this exception, following the service provider's death, to allow acceleration because of a beneficiary's death, disability, or unforeseeable emergency. If an employer would like to take advantage of this exception, it should include appropriate language in the applicable plan or election form.

Payment of Legal Expenses

The proposed regulations extend the exception from Section 409A for payment of legal expenses for "bona fide legal claims" to include expenses to enforce any claim by the service provider with respect to the service relationship. Previously, only claims based on wrongful termination, employment discrimination, the Fair Labor Standards Act, or workers compensation statutes were considered bona fide legal claims for this purpose. This change may affect drafting of employment agreements, in particular.

Delayed Payment Upon Death

The proposed regulations relax the timing rules for payment following death, so that payment is considered timely if made by December 31 of the year following the year of death. The proposed regulations also effectively allow a beneficiary to elect the year of payment. Previously, the deadline was the later of the end of the year of the participant’s death or the 15th day of the third calendar month following death. Under the proposed regulations, employers may take advantage of this additional time without specifically extending the potential time for payment under the plan. Accordingly, a plan amendment is not required.

Expansion of the Short-Term Deferral Exception

The proposed regulations expand the “short-term deferral” exception to permit a payment delay solely to avoid violating federal securities or other applicable laws. Payments made within two and a half months of the end of the tax year in which the compensation vests are considered short-term deferrals exempt from Section 409A. A payment delay required to avoid violating federal securities laws or other applicable laws will no longer affect the short-term deferral exception.

Beyond these items, other changes and clarifications in the proposed regulations may warrant revisiting deferred compensation practices and arrangements to ensure that they continue to comply with Section 409A. The regulations are generally effective on or after the date on which they are published in the *Federal Register*, but taxpayers may rely on them in the interim.

Copyright © 2025 by Morgan, Lewis & Bockius LLP. All Rights Reserved.

National Law Review, Volume VI, Number 260

Source URL:https://natlawreview.com/article/consider-amending-plans-proposed-section-409a-regulations