

CLIENT UPDATE

YEAR-END DEADLINE TO FIX SECTION 409A “RELEASE LANGUAGE”

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It's been a quiet year for Section 409A of the Internal Revenue Code. The IRS has not issued any meaningful guidance in 2012 and, after almost a decade of roller coaster 409A rules and “relief,” companies no doubt welcomed the respite. But it's time to make sure your documents requiring that a release be delivered to receive payment comply with earlier guidance.

You may recall that, back in early 2010, the IRS issued Notice 2010-6 in which it stated that a severance payment date must be fixed without regard to the timing of the delivery of any required release, even if the payments would in all events be made in the same taxable year as the termination. This position surprised many employers and, in late 2010, the IRS issued Notice 2010-80 to provide relief permitting employers to fix a more narrowly defined view of non-compliant “release language.” This more narrow view requires adjustment only in circumstances where the employee can effect the year in which the compensation is payable by controlling the time at which he or she delivers the release. Under this relief, if a plan in existence as of December 31, 2010 provides that severance may be paid or commence to be paid in a period that begins in one year and ends in another year, and the severance has not become payable by December 31, 2012, the plan will not be treated as violating Section 409A if the following conditions are met:

- *General Eligibility.* The general eligibility requirements of Notice 2010-6 must be satisfied, including that the company must take commercially reasonable steps to identify and correct all other plans with a substantially similar failure.
- *Plan Correction.* A plan that provides for a defined payment period (such as within 90 days of separation from service) must be revised by December 31, 2012 to provide that the severance is paid or commences to be paid either (a) on the last day of the period or (b) in the second year. A plan that does not provide for a defined payment period must be revised by December 31, 2012 to provide that the severance is paid or commences to be paid either (a) on the 60th or 90th day following separation from service or (b) during a specified period not longer than 90 days, with the condition that the payment will be paid or commence to be paid in the second year.
- *Notice Requirement.* While the employer does not have to provide the employee with notice about the correction (as would be the case with other 409A corrections under Notice 2010-6), the employer must include information with its own tax return relating to the correction. This information includes, among other things, a list of the employees affected by the correction, and how the company corrected the plan.

If amending each document is too burdensome, it may be possible to effect the correction with a company-wide policy.

In light of the looming December 31, 2012 deadline, employers should review and correct their plans and agreements before it's too late.

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Please do not hesitate to contact us with any questions.

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