

## IRS Publishes Updated Guidance Regarding Nonqualified Deferred Compensation Compliance Dates

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For the better part of 2 years, the IRS has been issuing guidance and revamping rules related to nonqualified deferred compensation arrangements. These rules interpret Internal Revenue Code §409A (enacted in 2004, and generally effective January 1, 2005). Subject to certain exceptions, the rules generally govern any arrangement that defers the receipt of compensation beyond the year in which it becomes earned and vested. This can include various types of arrangements such as the following:

- Employment agreements (or other arrangements with one executive) providing for delayed compensation distributions;
- Severance arrangements and noncompete and consulting arrangements;
- Bonus plans, stock option plans, stock appreciation rights and phantom stock plans;
- Director compensation arrangements; and
- Traditional "top-hat" or "supplemental executive retirement plans" (sometimes referred to as "SERPs").

Public sector and other tax-exempt employers are also subject to Code §409A. Arrangements used by these employers are typically referred to as "§457(f)" arrangements and often contain some of the features described above.

Previously, the IRS provided us with a Notice and Proposed Regulations along with instructions making "good faith" operational compliance mandatory prior to the documentation compliance date. Additionally, the IRS recently issued Notice 2006-79, which generally extends the date (to January 1, 2008) on which all plans and arrangements must have compliant documentation. Final Regulations are expected to be issued prior to the end of 2006. In the interim, any plans or arrangements providing for "deferred" compensation payouts need to be identified and reviewed for "good faith" operational compliance regardless of the plan document compliance date. Severe consequences (including retroactive income taxes, penalties and interest) apply to noncompliant arrangements.

For more information on Code §409A or nonqualified deferred compensation issues in general, contact Christopher A. McMican at [mcmican@millercanfield.com](mailto:mcmican@millercanfield.com) or (313) 496-7922, or another member of the Federal Tax and Employee Benefits practice group. This message is for general information only and should not be used as a basis for specific action without obtaining further legal advice.