



Our **Employee Benefits and Executive Compensation** attorneys have a diversified national practice. We assist clients of all shapes and sizes - businesses in virtually every industry sector, 501(c)(3)s and other tax-exempt organizations, and governmental entities under 414(d) - on compensation and benefit-related issues.

Year End Deadline for Penalty-Free Section 409A Corrections

All nonqualified deferred compensation plans, programs, or agreements must comply in both written form and operation with Section 409A of the Internal Revenue Code of 1986, as amended. These rules apply not only to traditional deferred compensation plans, but also to certain severance payments, phantom equity, restricted stock units, discounted stock options and deferred bonuses, among other things. Failure to comply results in taxation upon vesting, a 20-percent additional tax and interest.

IRS Notice 2010-6 allows for correction of written documents in certain cases to comply with Section 409A, but in many situations requires a tax payment as a cost of correction. **However, under a special transitional rule, these tax payments are not required if correction is made by December 31, 2010** (although the other elements of Notice 2010-6 must be met). For example, in most instances, use of the correction procedure must be disclosed on the tax returns of the service provider and service recipient for the year of correction. Also, correction of any corresponding operational errors must be made by year end under a separate program in IRS Notice 2008-113 (which may also entail tax return disclosures and in some cases a tax payment as the cost of correction).

Further, under proposed regulations, Section 409A document corrections can be made as to nonqualified deferred compensation which has not yet vested as of year end. These corrections can be made outside Notice 2010-6.

Some of the common Section 409A document errors that continue to be found are the following:

- Plans and agreements are not identified as being subject to 409A and do not address 409A at all.
- Employees have discretion to delay severance subject to 409A by delaying signing a release.
- Discounted stock options do not have exercise dates complying with 409A.
- Phantom equity has payment dates that do not comply with 409A.
- Severance subject to 409A payable by public companies to certain "specified employees" is not delayed for 6-months following separation.

Any company with plans or agreements providing nonqualified deferred compensation that do not address Section 409A at all, or that are out of compliance with Section 409A, is urged to contact one of our employee benefit lawyers as soon as possible to address whether correction can be made before year end.

Please contact any of the attorneys in our [Employee Benefits & Executive Compensation](#) group if you have any questions regarding this alert.

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