

IRS Notice 2007-78 Extends the Deadline for I.R.C. § 409A Compliance Amendments to 1-31-2008, but not for the Time and Form of Payment Elections which must be made, in Writing, by not Later than 2007.

On September 10, 2007, the IRS announced a one year extension of the deadline for the restatement or amendment of deferred compensation plans or arrangements (referred to as “plans”) that are required to comply with I.R.C. § 409A, i.e., to December 31, 2008, retroactive to January 1, 2008.

The most important aspect of this IRS Notice, however, is that it expressly does not extend the requirement that time and form of payment elections for deferred compensation plans must be made in writing by not later than December 31, 2007, in order to comply with I.R.C. § 409A.

While IRS Notice 2007-78 includes guidance with respect to other I.R.C. § 409A issues, this Benefits Alert only addresses the importance of having time and form of payment elections completed by 12-31-2007.

The time of payment must be upon the occurrence of one of the following distribution events:

- A separation from service;
- A change in control;
- An unforeseeable emergency;
- A specified date or fixed schedule of payments;
- Death; or
- Disability.

The election can specify whether time of payment is the earliest or latest of the elected events.

The form of payment may be:

- a lump sum payment;
- installment payments;

- an annuity; or
- a combination of the above.

If installment payments are elected, the election (or the plan) may specify whether the installments are to be treated as a single payment or separate payments for the purpose of changes in the time and form of payment under the I.R.C. § 409A subsequent deferral rule. If no election is made in this regard, or the plan is silent with respect to this issue, a single payment is deemed to have been elected.

The election must be made in writing, or the plan must specify the time and form of payments. If permitted by the plan, an amendment to the plan by not later than December 31, 2007 to specify the time and forms of payment may be an appropriate, expeditious way to comply with the I.R.C. § 409A advance time and form of payment requirement.

Finally, compliant designations of a time and form of payment may be made in one of the following three ways:

1. To only apply to a specifically identified deferred compensation plan or arrangement;
2. To apply to any deferred compensation plan in which an employee or independent contractor participates (such as a member of the board of directors); or
3. A combination of the above.

For example, a single election of the time and form of payment election can specifically refer to a known, identified 409A deferred compensation plan and any other deferred compensation plan in which the employee or independent contractor participates and to which I.R.C. § 409A applies.

This could be particularly helpful for employers who have not identified all of their deferred compensation plans which are subject to I.R.C. § 409A.

Why is this important?

In order to avoid the draconian penalties for the failure to comply with I.R.C. § 409A, which are:

- Inclusion of the deferred compensation in the employee's taxable income;
- A penalty tax of 20% of the amount included in the employee's taxable income; and
- Interest.

For more information, please contact Haynes Benefits PC at 816-875-1919 or visit www.haynesbenefits.com.