

Compensation & Benefits Tax News

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New Proposed Regulations Under Internal Revenue Code (IRC) Section (§) 409A

In October 2004, IRC § 409A was added to the Internal Revenue Code as part of the American Jobs Creation Act of 2004. This section governs plans and arrangements that provide nonqualified deferred compensation (NQDC) to executives. On September 29, 2005, the Treasury Department issued new proposed regulations under IRC § 409A which amend and amplify the guidance previously issued in IRS Notice 2005-1. The regulations are in proposed form. Final regulations will likely be issued after public hearings scheduled for January 2006. The effective date of the final regulations is scheduled to be January 1, 2007. Until that time, employers and service providers are required to operate NQDCs in a manner reflecting reasonable, good-faith compliance with the Statute.

The proposed regulations extend the deadline for documentary compliance that conform with IRC § 409A until December 31, 2006. Notwithstanding, operational compliance is still effective as of January 1, 2005.

Specific Plans and Issues:

- Short-term deferrals will not be deemed to be deferred compensation. A short-term deferral is a payment within 2½ months after the conclusion of the year in which the services are performed.

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Internal Revenue Code (IRC) Section (§) 409A (cont'd)

The proposed regulations require the 2½ month rule to be specified in the NQDC plan document; without a specified date, the deferred payment will be in violation of IRC § 409A.

- The proposed regulations clarify that ineligible NQDC plans under IRC § 457(f) for tax-exempt employers are also subject to IRC § 409A.
- Separation pay is generally subject to IRC § 409A. The proposed regulations provide an exemption for separation payments where:
 1. the total payment does not exceed \$420,000, or if less, two times the employee's annual compensation; and
 2. the separation payments are completed by the close of the second calendar year following the year of separation.
- While stock options, both incentive, and nonqualified, are generally exempt from IRC § 409A, discounted stock options are subject to the statute. In the case of employers whose stock is not publicly traded, the regulations require the reasonable application of a reasonable method. The method should take into account relevant factors, including the value of tangible and intangible assets, and present value of cash flow, among others. Evaluation performed by an independent appraiser that would satisfy the requirements for valuing stock owned by an Employee Stock Ownership Plan (ESOP) is presumed to be reasonable. This will certainly impose greater costs and administrative burdens upon non-public companies that issue stock options.
- Stock Appreciation Rights (SARs). Under prior guidance, SARs of

publicly held companies were exempt from IRC § 409A. On the other hand, SARs of non-publicly held companies were subject to IRC § 409A. The proposed regulations provide that SARs issued by both publicly traded and non-publicly traded companies are exempt from the statute if the SARs are settled in cash or stock. Additional requirements apply to SARs of non-publicly traded companies, particularly the valuation rules discussed above applicable to stock options.

In the area of distributions, the statute limits payments to be made no earlier than the date of separation from service, disability, death, a specified time or fixed schedule, in the event of a change in control or in the event of an unforeseeable emergency. Where a NQDC plan coordinates the timing of distributions to those elected under a qualified plan, the proposed regulations extend the permissibility of this distribution method through 2006. In addition, designated payment dates may be further deferred only upon 12-months prior notice and the first payment must be deferred for at least a five-year period. Also, the proposed regulations clarify that a stream of payments over several years may be treated as either installment payments or one payment, depending on the terms of the plan document.

The employer may be permitted the delay of payments where:

- The limitations of IRC § 162(m), dealing with excessive compensation, are exceeded.
- A loan covenant might be violated.
- Federal securities and other applicable law is violated.

The proposed regulations permit acceleration of the benefits where such distributions are on account of the plan's failure to satisfy IRC §

409A, to pay a domestic relations order, to pay employment taxes or for certain de minimus amounts. In addition, under certain circumstances, distributions are permitted in the event of plan termination.

As previously noted, the IRC § 409A rules apply to amounts deferred on or after January 1, 2005. Further, amounts deferred and/or vested before January 1, 2005 are not subject to the new rules, but non-vested benefits as of January 1, 2005 will be subject to IRC § 409A. The material modification of a grandfathered plan after October 3, 2004 will render the plan subject to the new statute, except for a modification to follow the new rules. Although plan sponsors have until December 31, 2006 to bring the plan documents into IRC § 409A compliance, plans must have been operationally compliant by January 1, 2005. The proposed regulations provide that material modifications may be rescinded prior to the earlier of the exercise date of the right which has been modified, or the end of the calendar year during which the modification was made. In addition, changes in investment alternatives are not material modifications. Generally, the material modifications in effect on October 23, 2004 will result in such plans being subject to IRC § 409A.

In the meantime, you should review all deferred compensation agreements and determine whether the plan requires a complete overhaul or minor modifications. It is important to protect grandfathered benefits; this may require the adoption of a new separate plan. Be sure to keep your participants posted as you go. ■

2006 Dollar Limits for Qualified Plans and FICA Changes

There are various limitations imposed on tax favored plan contributions and benefits. For example, the maximum dollar contribution an individual could defer into a 401(k) Plan was \$14,000 in 2005. Many of these dollar limitations are increased for cost-of-living adjustments (COLA). The Social Security wage base is also subject to a COLA.

The IRS recently announced dollar limitations for 2006, which are shown below.

DESCRIPTION	2005	2006
Retirement Plan Limits		
Maximum Elective 401(k) / 403(b) / 457(b) Contribution	\$14,000	\$15,000
Maximum Elective 401(k) / 403(b) Catch-Up contributions (for age 50 or older)	\$4,000	\$5,000
Maximum Elective SIMPLE Contribution	\$10,000	\$10,000
Maximum Elective SIMPLE Catch-up Contributions (for age 50 or older)	\$2,000	\$2,500
Maximum Annual Benefit from Defined Benefit Pension Plan	\$170,000	\$175,000
Maximum Annual Addition to Defined Contribution Account	\$42,000	\$44,000
Highly Compensated Employee—		
a. 5% Owner, including spouses, parents, children and other relatives	Yes	Yes
b. Any Employee Exceeding the Dollar amount in the prior year	\$95,000	\$100,000
c. Top-Paid 20% Group (If elected) Exceeding	\$95,000	\$100,000
Maximum Annual Compensation Limit	\$210,000	\$220,000
Social Security Base and Rates:		
<i>(A) Applicable to each of Employer and Employee</i>		
OASDI Percentage	6.20%	6.20%
OASDI Wage Base	\$90,000.00	\$94,200.00
Maximum OASDI Withholding Tax	\$5,580.00	\$5,840.40
Medicare Percentage	1.45%	1.45%
Medicare Wage Base	No limit	No limit
Maximum Medicare Tax	No limit	No limit
<i>(B) Self-Employment Tax</i>		
OASDI Percentage	12.4%	12.4%
OASDI Wage Base	\$90,000.00	\$94,200.00
Maximum OASDI Withholding Tax	\$11,160.00	\$11,680.80
Medicare Percentage	2.9%	2.9%
Medicare Wage Base	No limit	No limit
Maximum Medicare Tax	No limit	No limit
A self-employed individual continues to be allowed an income tax deduction for one-half of the amount of his or her self-employment tax (both OASDI and Medicare portions).		

2005 Year-End Benefits Planning Tips

With leaves changing into beautiful colors, the year-end tax planning season begins. Now is the time to look back and forward to make 2005 as beneficial to you as possible with some year-end benefits tips and pointers to consider.

For 401(k) Plan Sponsors and Participants

1. If your business sponsors a Safe-Harbor 401(k) plan, the rules require you to distribute a notice to participants of your intended method of satisfying the safe-harbor contribution and the formula. Effectively, a safe-harbor 401(k) plan sponsor may satisfy the safe-harbor contribution requirement by making either a fully vested:
 - a. formula-driven matching contribution to employees who contribute to the plan; or
 - b. a contribution of 3 percent of each eligible employee's compensation.
2. If you, as an employee, participate in a Section 401(k) plan, Section 403(b) plan, or Section 457(b) plan, now is the time to assess the propriety of your deferral elections and to make adjustments as necessary and appropriate to achieve your benefit savings objectives. Remember, the maximum 2005 pre-tax salary deferral to both Section 401(k) and Section 403(b) plans is \$14,000, plus an additional \$4,000 catch-up contribution for participants age 50 or older by year-end. Section 457 plans also allow catch-up contributions. The amounts are adjusted for inflation for years after 2006. The rule limiting the maximum annual

contribution to 100 percent of salary also applies to the Age 50 Catch-Up provision.

Required Minimum Distributions (RMD)

If you reach age 70½ by December 31, 2005, you are required to take a RMD.

1. If you just turned age 70½ in 2005, the general rule requires a RMD no later than April 1, 2006 for 2005. Note, however, that you will also be required to take a 2006 RMD by December 31, 2006.

Benefits Tip

If you delay your 2005 RMD until April 1, 2006, you'll receive two taxable distributions, both the 2005 RMD and, by December 31, 2006, the 2006 RMD. Alternatively, if your 2005 RMD is accelerated into 2005, you may avoid a bunching of income problem in 2006. Consult your BDO Seidman tax advisor on how to proceed.

2. If you already commenced taking RMDs before 2005, confirm that your plan trustee will assure the timely distribution of your 2005 RMD by December 31, 2005.

Roth IRAs

1. Many taxpayers with substantial assets accumulated in a traditional IRA may consider converting such IRA to a Roth IRA, where

contributions are not tax deductible, but where distributions, including investment earnings, are not taxable when received.

One of the major obstacles is the requirement that a taxpayer's adjusted gross income (AGI), excluding the currently taxed converted IRA, may not exceed \$100,000. To the extent you can influence the timing of income or loss recognition, bring your AGI below \$100,000 to enable a Roth IRA conversion.

2. For qualified retirement plan sponsors, for plan years beginning on or after January 1, 2006, a Roth 401(k) provision may be added to your plan. The benefits include the avoidance of the aforementioned \$100,000 AGI limit, the ability to obtain distributions of after-tax contributions anytime without tax or penalty, and the potential economic benefits derived from a Roth IRA. On the flip side, there are not many large plan administration firms geared up to handle such plans, and unless there is a law change, these plans will no longer be permissible after 2010.

Time for Adopting a Plan

If you want to adopt a qualified retirement plan, e.g., pension, profit sharing, Section 401(k) or Keogh plan, it must be adopted no later

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Planning Tips (cont'd)

than December 31, 2005 to be applicable for 2005.

Exceptions:

An individual retirement account (IRA) may be established and funded by April 15, 2006.

A Simplified Employee Pension (SEP) may be established and funded by the extended due date of the sponsor's tax return, which can reach October 16, 2006 for individuals and partnerships, and September 15, 2006 for corporations, including S-Corporations.

If You Participate in a "Cafeteria Plan"

Cafeteria plans, also called Section 125 plans, require that amounts taken from compensation to reimburse you for certain expenses, e.g., medical or dependent care, must be incurred by December 31, 2005 to maintain your right to a reimbursement. If any amounts remain in your account for unexpended 2005 reimbursements, this money is forfeited back to the employer. This is known as the "use it or lose it" rule.

Benefits Tip

The benefits tip is to utilize unused amounts remaining in your account. The IRS has recently liberalized the types of medications and other medical care expenses available for reimbursement to include many generic pharmacy items, such as over-the-counter pain killers, cold and flu medicines, etc.

2005 Planning Pointer

In a 2005 Revenue Ruling, the Treasury Department provided for an additional 2½ months of time (the Grace Period) to incur expenses

to be reimbursed from amounts accumulated but not utilized in a prior year. Effectively, the "use it or lose it" rule ends around March 15, 2006 for 2005.

Caution

A cafeteria plan has to be amended by the plan sponsor to include the Grace Period in order for a participant to make use of the additional 2½ months.

Self-Employed Individuals

1. If you are self-employed, you will likely have or should have a Keogh plan or a Simplified Employee Pension (SEP). If you wish to have a Keogh available for 2005, it must be established by December 31, 2005. Contributions are required by the due date of your income tax return, including extensions. This SEP rule is more liberal, allowing the SEP to be established and funded by the extended due date of your individual income tax return, which can be October 16, 2006.

2. If you sponsor a Keogh plan, is it a "defined contribution" (DC) or "defined benefit" (DB) Keogh plan? If you are 45 years of age or older, consider a DB Keogh plan. In a DB Keogh plan, the annual contribution is not known, but is geared to provide a benefit certain (a defined benefit) at a given future date. The maximum benefit which may be funded for 2005 is \$170,000, increased to \$175,000 for 2006. It is likely that a DB Keogh plan will allow greater current income tax deductions and future pension benefits if you are age 45 or older, than a DC Keogh plan.

3. Add a 401(k) component to your DC Keogh plan. By doing so, you will find greater flexibility in the amount you may contribute. You may even be able to add \$14,000 to your otherwise deductible contribution, plus the \$4,000 catch-up if you are at least age 50 by year-end.

4. If you already sponsor or intend to adopt a DB Keogh plan, also establish a separate Section 401(k) salary deferral plan which will allow you to defer and exclude an additional \$14,000 from gross income, plus the \$4,000 catch-up if you are at least age 50 by year-end. ■

Education Savings Account Programs

As the year-end approaches, you should consider certain education savings programs for either pre- or post-secondary education expenses. Contributions made to these programs are not tax deductible for federal income tax purposes, but may be deductible for state income tax purposes. The earnings on contributions made to these accounts grow tax deferred and are not subject to income tax when withdrawn when used for qualified education expenses.

The following chart provides a brief comparison of Coverdell Education Savings Accounts and Section 529 College Savings Plans.

	Coverdell Education Savings Account	Section 529 College Savings Plan
Eligibility	Full contributions of \$2,000 annually can be made by single-filing taxpayers with adjusted gross income (AGI) below \$95,000 and married couples filing jointly with AGI under \$190,000. Partial contributions can be made by single individuals with AGI of \$95,000 - \$110,000 and by married couples with AGI of \$190,000 - \$220,000.	No eligibility requirements.
Maximum Annual Contributions	The total of all contributions cannot exceed \$2,000 per child and the child must be under 18 years of age.	There is no Federal contribution limit. However, contribution limits vary by state. Please refer to state by state chart.
Use of Funds	Qualified educational expenses for grades K through 12 and post-secondary education at public, private and religious schools (including tuition, fees, books and room and board).	Tuition and other qualified educational expenses at any accredited college or university.
Account Ownership	The fund is established in the child's name.	The fund is established in the name of the person setting up the account and making the contributions.
Other considerations	<ul style="list-style-type: none"> • The child must use money in the account before their 30th birthday. • Funds offer more investment flexibility than 529 plans. 	<ul style="list-style-type: none"> • There are no age limits. • Investment choices are limited by the plans that are established by each state.

The following chart provides a state by state summary of contribution limits and state income tax deductible amounts attributable to Section 529 College Savings Plans. Note: Coverdell Education Savings Accounts are not eligible for state income tax deductions.

State	Contribution Limit	Maximum Annual State Income Tax Deduction
Alabama ¹	\$300,000	\$0
Alaska	\$250,000	\$0 – AK has no state income tax
Arizona	\$275,000	\$0
Arkansas	\$245,000	Up to \$5,000 for individual taxpayer and \$10,000 for joint filers
California	\$285,000	\$0
Colorado	\$280,000	Unlimited
Connecticut	\$235,000	\$0
Delaware	\$270,000	\$0
Florida	\$287,000	\$0 – FL has no personal income tax
Georgia	\$235,000	Up to \$2,000 per year per dependent, subject to income tax imitations ²
Hawaii	\$305,000	\$0
Idaho	\$310,000	Up to \$4,000 for individual taxpayer and \$8,000 for joint filers
Illinois	\$235,000	Up to \$10,000 for individual taxpayer and \$20,000 for joint filers
Indiana	\$236,750	\$0
Iowa	\$239,000	Up to \$2,375 per beneficiary
Kansas	\$235,000	Up to \$3,000 per beneficiary for individual taxpayer and \$6,000 per beneficiary for joint filers
Kentucky	\$235,000	\$0
Louisiana	\$218,535	Up to \$2,400 per beneficiary for individual taxpayer and \$4,800 per beneficiary for joint filers
Maine	\$290,000	\$0
Maryland	\$250,000	Up to \$2,500 per beneficiary
Massachusetts	\$250,000	\$0
Michigan	\$235,000	Up to \$5,000 for individual taxpayer and \$10,000 for joint filers
Missouri	\$235,000	Up to \$8,000 for individual taxpayer and joint filers
Montana	\$275,000	Up to \$3,000 for individual taxpayer and \$6,000 for joint filers
Nebraska	\$300,000	Up to \$500 for married taxpayer filing separately and \$1,000 for individual taxpayers and joint filers
Nevada	\$250,000	\$0 – NV has no state income tax
New Hampshire	\$270,000	\$0 – NH has no state income tax
New Jersey	\$305,000	\$0
New Mexico	\$294,000	Unlimited
New York	\$235,000	Up to \$5,000 for individual taxpayer and \$10,000 for joint filers
North Carolina	\$312,551	\$0
North Dakota	\$269,000	\$0
Ohio	\$273,000	Up to \$2,000 per beneficiary
Oklahoma	\$235,000	Up to \$10,000 for individual taxpayer and \$20,000 for joint filers
Oregon	\$250,000	Up to \$1,000 for married taxpayer filing separately and \$2,000 for individual taxpayers and joint filers
Pennsylvania	\$315,000	\$0
Rhode Island	\$330,690	Up to \$500 for individual taxpayer and \$1,000 for joint filers
South Carolina	\$277,000	Unlimited
South Dakota	\$305,000	\$0 – SD has no state income tax
Tennessee	\$235,000	\$0 – TN has no state income tax
Texas	\$257,460	\$0 – TX has no state income tax
Utah	\$315,000	Up to \$1,510 for individual taxpayer and \$3,020 for joint filers
Vermont	\$240,100	5% tax credit on up to \$2,000 per beneficiary
Virginia	\$250,000	Up to \$2,000 per beneficiary, unlimited per beneficiary where taxpayer/donor is age 70 or older
Washington ³		
West Virginia	\$265,620	Unlimited
Wisconsin	\$246,000	Up to \$2,000 per beneficiary
Wyoming	\$245,000	\$0 – WY has no state income tax

¹ Alabama is the only state that does not permit state tax-free withdrawals both in-state and out-of-state. All other states provide for state tax-free withdrawals.

² Maximum deduction for each beneficiary decreases by \$400 for each \$1,000 of federal adjusted income over \$100,000 for a joint return or \$50,000 for a separate return.

³ The state of Washington offers a pre-paid tuition plan, not a college savings plan account.

Katrina Emergency Tax Relief Act of 2005 (KETRA)

Hurricane Katrina was the worst natural disaster to land on U.S. soil in American history. We are all saddened by the total devastation, and we reach out, through our contributions and with assistance of all forms.

The U.S. Congress and the President recognize the financial burdens imposed upon those who suffered from Hurricane Katrina, and have enacted legislation to make it easier for people to obtain funds from an otherwise untapped and unavailable source of assets—retirement plan assets. The following is a brief look at Katrina Emergency Tax Relief Act of 2005.

Special Rules for Use of Retirement Funds for Relief Relating to Hurricane Katrina

Important definitions:

1. "Eligible Individual" is defined as an individual whose principal place of residence on August 25, 2005 is located in the Hurricane disaster area and who has sustained economic loss by reason of Hurricane Katrina.
2. "Eligible Distribution" is defined as any distribution from an "eligible retirement plan" made on or after August 25, 2005 and before January 1, 2007.
3. "Eligible Retirement Plan" is defined as any qualified retirement plan, individual retirement account (IRA), Section 403(b) plan or a governmental Section 457 plan.
4. "Qualified distribution" is defined as a distribution from a Section 401(k) plan, Section 403(b) plan, or an IRA first-time home buyer distribution, which was to be used to purchase a principal res-

idence, but was not purchased on account of Hurricane Katrina.

Qualified Distributions for primary residences cancelled due to Hurricane Katrina may be recontributed back to the Eligible Retirement Plan.

1. The 10 percent tax on early distributions, up to \$100,000, from Eligible Retirement Plans has been waived. Generally, if an individual elects to receive a distribution from a retirement plan prior to attaining age 59½, he or she is subject to a 10 percent penalty in addition to inclusion of the distribution as ordinary income.
2. The Eligible Individual may pay income tax on the Eligible Distribution over three years.
3. Income tax is not due if the Eligible Distribution is repaid to the Eligible Individual's account in three years. This is done by recharacterizing the Eligible Distribution into a non-taxable rollover contribution.

An Eligible Individual can elect to receive an Eligible Distribution up to \$100,000 from an Eligible Retirement Plan.

If an Eligible Individual received a Qualified Distribution during the period beginning February 8, 2005 and ending on August 29, 2005, then he or she can make a recontribution (not to exceed the distribution

amount) back to the plan at any time during the three-year period beginning with the date of the Eligible Distribution. The repaid distribution is treated as a rollover contribution, just like other repaid distributions.

The limit on participant loans from Eligible Retirement Plans has been increased from \$50,000 to \$100,000.

1. For existing participant loans of Eligible Individuals, if a plan loan repayment due date occurs during the period beginning on August 25, 2005 and ending on December 31, 2006, such due date shall be delayed for one year and all subsequent loan repayments will be adjusted accordingly.
2. Generally, participant loans are required to be repaid within five years. The one-year period repayment delay discussed above is disregarded for this purpose, i.e., the five-year repayment period becomes a six-year repayment period.
3. The participant loan provision does not apply to an individual retirement account.

Provisions relating to plan amendments as a result of KETRA

Plan documents can be amended to be retroactively effective as long as the amendment meets the requirements of KETRA. A plan amendment for KETRA is required to be made on or before the last day of the first plan year beginning on or after January 1, 2007, or such later date as provided by the Internal Revenue Service. Governmental plans are given an additional two years in which to make required plan amendments. ■

Proposed Regulations Aim to Reverse Boise Cascade

The Treasury Department has issued proposed regulations that are intended to reverse the decision handed down in *Boise Cascade Corporation (“Boise”) v. United States*, 329 F.3d 751 (9th Cir. 2003).

In this case, Boise paid cash to a terminated employee in redemption of his shares of stock distributed to him as a participant in the Company’s Employee Stock Ownership Plan (“ESOP”). Several years later, Boise filed an amended return claiming a deduction for dividends under Internal Revenue Code Section (IRC §) 404(k) for this payment. Under IRC § 404(k), a C-Corporation that pays a dividend to an ESOP or to a participant therein may deduct the dividend if certain requirements are met.

In *Boise*, the government maintained that the redemption was not a deductible dividend, on the theory that the owners of the stock are the individual participants of the ESOP, and not the ESOP trust. Therefore, the redemption of the shareholder’s stock resulted in a meaningful reduction of his proportionate interest in Boise, which is considered a redemption of such participant’s stock (i.e., a capital transaction) and not a dividend under IRC § 302(b)(2). Additionally, because the redemption payment was not paid to all participants of the ESOP, it could not be declared a deductible dividend.

The 9th Circuit ruled that the redemption was in fact a dividend because the ESOP trust, and not the individual participants, is treated as the sole owner of the ESOP stock. Since the ESOP owned a controlling

interest in Boise both before and after the redemption, there was no meaningful reduction of the trust’s ownership of ESOP stock, and the dividend treatment was correct, and therefore, the payment was deductible.

The IRS continues to dispute the findings of the 9th Circuit and, as a result, the Treasury has proposed regulations intended to reverse the *Boise* decision. Proposed Regulation §1.162(k)-1(a) has been added to specify that a redemption used for a participant “dividend” is in connection with a redemption, and therefore a deduction for dividends is not permitted under IRC § 404(k). ■

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