

The 409A Deadline is Looming -- Are you ready?

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Internal Revenue Code Section 409A was enacted in 2004 and final regulations were issued in 2007. Section 409A was enacted to curtail abuses in nonqualified deferred compensation plans (NQDC).

The definition of a NQDC is very broad and includes any agreement where a participant has a legally binding right to compensation during one year that is payable in a later year, with some limited exceptions. Certain employment and severance agreements may even have elements of deferred compensation according to 409A. All NQDC plans must be in "operational" compliance and have a written plan document by December 31, 2008.

Section 409A requires restrictions on deferral elections, the timing and form of payments, and prohibits the acceleration of payments at the participant's discretion. Section 409A also has very specific definitions of substantial risk of forfeiture, change- of-control, and disability so all existing agreements must have definitions that comply with these definitions or be amended. In order to comply by the deadline, your first step is to make a list of your existing agreements, both verbal and written, that may fall under the 409A broad definition of deferred compensation. If you have any doubts, make sure to include them in your list. Secondly, have LWBJ review or discuss these arrangements with you to determine if they need to be amended or a plan document needs to be drafted. Finally, make sure that all amendments or plans that need drafting are complete by December 31, 2008.

Failure to comply with 409A by December 31, 2008 may subject the employee/participant to taxation on the deferred compensation **plus** an additional 20% tax and interest penalties.