

Mastering New Section 409A and 457(f) Deferred Compensation Rules: Calculating and Reporting Includible Amounts

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Aug. 23, 2016

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MASTERING NEW SECTION 409A AND 457(F) DEFERRED COMPENSATION RULES

Calculating and Reporting Includible Amounts

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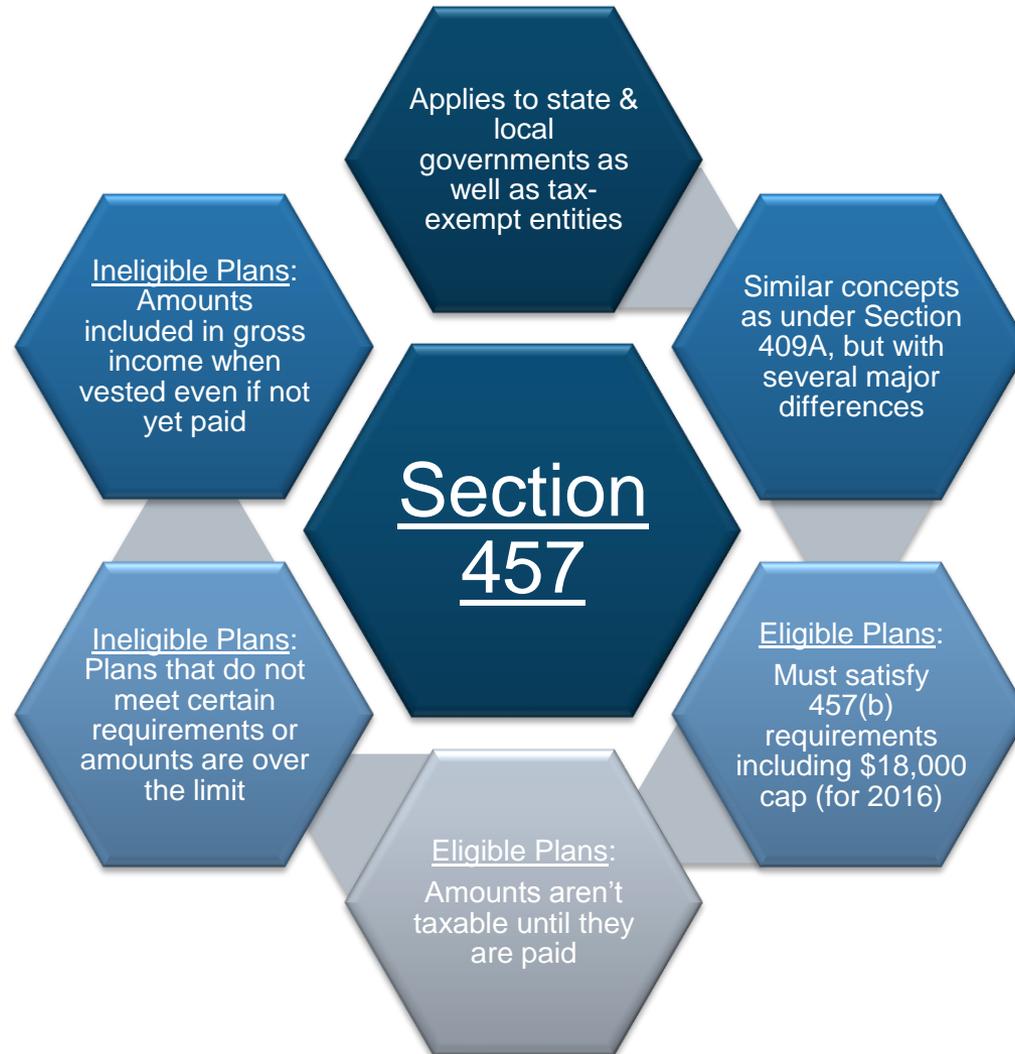
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INTRODUCTION







OVERVIEW OF SECTION 409A

Arrangements Subject to Section 409A

Account Balance Plans

- ⌚ Excess Defined Contribution Plan
- ⌚ Traditional Deferred Compensation Plan

Non-Account Balance Plans

- ⌚ SERPs
- ⌚ Excess Defined Benefit Plans

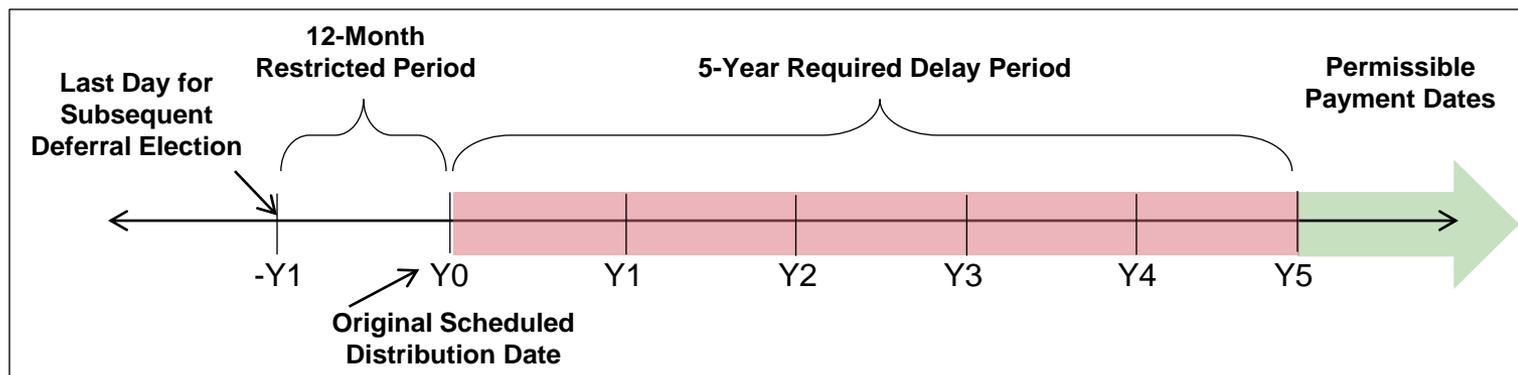
Severance Plans (some of them, anyway...)

Other Types of Plans That May Give Rise to Deferred Compensation

- ⌚ Below FMV Stock Options
- ⌚ Stock Options with Deferral Features
- ⌚ RSUs/Phantom Share Plans
- ⌚ Dividend Equivalent Rights
- ⌚ Section 457(f) Plans
- ⌚ Certain Provisions in Executive Agreements

Deferral Elections

- ⦿ Deferral Elections must be made prior to the beginning of the calendar year in which the compensation will be earned
 - Exceptions for first year of participation and performance-based payments
- ⦿ Elections as to payment form and timing **MUST** be made at the time of the deferral election
- ⦿ Distribution restrictions—limited to 6 events:
 - Separation from service, death, Disability, Change in Control, designated date or fixed schedule, Unforeseeable Emergency
- ⦿ Acceleration is **NOT** permitted (with very limited exceptions)
- ⦿ Elections to delay distributions cannot be effective for 12 months, and must delay the payment by at least 5 years from when the distribution would have otherwise been made



Substantial Risk of Forfeiture Defined

- ④ Compensation is subject to a substantial risk of forfeiture if:
 - Entitlement to the amount is conditioned on the performance of substantial future services by any person *or*
 - The occurrence of a condition related to a purpose of the compensation, *and*
 - The possibility of forfeiture is substantial.
- ④ Purpose of the Compensation:
 - A condition related to a purpose of the compensation must relate to the service provider's performance for the service recipient or the service recipient's business activities or organizational goals
 - » For example, the attainment of a prescribed level of earnings or equity value or completion of an initial public offering.
- ④ An amount is not subject to a substantial risk of forfeiture merely because the right to the amount is conditioned, directly or indirectly, upon the refraining from the performance of services.
 - For example, a covenant not to compete is not considered a substantial risk of forfeiture under Section 409A.

Exception – Short-Term Deferral

- ④ The Short-Term Deferral Exception takes many arrangements that would otherwise be deferred compensation out of the Section 409A definition.
 - Payment must be made no later than 2.5 months following the later of the end of the employee or employer’s tax year in which the payment is no longer subject to a substantial risk of forfeiture.
 - Example: STI/bonus payments that are earned in one year and paid early in the following year.
- ④ Note that a payment that would otherwise be a short-term deferral, that is not paid within the ST deferral period, will become subject to Section 409A.
- ④ However, if the plan specifies a payment date within the ST deferral period and the date is missed, the plan will still comply with Section 409A if the payment is made within the same tax year.

Practice Note: It’s best if the plan specifies a payment date within the ST deferral period, as that provides more flexibility if the payment date is missed

Exception – Severance Pay

- ⓘ If Severance Pay is treated as “vested,” then Section 409A may apply.
 - Ex. An employee’s ability to “walk” within a certain time following a CIC—in that case, the severance pay would be treated as vested and subject to Section 409A if termination of service could occur in a subsequent year.
 - Termination must be “involuntary” to prevent vesting.
 - » Involuntary termination “without cause”
 - » Voluntary termination for “good reason,” where the threshold is significant (e.g., substantial reduction in salary or duties).
 - There is a “safe harbor” in the regulations for good reason
 - If there is a good reason termination provision, need to analyze in light of the safe harbor provisions to see if it would prevent severance pay from becoming vested for 409A purposes.
 - Must include notice and cure provisions

Exception – Severance Pay (cont'd)

🏠 Separation Pay Exceptions:

- Short-Term Deferral
 - » Ex. Severance payable immediately in a lump sum following involuntary separation from service
- Collectively bargained separation pay plans
- Limited payments of severance payable only upon involuntary separation from service
 - » No more than 2x average annual compensation (up to 401(a)(17) limit in effect for year of separation)
 - \$265,000 for 2016
 - Paid no later than the end of the 2nd taxable year following the taxable year of the separation
- Payments less than the limit under Code Section 402(g)(1)(B)
 - » \$18,000 for 2016

Equity Awards



- 📌 Equity Awards of Service Recipient Stock Generally Subject to 409A, except for:
 - Statutory Stock Options (ISOs under Sections 422 and 423)
 - Nonqualified Stock Options, if:
 - » Exercise Price is not less than FMV on date of grant
 - » Option does not contain a feature for the deferral of compensation
 - Restricted Stock (subject to Section 83)
- 📌 Any Class of Common Stock May Be Used
 - Dividend preferences prohibited
 - Liquidation preferences OK
 - Stock must qualify as common stock under Section 305 and cannot resemble deferred compensation
- 📌 Must relate to “Service Recipient Stock”



**SECTION 409A NEW
PROPOSED REGULATIONS**

Overview



- Published on June 22, 2016 (81 Fed. Reg. 40569)
- Will become effective when finalized, but taxpayers may rely on Proposed Regulations



BUT NOTE: Portions of Proposed Regulations restate existing IRS position and should be viewed by taxpayers as currently in force

- Proposed Regulations fall into four categories:
 - New guidance that enhances taxpayer flexibility and eases compliance
 - Technical corrections and clarifications
 - Restatements of current IRS position under existing regulations (i.e., warnings to taxpayers of practices that violate Section 409A)
 - Revisions to proposed income inclusion rules (Prop. Treas. Reg. § 1.409A-4)

Delaying & Accelerating Payments

- Under Section 409A, it is permissible for scheduled payments to be delayed under the following circumstances for (1) deferred compensation under Section 409A and (2) amounts otherwise exempt from Section 409A as a short-term deferral:

(1) Payment Timing of Def. Comp.	(2) Short-Term Deferral
Administratively Impracticable	Administratively Impracticable
Jeopardizes service recipient's going concern	Jeopardizes service recipient's going concern
Not deductible under Section 162(m)	Not deductible under Section 162(m)
Violates Federal securities law or other applicable law	Violates Federal securities law or other applicable law

Proposed Regulations add this as a permissible delay for Short-Term Deferrals.

- The Proposed Regulations make limited changes to certain exceptions to the anti-acceleration provisions of Section 409A:

Exception	Prior Rule	New Rule
Foreign Ethics or Conflicts of Interest Law	Only applied to foreign earned income from sources within the foreign country that promulgated the law	Any non-qualified deferred compensation may be accelerated to comply
Federal Debt Collection Law	Limited to \$5,000 per taxable year	No limit if reasonably necessary to comply with debt collection law

Stock-Based Compensation

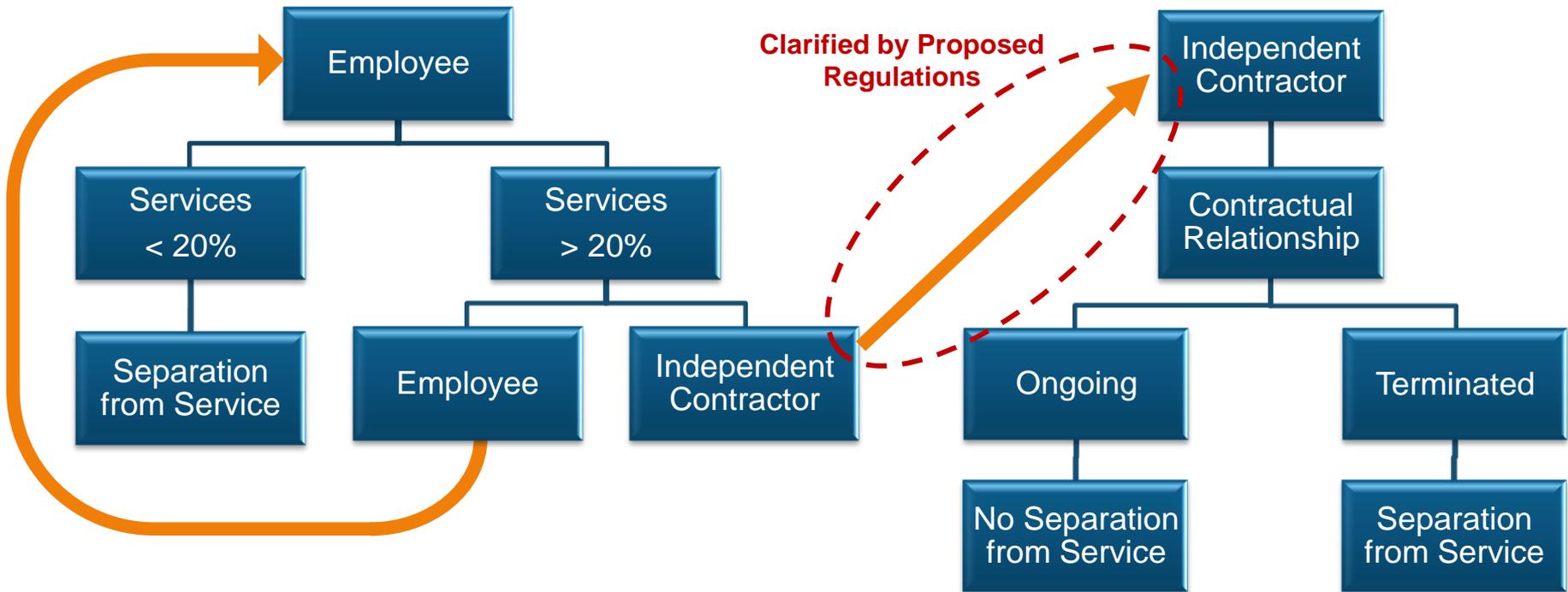


- 📌 The final regulations provide exemptions for certain stock-based awards (i.e., options, stock appreciation rights, etc.), provided certain requirements are met, if the stock underlying such awards qualifies as “service recipient stock.”
- 📌 The Proposed Regulations relax the rules in 2 different respects:

<u>1.</u> Definition of “service recipient stock”	<u>Prior</u> Previously limited to entities for which a service provider is providing services (or upstream entities).	<u>New</u> Now includes stock of any entity (or parent entities) provided the service provider actually commences employment within 12 months of the date of grant or otherwise forfeits the stock.
<u>2.</u> Basis for Determining Stock Price	<u>Prior</u> Previously prohibited stock price to be based on anything other than fair market value.	<u>New</u> Now allows stock price to be based on a measure that is less than fair market value for “bad leavers” (i.e., termination for cause, violating non-compete, etc.)

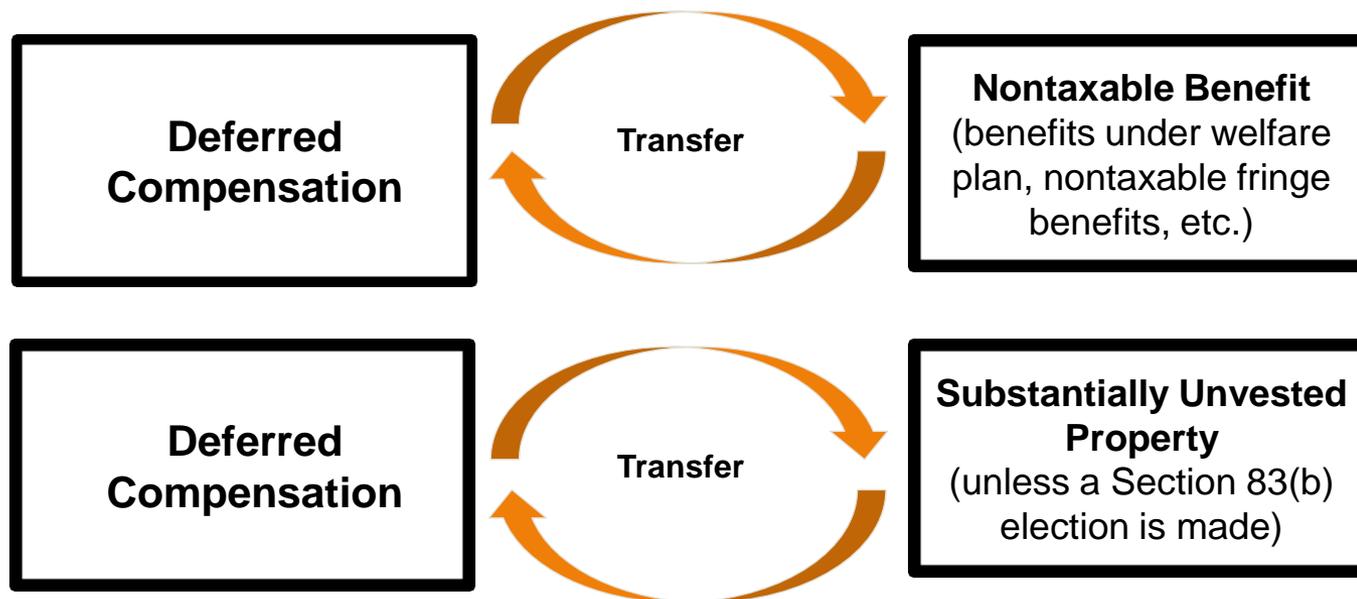
Separation from Service

- ⓘ The Proposed Regulations clarify that where an employee becomes an independent contractor (and services are expected to exceed the 20 percent threshold), any separation from service after such time will be determined based on the rules applicable to independent contractors.



New Payment Timing Rules

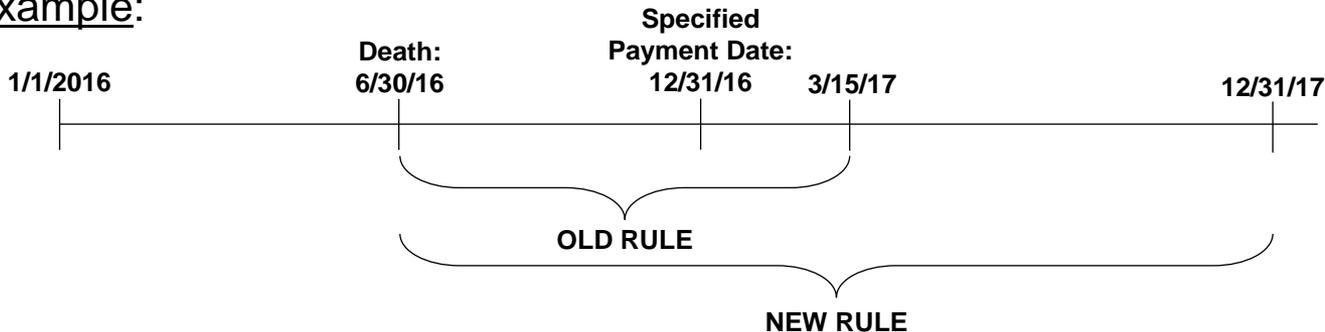
- 🏢 **New General Rule:** a payment is treated as made when any taxable benefit is actually or constructively received.
 - A payment is also made when an amount is included in income under Section 457(f)(1)(A) for all 409A purposes. Before, this only applied for purposes of the short-term deferral rule.
- 🏢 A payment is also made in the following types of transfers:



New Payment Timing Rules

Death Payment Timing

- The Proposed Regulations relax the payment timing requirements for death in recognition of the often time-consuming process of resolving certain issues after death.
- Example:



Permissible Payment Accelerations

- Section 409A permits acceleration of payment upon an intervening death, disability, or unforeseeable emergency as a potentially earlier alternative payment event for an amount previously deferred for:

	Death	Disability	Unforeseeable Emergency
Service Provider (SP)	✓	✓	✓
Beneficiary of SP	✓	✓	✓

Proposed Regulations expanded this exception to beneficiaries of service providers.

Anti-Abuse



- ④ Clarifies and modifies the anti-abuse rule to:
 - Disregard a substantial risk of forfeiture if a plan provision that is not otherwise permitted is changed and it affects the time or form of the payment unless there is a reasonable, good faith basis for concluding that the original provision failed to meet the Section 409A requirements and the change was necessary to bring the plan into compliance.
 - Provide examples of types of facts and circumstances that indicate whether a service recipient has a pattern or practice of permitting impermissible changes in the time or form of payment of nonvested amounts, which would result in the substantial risk of forfeiture being disregarded.
 - Require that if a particular correction method exists under applicable IRS guidance, that correction method must be used if a service recipient chooses to correct that type of a failure for nonvested amounts.

Other Provisions

- ① The Proposed Regulations made a handful other changes to the Section 409A rules as summarizes below:
 - Plan Termination
 - » Reaffirms existing IRS position that if a service recipient terminates a deferred compensation plan and accelerates payments, it must do so for all plans of the same type on an employer-wide basis (not on a participant-by-participant basis).



This problematic for large controlled group. Controlled group entities need to coordinate compliance.

- Separation Pay Exception
 - » Now allows service providers who were hired in the same year of termination to also fall under this exception, even though they do not have compensation in the preceding year. In those circumstances, the service provider's current year annualized compensation is used for applying the limit.

Other Provisions

– Part-Year Compensation Rules:

Provision	Prior Guidance	New Guidance
Part-Year Compensation (particular relevant for educators)	Not deferred compensation if (1) no deferral beyond last day of 13th month following beginning of the service period, and (2) amount deferred from 1 tax year to the next is less than the Section 402(g)(1)(B) in effect for the calendar year in which the service period begins (\$18,000 for 2016).	Modified the limit by providing that recurring part-year compensation (not just the amount deferred) up to the Section 401(a)(17) limit (\$265,000 for 2016) is not deferred compensation.

– Reimbursement of Legal Fees

- » Reimbursement of reasonable legal fees do not constitute a deferral of compensation for resolving bona fide legal claims based on wrongful termination, employment discrimination, the Fair Labor Standards Act, worker's compensation statutes, or **any other issue related to the service relationship**

Expanded by the Proposed Regulations

Clarifications

- ⦿ Section 409A applies separately and in addition to Section 457A (for tax indifferent parties).
- ⦿ Service provider can be an entity as well as an individual.
- ⦿ A deemed asset sale under Section 338 does not qualify as a disposition of assets since it is not a true asset sale where employees experience an actual separation of service. Accordingly, the service provider may not elect whether or not to treat employees affected by the transaction as separated from service.
- ⦿ The special rules around transaction-based compensation also applies to statutory stock options (ISOs) and stock rights that otherwise did not provide for a deferral of compensation.



OVERVIEW OF SECTION 457(F)

Overview



- ④ Section 457 applies to nonqualified deferred compensation plans maintained by state or local governments and tax-exempt entities other than a steeple church.
 - Does apply to nonqualified deferred compensation plans of church-controlled organizations such as church controlled organizations such as church related hospitals, colleges, universities, and nursing homes.

- ④ Section 457(b) applies to “eligible plans” – defined contribution plans that satisfy certain limits, including limits on employee contributions (\$18,000 in 2016).
 - Allows participants to defer tax on compensation until the amounts are paid.
 - If tax-exempt entity employee wishes to defer more than the applicable dollar amount, or the arrangement does not otherwise satisfy Section 457(b), the arrangement is an ineligible deferred compensation plan.

- ④ Section 457(f) plan participants are taxed on deferred compensation when it is vested, i.e., there is a lapse of a substantial risk of forfeiture (“SROF”), regardless of whether any amounts are actually paid at that time.



SECTION 457(F) NEW PROPOSED REGULATIONS

General Provisions



- ⦿ A plan provides for a deferral of compensation if a participant has a legally binding right to compensation that arises in one tax year and is or may be paid in a later tax year.
 - Generally matches up with the Section 409A definition as well.

- ⦿ Taxation Timing
 - Deferred amounts are taxed at the later of when the participant obtains a legally binding right to the compensation or when the substantial risk of forfeiture lapses.
 - Earnings credited on compensation deferred under an ineligible plan after the date on which the compensation is includible in gross income are includible in the gross income of the participant when paid.

- ⦿ Several exclusions exist including a short-term deferral exception:
 - » Same rule as under Section 409A, except substantial risk of forfeiture is defined differently.

Bona-Fide Severance Plan

- ⓘ Bona-Fide Severance Plans do not provide for a deferral. To qualify:
 - Benefits must be paid only upon:
 - » Involuntary severance from employment,
 - » A window program, or
 - » A voluntary early retirement incentive plan.
 - The amount cannot exceed 2 times the participant's annualized compensation.
 - » Based upon annual rate of pay, adjusted for any increase in compensation during the year that was expected to continue indefinitely if participant had not had a severance from employment.
 - Pursuant to written terms of the plan, severance benefits must be paid no later than the last day of 2nd calendar year following the calendar year in which the severance from employment occurs.

These rules are similar to the Section 409A rules for separation pay plans, but do not contain the limit of 2 times the Section 401(a)(17) limit (\$265,000 in 2016), which, in combination with the permissible stacking with the amount of Section 402(g) contributions, equals \$548,000 in 2016.



Involuntary Severance

By Service Recipient (SR) Without Cause

Result of SR's independent exercise of authority to terminate the SP, other than implicit/explicit request of SP, if SP is able to perform services

Facts & Circumstances Test

By Service Provider (SP) for Good Reason

Result of unilateral employer action that caused a material negative change to the relationship

Must be pre-specified in writing; Safe harbor definition is substantially the same as the 409A safe harbor



SECTION 457(F) PROPOSED REGULATIONS

Window & Voluntary Early Retirement Programs

- ④ Window programs are programs established by an employer to provide separation pay in connection with an impending severance from employment.
 - Must be offered for a limited period of time (typically not more than 12 months)
 - » Won't qualify if there is a pattern of repeatedly offering similar programs
 - Must be made available to employees who have a severance from employment during that period under specified circumstances
- ④ The voluntary early retirement incentive windows are only available to governmental entities and certain tax-exempt educational institutions.

These rules are similar to the early retirement windows for tax qualified defined benefit plans.

SECTION 457(F) PROPOSED REGULATIONS

Bona-Fide Death Benefit Plan & Bona-Fide Disability Pay Plans



- The following do not provide for a deferral of compensation:
 - Bona-Fide Death Benefit Plan
 - Bona-Fide Disability Pay Plan
 - » Plan only provides benefits in the event of a participant's disability, which is defined as one of the following:
 - Unable to engage in substantial gainful activity by reason of a medically determinable physical or mental impairment that can be expected to result in death or last for a continuous period of at least 12 months;
 - By reason of any medically determinable physical or mental impairment that can be expected to result in death or last for a continuous period of not less than 12 months, is receiving income replacement benefits for a continuous period of not less than 3 months under an accident or health plan covering the employee; or
 - Determined to be totally disabled by the Social Security Administration or Railroad Retirement Board

Same definition as
under Section 409A

Bona Fide Sick Leave and Vacation Leave Plan

- ④ Primary purpose must be to provide employees with paid time off from work, because of sickness, vacation, or other personal matters.
- ④ Facts and circumstances test. Factors to consider:
 - Whether the amount of leave provided could reasonably be expected to be used by employees in normal course (and before cessation of services).
 - Limits, if any, on the ability to exchange unused accumulated leave for cash or other benefits and other applicable accrual restrictions such as use it or lose it provisions.
 - The amount and frequency of any in-service distributions of cash or other benefits offered in exchange for accumulated and unused leave.
 - Whether the payment of unused sick or vacation leave is made promptly upon severance from employment or instead is paid over a period of time upon severance from employment
 - Whether the sick leave, vacation leave, or combined policy is broadly applicable or is available only to certain employees.

May be an issue for employers with policies that result in significant unused vacation.

Substantial Risk of Forfeiture (SROF) under 457(f)

- Amount is subject to a Substantial Risk of Forfeiture if entitlement to the amount is conditioned on either:

1.

Future performance of substantial services

- No safe harbor either as to duration or amount of services.
- Does not provide for services as needed. This may be problematic even if the services actually performed are substantial.
- Facts and circumstances test based on all relevant facts & circumstances, such as the hours required vs. compensation paid.

2.

Occurrence of a related condition

- Possibility of forfeiture must be substantial.
- The condition must be related to the purpose of the compensation.
- A condition is related to the purpose of the compensation only if the condition relates to the employee's performance of services for the employer, or to the employer's tax exempt activities or organizational goals.

Substantial Risk of Forfeiture (SROF) under 457(f) (Cont'd)



- ⦿ Tax-exempt organization must show that the condition of forfeiture is likely to be enforced.
- ⦿ Factors include:
 - The past practices of the employer;
 - The level of control or influence of the employee with respect to the organization;
 - The individuals who would be responsible for enforcing the forfeiture; and
 - The enforceability of the provision under applicable law.
- ⦿ If the organization is a closely held private foundation, it will be difficult to convince IRS that the condition would actually be enforced.

Non-Compete Provisions

- ⓘ Unlike 409A, which disregards non-competes in determining SROF, non-competes are recognized in limited circumstances in determining when SROF lapses under Section 457(f).
 - Common strategy used prior to issuance of new regulations to defer taxation under 457(f).

- ⓘ 3 conditions must be satisfied:
 1. Must be expressly conditioned on employee refraining from the performance of future services;
 2. Must be included in a written agreement; and
 3. Must be enforceable under applicable law.



Several jurisdictions limit the enforceability of non-competes.

The employer must consistently make reasonable efforts to verify compliance with all of the non-compete agreements to which it is a party (not only non-compete agreement at issue).

Elective Deferrals



- ④ Initial deferrals of current compensation are permitted (salaries, commissions, and certain bonuses) and existing risk of forfeitures may be extended if 4 conditions are satisfied:
 1. The present value of the amount to be paid upon lapse of the SROF must be “materially greater” than the amount the employee would otherwise be paid in the absence of the SROF, or the absence of the extension.
 - Materially greater if the present value of the amount to be paid is $> 125\%$, measured as of the date the amount would have otherwise been paid (or for an extension of the risk of forfeiture, the date that the substantial risk of forfeiture would have lapsed without regard to the extension).
 2. The initial or extended substantial risk of forfeiture must be based upon the future performance of substantial services or adherence to an agreement not to compete (i.e., can't be based solely on a performance goal).
 3. Must require substantial services for at least 2 years.
 4. The addition or extension of a substantial risk of forfeiture must be made in writing before the end of the calendar year in which services are to be performed in the case of initial deferrals, or 90 days before the date a substantial risk of forfeiture would have occurred absent an extension.

Present Value Calculation

- ④ Amounts are includible in income when vested.
 - Include deferred compensation amounts for which the participant has a legally binding right, multiplied by the probability that any condition on which the payment is contingent will be satisfied, and discounted to reflect the time value of money.
- ④ Rules for determining present value are similar to the present value calculation rules under Section 409A, with the most significant difference being timing:
 - » Section 457(f) valuation is done as of the vesting date, and
 - » Section 409A valuation is done as of the end of a plan year.
- ④ If the deferred amount may be paid or available at different times or in different forms under the plan, the amount is treated as payable at the time and form where the present value is highest.
- ④ If payment has commenced, or a time and form of payment have been elected and cannot be changed without the consent of both parties, the time and form of payment as commenced or elected is utilized.
- ④ If a forfeiture occurs after the vesting date, the employee is entitled to a deduction for the amounts permanently forfeited.
 - Generally treated as a miscellaneous itemized deduction and not be subject to “claim of right” doctrine under Section 1341.

Present Value Calculation (cont'd)

Account Balance Plans

- If based on a reasonable interest rate or a predetermined actual investment, the present value is equal to the account balance as of such date.
 - » If a plan's interest rate is not reasonable, the present value is determined by using the principal as of that date, plus the present value of the excess of any earnings to be credited under the plan over the earnings that would have been credited through the projected date using a reasonable rate of interest.
 - If plan does not determine a present value with earnings in this manner, the present value will be the principal plus the excess of any earnings to be credited under the plan through the projected payment date over the earnings that would be credited under the AFR.
 - » If an account balance plan is credited with the greater of 2 or more rates of return, such as a combination of investment and interest rate, the plan is treated as a non-account balance plan for purposes of determining present value.

Present Value Calculation (cont'd)

Non-Account Balance Plans

- The present value is the value, as of that date, of the right to receive payment of the compensation in the future, taking into account the time value of money and the probability that the payment will be made.
- Actuarial assumptions must be reasonable based on the facts & circumstances:
 - » The probability that the payment will not be made for a variety of reasons (unfunded status, employer can't pay, etc.) cannot be taken into account to reduce present value.
 - » The probability that a participant will die before a payment is made is permitted to be taken into account only to the extent that payment is forfeitable upon death.
- If the payment is upon termination of employment, the severance from service date can be treated as a date occurring not later than the 5th anniversary of the vesting date, unless that would be unreasonable.
- If the plan uses a formula amount, such as in a defined benefit plan SERP where final compensation and years of service are not known, the employer must make reasonable good faith assumptions with respect to any contingencies.
 - » Any increase or decrease due to change in facts and circumstances is treated as earnings or losses, respectively.

SECTION 457(F) PROPOSED REGULATIONS

Effective Date of Proposed Regulations

- ⦿ Proposed Regulations will be effective in the calendar year after the final regulations are issued.
 - Unless final regulations are issued this year, the earliest effective date will be January 1, 2018.
- ⦿ Proposed Regulations provide no transitional relief for existing arrangements (Note: IRS awaits comments on whether to include in final regulations).
 - Special effective date rules for collectively bargained agreements.
 - Taxpayers may rely upon Proposed Regulations until the effective date of final regulations.



Beware of potential retroactive effects -- Proposed Regulations will affect compensation deferred in prior years that has not been included in income.

IRS Call for Comment



- ① IRS has solicited comments on:
 - Whether there should be transitional relief for existing arrangements;
 - How single and multiple plans should be defined to prevent manipulation;
 - Whether there should be exceptions to the rules regarding amounts includible in income; and
 - Whether there should be special provisions for newly hired employees.



QUESTIONS?

Example #1

Facts:

- A university professor makes \$240,000 over 10 months (August through May), but the compensation is paid over 12 months.

Does the part-year compensation constitute deferred compensation?

Conclusion:

<u>COMPENSATION ASSUMPTIONS</u>		<u>OLD RULES</u>	<u>NEW RULES</u>
- Annual	\$ 240,000		
- Monthly	\$ 20,000		
- Monthly over 10 Months	\$ 24,000		
Monthly deferral	\$ 4,000	x 5 Months	Annual \$240,000 compensation <
		<u>\$20,000</u>	<u>\$265,000 limit</u>
		X SUBJECT TO 409A	✓ EXEMPT FROM 409A

Example #2

Facts:

- ⓘ On January 20, 2021, a nonprofit employer agrees to pay Employee \$80,000 on January 1, 2024 in exchange for Employee's promise to continue to perform substantial services for the employer until such time.
- ⓘ In 2022, the employer and employee agree to extend the payment until January 1, 2026 on the condition that the employee continues to provide substantial services through that later date.

When does the employee recognize income for purposes of Section 457(f)?

Scenario A: the present value of the 2026 payment equals \$90,000.

Conclusion:

- ⓘ The extension is disregarded (i.e., does not create a new SROF) because the present value of the amended payment (\$90,000) is less than 125% of the original payment (\$80,000).
- ⓘ Employee will recognize income of \$80,000 (the amount not subject to a SROF, disregarding the extension) on January 1, 2024.

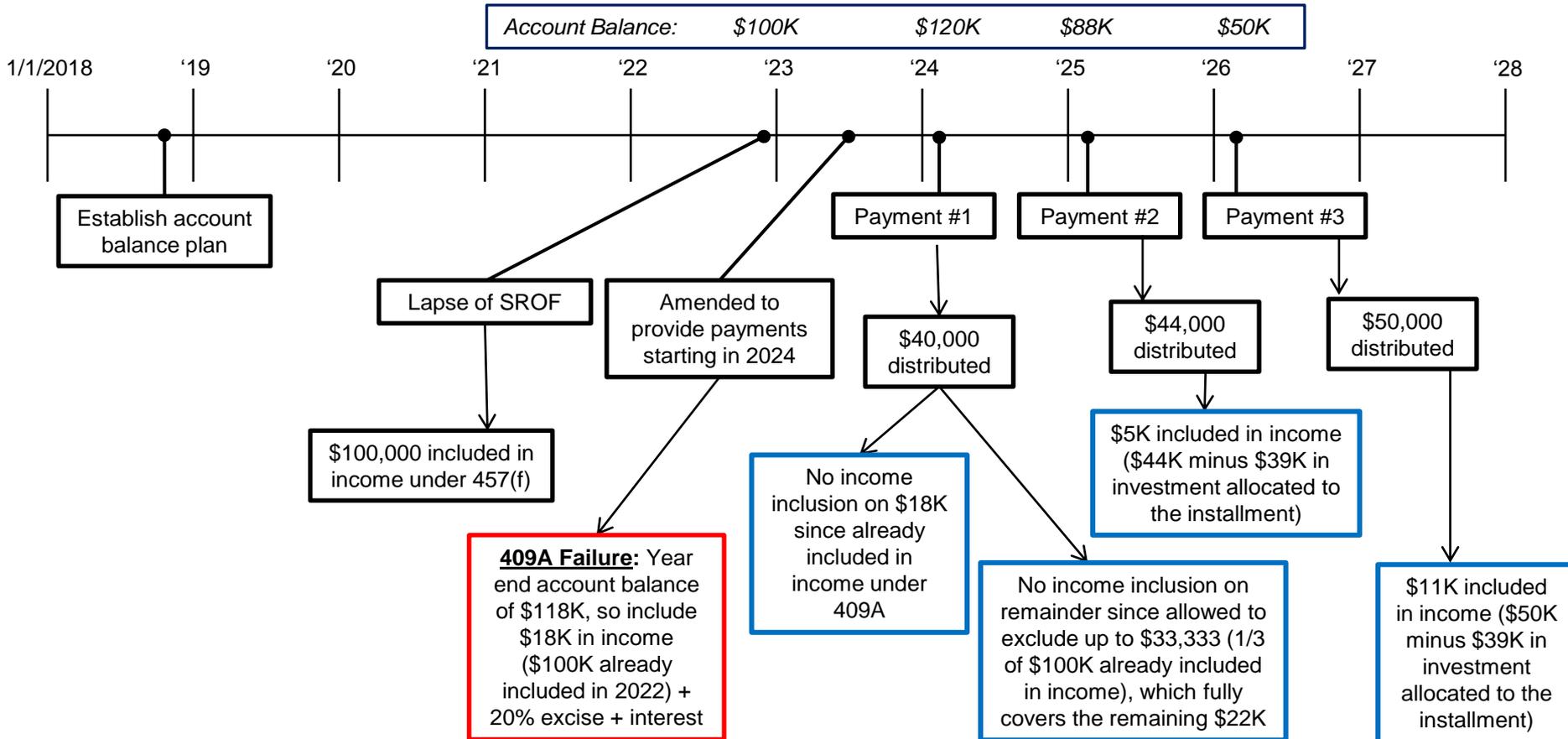
Scenario B: Same facts as Scenario A, except the present value of the 2026 payment equals \$110,000.

Conclusion:

- The amendment extends the SROF because the amended payment (\$110,000) is greater than 125% of the original payment (\$80,000) and all other requirements are satisfied.
- Employee will not recognize income until the SROF lapses on January 1, 2026.

Example #3

An eligible employer establishes an account balance plan subject to Section 457(f) which pays out in 3 annual installments starting in 2024. The SROF lapses in 2022. In 2023, the plan is amended to provide for payments starting in 2024, instead of 2025, which arguably violates Section 409A. The account balance at December 31, 2023 is \$118,000. Assuming the amendment violates Section 409A, the following results obtain:



Example #4



- ⦿ Current Section 409A Regulations provide that there can be an acceleration of a distribution under a 457(f) plan to pay taxes.
 - This regulation was not modified by the Proposed Regulations.
- ⦿ If amounts are taxed when the participant vests and effectively cease to be nonqualified deferred compensation, there should be no need for an exception to the anti-acceleration rules to provide for a distribution to cover taxes.
- ⦿ Comments to the IRS on the Proposed Regulations will ask IRS to clarify this issue.