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Structuring Employee Severance/Separation Arrangements: Revisiting Section 409A and Its Impact on Deferred Compensation

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Structuring Employee Severance Arrangements & Section 409A

Introduction: What is Section 409A?

- History of 409A – the Enron response…. NOT logical, it's a brain workout
- Significantly changes rules concerning nonqualified deferred compensation arrangements - Final regulations issued April 2007
- Extremely broad application
- Mandates timing of deferral/payment elections
  - Initial elections
  - Subsequent elections
- Dictates timing of payments
  - Statute designates permissible payment events
  - General prohibition on acceleration of distributions

Why comply?

- Adverse tax consequences for failure to comply
- Early income inclusion (for current and prior deferrals)
  - Deferrals are taxable unless the compensation is subject to a “substantial risk of forfeiture” or previously included in participant’s gross income
- 20% additional tax on amount required to be included in income
- Penalty interest (underpayment rate plus 1%)
- Tax liability generally imposed on service provider (individual) – generally not on employer (or other “service recipient”)
- However, employer has income tax withholding (but not 20% excise tax portion) and reporting obligations

Who does 409A apply to?

- 409A applies to deferred compensation paid to all service providers, including:
  - Employees
  - Directors
  - Independent contractors
  - Partners
  - Personal service corporations (or similar non-corporate entities)
- 409A applies to public and private companies; only the 6-month delay requirement for certain separation payments to “specified” employees applies only to public companies

Code Section 409A Penalties

1. **Your “dollar” (pre-409A)**

Relevant Tax ("Worst Case")	*Calculation*
Your "Dollar"	$1.00
Less Federal Income Tax at 35%	$0.35
Less State Income Tax at 6%	$0.06
Less 409A Tax at 20%	$0.20
Less 409A Interest Penalty at 4%	$0.04
Less State Imposed Tax at up to 20% (reduced to 5% in CA)	$0.20
Less FICA Tax at 7.65%	$0.08
Remaining "Dollar"	**$0.07**

Nonqualified Deferred Compensation Plans

- Deferral of compensation exists only if under the relevant facts and circumstances participant has a "legally binding right" during a taxable year to compensation that is or may be payable in a later tax year
  - Simple statement but with incredibly broad definition
- Need to identify plans subject to 409A and those that are exempt
- "Legally binding right" ≠ "vested"
  - Can have a legally binding (i.e. contractual) right to compensation that will only be payable to the extent a condition is satisfied (i.e. to the extent it vests)
  - Legally binding right is what triggers 409A analysis

Does 409A apply to all forms of severance?

- Examples of possible deferred compensation arrangements:
  - Voluntary employee-paid deferred compensation (deferrals of salary/bonus)
  - Employer-paid deferred compensation
  - Excess benefit plans
  - SERPs
  - Bonus plans
  - Employment agreements
  - Severance arrangements
  - Change in control agreements
- Fact that a severance arrangement is subject to Section 409A doesn't by itself result in any tax penalties – however, any severance benefits subject to 409A must satisfy its requirements

409A Requirements

- Written plan
- No payments that are triggered by a termination of employment or a separation from service can be made to a “specified” employee of a publicly-traded company until 6 months after termination
- Elections of the form of payment must be made before the year in which compensation is earned
- Employer and employee discretion regarding the time and form of payment is not allowed
- Payments must be triggered by one of the permitted payment events

Permissible Payment Events

- Amounts that are considered deferred compensation may only be distributed on a “permissible payment event”
  - On a specified date or pursuant to a fixed schedule (not a specified event)
  - ***Separation from service***
  - Change in control (as defined in 409A)
  - Unforeseeable emergency (as defined in 409A)
  - Disability (as defined in 409A)
  - Death

What is a “separation from service”?

- Presumption of separation
  - Level of services employee will perform is no more than 20% of the average level of services performed by the employee over the last 36 months = IRS presumes separation
  - If 50% or more = IRS presumes NO separation
  - Between 20% and 50%, no presumption applies
- Facts and circumstances based
- Presumptions are rebuttable by demonstrating that the actual services do not accurately reflect the parties’ reasonable anticipations
- If an employee has been terminated but continues to perform services as a consultant or in another capacity for the employer or any affiliate, the employee may NOT have a separation from service if the level of services is above the threshold level

Cash Severance Pay: Rules for Compliance

- Fixed Form of Payment
  - Must provide how separation pay will be paid: lump sum or salary continuation?
- Non-Acceleration/Redeferral Rules
  - Once entered into, agreement can't be changed as to how the separation will be paid
- Compliant Definition of "Separation from Service"
  - If pay is payable upon a "termination of employment", the termination of employment needs to meet the 409A standard of "separation of service"
- Six-Month Wait for Specified Employees
  - For public companies, specified employees can't receive severance pay that is subject to 409A until they have been separated from service for 6 months

Impact on Substitution

- Separation pay can’t act as a substitute or otherwise alter or replace other compensation subject to 409A
- Any substitution is considered a distribution or redeferral of the deferred compensation and typically violates 409A
- Be careful of offsets working as substitutions
- Example:
  - Employee participates in deferred compensation arrangements that will pay $300,000 in 3 annual installments of $100,000, beginning at the employee’s separation from service, or, if earlier, a change in control. The company fires the employee and negotiates that the $300,000 will instead be paid in a lump sum.

Can we skip this? Exemptions from 409A

Michael Best

Perhaps you needn't comply…. You may be exempt

- There are several ways to exclude arrangements from the scope of 409A compliance (but don't forget 401, 451, 83 and 457A – among others):
  - Per se exclusions - 401(k); other qualified retirement plans; certain foreign plans
  - Factual exclusions - short-term deferrals; "separation pay" exemption; restricted property
  - Definitional exclusions - no legally binding right

What severance arrangements are exempt?

- Some forms of severance are not deemed NQDC for purposes of 409A

- Exemptions:
- **Short term deferrals**
- **The 2x2 exemption (Separation Pay)**
- **Stock rights**

What severance arrangements are exempt?

- Some forms of severance are not deemed NQDC for purposes of 409A

- Exemptions:
- Certain health benefits
- Certain Reimbursements
- Limited payments
- Legal settlements
- Window programs
- Collectively bargained separation pay plans
- Foreign plans

More on the "Key Exemptions" to what is considered deferred compensation subject to Code Section 409A:

- Short Term Deferral Exemption (the "March 15th Rule")
  - To qualify for the short-term deferral exception,
    - the plan/arrangement must, by its terms, be written to require that the compensation be paid no later than 2-1/2 months after the end of the year in which the money is no longer subject to a substantial risk of forfeiture, and
    - the plan must also be administered so that the service provider actually or constructively receives the payment within that 2-1/2 month period.

More on the "Key Exemptions" to what is considered deferred compensation subject to Code Section 409A:

- Short Term Deferral Exemption (the "March 15th Rule") (continued)
  - It is not enough to simply make the payments within the 2-1/2 month period, if the written terms of the plan do not specify any specific payment date in writing, or if the written terms of the plan specify that payment will be made after the 2-1/2 month period.
    - The short-term deferral rule cannot be used for payments that are a substitute for other types of deferred compensation even if the payments are made by March 15.

More on the “Key Exemptions” to what is considered deferred compensation subject to Code Section 409A:

- Short Term Deferral Exemption (the “March 15th Rule”) (continued)
  - Short term deferral needs to be based on substantial risk of forfeiture
    - Bad “Good Reason” means no substantial risk of forfeiture

    - Can you set up a plan to comply with and be exempt from 409A?
      - Set payment timing event by no later than March 15th (e.g., payment will be made on January 1; payment will be made on March 15; payment will be made between January 1 and March 15th)
      - If it fails to be paid then, but is paid in same calendar year…. Then what?

More on the “Key Exemptions” to what is considered deferred compensation subject to Code Section 409A:

- Separation Pay Exemption (the “2x2 Rule”)
  - Separation pay plans providing for payment due to involuntary separation from service, or voluntary participation in a “window” program, are not considered to provide for the deferral of compensation under 409A if
    - The reason for the separation pay is due to an “involuntary termination” or under a window program;
      - Note that certain resignations for "good reason" may be treated as constructive, involuntary terminations provided certain requirements are met. [Note – bad “good reason” definition may negate use of 2x2]
    - The amount of separation pay (other than reimbursements), does not exceed two times the lesser of: (i) The executive’s annual compensation for the preceding calendar year (*not* including benefit plans or compensation resulting from the exercise of stock options, stock awards, or the disposition of the underlying stock); or (ii) The maximum amount of includible compensation permitted by IRS limits that apply to qualified plans (i.e., the 401(a)(17) limit, $285,000 in 2020); AND
    - The payment(s) must be made/completed no later than December 31st of the second calendar year following the year in which the executive separates from service.

More on the “Key Exemptions” to what is considered deferred compensation subject to Code Section 409A:

- Separation Pay Exemption
  - If the agreement permits payment on voluntary termination of employment (other than under a window program), then it does not qualify for the separation pay exemption ***even if*** the employee's actual termination is involuntary.
  - Where possible, severance plans / severance agreements should be designed to conform to these separation pay (2x2) limitations regarding the amount and timing of payments in order to avoid application of 409A.
    - NOTE – to the extent the separation amount exceeds the 2x2 limit, only the excess will be subject to 409A.
    - ALSO – consider if exemptions can be “layered” to remain exempt from 409A (see discussion on following slides)

2x2 v. Separation Pay

- It may not be necessary to rely on the 2x2 rule if the amount qualifies for the STD rule:

- Example: An executive is involuntarily terminated, has no employment agreement/severance agreement mandating severance and is negotiating her separation pay arrangement:
  - The proposed arrangement will provide her a lump-sum payment of severance of $660,000 (i.e., an amount greater than the 2x2 rule permits given the current 401(a)(17) limit).
  - 409A will not apply as long as the terms regarding the time and form of payment of her severance are agreed upon before she signs the agreement and thereby obtains a legally binding right to the payment.

2x2 v. Separation Pay

- It may not be necessary to rely on the 2x2 rule if the amount qualifies for the STD rule; unless we have another controlling contract (creating a LBR):

- Example: An executive is involuntarily terminated, and HAS an employment agreement/severance agreement in place mandating but wants to renegotiate her separation pay arrangement:
  - Since she already has in place a current contractual right to receive severance payment, she **cannot renegotiate** the timing of severance payments after she has been terminated, because it is the event of her termination of employment (separation from service) that gives rise to her legally binding right to the payment.
  - Any such change is likely to be an impermissible acceleration of payment…

2x2 AND Separation Pay ("Layering")

- It's possible to design an arrangement that takes advantage of BOTH exemptions
  - Consider an individualized separation pay agreement that exceeds the amount limitations of the 2x2 safe harbor described above…. And how it may still qualify as being exempt from the application of 409A if the amounts payable within the short-term deferral is disregarded (and removed from the calculation).
  - EXAMPLE: If the severance pay is to be paid in installments and the agreement provides that each installment is a separate payment for Section 409A purposes, then the short-term deferral rule can apply to the installments paid by March 15 and the 2x compensation limit only applies to the post-March 15th severance pay amounts. Note, the timing rule does not change.
    - REMEMBER – the "separate payment" language needs to be included in the document – otherwise, a series of payments/stream of payments is treated as single payment.

2x2 AND Separation Pay (“Layering”)

- What does layering get you?
  - Likely an “out” of the 6-month delay
    - Almost certainly, but using one or both of the STD and 2x2 rule for a public company, the required 6 months will have expired, so no further delay is required.
  - Ability to change payment schedule?
  - Note, however, any amount that is not exempt it is still subject to Section 409A and no change in the payment schedule can be made.

More on the “Key Exemptions” to what is considered deferred compensation subject to Code Section 409A:

- Stock Rights (generally options and SARs – also restricted stock)
  - A stock right to purchase “service recipient” (generally up and down the chain) common stock is exempt from 409A if:
    - the exercise price of the option or base price for the SAR equals or exceeds fair market value (FMV) of the underlying stock on the date of grant;
    - the stock right has no other feature for the deferral of compensation beyond the exercise date; and
    - with respect to SARs, the amount payable under the SAR is not greater than the difference between FMV of the underlying stock on the date of grant and FMV on the date of exercise
  - Incentive Stock Options (ISOs) are not subject to Section 409A if they meet the requirements above, but note:
    - The subsequent modification of an ISO (by, for example, amending it to extend the period within which it can be exercised after termination of employment) or failure to comply with the minimum ISO share holding requirements may cause it to become a nonstatutory option subject to 409A

What if my Stock Right is NOT 409A Exempt?

- Stock rights that do not qualify for the 409A exemption (either initially or on modification) must comply with 409A (which is almost impossible given the timing of exercise/payment feature)...
  - For example, exercise must be limited to one of the specified 409A events (or the first to occur of such events), including separation from service, disability, death, a time or fixed schedule, a change in control, or an unforeseeable emergency.

- A 409A-subject stock right that violates 409A is subject to:
  - Immediate taxation for the stock right recipient upon vesting instead of at exercise (or later); and
  - 20% additional tax.

Michael Best

More on the "Key Exemptions" to what is considered deferred compensation subject to Code Section 409A:

Probably 409A	Probably Not 409A
Stock Option (Below FMV)	Stock Option (FMV)
Promise to Transfer Stock	Restricted Stock
Deferred Compensation Plan	Profits Interest
SERP	Capital Interest
	RSUs
	Bonus Plan
	SAR

Stock Rights Extensions and Accelerations

- The vesting or exercisability of options and SARs may generally be either accelerated or extended to not later than the original expiration date or ten years from the grant date.
  - Extension or acceleration of an option or SAR that was not originally subject to Section 409A does not make it subject to Section 409A – but focus on in/out of money status and corresponding treatment.
- It is common for an employer to agree to accelerate the vesting of stock options and/or to extend the period after termination of employment in which the employee may exercise such options in an executive severance situation.
  - Check the terms of the governing equity award agreement, employment or separation agreement, change-in-control agreement/plan, etc. Review all governing documents/provisions to ensure that they work in coordination with any existing documents governing the grants, both as a general matter and specifically for purposes of compliance with Section 409A or eligibility for an exemption.
  - Again, the Section 409A rules expressly permit the accelerated vesting of option awards.

Other Equity Based Compensation

- RSUs and Phantom Shares (among other awards) are generally subject to 409A (absent compliance with the STD rule)
  - In this case, be very careful with acceleration of vesting – for example, a change in the vesting date may be significant if the vesting date is important for eligibility for short-term deferral treatment.
  - Remember, accelerated payment (as opposed to vesting) is generally NOT allowed without triggering a 409A violation.

Change in Control Severance Arrangements

- 409A regulations contain a CIC definition that may be different from the definition used in a company's other compensation plans
  - Does not cover exactly the same things as standard definitions
- CIC Definition:
  - Purchase of 50% of the company's stock measured by value or voting power
  - Purchase within one year of stock of at least 30% of the voting power; a higher percentage can be set but the agreement can't distinguish between different blocks of stock
  - Change in a majority of board membership over a one-year period
  - Transfer of at least 40% of gross value of assets (a higher percentage can be set in the agreement) to an unrelated party

Importance of “good reason” definition

- For Section 409A, the key question is whether “good reason” terminations are voluntary or involuntary terminations
- Resignation for "good reason" qualifies as involuntary termination only if the definition of good reason specified in the agreement meets either:
  - the Section 409A general definition or
  - the safe harbor definition
- General definition is a "material negative change" in the employment relationship and factors such as notice the employee must give and whether the severance is the same as for an involuntary termination

Safe harbor “good reason” definition

- Separation from service must occur within 2 years after initial existence of one or more of the following conditions arising without the consent of the employee:
  - Material diminution in base compensation;
  - Material diminution in authority, duties or responsibilities
  - Material diminution in authority, duties or responsibilities of the supervisor to whom the employee reports, including a requirement of not reporting to the board; or
  - Material diminution in the budget over which the employee has authority
  - Material change in the geographic location where the employee must work
  - Any other action or inaction by the employer constituting a material breach of the employment agreement or arrangement
- Amount, time and form of payment must be substantially identical to payment made on actual involuntary separation from service
- Employee must give notice within 90 days of the condition and employer must have 30 days to cure the condition

Safe harbor definition (continued)

- Good reason definitions that are LESS restrictive than safe harbor may be deemed involuntary separations from service
- Many employment agreements use good reason standards that fall short of the safe harbor
  - For example: including decrease in bonus opportunity as part of “good reason”
  - Having lower standard does not mean it is not an involuntary treatment; parties are accepting element of risk if IRS examines the arrangement

IRS Scrutiny of Non-Safe Harbor Definition

- IRS will scrutinize non-safe harbor definition based on the following:
  - Does the good reason standard or the employee's actions under the standard suggest the purpose of circumventing Section 409A?
  - Does the good reason condition require the employer to take an action that results in a material negative change in the employment relationship?
  - Is the good reason separation pay the same as the separation pay payable upon an actual involuntary separation from service?
  - Is the employee required to give the employer notice of the good reason condition and a reasonable opportunity to cure?

409A and Releases

- TWO MOST IMPORTANT POINTS:

  - A requirement that an employee sign a release in order to receive a benefit does not create a substantial risk of forfeiture; this means that payments that are otherwise vested but subject to the execution and delivery of a release should not be treated as unvested.
    - Important for purposes of a STD analysis.
  - Severance that is subject to 409A can be conditioned upon the receipt of a release but the timing of the payment cannot be based upon when the employee provides the release.

409A and Releases

- Background
  - In general, Section 409A-subject arrangements can provide for payments to be made on a specified date or during a designated period that occurs after the payment event.
  - If a payment period is used, it is limited to a period not to exceed 90 days, unless the entire period falls within a single calendar year.
  - Note that in the case when a payment period can cross into a new calendar year (e.g., the period for considering a release), then the employee may not have any discretion to determine whether payments will occur before or after the new year.

- Starting plan – is any of the severance compensation subject to 409A?

409A and Releases

- If so, then caution should be taken when drafting provisions for releases to ensure that the payment timing with respect to the provision of the release complies with 409A.
  - When there is NQDC (not all exempt comp) then the agreement must specify window for execution of release if severance commencement is contingent on such release; avoids service provider indirectly choosing tax year of payments.
  - Must specify when severance begins and must be within objectively determinable year.
- **Remember to coordinate with payroll department.**

409A and Releases

- *Example of Noncompliant Language*: "The severance described in Section X shall be payable to Employee pursuant to the Company's normal payroll practices, commencing following Employee's delivery of an executed release of claims in favor of the Company."

- *Example of Compliant Language*: "Payment of the severance described in Section X shall commence on the [60th] day following Employee's termination of employment, subject to a release of claims in favor of the Company, provided such release is executed, delivered and no longer subject to revocation, as applicable, within [60 days] following such termination of employment."
  - Alternative if delay is impracticable (want to start payments ASAP) – Severance shall commence within the [90-day] window following termination of employment, provided if such [90-day] period straddles two calendar years, payment will commence during the second calendar year.

Best Practices for Navigating 409A

- Starting Place:
  - Know where you're starting from? What agreements are in place? For example:
    - Severance plan / policy / practice
    - Employment agreement
    - Bonus plan
    - Deferred compensation plan
    - Insurance benefits
    - Restrictive covenant agreement
  - What is being negotiated?
    - Something "more" / "different" than what is owed under terms of incumbent agreements?

Best Practices for Navigating 409A

- One size doesn't fit all
- Whenever possible, try to fit within an exemption from 409A
  - Check definitions against the Treas. Regs.
  - Use safe harbors when possible
- Include "separate installment" language
- Beware of substitutions
- Think through acceleration of vesting on award and settlement/payment
- Watch out for 409A "Pay me later" concerns (in addition to wage payment laws)
- Carefully vet ability to change time or form of payment
- Defer to other plan documents/arrangements?
- Consult an expert

Best Practices for Navigating 409A

- Be particularly careful of:
  - Changing time / form of payments set in other document
  - Deferring payments into a new tax year
  - Continuing health insurance (not on COBRA) after a termination
  - Delaying payments or commencement of (e.g., severance) until a release is signed
  - Requiring release to start payment – and timing issues (including possible voluntary deferral into next tax year)

Best Practices for Navigating 409A

- Don’t forget other laws – e.g., ERISA
- Are benefits due / being payable from an “ERISA plan”? Starting place, does the arrangement have a written plan document?
  - If not – does the employer have regular practice of paying severance, particularly where such payments are subject to internal policies or procedures designed to maintain consistency or to limit the discretion of human resources personnel
  - If yes – is it always a one-time lump sum? I.e., is there an ongoing administrative scheme?
- It is possible (maybe even common) to create an “accidental” ERISA plan
  - Even if an ERISA plan isn’t intended, an employer could create one by having a regular practice of paying severance, particularly where such payments are subject to internal policies or procedures designed to maintain consistency or to limit the discretion of human resources personnel

A touch more on ERISA, please

- Need a written plan document… that includes (among other things)
  - Benefits to be provided
    - NOTE – generally can provide maximum discretion to pay severance payments in different amounts to different participants.
  - Claims procedures (some rigor here)
  - State law application (to the extent not preempted)
  - “Artificial” statute of limitations
  - Venue selection

Non-409A Severance “Grab Bag”

- Pension and 401(k)
  - NOT subject to 409A
  - BUT - We also can’t really negotiate here
    - Plan document controls above all else…
    - Be particularly careful on what separation agreement says v. retirement plan document
      - Best to defer to retirement plan document
  - Be aware of impact of “entire agreement” and integration clauses

Non-409A Severance “Grab Bag”

- Maximizing Deferral of tax liability – don’t look to 401(k)
  - When an employee terminates and the employer continues severance payments for a period of time after they leave, can the employer continue withholding 401(k) contributions from their severance pay?
    - No – not from severance
  - Employees are never allowed to defer from true severance pay, and companies should not count it when determining matching and/or profit sharing contributions.
  - However, there may be other forms of compensation paid during the severance period that are counted for retirement plan purposes – the starting place – the plan document

Health Plan Considerations – the basics

- 409A contains exemptions for certain expense reimbursements and in-kind benefits, for example: reimbursements for medical expenses allowable as a deduction under Section 213 (disregarding the 7.5% threshold) incurred during the period in which the employee **would be entitled to COBRA continuation coverage under a group health plan (i.e., Not longer than COBRA period)**
  - Is terminating employee covered under employer plan?
  - If so, will COBRA be offered?
    - COBRA generally applies to employers with at least 20 employees
    - Generally mandates allowing an election to continue coverage (as elected before termination/loss of coverage event)
    - Law provides that employee (QB) pays entire premium (plus possible 2% administrative fee)
  - Does company allow / can it allow continuation of coverage as an active (v. as a COBRA covered) individual?
    - Beware of inadvertently extending coverage and COBRA rights (i.e., COBRA should run concurrently with any severance subsidy, not consecutively)
  - Subsidizing COBRA?
    - More cash may be simpler

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