



FOLEY & LARDNER LLP

■ JUNE 5, 2007

Legal News Alert: Employee Benefits is part of our ongoing commitment to providing up-to-the minute information about pressing concerns or industry issues affecting our clients and our colleagues.

If you have any questions about this alert or would like to discuss these topics further, please contact your Foley attorney or any of the following individuals:

**Katherine L. Aizawa**  
San Francisco, California  
415.438.6483  
kaizawa@foley.com

**Christopher S. Berry**  
Madison, Wisconsin  
608.258.4230  
cberry@foley.com

**Lloyd J. Dickinson**  
Milwaukee, Wisconsin  
414.297.5821  
lj Dickinson@foley.com

**Gregg H. Dooge**  
Milwaukee, Wisconsin  
414.297.5805  
gdooge@foley.com

**Carl D. Fortner**  
Milwaukee, Wisconsin  
414.297.5739  
cfortner@foley.com

**Robert E. Goldstein**  
San Diego, California  
858.847.6710  
rgoldstein@foley.com

**Samuel F. Hoffman**  
San Diego, California  
619.234.6655  
shoffman@foley.com

**Sarah B. Krause**  
Milwaukee, Wisconsin  
414.319.7340  
skrause@foley.com

**Harvey A. Kurtz**  
Milwaukee, Wisconsin  
414.297.5819  
hkurtz@foley.com

**Belinda S. Morgan**  
Chicago, Illinois  
312.832.4562  
bmorgan@foley.com

**Isaac J. Morris**  
Milwaukee, Wisconsin  
414.297.4973  
Imorris@foley.com

**Greg W. Renz**  
Milwaukee, Wisconsin  
414.297.5806  
grenz@foley.com

**Leigh C. Riley**  
Milwaukee, Wisconsin  
414.297.5846  
lriley@foley.com

**Timothy L. Voigtman**  
Milwaukee, Wisconsin  
414.297.5677  
tvoigtman@foley.com

**Michael H. Woolever**  
Chicago, Illinois  
312.832.4594  
mwoolever@foley.com

Thank you.

Michael H. Woolever  
Managing Editor

## Act Now! Protect Your Key Executives From Additional Taxes and Penalties

### A Need for Prompt Action

All plans, programs, arrangements and individual agreements (plans) that are subject to Section 409A of the Code must be brought into technical documentary compliance with the requirements of Section 409A **no later than December 31, 2007**. In addition, transition rules adopted by the Internal Revenue Service (IRS) that allow for the amendment, restructuring or termination of plans that violate Section 409A without penalty also expire at the end of 2007.

Employers are encouraged to start now to identify their plans that are subject to Section 409A and to begin the process of bringing such plans into full compliance.

Merely adding savings clauses and other language expressing an intent to comply is not sufficient. Plans must be carefully reviewed to identify and amend or delete provisions that violate Section 409A and to incorporate all provisions required by Section 409A.

The task facing all employers is great. In some cases, formal board approval of the necessary changes will be required. Any delay merely increases the risk to your key executives.

### Consequences of Not Acting

Failure to modify plans that are subject to Section 409A to bring them into full documentary compliance by this deadline will result in your executives being taxed in 2008 on previously deferred compensation amounts. In addition, your executives will be subject to a special, additional tax of 20 percent of the amount of the deferred compensation, and interest charges from January 2005 or the date of the original deferral, if later. This acceleration of tax liability and added taxes will result even if your executives do not directly benefit from the offending provisions in your existing plans.

### Plans That Are Affected

The scope of Section 409A is very broad. It may apply to traditional elective deferred compensation plans, supplemental retirement benefit plans, change in control plans, severance plans and severance provisions in employment agreements, stock options and other equity

## ABOUT FOLEY

The Employee Benefits attorneys of Foley & Lardner LLP counsel employers on employee benefits and executive compensation matters to reduce exposure to employee complaints, governmental agency actions, and union-related problems. We counsel on health, dental, disability, life insurance, severance, cafeteria, and flexible benefits plans. Our counsel also extends to Medicare and Social Security benefits, COBRA compliance, and post-retirement benefits issues. We also advise clients in resolving benefits issues arising in mergers and acquisitions. We work closely with Foley trial lawyers who represent corporations and their benefit plans in litigation involving employment benefits and other obligations under ERISA.

## Foley.com

*Foley & Lardner LLP Legal News Alert: Employee Benefits is intended to provide information (not advice) about important new legislation or legal developments. The great number of legal developments does not permit the issuing of an update for each one, nor does it allow the issuing of a follow-up on all subsequent developments.*

*If you do not want to receive further Legal News Alert bulletins, please e-mail [info@foley.com](mailto:info@foley.com) or contact Marketing at Foley & Lardner LLP, 321 N. Clark Street, Suite 2800, Chicago, IL 60610 or 312.832.4500.*

awards. Any plan that provides for the payment of compensation in a year other than the year in which the services that give rise to the compensation were performed is potentially subject to Section 409A.

### Some Key Areas of Concern

Following is a list of plans (or specific plan provisions) that are likely to require amendment to avoid violating Section 409A. This list is not intended to be comprehensive. All plans that involve the potential deferral of compensation should be evaluated in light of Section 409A.

- **Employment Agreements.** Most, if not all, employment agreements providing severance benefits will need to be amended prior to the end of 2007 to incorporate certain Section 409A definitions and other provisions.
- **Equity Plans.** Grant agreements involving below market options and Stock Appreciation Rights (SARS) will need to be amended to reset the strike price or to bring the terms of the grant into compliance with Section 409A. Non-public companies also will want to review whether to continue to use options in light of the rules governing determination of fair market value under Section 409A.
- **Change in Control Agreements.** Plans that provide for payments triggered by a change in control with respect to the employer will need to be reviewed to insure that the change in control definition complies with Section 409A.
- **Supplemental Executive Retirement Plans (SERPS) Tied to Qualified Plans.** Separate benefit election

provisions will need to be incorporated into SERPS that “wrap around” qualified retirement plans.

- **Employer Discretion/Executive Elections.** Any provision that gives the employer or an executive ongoing discretion in determining when deferred compensation is paid will need to be eliminated.
- **Foreign Plans.** To the extent that U.S. citizens or resident aliens participate in plans outside the United States, such plans will need to be reviewed for Section 409A compliance.
- **Not-for-Profit (NFP) Employers.** NFP Employers will need to consider the ramifications of Section 409A on existing deferred compensation arrangements. In a number of areas, compliance with both Section 409A and 457 will need to be coordinated.

Foley's Estates & Trusts attorneys are prepared to assist you in bringing your plans into compliance with the requirements of Section 409A in order to protect your executives from unnecessary taxes. If you would like assistance in dealing with these new rules and requirements, please contact your Foley attorney.