

Legal News Alert is part of our ongoing commitment to providing legal insight to our employee benefits clients and colleagues. If you have any questions about or would like to discuss these topics further, please contact your Foley attorney or any of the following individuals:

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Extended Section 409A Relief for Nonqualified Deferred Compensation Plans

On October 22, 2007, the Internal Revenue Service (IRS) issued Notice 2007-86 providing extended transitional relief for compliance by nonqualified deferred compensation plans with the requirements of Internal Revenue Code Section 409A (Code Section 409A). Code Section 409A was originally adopted in October 2004, but it was not until April 2007 that final regulations were issued, with a stated compliance deadline of December 31, 2007. In early September 2007, the IRS granted partial relief, extending the general documentation deadline until December 31, 2008, but still requiring many decisions to be made no later than December 31, 2007. Notice 2007-86 generally pushes the stated compliance deadline back to December 31, 2008. The final regulations will now become effective January 1, 2009.

Consistent with the framework of the prior transition rules, plans will be permitted to give participants the ability to change the time and/or form of benefit payment as late as December 31, 2008 with the caveat that, for such election changes made in 2008, payments otherwise required to be paid in 2008 cannot be deferred past 2008, and payments otherwise required to be paid after 2008 cannot be accelerated into 2008. Any such 2008 election may supersede a permitted change made earlier. For instance, an election made in 2007 could alter the time and/or form of benefit payments, except that payments otherwise required to be paid in 2007 cannot be deferred past 2007, and payments otherwise required to be paid after 2007 cannot be accelerated into 2007. In addition, consistent with the transition rule in Notice 2006-79 for "linked plans," nonqualified deferred compensation plans may continue to be "linked" to elections under qualified plans until December 31, 2008.

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The extension also gives employers the ability to offer deferral elections during the remainder of 2007 for bonus payments that will be made in 2008 based upon 2007 service. Generally, under Code Section 409A, irrevocable elections had to be made, in most cases, prior to the beginning of 2007, but the transition rule gives this added opportunity.

Other than the special transitional rules, good-faith compliance with the statutory requirements of Code Section 409A continues to be required through December 31, 2008.

Internal Revenue Service regulations generally require that, for purposes of avoiding United States federal tax penalties, a taxpayer may only rely on formal written opinions meeting specific requirements described in those regulations. This newsletter does not meet those requirements. To the extent this newsletter contains written information relating to United States federal tax issues, the written information is not intended or written to be used, and a taxpayer cannot use it, for the purpose of avoiding United States federal tax penalties, and it was not written to support the promotion or marketing of any transaction or matter discussed in the newsletter