

# Section 409A Cheat Sheet

## What Does Section 409A Cover?

Section 409A of the Internal Revenue Code regulates any employment plan that provides for the “deferral of compensation”

## When Does a Plan Provide for “Deferral of Compensation”?

When a participant has a legally binding right to compensation that is or may be payable in a later tax year

## What Kinds of Deferrals Are There?

- Elective: made at the election of the participant through salary reduction
- Non-elective: contributions made by the employer without any salary reduction

## What Are the Requirements for a 409A-compliant Plan?

- Must be in writing
- Must provide that deferred compensation may not be distributed to a participant earlier than:
  - Separation from employment
  - Disability
  - Death
  - A time specified under the plan at the date of the deferral
  - A change in the ownership or effective control of the business OR
  - The occurrence of an unforeseeable emergency
- In the case of any “specified employee” (generally the top 50 paid officers), distributions on account of service may not be made earlier than 6 months post-separation
- In general, compensation for services performed in a taxable year may be deferred at a participant’s election only if the election to defer is made no later than the close of the preceding taxable year

- If a participant can make a subsequent election to delay payment:
  - The election may not take effect until at least 12 months after the date of election
  - If the election relates to a payment that is not made due to disability, death or unforeseen emergency, the payment must be deferred for a period of not less than 5 years from the date the payment would have otherwise been made
  - Any election related to a payment as of a specified time or pursuant to a fixed schedule may not be made less than 12 months prior to the date of the first scheduled payment

## Top Section 409A Tips

- Section 409A applies to any agreement that provides for the deferral of compensation, even if it is between the employer and only one participant
- Acceleration of the time or schedule of any payment under the plan is not permitted unless specifically authorized by federal regulations
- Noncompliance has no direct adverse effect on employers; however, participants may be subject to tax penalties