



IRS Issues Guidance on Section 409A Reporting and Withholding for 2008

The IRS has issued Notice 2008-115, which provides interim guidance on reporting and wage withholding requirements for deferred amounts includible in income for calendar year 2008 due to violations of Section 409A. Importantly, the guidance continues to relieve employers and payers of their annual obligation to report total amounts of deferred compensation where no violations of Section 409A rules have occurred, and the guidance will remain in effect until the IRS issues further guidance.

Background

Section 409A of the Internal Revenue Code governs the tax treatment of various nonqualified deferred compensation arrangements. Section 409A requires employers or payers to report all deferral amounts for the year under a nonqualified deferred compensation plan on a Form W-2 or Form 1099-MISC, regardless of whether such deferred compensation is includible in gross income under Section 409A. Deferred compensation amounts includible in gross income under Section 409A are treated as wages for income tax withholding purposes.

Since 2005, the IRS has issued notices each year suspending employers' and payers' obligations to report deferred compensation amounts subject to Section 409A that do not result in income inclusion and providing guidance on reporting and withholding on deferred compensation includible in income under Section 409A.

Notice 2008-115

In its latest [notice](#), the IRS provides guidance on reporting and withholding for calendar year 2008, which will remain in effect for subsequent years until the IRS issues further guidance. It does not expect to issue further guidance until [proposed regulations](#) issued on December 8 addressing the calculation of amounts includible in income and the additional taxes under Section 409A are finalized. Guidance on the correction of operational failures was issued separately in [Notice 2008-113](#).

Relief from Reporting Section 409A Deferred Amounts

Notice 2008-115 continues to relieve employers and payers from having to report total amounts deferred in a year under Section 409A to employees in box 12 of Form W-2 using code Y or to nonemployees in box 15a of Form 1099-MISC. Further, the IRS indicates that this annual reporting will not be required before the calendar year beginning after the income inclusion regulations are made final.

The IRS states that Notice 2008-115 does not affect FICA taxation and withholding obligations under Section 3121(v)(2) and related regulations.

Reporting and Withholding Under Non-Compliant Section 409A Arrangements

If employers must include their employees' deferred amounts in gross income in 2008 as a result of Section 409A violations, they must treat these amounts as wages and report them on line 2 of Form 941 and box 1 of Form W-2. They must also be reported as Section 409A income in box 12 of Form W-2 using code Z. Amounts includible in income are treated as supplemental wages for purpose of determining the amount of tax to be withheld, regardless of whether the employer paid any other wages to the employee during the calendar year. Further, the amount required to be withheld is not increased as a result of additional income taxes imposed under Section 409(a)(1)(B).

For independent contractors or other nonemployees, amounts includible in income for 2008 must be reported as nonemployee compensation in box 7 of Form 1099-MISC and as Section 409A income in box 15b of Form 1099-MISC.

Calculation of Amounts

The guidance in earlier notices on how to calculate the wage payment dates and amounts is generally retained. For amounts set aside in an offshore trust, the IRS notes that earlier transition guidance had expired and that nothing in the notice is intended to modify or extend it. However, employers must make a reasonable good faith effort to determine amounts includible.

The IRS notes that compliance with the recently proposed regulations will be deemed compliance with Notice 2008-115.

Conclusion

Although somewhat late, this guidance is welcome as many employers were struggling over how to report annual 409A-compliant deferrals. It is particularly welcome that the IRS has now delayed this reporting requirement indefinitely – i.e., until after final regulations are issued.

Buck's consultants are available to help affected employers comply with the Section 409A withholding and reporting requirements.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.