

IRS PROVIDES GUIDANCE – AND A NEW DEADLINE – TO COMPLY WITH SECTION 409A DEFERRED COMPENSATION PLAN REQUIREMENTS

ROBERT BRANT AND
STEVE KISLING



Section 409A of the Internal Revenue Code, enacted several years ago, imposes complex rules governing plans/arrangements that provide deferred compensation. Recently, the IRS issued guidance that would allow for the correction of noncompliant deferred compensation documents before December 31, 2010, with generally no adverse tax consequences for the employee.

The definition of “deferred compensation” is very broad and can include not only traditional deferred compensation plans, but also other arrangements such as employment agreements, stock options, severance payments and split-dollar insurance plans. If the deferred compensation is subject to 409A but does not comply with all the applicable rules, there can be adverse tax consequences to the employee/service provider in the form of accelerated income taxes and an additional tax of 20% (which is in addition to regular income tax owed on the deferred compensation), plus potential significant interest charges on these taxes.

The guidance from the IRS permits deferred compensation documents that do not comply with 409A to be corrected by December 31, 2010. If the changes are made by that date, there will generally be no tax consequences to the employee, although such consequences may arise if the plan in operation has failed to comply with 409A. The following is a summary of the more important items addressed in the IRS guidance:

Examples of Correctable Document Failures:

1. Payments Contingent on Execution of Employee Releases/Non-Competes

One of the general requirements under Section 409A is that payments must be made pursuant to a specified payment date. As a result, for example, a severance agreement that is subject to 409A is not in compliance if it provides that severance payments become payable only when the employee executes a release of claims and/or a non-compete/non-solicitation agreement, because that is not considered a specified payment date.

The IRS guidance permits such an arrangement to be amended to comply with 409A. The necessary amendment depends on the wording in the current severance agreement. In some cases, the agreement can be amended to provide that the severance payment will be made on the 90th day following the employee’s separation of service, provided that the employee has executed the release/non-compete.

2. Impermissible Payment Events and Payment Schedules

The IRS guidance permits plans to be amended to correct failures resulting from (a) impermissible payment events, (b) impermissible alternative payment schedules, (c) impermissible discretion with respect to a payment schedule following a permissible payment event and (d) impermissible employer discretion to accelerate payments.

3. Definitional Failures

The IRS guidance provides that a document can be amended if certain definitions contained in the plan do not comply with 409A, such as “separation of service,” “change in control” and “disability.”

4. Ambiguous Plan Terms

The IRS guidance permits plan documents to be changed to correct certain ambiguities, such as the events that trigger payment of the deferred compensation (409A provides that deferred compensation can be paid only upon certain specified events).

Information and Reporting Requirements:

The IRS guidance generally requires compliance with certain notice and reporting requirements for these document corrections. These requirements apply even if the plan is amended on or before the December 31, 2010, deadline described above.

The employer is required to attach a statement containing certain information to its federal income tax return for (a) the taxable year in which a correction is made, and (b) in some cases, the subsequent taxable year. The employer may also have to provide a statement to each affected employee. The employee is also subject to certain reporting requirements.

Recommended Action:

Documents were generally required to be amended to comply with 409A by December 31, 2008. Because of the relief afforded under the IRS guidance (especially if corrective action is taken by December 31, 2010), all plans/arrangements subject to 409A that have not been previously reviewed and amended should be reviewed now to determine whether any corrective amendments are needed.

NEW FEDERAL LIMITATIONS ON BUSINESS GIFT CARDS AND GIFT CERTIFICATES | DUSTIN THACKER



Businesses that sell gift cards or gift certificates should be aware of a recently enacted federal law generally known as the CARD Act. The CARD Act, which took effect on August 22, 2010, imposes significant restrictions on the terms and conditions

that a business can use on its gift cards or gift certificates. The central provisions of the CARD Act are those that deal with service fees, card expiration dates and disclosures.

Fees. Service fees (including balance inquiry, usage fees, dormancy fees and ATM fees) are prohibited unless: (a) there has been no activity on the card for the previous year, (b) only one fee per calendar month is assessed and (c) the fees are conspicuously disclosed on the card.

Expiration. No expiration date is permitted on a gift card unless there are “policies and procedures in place that provide consumers with a reasonable opportunity to purchase a card that has an expiration date that is at least five years from the date of purchase.”

Disclosures. In addition to specific disclosures regarding fees and expiration dates, the CARD Act requires disclosure on the card itself of a toll-free telephone number and, if applicable, a website.

Although the CARD Act officially took effect August 22, 2010, Congress also enacted the ECO Gift Card Act to delay the effective date of the disclosure requirements of the

CARD Act. The ECO Gift Card Act provides that cards that were produced prior to April 1, 2010, are not required to have the disclosure requirements until January 31, 2011. This was reportedly done to allow card issuers to use cards that have already been produced, rather than requiring card issuers to destroy millions of cards.

As a condition of this delayed effective date, issuers of gift cards are still required to: (a) comply with the CARD Act’s provisions relating to fees, (b) comply with the five-year expiration dates, and (c) comply with certain consumer rights disclosure requirements. Also, during this period of using the old cards, the new rules must be disclosed to consumers via in-store signage, messages during customer service calls, on websites or in all general advertising.

When considering the terms of its gift cards, a business must also take state law into account. There is uncertainty as to how the CARD Act will ultimately affect state law. Both Ohio and Kentucky have previously enacted gift card laws. The relationship between these state and federal laws will be clarified by the courts in upcoming years. As for now, most people assume that the CARD Act will act as a floor for consumer protections. Therefore, to the extent state law is more favorable to consumers than the federal law, the state law will control.

If you have any questions or would like additional information on these matters, please do not hesitate to contact Dustin Thacker at 513.721.4532 or dthacker@katzteller.com.

NEW TAX ACT INCLUDES ADDITIONAL ROTH CONVERSION OPPORTUNITY

The Small Business Jobs Act that was signed into law September 27, 2010, provides for a number of accelerated depreciation deductions and increased immediate expensing for many companies. In addition, this Act provides for a new Roth conversion opportunity.

Prior to the Act, the Roth conversion opportunity only applied to IRAs. Now an individual may be able to take advantage of this conversion opportunity within a qualified 401(k) plan (as well as certain other retirement arrangements). In other words, there is no longer the requirement that amounts be distributed from these plans, rolled over to an IRA and then converted to a Roth IRA. Any amounts that are converted will generally be taxed in the

year of the conversion, although there is a special rule that if the conversion occurs in 2010, then the conversion amount will be included in income (and taxed) one-half in 2011 and one-half in 2012, unless elected otherwise.

Although the conversion may now take place within the qualified plan, only plans that permit in-service distributions (meaning a distribution that can be made to the participant while still employed) will be allowed to make these conversions inside the plan. Therefore, in order to take advantage of these new provisions, you will need to determine whether your plan permits (or can be amended to permit) in-service distributions, and then it can be amended to allow these conversions to take place within the plan.

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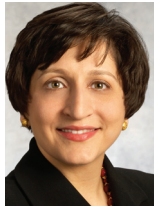
- Andy Berger, Bob Pitcairn, Tedd Friedman, Adam Colvin and Matt Kitchen represented Jewish Health System in connection with its withdrawal from the Health Alliance of Greater Cincinnati, and the sale of the Jewish Hospital to Mercy Health Partners.
- Andy Berger has been appointed vice president for Strategic Planning and chair of the Long-Range Planning Steering Group of the Jewish Federation of Cincinnati, where he also serves on the Board of Trustees and Executive Committee. As a member of the Board of Governors of Hebrew Union College, Andy has also been appointed as chair of the board's New Way Forward Implementation Task Force.
- Congratulations are in order for Adam Colvin, who will become a shareholder of Katz Teller on January 1, 2011.
- Mark Jahnke and Bob Pitcairn were listed in Chambers USA's publication, *Leading Lawyers for Business*. Mark was listed in Tier One as one of the top five Corporate/Mergers & Acquisitions lawyers in Ohio. At the September meeting of the Association for Corporate Growth, Mark participated as a panelist in a discussion on developments in private equity.
- Mark Jahnke and Steve Kisling represented the management shareholders of a local company in their second private equity recapitalization transaction. The transaction price was in excess of \$800 million.
- Matt Rich was one of five finalists for the 2010 Next Generation Leader Awards in the category of Legal Services. The Next Generation Leader Awards are presented by the Northern Kentucky Chamber of Commerce, and recognize young professionals in the Northern Kentucky/Greater Cincinnati area who have accomplished outstanding achievements in their professions and have shown leadership and a commitment to community involvement.
- Reuven Katz and Bill Russo were recently honored as Lawyers of the Year in Cincinnati by Best Lawyers in America. Reuven was named the 2011 Cincinnati Corporate Lawyer of the Year, while Bill was recognized as the 2011 Cincinnati Tax Lawyer of the Year. A lawyer honored as Lawyer of the Year is one who has received particularly high ratings in surveys conducted by Best Lawyers in America, having earned a high level of respect among his or her peers for his or her abilities, professionalism and integrity.

- A whopping 17 of Katz Teller's 26 attorneys were selected by their peers for inclusion in Woodward/White's *The Best Lawyers in America 2011*. Those named were:
 - Andrew R. Berger – Corporate Law, Securities Law
 - Joel S. Brant – Tax Law, Trusts and Estates
 - Joseph A. Brant* – Trusts and Estates
 - Robert E. Brant – Corporate Law, Employee Benefits Law, Tax Law
 - Tedd H. Friedman – Real Estate Law
 - John R. Gierl – Corporate Law
 - Bradley G. Haas – Corporate Law
 - William T. Hayden – Corporate Governance and Compliance Law
 - Guy M. Hild* – Family Law
 - Mark J. Jahnke – Corporate Law, Mergers & Acquisitions Law
 - Reuven J. Katz** – Corporate Law
 - Steve Kisling – Employee Benefits Law
 - James McCarthy III – Commercial Litigation
 - Robert A. Pitcairn, Jr.* – Bet-the-Company Litigation, Commercial Litigation, Labor and Employment Law
 - William F. Russo* – Tax Law, Trusts and Estates
 - Jerome S. Teller** – Family Law
 - Daniel P. Utt – Project Finance Law, Real Estate Law

*Denotes listed for at least 10 years

**Denotes listed for at least 20 years

HANDLING RELATIONSHIPS WITH CONFIDENCE AND CARE | WIJDAN JREISAT



Wijdan Jreisat brings people together. Whether connecting professionals who might benefit from each other's experiences or organizing gatherings of social or business groups, she enjoys watching relationships unfold. It seems ironic, then, that her practice finds her advising people on moving apart in business and personal settings.

She serves as an advisor to employers in handling their relations with employees. So, whether hiring, disciplining or firing, Wijdan assists in setting the tone for that employer's relationships with its employees. Her primary practice focus, however, is on divorce and dissolution actions, prenuptial agreements and related legal proceedings. She has translated her understanding of relationship dynamics into her practice, while using the sharp negotiation and dispute resolution skills she honed handling commercial litigation. Building on that background, she comfortably navigates hotly contested and emotionally charged matters, negotiating and litigating these cases that often involve the valuation and division of privately held businesses and other high net worth assets.

Where appropriate, she encourages participation in the collaborative divorce process, helping spouses resolve their differences without resorting to litigation. As a member of the Cincinnati Academy of Collaborative Professionals, she has discovered that her skill at building relationships is equally helpful in unwinding those relationships in a productive and respectful manner.

After graduating from the University of Virginia School of Law in 1994, Wijdan came to Cincinnati with her husband, Patrick Points. Since then, she has been routinely recognized by her peers as an outstanding lawyer and leader, having been honored by *Law &*

Politics Media as a Super Lawyer, by *Cincy Business Magazine* as a Leading Lawyer, and by the *Business Courier* as one of its "Forty Under 40," which honors the next generation of community leaders and innovators.

She has been active in the Greater Cincinnati community serving as a trustee on the Cincinnati Bar Association Board of Trustees, and as a member of the board of Girl Scouts of Western Ohio, which serves 60,000 girls in 32 counties. The nonprofit organization she and Patrick helped found, Social Venture Partners Cincinnati, unites individuals who make financial, time and expertise commitments to provide nonprofits with grants and support in marketing, finance, strategic planning and capacity building. She is a member of the Leadership Council for the Women's Fund of the Greater Cincinnati Foundation, which provides a means for individuals to support women's issues by making charitable contributions to fund a permanent endowment, and a member of the President's Advisory Council of her beloved alma mater, Centre College. She is a graduate of WE Lead Class I and Leadership Cincinnati Class XXXI.

Despite all of her commitments, she manages to find time to participate in what she describes as the best book club ever – and with the next meeting set to take place on Sanibel Island, the description seems accurate. She is also an avid traveler who has found her way to destinations across the globe, including Greece, France, Italy, the Czech Republic, Tunisia, Morocco, Bahrain, Qatar, Chile and Argentina.

If you are in need of legal assistance with employment or family law matters, Wijdan can be reached at 513.977.3421 or wjreisat@katzteller.com.

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PRRST STD
US POSTAGE PAID
CINCINNATI, OH
PERMIT NO. 6657

255 EAST FIFTH STREET, SUITE 2400
CINCINNATI, OHIO 45202-4787
PHONE: 513.721.4532
FAX: 513.721.7120
WWW.KATZTELLER.COM

