

Alert

Employment Law — Section 409A Deadlines — Considerations for Employers Impacted by COVID-19

March 17, 2020

In light of the disruptions caused by the COVID-19 pandemic, employers that maintain bonus arrangements are reminded of certain deadlines imposed under Section 409A of the Internal Revenue Code of 1986, as amended (“Section 409A”).

First, bonus arrangements, whether under bonus programs or individual agreements with employees, that are designed to be exempt from the requirements of Section 409A might specifically require payment by March 15, 2020 to avoid the more onerous requirements of Section 409A. In general, an employee must be paid compensation designed to qualify as a “short term deferral” within 2-1/2 months of the year in which the employee became vested in the compensation (i.e., met all the requirements to be paid and is not required to continue employment through the payment date). Fortunately, an employer who might have missed this deadline due to the COVID-19 pandemic may be eligible to rely on relief under Section 409A. Payments that should have been made by an employer by March 15 may still qualify as exempt from Section 409A if the employer can establish that it was administratively impracticable to make the payment on time because of the unforeseeable events arising from the pandemic, provided that the employer actually makes the payment as soon as administratively practicable after March 15.

Employers should also consider a second Section 409A deadline coming soon that affects deferred compensation arrangements that permit employees to defer “performance-based compensation.” Those arrangements rely on a special rule under Section 409A that allows employees to make deferral elections with respect to “performance-based compensation” up to six months before the end of the applicable performance period — otherwise, section 409A generally requires such elections to be made before the start of the calendar year. To qualify as performance-based compensation for this exception, one primary requirement is that the performance criteria must be established in writing no later than 90 days after the commencement of the performance period — in the case of calendar year bonuses, that date is March 30, 2020. There is no exception under Section 409A to this deadline. As a result, despite the current economic uncertainty, employers with such deferral arrangements must ensure that the performance criteria be established by March 30.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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