

## **Section 409A Compliance: Release of Claims Provisions Require Employer Action Now**

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In Notice 2010-80, the Internal Revenue Service (“IRS”) expanded the methods and procedures for correcting provisions in deferred compensation plans or employment, severance, or other agreements that are in violation of Section 409A of the Internal Revenue Code of 1986, as amended (“Section 409A”), and the guidance issued thereunder. The IRS also provided in Notice 2010-80 additional guidance and transitional relief for documentary failures relating to the common practice of conditioning payments that are payable upon termination on the employee’s execution of a release of claims. As discussed below, in order to take advantage of the transitional relief, there are specific rules to follow and a plan amendment may be required. These rules also apply to other employment-related actions, such as the execution and submission of a noncompetition or nonsolicitation agreement.

Under Notice 2010-80, plans or agreements should require that any payment conditioned on the employee’s execution of a release of claims be made within a specified period and should state that payment must be made on the last day of the specified period or in the second taxable year if the specified period spans two taxable years. If the plan or agreement conditions payment upon the employee’s execution of a release of claims or other employment-related action, but does not require that payment be made within a specified period, the plan or agreement should be amended to provide that payment will be made (i) upon a fixed date, such as the 60<sup>th</sup> or 90<sup>th</sup> day following separation from service, or (ii) during a specified period not longer than 90 days following separation from service, and, if the specified period spans two taxable years, payment will be made in the second taxable year. Thus, deferred compensation plans, employment agreements, severance agreements, and other agreements that allow the employee to control the timing of the payment based on his or her execution of a release of claims or other employment-related action may need to be amended to comply with Section 409A.

To take advantage of the new guidance and extended transitional relief, employers should review their deferred compensation plans and employment, severance, and

other agreements that contain provisions conditioning any payment that is payable upon a separation from service on a release of claims or other employment-related action as of December 31, 2010. The extended transitional relief permits employers to amend their noncompliant agreements to comply with Section 409A, provided that (i) any payments made after March 31, 2011, that could be paid during a period that spans two taxable years will be made in the second taxable year, and (ii) if any amounts remain unpaid, the agreement will be amended no later than December 31, 2012. Employers should also confirm that new agreements conditioning payments on the employee's execution of a release of claims or other employment-related action require that payment be made within a specified period of time, consistent with the guidance under Notice 2010-80.

Attorneys at EpsteinBeckerGreen regularly assist employers in the area of deferred compensation plans and employment, severance, and related agreements, and provide advice and counsel to those employers undergoing deferred compensation compliance reviews.

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