



2005 Nonqualified Deferred Compensation Reporting and Withholding Suspended

The IRS just released Notice 2005-94, which suspends certain employers' and payors' reporting and withholding requirements with respect to 2005 Section 409A nonqualified deferred compensation amounts. Thus, for 2005, employers and payors do not have to satisfy the information reporting requirements for these amounts in Box 12, using code Y of Form W-2 or Box 7 and 15a of Form 1099-MISC. Further, according to the notice, they also do not have to report and withhold on amounts that, under Section 409A, are includible in gross income of an employee (or an independent contractor) but have not been actually or constructively received by that individual in 2005. These amounts would have been reported as wages in Box 1 of Form W-2 and as income in Box 12 of Form W-2 using code Z, or with respect to an independent contractor, in Box 7 and 15b of Form 1099-MISC. This later relief assists employers that currently are not sure what, if any, deferral amounts are includible in gross income under Section 409A. However, even though employers have a reprieve with respect to calendar year 2005, the IRS notes that they may be required to provide corrected Forms W-2 (or Forms 1099 MISC) to affected individuals based on future IRS guidance.

Significantly, the notice does not eliminate or postpone an individual's tax filing requirements, tax liability or interest on underpayments with respect to 2005 Section 409A deferred compensation amounts that are includible in gross income (although the IRS will not assess any penalties for underreporting of 2005 Section 409A deferred compensation amounts that are includible in income as long as taxes are paid in a subsequent period in accordance with future guidance to be issued during the first half of 2006).

BUCK COMMENT. *The guidance in essence provides employers and payors with relief from penalties under "a what-you-don't know now but subsequently find out" scenario. Thus, in the future, if it turns out that 2005 deferrals were in violation of Section 409A and therefore includible in income, no penalties will be assessed with respect to a failure to timely withhold and report such amounts. However, employers and payors that are able to determine the amounts that are includible in gross income should report them in Box 1 and 12 using code Z of Form W-2 or Box 7 and 15b of Form 1099-MISC.*

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