
IRS Suspends 409A Reporting and Withholding Requirements for 2005

2005-12-20

Overview

On December 8, 2005, the Internal Revenue Service released Notice 2005-94, which suspends employers' and payers' reporting and withholding requirements for calendar year 2005 with respect to deferrals of compensation subject to Section 409A of the Internal Revenue Code (the Code). As a result, employers and payers are not required to report deferrals of compensation on Forms W-2 and 1099 issued for calendar year 2005 compensation, and employers are not required to withhold with respect to deferrals of compensation during 2005. Employees and other service providers are still required to report and pay tax on amounts includible in gross income under Section 409A for calendar year 2005, however, Notice 2005-94 provides that the IRS will not assert penalties for failure to report such amounts and pay such taxes until future guidance is issued.

Background

The American Jobs Creation Act of 2004 (the Act), which added Section 409A to the Code, also amended other sections of the Code in order to impose on employers and payers reporting and withholding obligations with respect to nonqualified deferred compensation subject to Section 409A. In particular, the Act requires employers and payers to report all deferrals under a nonqualified deferred compensation plan on Form W-2 or Form 1099, as applicable, and expands the definition of "wages" subject to withholding to include any amount includible in gross income of an employee under Section 409A. While the IRS provided initial guidance in Notice 2005-1 (released in December 2004) as to how to report deferred amounts, to date, very little guidance has been provided on how to calculate the amount of the deferral to be reported. The IRS expects to issue additional guidance on reporting and withholding issues under Section 409A in the first half of 2006.

Effect on Employers and Payers

Employers and payers will not be required to report deferrals of compensation on Forms W-2 and 1099 issued for calendar year 2005. In addition, employers are not required to withhold income and employment taxes in 2005 with respect to deferrals of compensation includible in gross income

under Section 409A. However, Notice 2005-94 provides that future guidance may require employers and payers to issue corrected information returns for 2005 to report previously unreported amounts includible in income under Section 409A. The Notice does not affect any other reporting and withholding obligations applicable to employers and payers.

Effect on Employees and Other Service Providers

Employees and other service providers must timely file their tax returns, and include in income and pay taxes on all amounts reported on Forms W-2 and 1099. Because Notice 2005-94 has suspended the reporting requirements for employers and payers with respect to deferrals subject to Section 409A, the IRS will not assert failure to report, failure to pay taxes, and accuracy-related penalties for calendar year 2005 if the employee or service provider reports and pays all taxes due with respect to such amounts in accordance with future published guidance. Such guidance will provide a compliance period during which employees and service providers can report and pay taxes without incurring the above penalties; however, interest will accrue with respect to any underpayments of tax.

For more information on Section 409A or other tax matters, please see our other [department publications](#) or contact the authors listed above.

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