

## Executive Compensation Plans

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### *Bloomberg Law Reports*

Six years after its enactment in 2004, section 409A of the Internal Revenue Code, 26 U.S.C. § 409A, has developed to be almost everything a tax statute should not be. It imposes extraordinary tax penalties on employees and other service providers who participate in nonqualified deferred compensation plans that do not comply (either in form or operation) with its rigid requirements, without regard to whether such taxpayers bear any responsibility for the noncompliance. Because the regulations governing the scope and requirements of section 409A are a technical thicket of tightly drawn rules, formalistic and benign compliance errors by employers are likely to be commonplace. In most instances, those errors will have conferred no financial or tax benefit on employees or resulted in any loss of tax revenues. However, in the eyes of section 409A, concepts such as "no harm no foul," substantial compliance, and blamelessness of the taxpayer make no difference. Thus, if section 409A is rigorously enforced by the IRS, it will largely function as a high-stakes "gotcha" statute, though the vast majority of compliance errors will likely go undetected by anyone, without harm to the tax system or benefit to taxpayers. Click on the attached pdf for the full version of the article.

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