eBenefits Alert: Final 409A Regulations

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On April 10, 2007, the IRS issued the long-awaited final regulations on Code Section 409A. The final regulations follow the basic format of the proposed regulations. They contain a broad definition of "deferred compensation" potentially subject to 409A, and then carve out a very lengthy and complicated list of compensation that is excluded. The final regulations are in some ways more generous than the proposed regulations. They allow the exercise period for stock options and stock appreciation rights to be extended in many cases. They also allow many "good reason" terminations to be considered "involuntary" for purposes of satisfying the exception for severance pay.

As under the proposed regulations, many types of severance pay, bonus pay, phantom stock, discounted stock options and stock appreciations rights, restricted stock units, and gross-ups are potentially subject to 409A, as well as the garden variety top hat plan. Arrangements subject to 409A must be in a written form that complies with the requirements of the final regulations by no later than the end of this year. Operational compliance has been required since 409A became effective in 2005, but there are rules allowing for "good faith" compliance with 409A for periods prior to January 1, 2008, if the guidelines set out in prior IRS guidance (or the final regulations) have been followed.

If you have not already done so, please inventory your plans, agreements or other arrangements potentially subject to 409A and contact a member of the Gray Plant Mooty Employee Benefits and Executive Compensation group as soon as possible regarding necessary plan amendments.

If you would like a more detailed summary of the regulations, please click here.

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