

Executive Compensation, Benefits and Employment Law Focus

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Reductions in Force Could Result in a Partial Termination of an Employer’s Tax-qualified Retirement Plan

As a result of the recent nation-wide economic downturn, many employers have experienced reductions in their workforce (or “RIFs”). One potential unintended and costly consequence of a RIF is that an employer’s tax-qualified retirement plan may have incurred a so-called “partial plan termination” as a result of such RIF (i.e., a significant reduction in plan participation that would cause the immediate vesting of affected participants). This article summarizes the applicable law regarding “partial plan terminations” under the Internal Revenue Code of 1986, as amended (the “Code”), and also discusses the adverse consequences that could result from the failure to treat a reduction in plan participation as a partial plan termination in the event that the IRS and/or a court of law ultimately determines that a partial plan termination had occurred. This article also explains the methodology for determining whether a partial plan termination has occurred, depending on the exact nature of participant turnover within an employer’s tax-qualified retirement plan, and, if such determination remains in doubt, the process available to seek a determination from the Internal Revenue Service as to whether a partial plan termination has occurred.

Potential Consequences of Failing to Treat a Plan as Having Incurred a Partial Termination

The Code specifically provides that a plan will not qualify as a tax-qualified retirement plan if upon a partial termination of the plan the rights of all affected employees to benefits accrued as of the date of such partial termination, to the extent funded as of such date, are not nonforfeitable. Thus, if a partial termination occurs with respect to a tax-qualified plan and the plan sponsor does not vest affected employees in their accrued benefits to the extent such benefits are funded, the plan will cease to be qualified under the Code. The consequences of the disqualification of a retirement plan are as follows: (1) for open tax years, the employer loses its deduction for nonvested contributions made to the plan for such years; (2) for open tax years, participants recognize income with respect to their vested accrued benefits; (3) for open tax years, the plan’s trust recognizes income on its earnings; (4) distributions from the disqualified plan are not eligible for rollover into another tax-qualified vehicle; and (5) the plan sponsor and/or the plan fiduciaries responsible for



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The contents of this employment update should not be construed or relied upon as legal advice or a legal opinion.

EXECUTIVE COMPENSATION, BENEFITS AND EMPLOYMENT LAW FOCUS authors:

Tal Marnin
tmarnin@whitecase.com

Randall McGeorge
rmcgeorge@whitecase.com

Andrew L. Oringer
aoringer@whitecase.com

Kenneth A. Raskin
kraskin@whitecase.com

Laura Westfall
lwestfall@whitecase.com

White & Case
1155 Avenue of the Americas
New York, NY 10036
+ 1 212 819 8200

www.whitecase.com

failing to maintain the plan's tax-qualified status face the risk of lawsuits by participants who are forced to prematurely recognize income under (2) and (4) above.

General Discussion of the Partial Plan Termination Rule

The Code provides, in relevant part, that, in the event of a termination or "partial termination" of a tax-qualified retirement plan, the rights of affected participants to benefits accrued to the date of such termination or partial termination shall be non-forfeitable, to the extent the plan is funded, as of the date of such termination or partial termination. The regulations promulgated under the Code provide that the question of whether a partial termination has occurred is to be resolved on the basis of "all the facts and circumstances" of the particular case. The regulations go on to provide, in relevant part, that such facts and circumstances include the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan.

Unfortunately, neither the Code nor the regulations thereunder explicitly define the term "partial termination." Thus, the determination of whether a particular reduction in a tax-qualified retirement plan sponsor's workforce results in a partial termination of the sponsor's tax-qualified retirement plan is often problematic for such sponsor. Thus, in the absence of clarification in the statute or regulations, we must look to the IRS rulings and case law for the parameters for making a partial termination determination.

Absent any statutory or regulatory guidance on the matter, in addressing the issue of the meaning of the term "partial termination," the cases and IRS rulings have developed and utilized a so-called "significant percentage test." Such test was first announced by the IRS in a 1972 Revenue Ruling, in which the IRS held that a 70 percent reduction in plan participation

resulted in a partial termination of the plan. Although this Revenue Ruling did not set forth a specific percentage for which a reduction in plan participation would be deemed to be "significant," the focus on the percentage of such reduction has been generally accepted by courts as the key factor in making a ruling on the partial termination issue.

The Applicable Percentage

Prior to guidance issued by the Internal Revenue Service in 2007, there was no magical figure at which a partial termination was deemed to occur and the exact level at which it became determinative of the issue was historically still somewhat ill defined. Notably, several cases have held that the percentage drop in plan participation standing alone may be sufficiently large (i.e., generally greater than 50 percent) or small (i.e., generally less than five percent) to determine the partial termination question without the need for any further inquiry into the facts. Between these two extremes, although the surrounding facts and circumstances have been considered in conjunction with the percentage drop in order to decide whether the percentage drop is significant, the primary focus of the determination had been on the percentage drop in plan participants. In this regard, a "semi-bright line" test had developed that (a) a drop of less than 20 percent is considered significant **only if** accompanied by egregious abuse on the part of the employer, such as discrimination in favor of the highly compensated, manipulation of the pension rules to obtain tax benefits, creation of a reversion of plan assets to the employer, or an attempt to prevent employees from becoming vested in accrued benefits, and (b) a percentage drop of at least 20 percent is sufficient, **if** coupled with other circumstances, such as the closing of a plant or division, to suggest that a partial termination has occurred.

In Revenue Ruling 2007-43, the IRS adopted a 20 percent presumption test. Thus, if the turnover rate is at least 20 percent, there is a "presumption"

that a partial termination of the plan has occurred. However, the IRS noted that whether or not a partial termination occurs on account of participant turnover is ultimately dependent on all of the facts and circumstances in a particular case. Facts and circumstances indicating that the turnover rate for an applicable period is “routine” for the employer favor a finding that there is no partial termination for that period. For this purpose, information as to the turnover rate in other periods and the extent to which terminated employees were actually replaced, whether the new employees performed the same functions, had the same job classification or title, and received comparable compensation are relevant to determining whether the turnover is routine for the employer.

Defining the Class of Affected Employees

Notably, in applying the significant percentage test, certain classes of separated plan participants are excluded from the terminated class. Revenue Ruling 2007-43 uses the term “employer-initiated severance” to describe the class of affected participants to be used in the applicable test. For these purposes, an employer-initiated severance from employment generally includes any severance from employment (even if caused by an event outside of the employer’s control) other than a severance that is on account of death, disability, or retirement on or after normal retirement age. In addition, the IRS indicated that the employer may be able to verify that an employee’s severance was not employer-initiated through supporting information as to its voluntary nature from personnel files, employee statements and other corporate records.

Revenue Ruling 2007-43 also provides that employees who have had a severance from employment with the employer maintaining the plan on account of a transfer to an unrelated company are not considered as having a severance from employment for purposes of calculating the turnover rate if those employees continue to be covered by

a plan that is a continuation of the plan under which they were previously covered (i.e., if a portion of the plan covering those employees was spun off from the plan in accordance with the rules of Section 414(l) of the Code and will continue to be maintained by the new employer).

Another complicating issue has historically been whether the significant percentage test is applied with respect to “all” participants or only to participants who are “actively employed” as of the dates being analyzed under the test. Revenue Ruling 2007-43 clarifies the IRS’ position on this issue by providing that the test is to be applied with respect to active participants (or, as the IRS refers to them in the facts section of the ruling, “participants who are employees”).

The Relevant Time Period / Aggregation of Multiple Plan Years

Neither the Code, nor its legislative history, nor the applicable regulations thereunder specify whether aggregation of multiple plan years is required or permitted in determining whether a partial plan termination has occurred. Most IRS rulings and court decisions analyzing the partial termination rules have simply applied the significant percentage test on a plan year basis, without discussion of the merits of such decision. On this point, IRS Revenue Ruling 2007-43 provides that the applicable period “depends on the circumstances,” and indicates that the applicable period is generally the plan year, but could be a longer period if there are a series of related severances from employment.

The cases that have used a facts and circumstances analysis to hold that employee terminations during consecutive plan years should be taken into account have stated that the applicable time period runs from the start of the event causing the employer-initiated terminations through its completion. Some courts have bifurcated multiple corporate events where clear timing break-points could be established.

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For instance, one federal circuit court of appeals applied the significant percentage test with respect to two different time periods where the applicable tax-qualified retirement plan lost participants due to (a) the general economic recession in the March 1989 – June 1990 time-period and (b) the increase in the luxury tax rate which suppressed the plan sponsor's boat sales from January 1991 – June 1991. By contrast, another federal court rejected a tax-qualified retirement plan sponsor's argument that terminations over a two and a half year period occurred due to two distinct corporate events (i.e., terminations in connection with the merger of the plan sponsor with another company, and terminations due to the drastic decline in oil prices), and held that the plan sponsor's business decisions to reduce its work force resulted in a single corporate event throughout this two and a half year period for purposes of applying the significant percentage test to the partial termination analysis.

IRS Determination Letter Process

As discussed above, neither the Code nor the regulations promulgated thereunder explicitly define what constitutes a partial termination. However, the IRS will, upon request for a determination through the filing of an IRS determination letter application on IRS Form 5300, rule on the issue of whether or not a partial termination has occurred with respect to a particular plan. In this regard, the IRS has taken the position that a plan sponsor who requests a partial termination determination before fully vesting affected participants may rely on the qualified status of its plan if the IRS determines that a partial termination has occurred and the sponsor thereupon retroactively vests all affected participants as of the date of the partial termination. Hence, the plan will retain its qualified status if the employer vests affected participants after the occurrence of the partial termination so long as the vesting occurs within a fairly short period of time after the IRS' determination of the occurrence of a partial termination.

The benefit of obtaining such a determination letter is two-fold: (1) it protects the plan sponsor from a later challenge by the IRS; and (2) a court will likely give the IRS determination deference in rendering its decision in an action brought by a plan participant alleging that a partial termination has occurred entitling him or her to full vesting. (Of course, such benefits of an IRS determination are only available to the extent that all relevant information regarding the applicable participant terminations is adequately and completely disclosed to the IRS, and that the plan sponsor complies with all requirements with respect to the form of the determination letter request (e.g., participant disclosures)). Of course, the disadvantage in seeking a determination letter is that an IRS determination that a partial plan termination has occurred will require the employer to fully vest all affected participants and foreclose the ability of the employer to take a good faith position that a partial plan termination has not occurred.

Conclusion

Because of the uncertainty in the application of the partial termination rule and the severe adverse consequences that could result from making an erroneous determination in this regard, an employer who has seen its workforce shrink in recent times should engage in a significant and careful analysis as to whether or not any tax-qualified retirement plan sponsored by it has incurred a "partial termination." To the extent that the results of such analysis are not 100 percent clear in this regard, such an employer should consider utilizing the IRS' determination letter program discussed above and seek a ruling from the IRS as to whether or not the applicable plan has incurred a partial termination. White & Case would be pleased to assist in helping you conduct this partial termination analysis and/or any corresponding IRS determination letter submissions.

Department of Labor's Updated Final Rules Regarding the Federal Family and Medical Leave Act of 1993

The United States Department of Labor's updated final rules regarding the federal Family and Medical Leave Act of 1993 ("FMLA") became effective on January 16, 2009. These new regulations update the previous FMLA regulations issued in 1994 and also provide details regarding the military family leave provisions added to the FMLA in 2008. The following summarizes some of the more significant changes and clarifications contained in the new regulations:

■ **Employer Notice Obligations:** Employers covered by the FMLA are required to post in the workplace a general notice explaining the FMLA's provisions and providing information regarding the procedures for filing complaints with the US Department of Labor, Wage and Hour Division. *Sample FMLA posters are located on the US Department of Labor's website.* In addition, for covered employers who have any FMLA-eligible employees, the employers also must provide this general notice in their employee handbooks or other written benefits or leave materials (if such written materials do not exist, the notice must be provided to employees upon hiring). The regulations clarify that these general notices may be provided by an electronic notice if all employees and **applicants for employment** have access to the information electronically. The regulations also clarify that covered employers must post a general notice even if they have no FMLA-eligible employees. *The regulations contain a sample notice that may be used by employers as the general notice—employers may instead use another format provided that it includes, at a minimum, all of the information contained in the sample notice. Since the sample notice contains information that had not typically been included in employer FMLA policies, employers will need to update their employee handbooks or other written materials regarding the FMLA, as well as their FMLA posters.*

- The regulations generally require employers to provide an eligibility notice and a notice of rights and responsibilities to employees within five (5) business days of any request for leave or after learning that a leave may qualify as FMLA-leave—the prior regulations required notice to be provided within two (2) business days. If the employee is not eligible for FMLA leave, the regulations require the eligibility notice to state at least one reason why the employee is not eligible for such leave. *The regulations contain a new suggested, combined form for these purposes—Notice of Eligibility and Rights and Responsibilities.*
- The regulations also require employers to provide a notice designating the leave as FMLA leave within five (5) business days (previously two (2) business days) after receiving sufficient information to determine whether the leave qualifies as FMLA leave. *The regulations contain a new suggested form for this purpose—Designation Notice.* The designation notice may be provided at the same time as the eligibility and rights and responsibilities notices if the employer has sufficient information at that time to designate the leave as FMLA leave.
- The regulations provide that an employer's failure to comply with the FMLA's notice requirements may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. As such, the employer may be liable for damages if the affected employee demonstrates that he or she has suffered individualized harm. Under the prior regulations, an employer's failure to designate leave as FMLA leave within two (2) business days of the employee's request for leave precluded the employer from designating such leave as FMLA leave. The US Supreme Court, however, rejected that portion of the prior regulations as inconsistent with the statutory provisions of the FMLA.

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- **Employee Notice Obligations:** The regulations generally retain the requirement that employees provide 30 days notice whenever the need for leave is foreseeable. The regulations now also provide that, if 30 days notice is not practicable (e.g., because of changed circumstances or medical emergency), employees must provide notice as soon as practicable. If an employee provides less than 30 days notice where the leave for need was foreseeable and the employer so requests, the employee must explain why the 30 days notice was not practicable. In addition, the regulations provide that employees needing FMLA leave may be required to follow the employer's usual and customary call-in procedures for reporting an absence, absent unusual circumstances—the old regulations permitted employees to provide such notice up to two (2) full business days **after** an absence, even if the employees could have provided such notice more quickly.
- **Eligible Employees:** In order to take FMLA leave, employees must have been employed for at least 12 months and have worked at least 1,250 hours in the 12 months immediately preceding the requested leave.
 - The regulations clarify that although the 12 months of service need not be consecutive, employment prior to a break in service of seven (7) years or more need not be counted (except if the break resulted from National Guard or Reserve service obligations or a written agreement exists concerning the employer's intention to rehire the employee after the break in service).
 - The regulations also clarify that employees on leave who have not satisfied the 12-month employment requirement may satisfy this requirement and therefore become FMLA eligible during the leave period—i.e., since the employee is still considered employed while on leave, the employee may satisfy the 12-month requirement while out on leave. Any portion of the leave taken after the employee becomes eligible is treated as FMLA leave.
- **Military Family Leave:** The 2008 amendments to the FMLA added new leave entitlements for eligible employees to take Military Caregiver Leave (also known as Covered Servicemember Leave) and Qualifying Exigency Leave.
 - Eligible employees may take up to 26 workweeks of unpaid Military Caregiver Leave in a “single 12-month period” to care for a family member who is a “covered servicemember” with a serious illness or injury incurred in the line of duty on active duty.
 - Eligible employees with a covered military member serving in the National Guard and Reserves may take the normal 12 workweeks of unpaid FMLA leave for “any qualifying exigency” arising out of the fact that the covered military member is on active duty or called to active duty status in support of a “contingency operation.” The Regulations discuss the following eight categories of “qualifying exigencies:” (i) Short-Notice Deployment; (ii) Military Events and Related Activities; (iii) Childcare and School Activities; (iv) Financial and Legal Arrangements; (v) Counseling; (vi) Rest and Recuperation; (vii) Post-Deployment Activities; and (viii) Additional Activities Not Encompassed in the Other Categories.
 - *The Regulations include two new certification forms that can be used for military family leave: Certification of Qualifying Exigency for Military Family Leave; and Certification for Serious Injury or Illness of Covered Servicemember.*
- **Light Duty:** Time spent performing “light duty” work is not considered part of FMLA leave and therefore does not count against an employee's FMLA leave entitlement. In addition, the employee's right to job restoration under the FMLA is held in abeyance during the time the employee performs “light duty” work (or, if earlier, until the end of the applicable 12-month FMLA leave year).

- **Waiver of Rights:** Employees may settle or release any FMLA claims based on past employer conduct without approval of a court or the Department of Labor. Employees, however, cannot prospectively waive their FMLA rights.
- **Serious Health Condition:** The Regulations generally retain the same six (6) individual definitions of “serious health condition,” with certain modifications.
 - One of the definitions requires more than three (3) consecutive, full calendar days of incapacity plus “two visits to a health care provider.” The Regulations now state that the two (2) visits must occur within 30 days of the beginning of the period of incapacity and the first visit must take place within seven (7) days of the first day of incapacity—the prior regulations did not specify any time period for such visits.
 - Another definition requires more than three (3) consecutive, full calendar days of incapacity plus a regimen of continuing treatment. The Regulations provide that the first visit to the health care provider must take place within seven (7) days of the first day of incapacity.
 - A third definition regarding chronic serious health conditions requires “periodic visits” to a health care provider. The Regulations now define “periodic visits” as at least two (2) visits per year—the prior regulations did not specify the requisite number of such visits.
- **Substitution of Paid Leave:** The regulations clarify that an employee may be required to satisfy the same procedural requirements for substituting any accrued paid leave (including vacation, sick, personal or generic “paid time off” leave) that other employees not taking FMLA leave would be required to satisfy (e.g., paid leave being available only in full day increments or only upon completion of a specific leave request form). The regulations also provide that, where state law permits, the employer and employee may agree to use paid leave to supplement disability insurance or workers’ compensation benefits—the prior regulations did not permit the use of paid leave during the time that an employee also received disability insurance or workers’ compensation benefits.
- **Perfect Attendance Awards:** Employers may now deny “perfect attendance” awards to employees who do not have perfect attendance because they took FMLA leave provided that the employer treats employees taking non-FMLA leave in the same way.
- **Intermittent (or Reduced Schedule) Leave:** Employees who take intermittent leave for planned medical treatments when medically necessary are required to make a “reasonable effort” to schedule such treatment so as not to disrupt unduly the employer’s operations—the prior regulations did not include the “reasonable effort” standard.
 - Employers must count leave usage in increments no greater than the shortest period of time used for other non-FMLA leaves, provided that such increments can be no greater than one (1) hour. The regulations clarify that an employee’s FMLA entitlement cannot be reduced by more than the amount of leave taken by the employee—e.g., if an employee arrives to work several minutes late because of an FMLA-qualifying reason, only several minutes of FMLA leave can be counted against the employee’s FMLA entitlement even if the employer normally tracks FMLA and other leave in one (1) hour increments.
 - Employees who are unable to work required overtime hours because of an FMLA-qualifying condition may have such overtime hours counted against their FMLA leave entitlement.
- **Medical Certification:** *The regulations contain separate, updated medical certification forms for the employee and covered family members (for applicable family leaves)—Certification of Health Care Provider for Employee’s Serious Health Condition; and Certification of Health Care Provider for Family Member’s Serious Health Condition.* As stated above, there are additional medical certification forms for Military Caregiver Leave and Qualifying Exigency Leave. The Certification

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forms now allow, **but do not require**, health care providers to provide a diagnosis of the patient's health condition as part of the certification.

- If an employer deems the information in a medical certification to be insufficient, the employer must specify in writing what information is lacking and give the employee seven (7) days to redo the certification.
- An employer's representative also may contact the employee's health care provider to authenticate or obtain clarification of information contained in the medical certification form. The employer's representative must be a health care provider, human resources professional, leave administrator or management official, **but** cannot be the employee's direct supervisor. The employer's representative may not request additional information than that required to be included in the medical certification form. The employer must comply with any HIPAA privacy requirements, including obtaining written authorization from the employee where necessary.

- Employers may require a new medical certification each leave year for medical conditions that last longer than one (1) year. Employers also may request recertification of an ongoing condition every six (6) months in conjunction with an absence.

- **Fitness for Duty Certification:** Employers may require that the certification specifically address the employee's ability to perform the essential functions of the job—if the employers choose to do so, they must provide the employees with a list of the essential job functions at the time of the designation notice and the designation notice must state that this will be a requirement. In addition, where reasonable job safety concerns exist, an employer generally may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

White & Case Partner Evaluates 401(k) and IRA Investment Advice Rules at US House Subcommittee Hearing

On March 24, 2009, the Subcommittee on Health, Employment, Labor, and Pensions of the US House of Representatives' Committee on Education and Labor held a hearing called "Retirement Security: The Importance of an Independent Investment Adviser" to review the existing rules that govern financial advice administered to 401(k) and IRA participants. In particular, the Subcommittee sought to understand the current rules outlining how investment advice can be rendered to participants in participant-directed "401(k)" plans and to those with individual retirement accounts.¹ The hearing was largely in response to final regulations of the Department of Labor, published in the Federal Register on January 21, 2009,² the effective date of which has now been extended at least until May 22, 2009.³

The Subcommittee heard testimony conveying a wide range of viewpoints. One of those asked by the Subcommittee to speak at the hearing, White & Case Partner Andrew Oringer, generally advocated in favor of finding a balance that would permit a wide range of advice to be available. "The

Holy Grail here should not be the delivery of purely conflict-free advice—it should be the delivery of conflict-safe advice," Oringer said. "If we can permit the provision of well-intentioned professional advice in an appropriately safeguarded way, we will have done well for the participants we are trying to help and protect." He went on to note that the term "inside advice" might be a more neutral way of referring to the provision of investment advice by inside providers, as compared with the more pejorative term, "conflicted advice," explaining that "concerns about conflicted advice should not lead to the conclusion that inside advice—advice provided by one already providing services to the plan or with respect to its investments—can never feasibly be permitted." Mr. Oringer had also previously blogged for BNA on the topic.⁴

It seems apparent that the last word has not yet been heard regarding these issues, and the fate of the regulations (and, indeed, maybe even the statute) is in substantial doubt. Additional information regarding the Subcommittee hearing can be found on the US House of Representative's Committee on Education and Labor's [website](#). Mr. Oringer's testimony can be found [here](#). The Subcommittee hearing can also be viewed online in its entirety [here](#).

¹ <http://edlabor.house.gov/hearings/2009/03/retirement-security-the-import.shtml>; see also Riechmann, "House Reviews Advice Given to 401(k), IRA Holders," Associated Press, March 24, 2009, available at: <http://www.businessweek.com/ap/financialnews/D974JM0G0.htm>; Hughes, "US Lawmakers, Pension Experts Weigh Retirement Advice Rules," Dow Jones Newswires, March 24, 2009, available at <http://www.nasdaq.com/aspxcontent/NewsStory.aspx?cpath=20090324%5CACQDJON200903241058DOWJONESDJSONLINE000403.htm&&mypage=newsheadlines&title=US%20Lawmakers,%20Pension%20Experts%20Weigh%20Retirement%20Advice%20Rules>

² Brandon, "House Evaluates 401(k) and IRA Financial Advice Rules," *U.S. News & World Report*, March 24, 2009, available at: <http://www.usnews.com/blogs/planning-to-ire/2009/03/24/house-evaluates-401k-and-ira-financial-advice-rules.html>

³ 74 Fed. Reg. 11,847 (Mar. 20, 2009).

⁴ See Oringer, "Are Certain Reactions to the Investment-Advice Regulations Ill-Advised?" <http://bnablog.bna.com/penben/2009/01/are-reactions-to-the-investmentadvice-regulations-illadvised.html> (Jan. 29, 2009).

New York State Bar Association Proposes Program Regarding Documentary Noncompliance Under Section 409A in Response to IRS Notice 2008-113

Section 409A of the Internal Revenue Code of 1986 for the first time comprehensively codifies the federal income-tax treatment of nonqualified deferred compensation. In general, Section 409A provides that amounts deferred under a nonqualified deferred compensation plan are currently includible in a service provider's gross income to the extent such compensation is not subject to a substantial risk of forfeiture and was not previously included in the service provider's gross income, unless certain requirements are met. Further, noncompliant deferrals are subject to an additional 20 percent tax and additional interest on any related underpayment of taxes. Section 409A is extremely comprehensive and complex, with there being many interpretive issues that remain open, and it is at this point axiomatic that Section 409A has caused substantial consternation in the market.

In response to the request in Notice 2008-113 for suggestions regarding a voluntary program for documentary noncompliance, the Employee Benefits Committee of the Tax Section of the New York State Bar Association on March 25, 2009 submitted a report¹ proposing such a program. The report, co-authored by White & Case Partner Andrew Oringer, proposes a "three-pronged program" to remedy documentary noncompliance under Section 409A, as follows:

- the establishment of an approved list of inadvertent and nonabusive documentary compliance failures subject to correction;

- a remedial amendment period to run for a short period of time following creation of a new right or a change to an existing right under a plan; and
- a policy to enforce prospectively future guidance and judicial determinations, and to provide liberal transition relief so that "a higher quality of fairness and orderly compliance with the new rule or rules may be achieved."

It appears to us that the regulators want to be constructive here, and are struggling to come up with a program that appropriately helps taxpayers, without compromising the intent of the statute. The report is "intended to facilitate the establishment of a multifaceted program in a manner that is faithful to Congressional intent..., and that is administrable and does not unduly penalize taxpayers for inadvertent errors...."

The extent to which a possible compliance program may ultimately evolve is still uncertain. White & Case personnel will be monitoring the process, and would be happy to discuss these matters or any other aspects of Section 409A and the continuing evolution of the regulation of nonqualified deferred compensation.

¹ New York State Bar Ass'n. Tax Section, "Employee Benefits Committee Report on a Program to Remedy Documentary Noncompliance by Section 409A Plans in Response to Notice 2008-113" (March 25, 2009), available at <http://www.nysba.org/Content/ContentFolders20/TaxLawSection/TaxReports/1180.pdf>.

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Please contact Andrew L. Oringer, Sharon Parella, Kenneth A. Raskin or any member of White & Case's Executive Compensation, Benefits and Employment Law Practice Group if you have any questions or comments or you would like an additional copy of this or other issues. You may also call upon White & Case's Legislative Services in Washington, DC for information on pending bills, hearing dates, etc. For address changes or to receive this publication by e-mail, please send your information to ECBEL@whitecase.com.

Andrew L. Oringer, Esq.
New York
aoringe@whitecase.com

Sharon Parella, Esq.
New York
sparella@whitecase.com

Kenneth A. Raskin, Esq.
New York
kraskin@whitecase.com

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