

# Section 409A Time & Form of Payment Rules for Employment Agreements

Permitted Payment Events (A)	General Rules (B)	Separation From Service (C)
<ul style="list-style-type: none"> <li>Specify time and form of payment (can provide for election of time and form of payment by employee or employer, if made in a timely fashion) unless an exception (such as the short-term deferral exception (See Box J) applies.</li> <li>Payment is permitted upon five events: death, disability, an unforeseeable emergency, separation from service and change in control, (the last four events are defined in the 409A regulations) or at a specified time or pursuant to a fixed schedule.</li> </ul>	<ul style="list-style-type: none"> <li>Generally, only one time and form of payment is permitted for each event; can have different times and forms of payment for different payment events (e.g., installment form upon separation from service but a lump sum upon death or disability).</li> <li>Payment date may be specified as “on the 90th day after occurrence of the event;” if so, payment may be made by 12/31 of the calendar year in which 90th day occurs.</li> </ul>	<ul style="list-style-type: none"> <li>General rule: Cannot have different times and forms of payment depending on type of separation (e.g., voluntary vs. involuntary) or on employee’s status (single or married).</li> <li>Exceptions: Can specify different forms for separation upon a change of control within two years; separation based on age or age plus service.</li> <li>Requiring forfeiture upon separation for cause is okay.</li> <li>Specified Employees subject to the six-month delay rule (See Box O).</li> </ul>
Change in Control (D)	Annual Bonus (E)	Reimbursement; Tax Gross-Up (F)
<ul style="list-style-type: none"> <li>Preferable to coordinate definition of change in control in the agreement with the definition of change in control in section 280G of the Code.</li> <li>If agreement provides for amounts to be cut-back to meet the 280G limits, preferable to build in an ordering rule for the cutbacks.</li> </ul>	<p>Need not specify payment form or date:</p> <ul style="list-style-type: none"> <li>For reimbursements or other expenses including certain outplacement expenses and moving expenses if expenses are incurred no later than the end of second year after separation and are reimbursed no later than third year after separation.</li> <li>For limited payments if aggregate does not exceed 402(g) limit (\$20,500 for 2022).</li> </ul>	<ul style="list-style-type: none"> <li>Deemed to meet 409A time and form of payment rules if, among other things;</li> <li>Reimbursements. Expenses eligible for reimbursement in one year may not affect expenses eligible for reimbursement in another year and reimbursement is made in the year following the year in which incurred.</li> <li>Tax Gross-Up. Payment made by the end of the calendar year following the calendar year in which the employee remits the taxes.</li> </ul>
Indemnification; Release (G)	Post-Severance Benefits (H)	Benefits Exempt From 409A (I)
<ul style="list-style-type: none"> <li>Amounts paid upon settlement of certain types of bona fide legal claims including wrongful termination or employment discrimination claims are not deferred compensation.</li> <li>Execution of the release is not a payment event under 409A; agreement must include mechanics that meet 409A requirements for specifying time and form of payment</li> <li>Director and officer liability coverage is not deferred compensation.</li> </ul>	<p>Need not specify payment form or date:</p> <ul style="list-style-type: none"> <li>For reimbursements or other expenses including certain outplacement expenses and moving expenses if expenses are incurred no later than the end of second year after separation and are reimbursed no later than third year after separation.</li> <li>For limited payments if aggregate does not exceed 402(g) limit (\$20,500 for 2022).</li> </ul>	<ul style="list-style-type: none"> <li>Qualified (e.g., 401(k)) plan benefits.</li> <li>Bona fide sick leave or vacation benefits.</li> <li>Disability benefits, death benefits.</li> <li>Certain medical reimbursement arrangements.</li> <li>Nontaxable benefits; post-severance health benefits under a self-insured plan may not be taxable under Code §105 if executive pays fair market value of premiums on after-tax basis.</li> <li>Equity compensation provided the applicable 409A rules are met.</li> </ul>
Short-Term Deferral Exception (J)	Severance Exception (K)	Permitted Accelerations (L)
<p>Need not specify payment form or date:</p> <ul style="list-style-type: none"> <li>If amount is paid by March 15 of the calendar year following the calendar year in which a substantial risk of forfeiture lapses; six month delay rule (See Box O) does not apply.</li> <li>If amount payable solely upon an involuntary separation from service (including certain Good Reason separations) is treated as being subject to a substantial risk of forfeiture; 409A regulations include a safe-harbor definition of Good Reason.</li> </ul>	<p>Need not specify payment form or date if:</p> <ul style="list-style-type: none"> <li>Amount payable solely upon an involuntary separation.</li> <li>Amount does not exceed two times the lesser of (i) the employee’s annual compensation or (ii) the annual 401(a)(17) limit (\$305,000 for 2022).</li> <li>Agreement should provide that amount may be paid no later than last day of second calendar year following calendar year in which separation occurs; six-month delay rule (See Box O) does not apply.</li> </ul>	<ul style="list-style-type: none"> <li>Agreement may (or may be later amended to) provide for some or all of permitted acceleration events.</li> <li>In general, acceleration is permitted (i) to fulfill a domestic relations order, (ii) to comply with ethics laws or conflicts of interest laws, (iii) up to a limited amount that is under the 402(g) limit (\$20,500 for 2022), (iv) for payment of employment taxes or state, local or foreign taxes, (v) upon income inclusion for failure to meet 409A, and (vi) upon certain plan terminations.</li> </ul>

# Brief Guide To Administering Employment Agreements that Comply with Section 409A

For Publicly Held Companies

Separation From Service Leave/Change of Employer (M)	Separation From Service Dual Status Rules (N)	Separation from Service Six-Month Delay Rule (O)
<ul style="list-style-type: none"> <li>Sick leave or other bona fide leave of absence does not count as separation from service as long as the leave does not exceed six months or, if longer, the period for which the employee retains a right to reemployment under the agreement or under applicable law.</li> <li>Separation from service deemed to occur only if employee ceases to provide services to entire controlled group. (E.g., transfer of employment from parent to subsidiary or from subsidiary A to subsidiary B is not separation from service.)</li> </ul>	<ul style="list-style-type: none"> <li>If employee's status changes to consultant, a separation does not occur for 409A purposes unless level of services decreases significantly.</li> <li>Under the 409A regulations, separation is presumed to occur when level of service is <math>\leq 20\%</math> of trailing three-year service average. If trailing three-year service average is <math>\geq 50\%</math>, no separation.</li> <li>Check agreement; it may provide another standard permissible under 409A.</li> <li>If employee also serves on the Board, separation may occur even if employee continues on the Board under certain circumstances.</li> </ul>	<ul style="list-style-type: none"> <li>If employee is Specified Employee (SE), payment upon severance subject to six-month delay.</li> <li>SE defined in 409A regulations.</li> <li>Administrative procedures for identifying SEs include: Pick SE identification date &amp; SE effective date; identify all SEs as of SE identification date; individual who is SE on identification date will be subject to six-month delay if separation occurs during the 12-month period beginning on SE effective date.</li> <li>For other methods of identifying SEs, check with counsel.</li> <li>Other Payment Events (P) Annual Bonus (Q) Bonus Payment Elections</li> </ul>
Other Payment Events (P)	Annual Bonus (Q)	Bonus Payment Elections (R)
<p><b>For payments upon disability, unforeseeable emergency or change in control:</b></p> <ul style="list-style-type: none"> <li>Check employment agreement to determine whether circumstances meet the definitions of disability, unforeseeable emergency or change of control included in the employment agreement.</li> <li>If not, check with counsel. Default definitions included in the 409A regulations may apply.</li> </ul>	<p><b>No Election</b></p> <ul style="list-style-type: none"> <li>If payment year or date is specified in agreement, follow agreement.</li> <li>If no payment year or date is specified in agreement, check with counsel; amounts may be subject to the short-term deferral rules and payment may need to be completed by March 15 of calendar year following calendar year to which the bonus relates.</li> </ul> <p><b>Valid Employee or Employer Election</b></p> <ul style="list-style-type: none"> <li>Pay in accordance with election.</li> </ul>	<ul style="list-style-type: none"> <li>Annual bonus election. Must be made in the calendar year preceding the calendar year to which the bonus relates (See 409A regulations for rules where employer's tax year is the fiscal year).</li> <li>Performance bonus election. May be made until six-months before the end of the performance period, provided, among other things, the employee meets certain employment requirements and the bonus is not readily ascertainable at such time.</li> </ul>
Permitted Election Changes (S)	Form W-2 Reporting (T)	Miscellaneous (U)
<p><b>Before Election Deemed Irrevocable Under 409A or the Agreement</b></p> <ul style="list-style-type: none"> <li>Anytime, with no adverse consequences.</li> </ul> <p><b>After Election Deemed Irrevocable Under 409A or the Agreement</b></p> <ul style="list-style-type: none"> <li>New election cannot take effect until at least 12 months after the date the election is made.</li> <li>Payment is deferred for a period of not less than five years from the date the payment would otherwise have been made; in the case of installment payments, check whether agreement treats each installment as a separate payment; default rule-entire series is treated as a single payment.</li> </ul>	<ul style="list-style-type: none"> <li>Current year deferrals and earnings on current and prior deferrals - Report in Box 12 (using Code Y).</li> <li>Amounts included in gross income as a result of failure to satisfy 409A - Report in Box 1 and in Box 12 (using Code Z).</li> <li>If arrangement meets (or is exempt from) 409A but amounts are includible in income because of an economic principle such as the economic benefit doctrine (e.g., employer's payment of premiums on group life insurance in excess of \$50,000) - Report in Box 1.</li> <li>Distributions - Report in Box 1 and Box 11.</li> <li>Prior year deferrals that became taxable in current year for FICA and Medicare purposes but were for prior year services - Report in Box 11.</li> </ul>	<p><b>Permitted Payment Delays</b> Payment may be delayed beyond the short-term deferral period if:</p> <ul style="list-style-type: none"> <li>Payment is not administratively practicable.</li> <li>Payment would jeopardize the ability of the employer as a going concern.</li> </ul> <p><b>Cancellation of Deferrals</b></p> <ul style="list-style-type: none"> <li>Cancellation is permitted</li> <li>Following an unforeseeable emergency or a hardship distribution.</li> <li>Due to a disability.</li> </ul> <p><b>Correction of Errors - Notice 2010-80, Notice 2010-6 &amp; Notice 2008-113</b></p> <ul style="list-style-type: none"> <li>Notices provide correction methods for certain documentary and operational failures.</li> </ul>