



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

May 2, 2006

OFFICE OF
CHIEF COUNSEL

Number: **INFO 2006-0033**
Release Date: 9/29/2006
Index: 409A.00-00

CONEX-118148-06

The Honorable Virgil H. Goode, Jr.
Member, U.S. House of Representatives
70 East Court Street
Suite 215
Rocky Mount, VA 24151

Dear Congressman Goode:

This letter is in response to your inquiry, dated March 10, 2006, on behalf of your constituent,

. She
asked about the application of certain tax rules to retirees from the
who return to work part-time.

says the told her that new regulations under section 409A of the Internal Revenue Code (the Code) require a retiree to complete a bona fide break in service of at least 30 days before receiving a service retirement benefit, and that the new position be a part-time position, not exceeding 80% of the services provided in a full-time position. I am glad to provide you the following general information on section 409A of the Code.

Section 885 of the American Jobs Creation Act of 2004, Public Law 108-357 (118 Stat. 1418) added section 409A to the Code. This law generally provides that unless certain requirements are met, amounts deferred under a nonqualified deferred compensation plan are included in gross income to the extent not subject to a substantial risk of forfeiture and not previously included in gross income.

Certain types of retirement plans are not covered by section 409A. These plans include a qualified retirement plan under section 401(a), a qualified retirement annuity under

section 403(b), and an eligible deferred compensation plan under section 457(b). All other types of deferred compensation plans are generally subject to section 409A. These include retirement plans covered by section 457(f) (addressing certain nonqualified deferred compensation plans of state and local governments and nonprofit organizations that are ineligible under section 457(b)). Unfortunately, because letter does not fully describe the plan in question, we cannot determine whether the plan is subject to section 409A.

If the plan is subject to section 409A, a participant can receive a payment only upon one of six permissible payment events:

- Separation from service
- Death
- Disability
- Unforeseeable emergency
- A corporate transaction resulting in a change in control of the corporation
- A specified date or a fixed schedule of payments

On September 29, 2005, the Treasury Department and the Internal Revenue Service issued proposed regulations under section 409A (2005-43 I.R.B. 786 (Oct. 24, 2005)). The proposed regulations define a "separation from service," for purposes of determining when a payor must make a payment under a plan providing for payment upon a separation from service. However, letter refers to rules that are not in the proposed regulations. She may wish to confirm that the plan in question is covered by section 409A or explore whether the rules to which she refers come from another Code provision applicable to the plan, a state law, or the terms of the plan itself.

If determines that the plan in question is subject to section 409A and she would like to submit a comment on the effect of the proposed regulations on the plan, she can write to:

CC:PA:LPD:PR (REG-158080-05)
Room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington, DC 20044

In addition, she can send a comment electronically, via the IRS Internet site at www.irs.gov/reg or via the Federal eRulemaking Portal at www.regulations.gov (IRS REG-158080-04).

We have received approximately 100 comments to the proposed regulations, including several comments related to the definition of a separation from service. We held a public hearing on the proposed regulations on January 25, 2006. We are considering all public comments we received in formulating the final regulations.

If you or _____ have any questions about the proposed rules on distributions upon a separation from service, or any other aspect of section 409A, please contact me or _____ of my staff at _____ .

Sincerely,

Nancy J. Marks
Division Counsel/Associate Chief Counsel
(Tax Exempt & Government Entities)

cc: