

# INDEX

## A

### Acceleration of benefits

- beneficiary change and, 72–73
- cafeteria plan, 88
- cash-out distribution, 69
- cash-out of small benefits, 74
- change of control and, 75
- conflict of interest or foreign ethics laws and, 69, 73
- deferred compensation distributions, 69–70
- disability or death, 71–72
- dispute settlement and, 87–88
- domestic relations order, 69, 76–78
- election by service provider, 72–73, 74, 81
- employer termination/liquidation of plan, 79–81
- federal debt collection laws and, 86
- forfeiture or voluntary relinquishment of deferred compensation, 84–85
- impermissible service recipient discretion, 201
- installment or annuity payment cash-outs, 74–75
- loans prohibited, 83–84
- lump sum cash-out, 73–74
- nonallocation year and, 87
- offset provisions, 85–86
- pandemic emergency, 70–71, 181–192

provision for plan termination, 81

- as security for loan or other amount due creditors, 84
- service recipient plan termination, 81–82
- substitute plans or benefits prohibited, 83
- substitution rule, 83
- tax-exempt entities and, 292
- tax withholding and, 86
- top hat plans, 89–90
- unforeseeable emergency, 70–71
- vesting, unforeseeable acceleration of, 69, 82–83
- violation of Section 409A and, 86

### Account balance plan

- documentation requirements, 20
- grandfathering and, 274
- types of subject to Section 409A, 1–2

### Aggregation rule

- deferrals and, 96
- federal income tax liability, 96
- other Section 409A applications, 97
- plan types for, 95–96
- service provider deferral elections, 108

Ambiguous terms, use of to define payment event, 198–200

Annualized recurring part-year compensation, 105  
 Anti-toggling rule, 59–61  
   impermissible additional payment schedules, 202–203  
 Applicable covered employee, 177–179  
 Asset sales and separation from service, 39, 40

**B**

Beneficiary change, 72–73  
 Benefits  
   acceleration of (*see* Acceleration of benefits)  
   death (*see* Death benefits)  
 Board of directors, early distribution with consent of, 16  
 Bona fide death benefit plan, 3, 12, 157, 282  
 Bonus  
   deferral and cancellation, 110–111  
   discretionary, 181, 190  
 Bonus life insurance or annuity plan  
   advantages of, 159  
   defined, 158–159  
   disadvantages of, 159–160  
 Breach of Section 409A  
   aggregation rule, 95–97  
   documentary violation, 97  
   employer disclaimer of responsibility, 95  
   enforcement of penalties, 196  
   federal income tax consequences of, 93  
   federal income tax structure, 91–93  
   income tax due on, 92–93  
   mediation of negative tax consequences, 100

negative tax consequences, 92  
 operational violation, 98–99  
 prior federal income tax law and, 99–100  
 service provider violation, 91  
 service recipient responsible for payment of taxes due to, 94–95  
 state personal income tax, 100  
 statute of limitations, 264–265  
 subsequent deferrals after, 99  
 substantial risk of forfeiture, 94

Broad-based foreign retirement plan, 166

**C**

Cafeteria plan, 88  
 Cash basis rule for subsequent year, 109  
 Cash-out distribution  
   acceleration of benefits, 69  
   installment or annuity, 74–75  
   lump sum, 73–74  
   small benefits, 74  
 Change in ownership or effective control (CIC, COC)  
   accelerated benefits, 69, 75  
   defined for Section 409A, 75–76  
   election to distribute by service provider, 75  
   impermissible definition of, 202  
   plan continuation following, 75, 79–80, 82  
   as primary permissible distribution event, 35  
 Child college admission as impermissible distribution event, 16  
 CIC or COC (*see* Change in ownership or effective control)  
 Commissions, 1, 101, 103–104, 105, 198

- Compensation
  - covered, 1, 171–172, 215
  - educational partial-year
    - (*see* Recurring part-year compensation)
  - subject to forfeiture, 107
  - substantial risk of forfeiture and, 28–31
- Conflict of interest laws,
  - acceleration of benefits to comply with, 69, 73
- Correction, super summary for, 319–322
- Correction of Documentary Failures sample statements, 315–316
- Correction of operational errors, 214. *See also* Di minimus error correction
- Correction of Operational Failures sample statements, 317–318
- Covenant not to compete,
  - substantial risk of forfeiture and, 30
- Covid-19 pandemic. *See* Pandemic emergency distributions
- D**
- Death
  - accelerated benefits, 69, 71–72
  - beneficiary, 58
  - payments made upon, 56
  - as primary permissible distribution event, 35
- Death benefit only (DBO) life insurance plans, 1, 12, 161, 162
- Death benefits
  - bona fide plans, 12, 282
  - and death of beneficiary, 58
  - specification of period of payment of, 57
- Debt collection laws, offsets of
  - deferred compensation to comply with, 86
- Deferral elections. *See* Service provider deferral elections
- Deferred amounts, tax
  - consequences due to breach of Section 409A on, 93
- Deferred compensation
  - acceleration of benefits, 69–70, 86–90
  - amounts paid shortly after earned as not, 23
  - checklist for structuring nonqualified, 293–294
  - definition of, 4–6
  - dispute settlement and, 87–88
  - employer account balance plans, 101–102
  - employer non-account balance plans, 102
  - federal debt collection laws and, 86
  - foreign plans, 163–165
  - forfeiture or voluntary relinquishment of, 84–85
  - income amounts includable under Section 457, 290, 291–292
  - made in form of stock option, 66
  - nonallocation year and, 87
  - participant account balance plans, 101
  - present value of, 291
  - replaced with split-dollar arrangement, 66
  - tax withholding and, 86
- Delayed payments, 63–64
- De Minimis error correction, 214

- Disability
  - accelerated benefits, 69, 71–72
  - definition of, 52
  - impermissible definition of, 200
  - leave of absence, 18, 38–39
  - letter rulings, 193–194
  - loans, 84
  - plan access during pandemic, 184
  - as primary permissible
    - distribution event, 35
  - stoppage of deferral
    - contributions only-different definition, 52
- Disability pay, 11–12
  - bona fide disability pay plans, 282–283
  - separation from service and, 53
- Discretionary bonus, 5, 109, 181, 190
- Dispute settlement, 87–88
- Distribution events
  - anti-toggling rule, 59–61
  - asset sale, 39, 40
  - benefit value as a basis for form of distribution, 64–65
  - death of beneficiary and, 58
  - delayed payments, 63–64
  - disability, 52
  - downturn in financial health, 63
  - earliest of two or more
    - permissible events, 59
  - employee to independent contractor status change, 41–42
  - impermissible, 16
  - independent contractors and
    - separation from service, 40–41
  - involuntary separation from service, 62
  - late payments, 62–63
  - leave of absence, 38–39
  - marriage and, 61
  - pandemic emergency, 70–71, 181–191
  - plan terminations, 35–36, 79–82
  - primary permissible, 35–36
  - publicly traded companies, 43–44
  - refusal or failure to make payment, 67
  - rehire impact, 66–67, 118
  - separation from service
    - qualifications, 36–38
  - service provider claim release and, 58–59
  - six-month delay rule, 44–46
  - small amounts, 64, 73–74, 215, 312
  - specified employees, identifying, 44–51
  - split-dollar arrangement, 66
  - stock option, 66
  - stock *vs.* cash payment, 65
  - suspension of due to employee rehire, 66–67
  - time and payment type, plan dictated, 53–54
- Distribution restrictions,
  - grandfathered amounts and, 274–275
- Dividend-equivalent distributions, 147–148
- Divorce, 19, 76, 77–78, 296, 303, 307
- Documentary errors
  - ambiguous provisions and terms, 198–200
  - amendment correction with limited recognition, 201–205
  - amendment correction without income recognition, 200–201
  - corrections requiring plan amendment, 205, 209–210
  - limiting tax consequences, 197

- linked plans, 207
- new plan treatment, 208–209
- Notice 2010-6, correcting without complying with, 210–211
- Notice 2010-6 corrections, 207–208
- plan amendment, correction by, 200–205
- plan types not eligible for correction, 198
- scriveners' error, 210
- service provider income, 208–209
- stock plans, 206
- stock rights, 206
- types of errors subject to correction, 197–198
- Documentary violation, 97, 210–211
- Documentation requirements, Section 409A
  - account balance plan, 20
  - all plans, 18–19
  - elective deferral plan, 20
  - employer non-account balance plan, 21
  - error corrections, 315–316
  - minimum requirements for, 18–21
  - part-year compensation deferral elections, 113
  - plans outside scope of, 17
  - prohibited distribution events, 16
  - provisions not permitted or advisable, 21
  - publicly held employer plan, 19–20
  - right to select time/ form of payment plan, 20
  - tax consequences of violation of, 97
  - timetable, 15
  - written plans, 15
- Domestic relations order (QDRO), 307–310
  - acceleration of benefits, 69, 76–78
- Downturn in financial health, 63
- E**
- Early distribution with board of directors consent, 16
- Educator recurring part-year compensation, 105
- Effective dates
  - compliance standards from 2005 through 2008, 275
  - efforts to repeal Section 409A and, 276
  - grandfathering, 269–275
  - Section 409A, 269, 275
- Election cancellation, 52, 110–111, 120, 182, 185–186
- Election to defer. *See* Service provider deferral elections
- Elective deferral plan
  - documentation requirements, 20
- E-mails, Section 409A
  - documentation and, 18
- Employee definition. *See* Service recipient
- Employee stock purchase plan options, 135
- Employer account balance plans, 101–102
- Employer non-account balance plans
  - documentation requirements, 21
  - elections of time and form of payment, 107
  - treatment under Section 409A, 102

- Employer-owned life insurance policy, 161
  - Employment agreements
    - fringe benefit arrangements, 151–153
    - indemnification payments, 155
    - legal fees, employment-related, 155
    - legal settlements, 154
    - Section 409A issues, 151
    - self-insured medical coverage, 153
    - tax gross-up payment, 153–154
  - Enforcement
    - 409A issues ruled on by IRS, 194
    - auditing and enforcing, IRS
      - current, 194
    - IRS no-ruling position, 193–194
    - penalties for Section 409A violation, 196
    - reporting obligations of service recipient, 195
    - timing requirements, 196
  - Evergreen elections, 106
  - Exceptions
    - deferred compensation, 163–165
      - to part-year compensation deferral elections, 111–112
    - to plans subject to Section 409A, 3–4
      - regulatory, 3–4
    - severance plans, 127, 129
    - statutory, 3
  - Excess benefit plans, 106
  - Excise taxes and acceleration of benefits, 69–70
- F**
- Fair market value of stock, 139–141
  - Federal debt collection laws, 86
  - Federal Insurance Contributions Act (FICA), 86
  - Financial hardship. *See* Unforeseeable emergency
  - Financial health of service recipient, downturn in, 63
  - Fiscal year compensation deferral. *See* Service provider deferral elections
  - Fiscal year plans, 105
  - Foreign earned income, 167
  - Foreign ethics laws, acceleration of benefits to comply with, 73
  - Foreign plans
    - broad-based retirement plan, 166
    - deferred compensation exceptions, 163–165
    - foreign earned income, 167
    - foreign social security system, 166
      - Sections 457A/409A compared, 167–168
      - subject to Section 457A and Section 409A, 169
    - tax equalization agreement, 165–166
      - treaty exemption, 165
  - Foreign social security system, 166
  - Forfeiture
    - compensation subject to, 28–31, 107
      - rolling risk of, 125–126, 289–290
      - substantial risk of (*see* Substantial risk of forfeiture)
  - Freezing plans (frozen plans), 78, 172, 190–191, 271
  - Fringe benefit arrangements, 151–153

- Funding
  - grandfathered plans, 179
  - offshore trusts, 177
  - requirements for, 175–176
  - restricted period, 177–179
  - trust assets as, 176–177
- G**
- Grandfathering
  - acceleration of benefits and, 83
  - account balance plan and, 273–274
  - amounts eligible for, 274–275
  - distribution restrictions, 274–275
  - domestic relations order and, 78
  - effective dates, 269–275
  - funding and, 179
  - life insurance contract and, 272
  - material modification, 269–271, 272–273
  - non-account balance plan and, 274
  - operational errors and, 215
  - split-dollar life insurance, 158, 274
  - tax consequences, 100
- Grantor trusts, 175–176, 177
- H**
- Haircut provisions, 16
- Health care reimbursements, 152
- Hogans, Daniel L., 17, 28, 61, 173
- I**
- Impermissible distribution events, 16
- Impermissible reimbursements, 203
- Incentive stock options, 135–136
- Income taxation, deferral of, 290
- Indemnification payments, 155
  - termination of contract (employment), 40, 42
- Independent contractors
  - definition (*see* Service recipient)
  - separation from service and, 40–41
  - status change from employee to, 41–42
  - termination of contract (employment), 40, 42
- Initial public offering, 50
- In-kind benefits, impermissible, 203
- Insider, definition for operational error correction purposes, 255–256
- Investment commissions, 105
- IRS examination, disqualification by, 264
  - assessment of tax liabilities time-barred, 265–266
- audit status, service recipient, 260–261
- correction considered complete, 261
- correction program and taxpayer audit risk, 262
- service provider, 260
- service recipient, 259–260
- statute of limitations, 264–265, 266–267
- subsequent operational failure, 263
- taxpayer duty, 262
- tax-qualified retirement plan, 263–264

**J**

Joint life expectancies, 72–73

**K**

Key employee, 47, *See also*  
 Specified employees, identifying  
 Key person life insurance policy,  
 161

**L**

Late payments, 62–63  
 Leave of absence, 38  
 Leaves of absence, 18, 38–39  
 during pandemic, 192  
 Legal fees, employment-related, 155  
 Legal settlements, 154  
 Letter rulings, 193–194  
 Letter rulings, private, 329–355  
 Life insurance arrangements  
 bonus life insurance or annuity  
 plan, 158–160  
 death benefit only (DBO) plan,  
 12, 162  
 employer-owned life insurance,  
 161  
 grandfathering, 272  
 key person policy, 161  
 split-dollar, 157–158, 162  
 Limited payment rule, 129  
 Linked plans, 106–107, 207  
 Linking plans, limitations on  
 offsetting benefits, 172–173  
 participant elections,  
 nonqualified to qualified,  
 171–172  
 Loans, 83–84, 162

**M**

Marriage and distribution events,  
 61  
 Materially greater amounts,  
 defined, 125–126

Mediation of negative tax  
 consequences, 100  
 Mid-year start (pro rata rule), 104

**N**

Non-account balance plan,  
 grandfathering and, 274  
 Nonallocation year, 87  
 Non-qualified deferred  
 compensation  
 benefit access during pandemic,  
 182–184  
 checklist, 319–322  
 disability pay and, 11–12  
 plan types subject to  
 Section 409A, 2  
 Non-qualified stock options,  
 135–136  
 dividend equivalent rights,  
 144–145  
 Section 409A, becoming subject  
 to, 143–144  
 stock split or stock dividend, 145  
 Nontaxable fringe benefits,  
 151–152  
 Non-vested amounts, tax  
 consequences due to breach of  
 Section 409A on, 93  
 Nonvested stock, service providers  
 rights, 137  
 Notice 2010-6  
 date of correction for,  
 207–208  
 documentary errors, correcting,  
 197–198, 210–211, 315–316  
 operational errors, correcting,  
 213–214  
 plans not eligible for correcting  
 documentary errors, 198  
 relief without plan amendment,  
 198–200  
 scrivener's errors and, 210



- service provider income recognition, 208–209
- service provider tax liability under, 91
- stock plans and, 206

**O**

- Officer, definition of, 256
- Offset provisions
  - acceleration of benefits, 85–86
  - linking plans, limitations on offsetting benefits, 172–173
  - salary advance, against deferred compensation, 16
- Offshore trusts, funding with, 177
- Operational errors
  - analysis to determine, 215–217
  - correction for, 213–214
  - correction of de minimis errors, 214
  - deferred amount greater than deferral election, 234–239
  - deferred payment made before scheduled time, 239–246
  - distribution in correct year but earlier than scheduled date, 246–253
  - documentation and reporting of, 214
  - earnings or losses adjustments by applicable deadline, 256–257
  - exercise price of stock below fair market value, 253–255
  - grandfathered plans and, 215
  - insider, definition of, 255
  - late distribution of previously deferred compensation, 223–227
  - Notice 2008-113 reporting/disclosure requirements, 257
  - officer, definition of, 256

- Section 402(g)(1)(B) deferral amount, 255

- Section 409A, 217–223
- separation from service payments during first six months, 228–234

- Operational violation of Section 409A, 98–99
- super summary for correction, 319–322

- Ownership or effective control
  - change in acceleration of benefits, 75
  - definition of, 75–76
  - as primary permissible distribution event, 35

**P**

- Pandemic emergency distributions, 70–71
  - challenges created by, 181–182
  - compensation reduction and, 186
  - deferral election cancellation and, 185–186
  - disability and, 184
  - funding of rabbi trust and, 191
  - leave of absence and, 192
  - legislative or regulatory relief, 182
  - nonqualified benefit plan access, 182–184
  - performance-based bonus during, 188–190
  - promise to pay reduced compensation later, 187
  - reduced or canceled credits, 190
  - separation of service and, 191–192
  - temporary shutdown of all business operations and, 190

- Pandemic emergency distributions, *continued*
  - as unforeseeable emergency, 183–184
  - voluntary plan termination and, 184–185
- Participant account balance plans, 101
- Participant definition. *See* Service recipient
- Partnership arrangements subject to Section 409A, 10–11
- Part-year compensation deferral elections, 111–114
  - deadline for submission, 112
  - documentation required, 113
  - exceptions to, 111–112
  - failure to meet timing rule,
    - additional taxes for, 113–114
  - making changes to, 113
  - recurring part-year compensation, 286–287
  - Section 409A requirements, 112
- Payments
  - death benefits, death of beneficiary, 58
  - death benefits, specification of period for payment of, 57
  - delayed, 63–64
  - elections of time and form of, with respect to employer plans, 107
  - indemnification, 155
  - late, 62–63
  - refusal or failure to make, 67
  - service provider claim release and timing of, 58–59
  - short-term deferral rule and timing of, 27, 31
  - substantial risk of forfeiture and, 56
  - tax gross-up, 153–154
  - timing of, 55–56
  - transaction-based compensation, 148–149
  - transfer of property at substantial risk of forfeiture, 56
  - upon death, 56
- Performance-based compensation, 105, 109–110
  - during pandemic, 188–190
- Permissible distributions and accelerations checklist, 311–313
- Phantom stock units, 146–147
- Plans not subject to Section 409A, 3–4
- Plans subject to Section 409A
  - death benefits and, 12
  - deferral of compensation and, 4–6
  - determination of, 6
  - disability pay and, 11–12
  - exceptions to, 3–4
  - general requirements for, 13
  - legally binding treatment of, 6–7
  - partnerships and, 10–11
  - property acquisition or interest and, 9
  - service provider for, 8
  - service recipient for, 7–8
  - tax-exempt entities (*see* Tax-exempt entities, plans of)
  - types of, 1–2
  - vacation leave and, 13
- Plan termination
  - accelerated benefits, 69
  - pandemic emergency, 184–185
    - as primary permissible distribution event, 35–36
- Present value of deferred compensation, 291
- Previously eligible participants, 104–105
- Property acquisition or interest, plans subject to Section 409A and, 9

Publicly held employer plan  
documentation requirements,  
19–20

Publicly traded companies  
separation from service, 43–44  
specified employees, 45–46

## Q

QDRO. *See* Domestic relations  
order

## R

Rabbi trust funding, 19, 175–179,  
182, 270, 296

during pandemic, 191

Railroad Retirement Act  
(RRTA), 86

Recurring part-year compensation,  
11, 105, 111–112, 114, 286–287

Reduced or canceled credits during  
pandemic, 190

Regulatory exceptions to  
Section 409A, 3–4

Rehire, impact on distributions,  
66–67

Reimbursement provisions, 203

Release, non-compete agreement, 201

Reporting

aggregate plan deferral amounts,  
96, 195

federal W-2 (*see* Tax reporting,  
W-2)

state income taxation (*see* Tax  
reporting, state income  
taxation)

Restricted period, 177–179

Restricted stock, 146–147

Restricted stock units, 146–147

Right to select time/form of  
payment plan documentation  
requirements, 20

Risk of forfeiture, substantial. *See*  
Substantial risk of forfeiture

Rolling risk of forfeiture, 125–126,  
289–290

## S

Safe harbor requirements, 120,  
130–131

Sales commissions, 105

SARs. *See* Stock appreciation rights

Schmidt, William, 30

Scriveners' error, 210

Section 338, deemed asset sale

under, 40

Section 409A plan documentation  
checklist, 295–299

Securities market, established, 43

Self-insured medical coverage, 153

Separation from service  
asset sales and, 39, 40

change in status from  
employee to independent  
contractor, 41–42

different payment schedules for  
voluntary and involuntary, 202

disability pay and, 53

distribution qualifications, 36–38  
during pandemic, 191–192

impermissible definition of, 202

independent contractor, 40–41

involuntary, 62

leaves of absence, 38–39

operational errors and, 228–234

as primary permissible  
distribution event, 35

publicly traded companies, 43–44

spin-off and, 39

stock sale and, 39

termination of employment  
presumptions, 36–38

Service provider, definition, 8

- Service provider deferral elections
  - annualized recurring part-year compensation, 105
  - annuity payment types, 117–118
  - beneficiaries, 8, 56, 72–73
  - bonus deferral and cancellation, 110–111
  - cancellation, 120
  - cash basis rule for subsequent year, 109
  - compensation subject to forfeiture, 107
  - deferral of short-term deferral awards prior to vesting, 107–108
  - definition of, 103
  - different deferral percentages for different types of compensation, 121–122
  - educator compensation, 105
  - elections of time and form of payment with respect to employer plans, 107
  - employee missed or late submissions, 112
  - evergreen elections, 106
  - exceptions to, 111–112
  - excess benefit plans, 106
  - fiscal year plans, 105
  - flexibility, 122–124
  - investment commissions, 105
  - linked plans, 106–107
  - mid-year start (pro rata rule), 104
  - multiple subaccounts, 121
  - nondiscretionary formula calculation method, 108
  - pandemic emergency cancellations, 185–186
  - partial deferral, 118
  - part-year compensation, 111–114
  - performance-based compensation, 105, 109–110
  - periodic installments deferral, 118–119
  - plan aggregation, 108
  - previously eligible participants, 104–105
  - rolling risk of forfeiture, 125–126
  - sales commissions, 105
  - Section 409A requirements, 112, 113
  - single sum payment, 119
  - subsequent election requirements, 114–119, 122–124
  - 30-day rule, 104
  - time frame for, 104–108
- Service recipient, definition, 1, 7
- Service recipient stock
  - fair market value of, 139–141
  - granting of stock rights, 136
  - mandatory repurchase obligations, 139
  - stock-based compensation, 137–138
- Severance payments
  - bona fide severance pay plans for purposes of Section 457, 280–281
  - breach of Section 409A, 132–133
  - collectively bargained, 134
  - exempt from Section 409A, 127, 129
  - foreign, 134
  - form and type modifications, 132
  - mitigation provision, 132
  - nonqualified deferred compensation payments, 133
  - rules used for, 128–129

- termination for good reason, 130–131
  - voluntary termination, 130
  - window program, 134
- Shareholder service providers (sole & majority) treatment, 28, 110, 145, 148
- Short-term deferrals
  - amounts paid shortly after earned, 23
  - delay in payment situations, 27–28, 31
  - documentation of, 16
  - examples of, 26
  - rule defined, 24–26
  - Section 457 and, 284
  - service provider deferral elections, 107–108
  - substantial risk of forfeiture and, 28–31, 32–33
  - timing of payment, 27
  - vest and pay lump sum, 33
- Shutdown, pandemic, 190
- Sick leave plan, bona fide, 283
- Six month delay rule
  - documentary errors, 203
  - exceptions to, 43–44
  - publicly held employer plan, 19–20
  - rehired employee cases and, 67
  - specified employees and, 44–46, 51–52
- Small benefits, cash-out
  - distribution of, 74
- Specified employees, identifying
  - alternative approaches for, 45–46
  - claim for post-employment discrimination or retaliation, 51–52
  - default rules for, 44–45
  - following corporate transaction, alternative rules, 50–51
  - following initial public offering, 50
  - following spin-off, 50
  - public/nonpublic company transaction, following, 49
  - six-month delay rule, 44–46, 51–52
  - two public companies corporate transaction, following, 47–49
- Specified time/fixed schedule as primary permissible distribution event, 35
- Spin-offs
  - identifying specified employees following, 50
  - and separation from service, 39
- 401k Spill-over (401k wrap-around) plans, 171
- Split-dollar life insurance arrangements
  - defined, 157
  - grandfathering and, 158, 274
  - termination of, 162
  - types of, 157–158
- State income taxation, 77, 100, 217
- Statutory exceptions to
  - Section 409A, 3
- Stock appreciation rights (SARs)
  - modification in terms of stock right, 142–143
  - Section 409A, becoming subject to, 143–144
  - Section 409A, structure to comply with, 145–146
  - transaction-based compensation rules, 149
- Stock-based compensation
  - change in terms of stock right, 142–143
  - dividend-equivalent distributions, 147–148

- Stock-based compensation,
    - continued*
    - employee stock purchase plan option, 135
    - fair market value of, 139–141
    - incentive stock options, 135–136
    - nonqualified stock options, 135–136, 143–146
    - nonvested stock, service provider rights, 137
    - phantom stock, 146–147
    - restricted stock and restricted stock units, 146–147
    - Sections 409A and ASC 718 compared, 141–142
    - service recipient stock, 138–139
    - stock appreciation rights (SARs), 136, 143–144
    - stock rights granted before becoming service provider, 138
    - transaction-based compensation payments, 148–149
    - valuation date for restricted stock units, 147
  - Stock options
    - substantial risk of forfeiture and, 66
    - transaction-based compensation rules, 148–149
  - Stock sale and separation from service, 39
  - Stoppage of plan contributions
    - stoppage of deferral
      - contributions only, different definition, 66–67, 120
    - stoppage of employer contributions, 120, 190–191, 297–298
    - stoppage of participant elections to defer (*see* Service provider deferral elections)
  - Subsequent deferred election requirements, 114–119, 122–124
    - impermissible discretion, 203–204
  - Substantial risk of forfeiture, 28–31
    - breach of Section 409A tax consequences, 94
    - definitions of, under Sections 409A, 83, and 457(f), 9, 32–33, 284–286
    - example of, 32–33
    - payment, transfer of property considered, 56
    - service provider deferral elections, 107, 125–126
    - tax-exempt organizations, 284–286, 287–289
  - Substitution rule, acceleration of benefits, 83
- T**
- Tax consequences. *See* Breach of Section 409A
  - Tax equalization agreement exemption, 165–166
  - Tax-exempt entities, plans of
    - acceleration of benefits to pay taxes, 292
    - death benefit plans, bona fide, 282
    - deferral of income taxation, 290
    - deferred compensation defined in context of, 279
    - disability pay plans, bona fide, 282–283
    - income amounts includable under Section 457, 290, 291–292
    - income subject to substantial risk of forfeiture, 287–289
    - legally binding plans, 280
    - non-qualified deferred compensation, 277
    - plans not subject to Section 457, 279–280

- present value of deferred compensation, 291
    - recurring part-year compensation, 286–287
    - rolling risk of forfeiture, 289–290
    - rules for taxable employers *vs.*, 278
    - Section 409A and, 9–10, 279
    - Section 457 and, 279
    - severance pay plans, bona fide, 280–281
    - short-term deferral rule, 284
    - sick leave plan, bona fide, 283
    - substantial risk of forfeiture, definition of, 284–286
    - vacation leave plan, bona fide, 13, 283
  - Tax gross-up payment, 153–154
  - Tax reporting
    - state income taxation, 77, 100, 217
    - W-2, 91, 195, 209, 219–221, 223, 225–227, 229, 232–233, 236–237
  - Tax withholding, 86
  - Termination of employment
    - examples of, 37–38
    - generally, 36
    - presumptions, 36–38
  - Termination of plans. *See*
    - Acceleration of benefits, service recipient plan termination
    - 30-day rule, 104
  - Top hat plans, 89–90
  - Transaction-based compensation payments, 148–149
  - Treaty exemption, 165
  - Trust assets, funding with, 176–177
- U**
- Unforeseeable emergency
    - acceleration of benefits, 69, 71
    - distribution request form, 301–305
    - plan access during pandemic, 183–184
    - as primary permissible distribution event, 35
    - Section 409A, 70–71
- V**
- Vacation leave plan, bona fide, 13, 283
  - Valuation methods for stocks, 139–141
  - Valuation of Privately Held Company Equity Securities Issued as Compensation* (AICPA), 142
  - Vest and pay lump sum SERP, 33
  - Vested amounts, tax consequences due to breach of Section 409A on, 93
  - Vesting
    - deferral of short-term deferral awards prior to, 107–108
    - unforeseeable acceleration of, 69, 82–83
  - Voluntary salary deferrals, substantial risk of forfeiture and, 30
  - Voluntary service recipient plan terminations, 81–82, 184, 296
- W**
- W-2 reporting for federal income tax purposes. *See* Tax reporting, W-2
  - 401k Wrap-around plans (spill-over plans), 171
  - Window program, 134
  - Written plans, documentation requirements, 15. *See also* Documentation requirements, Section 409A