December 31st Deadline to Amend Deferred Compensation Plans

December 10, 2020

The 2017 Tax Cuts and Jobs Act (the ?ÃÂ£***TCJA***?ÃÂ¥) significantly amended Section 162(m) of the Internal Revenue Code (?ÃÂ£***Code***?ÃÂ¥) by expanding the definition of a ?ÃÂ£covered employee?ÃÂ¥ to also include an employee who was formerly a ?ÃÂ£covered employee?ÃÂ¥ of the publicly traded corporation (*i.e.*, the "once a covered employee, always a covered employee"?Ã¡rule). Under this expanded rule, anyone who was a covered employee of the publicly traded corporation (or any predecessor) for any taxable year beginning on or after January 1, 2017, will continue to be a covered employee for taxable years beginning in 2018 and later, even after the employee?ÃÃs separation from service. This change potentially impacts the availability of benefit payments under certain nonqualified deferred compensation plans which provide that payments may be delayed if the company?ÃÃs deduction would not be permitted under Code Section 162(m). The application of this "once-in, always-in rule" could thus result in a benefits payment never being made to a participant under the plan. An amendment that accelerates the timing of payment of amounts that are already deferred under a nonqualified deferred compensation arrangement could be considered an ?ÃÂ£impermissible acceleration?ÃÂ¥ under Code Section 409A. However, the IRS issued proposed regulations (the ?ÃÂ£***Proposed Regulations***?ÃÂ¥), which provide guidance on the TCJA changes to Code Section 162(m). Under the Proposed Regulations, a publicly traded corporation may amend its nonqualified deferred compensation plan by no later than December 31, 2020, to remove any provision providing for delay of payment of deferred compensation until the time when the payment would be deductible under Code Section 162(m) without the amendment being treated as an ?ÃÂ£impermissible acceleration?ÃÂ¥ under Code Section 409A. Publicly traded corporations should thus review their nonqualified deferred compensation plans and make any necessary amendments before year-end.

The Proposed Regulations are available here.

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