



# NYLEX News

*News and Events in the Executive Benefit Program Marketplace*

## 2008 Nonqualified Plan Tax Reporting Requirements

*TO OUR CLIENTS AND FRIENDS*

THIS ISSUE OF NYLEX NEWS DISCUSSES 2008 TAX REPORTING REQUIREMENTS FOR DEFERRED COMPENSATION. YOUR PAYROLL DEPARTMENTS WILL NEED TO UNDERSTAND THESE REQUIREMENTS IN ORDER TO COMPLETE EMPLOYEE W-2 AND INDEPENDENT CONTRACTOR 1099-MISC REPORTS IN JANUARY.

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### TAX REPORTING OF

#### DEFERRALS

The American Jobs Creation Act of 2004, which added Section 409A to the Internal Revenue Code, also added Sections 6041(g)(1) and 6051(a)(13). These sections require that all deferrals for the year under a nonqualified deferred compensation plan be separately reported on Form W-2 (Wage and Tax Statement) for employees, or Form 1099-Misc for independent contractors. These provisions require reporting of deferrals regardless of whether such amounts are includible in taxable income.

Nonqualified            deferred

compensation that must be reported encompasses both salary deferral and defined benefit type plans.

This reporting requirement was waived for tax years 2005 through 2007 because of the strong outcry from employers that additional time was needed to create new reporting systems. Also, the IRS had yet to provide guidance on how to calculate the deferred amounts that needed to be reported. It is unlikely that a waiver will be issued for 2008.

#### CALCULATING ANNUAL DEFERRALS

##### Account Balance Plans

Account balance plans

include plans where an individual's benefit is based on a balance in his or her account. An example would be a salary or bonus deferral plan. The amount to be reported on Form W-2 or Form 1099-Misc is the amount credited to an individual participant's account for 2008 plus current year earnings on the account balance.

##### Nonaccount Balance Plans

Nonaccount Balance Plans include plans in which a participant's benefit is not based on the balance in an individual's account. An example would be a defined benefit Supplemental Executive Retirement Plan (SERP).

The annual deferral to be reported is the reasonably ascertainable present value of future benefits accrued during the year. This amount is reasonably ascertainable if the amount, form and commencement date of the benefit payments are known and the only actuarial or other assumptions regarding future events or circumstances needed to determine the amount deferred are interest and mortality.

Benefits which are not reasonably ascertainable, as this term is defined, are not required to be reported. For example, a SERP with benefits based on a percentage of final average salary is not reasonably ascertainable until final salary has been determined.

**De Minimis Exception**

Reporting is not required if all deferrals for the year with respect to an individual under all nonqualified plans do not exceed \$600.

**REPORTING AND WITHHOLDING ON AMOUNTS INCLUDIBLE IN GROSS INCOME UNDER 409A**

An employer must treat amounts includible in gross income because of a violation of Section 409A as wages on the employee's W-2. These amounts are considered supplemental wages for purposes of determining the amount of

income tax required to be withheld regardless of whether the employer has paid the employee any regular wages during the calendar year. The amount required to be withheld is not increased on account of the income tax penalty imposed under 409A. Employees should thus be made aware that estimated tax payments may be required to avoid penalties.

For nonemployees, companies must report any amount includible in income under 409A on Form 1099-MISC.

**Plan Documents: 409A Compliance**

Deferred compensation plan documents must be brought into compliance with 409A by December 31, 2008. If your Plans have not yet been reviewed and revised if necessary, time is running out! If your Plans are not compliant by December 31<sup>st</sup>, amounts deferred risk being immediately taxed.

**REPORTING COMPANY-OWNED LIFE INSURANCE (COLI)**

Section 101(j) of the Internal Revenue Code provides certain requirements in order for death proceeds from employer-owned life insurance contracts to be received income tax-free. Section 101(j) requires, for

example, that when the policy is issued the insured be a director or a highly compensated individual, and that certain notice and consent requirements are satisfied. Section 101(j) also requires that before the policy is issued (1) the employee must be notified in writing of the employer's intention to insure the employee and the maximum face value of such insurance, (2) the employee must consent in writing to be insured under the contract and (3) the employee must be informed in writing that the employer/policyholder will be the beneficiary of any death proceeds payable on the death of the employee.

At the same time as Section 101(j) was passed, Congress enacted Section 6039I which established reporting requirements with respect to employer-owned life insurance contracts issued after August 17, 2006, the date the statute was enacted. Form 8925, reporting employer-owned life insurance contracts, is required for tax years ending on or after November 14, 2007 and must be filed by any policyholder who owns an employer-owned life insurance contract that was issued after August 17, 2006. Life insurance contracts issued prior to that date that are materially modified also are subject to reporting.

Form 8925 requires reporting (1) the total number of the policyholder's employees at the end of the tax year, (2) the number of employees insured under employer-owned life insurance contracts issued after August 17, 2006 and (3) the total amount of life insur-

ance on those policies. Form 8925 also asks whether the policyholder has valid consents for all covered employees and the number of such employees for whom the policyholder does not have valid consents.

Form 8925 is filed with the policyholder's income tax return.

#### **SUMMARY**

As new 409A Regulations are issued, NYLEX Benefits will keep you informed as to necessary reporting requirements.

### About **NYLEX**Benefits

NYL Executive Benefits LLC (NYLEX Benefits) is an independently managed subsidiary and the executive benefits consulting arm of the New York Life Insurance Company, a Fortune 100 company. New York Life is the largest mutual life insurance company in the United States, with an enviable 163 year history, and as of 12/31/07 had \$14.7 billion in surplus and \$280 billion in assets under management.

NYLEX Benefits provides supplemental executive benefit programs to a wide range of commercial clients. We focus on developing cost effective executive benefit solutions that are designed to attract, reward and retain key employees.

NYLEX Benefits' professional staff includes the following professional disciplines, all dedicated to supporting our client's programs, processes, systems and services:

- Accountants
- Actuaries
- Attorneys
- Benefit specialists
- Insurance specialists

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