



EDUCATION LAW GROUP

# ALERT

## ATTENTION ALL SCHOOL DISTRICT AND EDUCATIONAL INSTITUTION CLIENTS

Recently, the IRS issued Notice 2008-62 indicating that it will issue regulations under Code section 457(f) (and future regulations under Internal Revenue Code section 409A) intending to exempt teacher and administrator salary pay arrangements from the deferred compensation rules of Code sections 457(f) and 409A. While the Notice focuses primarily on Code section 457(f) - which governs certain government and tax-exempt deferred compensation arrangements and generally is subject to Code section 409A - it states that a conforming change to the regulations under Code section 409A, so that 409A will also follow in the near future.

Notice 2008-62, which may be relied upon effective as of July 1, 2008, specifies that any arrangement by which an employee receives recurring part-year compensation, including arrangements involving public school employees who provide services during a 10-month school year and elect to be paid ratably over 12 months, does not provide for deferred compensation for purposes of Code section 457(f) if the arrangement:

- does not defer payment of any salary payments beyond the last day of the 13th month following the beginning of the service period, which is typically the end of August or beginning of September for many public schools and tax-exempt educational institutions
- does not defer from one taxable year to the next taxable year the payment of more than the applicable dollar amount under Code section 402(g)(1)(B) in effect for the calendar year in which the service period *begins* (\$15,500 for 2008)

For example, assume a school district employee works during a school year that begins on September 1, 2008, and ends on June 30, 2009 (a 10-month school year). Assume further that the school district pays the employee over the 12-month period beginning September 1, 2008. The salary payment arrangement would not provide for deferred compensation for purposes of Code section 457(f) if the employee earns less than \$232,500 for the school year. To illustrate further, four months of the school year are in 2008 and six months are in 2009, and the employee, whose salary for the school year is \$232,500, earns \$93,000 in 2008 and \$139,500 in 2009. Under the 12-month payment schedule, the employee receives \$77,500 in 2008 and \$155,000 in 2009. Because the amount the employee earns during 2008 that is paid in 2009 (\$93,000 - \$77,500, or \$15,500) does not *exceed* the \$15,500 dollar limit, the arrangement would not provide for deferred compensation for purposes of Code section 457(f).

The intent of the Notice and the impending regulations is to exclude most teachers' pay arrangements from application of Code sections 457(f) and 409A. However, please do not take any action just yet - we are not out of the woods until the IRS actually issues the new regulations under Code sections 457(f) and 409A. We will keep you updated on this issue as we receive further guidance.

If you have any questions regarding this information, please contact Jeffrey T. Sultanik at 610.397.6515 or [jsultanik@foxrothschild.com](mailto:jsultanik@foxrothschild.com), or Sarah K. Ivy at 610.458.3118 or [sivy@foxrothschild.com](mailto:sivy@foxrothschild.com).