

Part III – Administrative, Procedural, and Miscellaneous

2008 Application Death Under § 409A to Nonqualified Deferred Compensation Plans

Notice 2007-90

I. PURPOSE

This notice provides additional guidance on the application of a service recipient's death under § 409A of the Internal Revenue Code to nonqualified deferred compensation plans. This guidance includes:

- A more precise definition of death (also known as “separation from life”).
- Presumptions the Service will apply in determining if a service recipient has experienced a separation from life under § 409A.
- Examples detailing situations that the help illustrate the Treasury's position on separation from life.

II. BACKGROUND

Section 409A provides certain requirements applicable to nonqualified deferred compensation plans. If a plan does not meet those requirements, participants in the plan are required to immediately include amounts deferred under the plan in income and pay additional taxes on such income.

The Treasury Department and the IRS issued final regulations under § 409A in April 2007 (72 Fed. Reg. 19234 (April 17, 2007)). The final regulations apply to taxable years beginning on or after January 1, 2008. In general, the final regulations provide that payment may be made under a nonqualified deferred compensation plan upon a service provider's death. Commentators stated that taxpayers anticipate difficulties in

formally determining if a service provider is dead. In addition, a number of commentators have raised questions regarding the application of the final regulations to certain types of deaths. This notice is issued in response to these comments and questions.

III. DEATH

A. In General

For purposes of determining if a service provider (or a service provider's beneficiary or estate) is entitled to a payment under a nonqualified deferred compensation plan on account of the service provider's death, the Treasury will consider a service provider to be dead if the service provider's death meets the criteria necessary for a separation from life.

B. Separation from Life

1. In General

A service provider separates from life with the service recipient if the service provider has a termination of all mental and bodily functions. However, the service provider's life is treated as continuing intact while the individual is temporarily unconscious, having an out of body experience, cryogenically frozen or experiencing another bona fide leave of absence from the individual's conscious state, if the period of such leave does not exceed ten minutes, or if longer, so long as the individual retains a right to regain life and/or reanimation under an applicable contract (with the devil or otherwise) or other arrangement.

If the period of leave exceeds ten minutes and the individual does not retain a right to regain life and/or reanimation under an applicable contract or other

arrangement, the death is deemed to occur on the first minute immediately following such ten-minute period. Notwithstanding the foregoing, where a leave is due to any medically determinable physical or mental impairment that can be expected to result in death, where such impairment causes the service provider to be unable to perform the essential functions of life without mechanical support, a 525,600 minute period of absence may be substituted for such ten minute period.

2. Termination of Life

A service provider will be deemed to have experienced a separation from life if he or she experiences a termination of life. Whether a termination of life has occurred is determined based on whether the facts and circumstances indicate that the service provider reasonably anticipated (or would have reasonably anticipated) that no further mental and bodily functions would be performed after a certain date or that the level of bona fide mental and bodily functions the service provider would perform after such date (whether with or without mechanical assistance) would permanently decrease to no more than 20 percent of the average level of bona fide mental and bodily functions performed (whether with or without mechanical assistance) over the immediately preceding 36-month period (or the full period of life if the service provider has been living less than 36 months). Facts and circumstances to be considered in making this determination include, but are not limited to, whether the service provider continues to be treated as living for other purposes (such as whether or not he or she continues to receive a paycheck from the service recipient), whether similarly situated service providers have been treated consistently by the service recipient, and whether the service provider is permitted, and realistically available, to perform services for other

service recipients. A service provider is presumed to have separated from life where the level of bona fide mental and bodily functions performed decreases to a level equal to 20 percent or less of the average level of mental and bodily functions performed by the service provider during the immediately preceding 36-month period. A service provider will be presumed not to have separated from service where the level of bona fide mental and bodily functions performed continues at a level that is 50 percent or more of the average level of mental and bodily functions performed by the service provider during the immediately preceding 36-month period. No presumption applies to a decrease in the level of bona fide mental and bodily functions performed to a level that is more than 20 percent and less than 50 percent of the average level of bona fide mental and bodily functions performed during the immediately preceding 36-month period. The presumption is rebuttable by demonstrating that the service provider reasonably anticipated that as of a certain date the level of bona fide mental and bodily functions would be reduced permanently to a level less than or equal to 20 percent of the average level of bona fide mental and bodily functions provided during the immediately preceding 36-month period or full period of life if the service provider has been alive for a period of less than 36 months (or that the level of bona fide mental and bodily functions would not be so reduced). For example, an service provider may demonstrate that the service provider reasonably anticipated that the service provider would cease mental and bodily functions, but that, after the original cessation of mental and bodily functions, a deal made with God (such as in the movie "Heaven Can Wait") caused the service provider to return to life. Although the service provider's return to life may cause the service provider to be presumed to have continued to live because the service

provider is performing mental and bodily functions at a rate equal to the rate at which the service provider was performing mental and bodily functions before the termination of life, the facts and circumstances in this case would demonstrate that at the time the service provider originally ceased to perform mental and bodily functions, the service provider reasonably anticipated that the service provider would not perform mental and bodily functions in the future.

Notwithstanding the foregoing paragraph, a plan may treat another level of reasonably anticipated permanent reduction in the level of bona fide mental and bodily functions as a separation from life, provided that the level of reduction required must be designated in writing as a specific percentage, and the reasonably anticipated reduced level of bona fide mental and bodily functions must be greater than 20 percent but less than 50 percent of the average level of bona fide mental and bodily functions provided in the immediately preceding 36 months. The plan must specify the definition of separation from life on or before the date on which a separation from life is designated as a time of payment of the applicable amount deferred, and once designated, any change to the definition of separation from life with respect to such amount deferred will be subject to the rules regarding subsequent deferrals and the acceleration of payments. For purposes of this paragraph, for periods during which a service provider is experiencing a bona fide absence (as described in section III(B)(2)) and has not otherwise terminated life pursuant to this paragraph, the service provider is treated as performing bona fide mental and bodily functions at a level equal to the level of mental and bodily functions that the service provider would have been required to perform to

receive the compensation. In this regard, the Service recognizes that not all jobs require the same level of mental and/or bodily functions.

3. Examples

Example 1 – Joanna uses 10% of her brain and 90% of her body on a daily basis. Joanna gets hit by a truck such that she can only use 2% of her brain and 18% of her body. If Joanna's nonqualified deferred compensation plan provides for payments on separation from life, Joanna is entitled to payment under her nonqualified deferred compensation plan because she is only providing mental and bodily functions equal to 20% of the bona fide mental and bodily functions she was performing before she was hit by a truck.

Example 2 – Pete uses 5% of his brain and 50% of his body on a daily basis. Pete has struck a deal with the devil such that, in exchange for his soul, Pete retains the right to regain life after the first two times that he would otherwise separate from life. Pete gets mauled by a cougar and is not performing any mental and bodily functions for more than 10 minutes. However, because Pete retains the right to regain life, he has not experienced a separation from life.

Example 3 – The same facts as Example 2 except that the devil realizes he got a raw deal because Pete does not have a soul. Because the contract providing Pete the right to regain life is not valid, even under the laws of hell, Pete no longer has the right to regain life pursuant to a contract or other arrangement, and therefore experiences a separation from life at the expiration of the 10-minute period.

VII. DRAFTING INFORMATION

The principal author of this notice is B. L. Zebub of the Office of Division

Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the Treasury Department and the IRS participated in its development. For further information regarding this notice, contact B.L. Zebub at (666) 911-4355 (not a toll-free call).