

# Nonqualified plan distributions to “specified employees” of public companies

Internal Revenue Code Section 409A (IRC Section 409A) and subsequent guidance place special requirements on nonqualified deferred compensation plan distributions paid to **key employees of public companies**. Public companies include all those traded on an “established securities market”, which would include foreign, as well as domestic, stock exchanges. **Non-public** companies are not subject to these distribution rules for key employees, unless the company is a member of a controlled group of corporations that includes a public company.

IRC Section 409A defines the includable group of key employees as “**specified employees**”. Employees falling under this definition must wait at least **six months following a separation from service** before deferred comp distributions may begin from the plan.

Under IRC Section 409A, specified employees are defined as those employees who meet the definition of a key employee found in IRC 416(i), generally known as the “top-heavy” rules for qualified plans. Under Section 416(i), key employees are those employees who are (1) officers with annual compensation above the Section 416(i) limit (indexed annually, see [Key Federal Tax Rates and Amounts](#)), or (2) a 5% owner, or (3) a 1% owner with annual compensation greater than \$150,000. The total number of officers covered is limited to at most 50, or, if lesser, the greater of three officers or 10% of the total employees of the company.

In order to comply with this provision, public companies with deferred compensation plans must identify their specified employees. An employee is a specified employee if any of the above conditions are met within the 12-month period ending on the **identification date**. Under IRC Section 409A, December 31 generally will be used as the identification date, unless the employer elects to use a different date. If so, that date must be used consistently in all plans sponsored by the employer and may only be changed after it is in effect for 12 months.

Participants who are considered specified employees as of the identification date, and who separate from service during the 12-month period starting on the first day of the fourth month following the identification date, **must wait six months after separation from service** before they receive distributions from the deferred compensation plan. If the specified employee dies before the end of the six-month period, payment may be made to their beneficiary without regard to the waiting period. The regulations also permit payments that the participant would otherwise be entitled to during the six-month period be accumulated and then paid after the waiting period expires.



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