

## IRC §§ 409A and 457 Guidance for Faculty

In an effort to assist University of Houston faculty with their Faculty Pay Option Election Form for the academic year 2008-2009, we have summarized the most recent opinions and interpretations from several reliable sources.

This excerpt is from the National Association of College and University Business Officers published August 2008:

“ In the college and university world it is common for the institution to require a professor to work for nine or ten months during the year but pay the professor over a 12-month period, either because it is the institution’s policy to do so or the professor elects to be paid over the longer period of time. These arrangements, however, can raise issues under the deferred compensation rules of IRC §§ 409A and 457, which generally prohibit the payment of deferred compensation unless the amount deferred is subject to a substantial risk of forfeiture. Because the deferrals under these part-year arrangements do not involve a forfeiture provision, they risk running afoul of these rules.” Page 900:77-78

Two conditions will permit these payment arrangements:

1. The arrangement must not defer payment of any of the part year compensation beyond the last day of the 13<sup>th</sup> month following the beginning of the service period.
2. The arrangement must not defer from one taxable year to another taxable year an amount in excess of the amount set forth in IRC §§ 402 (g)(1)(B), which for 2008 is \$15,500.

The IRS says that taxpayers may rely on these two conditions beginning with the first taxable year that includes July 1, 2008 and may continue to rely on these rules until regulations are issued. These rules went into effect on January 1, 2008.

### What a U of H Faculty Member MUST do to Comply with IRC §§ 409A

Under the rules of IRC §§ 409A, if the institution (University of Houston) offers part-year employees and option to annualize their pay, **the employee must:** (*emphasis added*)

1. make the compensation election in writing or by electronic means, such as e-mail; [http://www.uh.edu/provost/fac/pay-opt\\_jun08.pdf](http://www.uh.edu/provost/fac/pay-opt_jun08.pdf)
2. be completed prior to the beginning of the work period, such as the first day of classes (August 25, 2008); and
3. be irrevocable, so that it cannot be changed once the work period begins.

### What the University MUST do to Comply with IRC §§ 409A

Where the University offers a choice and an employee *fails* to make an election prior to the start of the work period, the institution **MUST** pay the compensation as earned, or the employee will be faced with a 20 percent income tax penalty.

Questions? Call Monica Lawrence 713-743-5571 or Joan Albin 713-743-8881.