# Deferral Election Deadlines Under Section 409A Chart

| Rule | Compensation Covered | Deferral Election Deadline |
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| **Employee Elections** | All types of compensation if the employee has the right to make the election.<br><br>Compensation commonly covered by this rule includes salary deferrals. | December 31 of the calendar year before the calendar year in which the employee performs the services to which the compensation relates.<br><br>For example, an employee who would like to defer a portion of salary earned for providing services in 2021 must execute a deferral election by December 31, 2020.<br><br>This rule can be problematic for deferring discretionary bonuses because elections must be made significantly in advance of the bonus payment. For example, if an employer grants an employee a discretionary bonus on January 14, 2020 for services performed in 2019, the deferral election deadline was December 31, 2018 because the applicable service period was 2019. Under these circumstances, the employee would have had to elect to defer the bonus before the employee had a right to the bonus, unless another rule resulting in a later deadline also applies. |
| **Employer Elections** | Any type of compensation if the employer (and not the employee) elects the amount of compensation deferred and the time and form of payment.<br><br>This rule does **not** apply if the plan or arrangement allows an employee to make an election that the employer can disregard. Under these circumstances, the employee election timing rules apply (see above).<br><br>For example, an employer announces on January 1, 2021 a bonus that includes each of the following terms:<br><br>• The bonus will be discretionary and based on 2021 performance. | The later of:<br><br>• The date the employee is given a legally binding right to the compensation.<br><br>• The deadline that would apply to the employee, if the employee were making the election.<br><br>• For example, if an employee is granted a discretionary bonus on January 1, 2021 for services provided in 2020, the applicable deadline for the employer to elect the amount deferred and the time and form of payment is January 1, 2021, because that is the later of: |

  

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| | • The bonus recipients and amounts will be determined and paid on January 1, 2022.<br>• Each employee may elect to defer all or any portion of the bonus, but the employer may override the employee's election so that a greater or lesser amount is deferred.<br>• The election is not an employer election and would need to be irrevocably made by December 31, 2021 (see above).<br>• Compensation commonly covered by this rule includes discretionary bonuses that are granted after the employee performs the services related to the bonus. | • January 1, 2021 (the date the employee was given the legally binding right to the compensation).<br>• December 31, 2019 (the deadline that would have applied to the employee if the employee had made the election). |
| **Performance-based Compensation** | Compensation that is not paid unless pre-established performance criteria that relate to a performance period of at least 12 months are satisfied.<br><br>Written performance criteria must be established within the first 90 days of the performance period. At the time the performance criteria are established, the performance results must be substantially uncertain. | On or before the date that is six months before the end of the performance period, as long as the employee remains continuously employed during the period:<br>• Beginning on the later of the first day of the performance period or the date the performance criteria are established. |

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| | Performance criteria may be objective or subjective. If the performance criteria are subjective, they must satisfy each of the following requirements:<br><br>• The criteria must be bona fide and relate to the performance of the employee, a group of employees (including the employee) or a business unit that the employee works for.<br><br>• The determination of whether the criteria have been met is not made by the employee, a family member of the employee or a person that either the employee or a family member of the employee controls.<br><br>• The compensation of the person determining whether the criteria have been met is not controlled by the employee or any of the employee's family members.<br><br>• Performance criteria may be based on a specified increase in the value of the employer's stock or the employer's stock reaching a certain value. For example, a requirement that RSUs vest only if a specified per share price is achieved during a 12-month period may constitute valid performance criteria.<br><br>• If the terms of an arrangement provide that the compensation vests regardless of performance on death, disability or a 409A-compliant change in control, a deferral election may still be made under this rule. However, if vesting actually accelerates because of death, disability, or a change in control (rather than based on achievement of the performance criteria), then the deferral election is not given effect and the compensation is paid at the time it would have been paid | • Ending on the date the deferral election is executed.<br><br>• A deferral election may not be made on or after any date on which both of the following conditions exist:<br><br>• The compensation is substantially certain to be paid.<br><br>• The amount of the compensation is calculable.<br><br>• If the performance period spans multiple years, ensure that when the deferral election is made, both of these circumstances still do not exist. For example, if a cash bonus is conditioned on an employer's cumulative sales for 2019 through 2021 reaching $50 million, and the goal is unexpectedly reached on December 31, 2020, the employee cannot later execute a deferral election, even though there are still 12 months before the end of the performance period.<br><br>• If a portion of the compensation is calculable and substantially certain to be paid, then the compensation can be bifurcated. The portion that is calculable and substantially certain to be paid cannot be deferred under this rule. However, the portion that is not calculable or is not substantially certain to be paid could be deferred under this rule, as long as each portion is identified separately and determined independently of the other.<br><br>• For example, an employee is entitled to an annual bonus for 2020 with each of the following terms:<br><br>• If pre-established performance criteria are satisfied, the employee receives a cash payment equal to $10,000. |

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| | absent the deferral election. In applying this rule, the definition of disability is broader than the definition that generally applies under Section 409A.<br><br>• Compensation commonly covered by this rule includes annual performance bonuses and RSUs that vest on achievement of performance goals. This rule does not apply to any guaranteed or minimum portion of a bonus. | • The employee is guaranteed a minimum annual bonus for 2020 equal to $2,500, even if the performance criteria are not satisfied.<br><br>• Absent a deferral election, the bonus will be paid on May 1, 2021.<br><br>• The minimum $2,500 portion of the annual bonus cannot be deferred under this rule, but a deferral election for the $7,500 that is not guaranteed can be made on or before June 30, 2020. |
| **Forfeitable (Unvested) Rights** | Compensation that will not vest unless the employee provides services to the employer for a period of at least 12 months.<br><br>If the terms of an arrangement provide that the compensation vests on death, 409A-compliant disability or a 409A-compliant change in control occurring before the end of the 12-month vesting period, a deferral election may still be made under this rule. However, if the compensation actually vests because of death, disability or a change in control (rather than completion of the 12-month vesting period), then the deferral election is not given effect and the compensation is paid at the time it would have been paid absent the deferral election.<br><br>Compensation commonly covered by this rule includes RSUs that are subject to Section 409A and have a vesting schedule that requires at least 13 months of continued service. | On or before the 30th day after the date that the employee receives a legally binding right to the compensation, as long as the employee is required to provide services for at least 12 months after the date of the election.<br><br>For example, an employer grants to an employee RSUs subject to Section 409A with each of the following terms:<br><br>• The grant date is January 1, 2021.<br><br>• Absent a deferral election, the RSUs will vest and be paid on May 1, 2022.<br><br>• If the employee would like to defer distribution of the RSUs until January 1, 2025, the employee may make the deferral election any time on or before January 31, 2021. |
| **First Year of Eligibility** | Compensation earned during the first year in which an employee becomes eligible to participate in a nonqualified deferred compensation plan.<br><br>When applying this rule, all plans that must be aggregated together under Section 409A are considered one plan. For more information on how to aggregate plans for purposes of Section 409A. | Within 30 days after the date the employee becomes eligible to participate in the plan or arrangement. The deferral election may only apply to compensation earned after the date the deferral election is made.<br><br>For example, if a newly hired employee is given the right to an annual 2021 bonus on January 1, 2021 and executes a deferral election on January 31, 2021, the deferral election may only apply to 11/12th of the annual bonus, which is |

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| | Section 409A sets out the following rules for determining when an employee first becomes eligible to participate in a plan:<br><br>• An employee is eligible to participate in a plan at any time that the employee may, without further employer action, accrue an amount of deferred compensation under the plan (other than earnings on amounts previously deferred), even if the employee has elected not to accrue amounts under the plan.<br><br>• If an employee has been paid all amounts deferred under the plan and on and before the last payment date was not eligible to continue (or elect to continue) to participate in the plan for the period following the last payment date, then the employee is deemed newly eligible to participate in the plan as of the first day following the last payment date that the employee is again eligible to accrue a benefit under the plan.<br><br>• If an employee ceases to be eligible to participate in a plan (other than accruing earnings on amounts previously deferred) and again becomes eligible to participate at least 24 months later, the employee is deemed newly eligible for purposes of this rule.<br><br>• This rule is commonly used when an employee does not become eligible to defer salary payments under a deferred compensation plan until the middle of a calendar year. | the portion of the bonus that will be earned after the date the deferral election is made. |
| **Initial Eligibility: Excess Benefit Plans** | Compensation paid under a plan that both: | Within the 30-day period beginning on the first day of the calendar year immediately following the first calendar year in which the employee accrues a benefit under the plan. |

 

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| | • Does not provide for an election between current compensation and deferred compensation.<br>• Solely provides compensation equal to the difference between the benefits the employee would have accrued under a tax-qualified retirement plan if the limits of the Code did not apply to the tax-qualified retirement plan and the benefits the employee actually accrues under the tax-qualified retirement plan.<br>• Once an employee has accrued a benefit under an excess benefit plan in any year, the employee cannot make another initial deferral election under this rule in any future year, even if the originally accrued amounts have been forfeited.<br>• Compensation commonly covered by this rule includes benefits provided under a supplemental executive retirement plan providing executive pension benefits that cannot be provided under the employer's **defined benefit plan** because of Code limits. | For example, an employer has a supplemental executive retirement plan which includes the following terms:<br>• All members of senior management become eligible to participate in the plan as soon as their accrued benefits under the employer's defined benefit plan reach the limits under Code Section 415 (26 U.S.C. §415).<br>• Participants may elect whether to receive their benefits under the supplemental retirement plan in the form of installments or a lump sum.<br>• All payments are made (or begin) on the later of separation from service or the participant's 55th birthday.<br>• If an employee's benefit under the defined benefit plan reaches the limits under Code Section 415 on March 15, 2021, the employee can make a form of payment election on or before January 31, 2022. The election would apply to all benefits the employee accrues under the excess benefit plan. |
| **Short-term Deferrals** | For employers whose taxable year is a calendar year, compensation that is paid by March 15 of the calendar year immediately after the year in which the compensation ceases being subject to a substantial risk of forfeiture.<br>For employers whose taxable year is not a calendar year, compensation that is paid by the later of:<br>• March 15 of the calendar year immediately after the year in which the compensation ceases to be subject to a substantial risk of forfeiture.<br>• Two-and-a-half months after the end of the employer's taxable year in which the | At least 12 months before the date on which the compensation ceases to be subject to a substantial risk of forfeiture.<br>Payment must be delayed for at least five years beyond the otherwise applicable payment date, except for payments made on:<br>• 409A-compliant change in control.<br>• 409A-compliant disability.<br>• Death.<br>• 409A-compliant unforeseeable emergency. |

  

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| | compensation ceases to be subject to a substantial risk of forfeiture.<br><br>• For more information on when compensation ceases to be subject to a substantial risk of forfeiture for purposes of Section 409A.<br><br>• Compensation commonly covered by this rule includes calendar year annual bonuses paid by an employer only if the employee is employed on the bonus payment date. | • For example, if an employee would like to defer an annual bonus for 2021 to be paid on February 15, 2022 only if the employee is employed by the employer on the payment date, the employee can make the election on or before February 14, 2021. Unless the employee elects to defer payment until death, disability, unforeseeable emergency or a change in control, the earliest elected payment date must be February 15, 2027 (five years from the original payment date). |
| **Fiscal Year Compensation** | Compensation paid to an employee that is based on a period of service consistent with one or more consecutive fiscal years of the employer. This rule only applies if the compensation is not paid during the period of service and therefore does not apply to compensation payable for periods shorter than a fiscal year.<br><br>For example, a bonus based on performance during the employer's two consecutive fiscal years ending on September 30, 2021 would be covered by this rule. However, salary payments or quarterly or semi-annual bonuses would not be covered by this rule.<br><br>Compensation commonly covered by this rule includes bonuses paid by employers with non-calendar year fiscal years. | Not later than the last day of the employer's fiscal year immediately before the first fiscal year in which the employee performs the services related to the compensation.<br><br>For example, if an employee is entitled to a cash bonus for remaining continuously employed during the fiscal year beginning on July 1, 2021 and ending on June 30, 2022, the employee can make a valid deferral election on or before June 30, 2021. |
| **Separation Pay** | Severance that is negotiated at the time of the employee's termination of employment.<br><br>If the employee previously had a right to severance under an employment agreement or severance plan, this rule could only apply to any additional severance amounts that the employee becomes entitled to receive at the time of termination of employment. | Any time up to the time that the employee receives a legally binding right to the severance.<br><br>In negotiating the severance arrangement, the employee can negotiate the severance payment date. However, at the point in time that the arrangement is finalized so that the employee has a contractual right to the severance |

  

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| | This rule does not apply to any payments that could be viewed as a replacement for amounts that the employee is eligible to receive under another nonqualified deferred compensation arrangement.<br><br>For example, if an employer's deferred compensation plan provides that an employee is eligible to receive a lump sum payment of $50,000 at age 55, and on the employee's termination of employment at age 45, the employee forfeits the right to $50,000 under the deferred compensation plan and receives a $50,000 lump sum severance payment immediately on termination, the severance could be viewed as a replacement violating Section 409A. | payment, the employee must have elected the time and form of payment.<br><br>For example, if an employer notifies an employee who had no right to severance under an employment agreement or plan that the employee will be terminated without cause and will receive a $100,000 cash payment in exchange for a release of claims, the employer and the employee can negotiate the payment date of the severance amount and whether the severance will be paid in a lump sum or in installments. Once the employer and employee agree on the terms of the severance payment so that the employee has a legally binding right to the payment, any change in the payment date or form would be subject to the rule for subsequent deferrals (see Subsequent Deferrals below). |
| **Uniformed Service Employment and Reemployment Rights Act of 1994 (USERRA)** | If an employer reemploys an individual under USERRA, any benefits that the employee would have been able to accrue if the employee had been employed by the employer during the employee's period of service in the **uniformed services**. | An election is timely if it must be provided by USERRA. USERRA generally requires that on reemployment, an employee cannot be treated as having had a break in employment for purposes of participation, vesting and accrual of benefits in any plan that either:<br><br>• Provides retirement income to employees.<br>• Results in a deferral of income until termination of employment or later.<br>• If an employee election was required during the employee's absence, the employee must be given the opportunity to make an election once reemployed. |
| **Subsequent Deferrals** | Compensation previously deferred, if the employee or employer has the right to change the time or form of payment that was previously designated.<br><br>This rule **does not** apply if an employee or employer wants to add death, disability or unforeseeable emergency as an **earlier** payment event. Death, disability and unforeseeable emergency may be added as earlier payment events at any time. | At least 12 months before the otherwise applicable payment date.<br><br>For installment payments, the otherwise applicable payment date depends on whether the payments are each treated as separate payments under Section 409A. For more information on determining whether installment payments are treated as separate payments. |

  

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| | This rule **does** apply if death, disability or unforeseeable emergency is added as a **later** payment event.<br><br>For example, if a payment is to be made when an employee reaches age 65, and the employee wants to change the payment date to:<br><br>• The earlier of death or reaching age 65, the change may be made at any time.<br><br>• The later of death or reaching age 65, the change may only be made in accordance with this rule. | Payment must be delayed for at least five years beyond the otherwise applicable payment date unless made on disability, death or unforeseeable emergency.<br><br>For example, if an employee who has elected to receive a lump sum distribution on termination of employment wants to change the payment date to the later of termination of employment or age 65, the employee can make an election on or before the date one year before termination to receive the payment on the later of five years following termination or age 65.<br><br>This rule can be applied separately to each payment event permitted under Section 409A. Therefore, a fixed payment date (for example, age 60) can be delayed for five years (to age 65) without affecting the otherwise applicable payment schedule under the deferral election for death, disability, unforeseeable emergency or change in control. For a sample subsequent deferral election notice. |

## Period of Service Applicable to Commissions Chart

| Rule | Compensation Covered | Period of Service |
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| **Sales Commissions to Unrelated Customers** | Compensation that satisfies each of the following requirements:<br><br>• A substantial portion of the services the compensated employee provides includes the direct sale of a product or service to an unrelated customer.<br><br>• The compensation paid is either a portion of the purchase price for the product or service sold or an amount calculated based on the volume of sales. | When applying any of the deferral election rules, the period of service is the calendar year in which the employer receives payment from the applicable customer, or if applied to all similarly situated employees, the calendar year in which the sale occurs.<br><br>For example, in applying the employee elections rule, the applicable deadline would be December 31 of the calendar year immediately before the year in which the employer receives payment or in which the sale occurs.<br>. In applying the fiscal year compensation rule, the applicable<br>deadline would be the last day of the employer's |

  

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| | • Payment of the compensation is contingent either on:<br>• the employer receiving payment from an unrelated customer for the product or services; or<br>• the closing of the sales transaction, if applied consistently to all similarly situated employees. | fiscal year immediately before the first fiscal year in which the employer receives payment or in which the sale occurs. |
| **Sales Commissions to Related Customers** | Compensation that would fall under the sales commissions to unrelated customers rule (see above), except that a substantial portion of the employee's services involves the direct sale of a product or service to a related customer.<br><br>This rule only applies if both of the following additional conditions are met:<br>• Substantial sales or services also occur between the employer and a significant number of unrelated customers.<br>• The sales or service arrangement and the commission arrangement applicable to the related customer are:<br>• bona fide and arise in the ordinary course of business; and<br>• substantially the same in terms and in practice as those applicable to unrelated customers to whom the employer makes substantial sales or provides substantial services. | When applying any of the deferral election rules, the period of service is the same as that applicable to sales commissions to unrelated customers (see above). |
| **Investment Commissions to Unrelated Customers** | Compensation that satisfies each of the following requirements:<br>• A substantial portion of the services that the employee is being compensated for includes sales of financial products or other direct customer services, that are provided | When applying any of the deferral election rules, the period of service is the 12-month period before the date as of which the overall value of the assets or asset accounts is determined for the purpose of calculating the investment commission compensation. |

  

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| | to an unrelated customer for customer assets or customer asset accounts.<br><br>• The customer can terminate the customer relationship and may move or liquidate the asset or asset accounts without delay.<br><br>• The compensation consists of a portion of the value of the overall assets or asset account balance; an amount calculated by reference to the increase in the value of the overall assets or account balance during a specified period or both.<br><br>• The value of the overall assets or account balance and investment commission compensation is determined at least annually. | For example, in applying the employee elections rule, if the overall value of the assets is determined on June 30, 2021, the applicable deadline would be December 31, 2019. In applying the fiscal year compensation rule, if the employer's fiscal year ends on March 31 and the overall value of the assets is determined on June 30, 2021, the applicable deadline would be March 31, 2020. |
| **Investment Commissions to Related Customers** | Compensation that would fall under the investment commissions to unrelated customers rule (see above), except that a substantial portion of the services the employee is being compensated for includes sales of financial products or other direct customer services to a related customer.<br><br>This rule only applies if the following additional conditions are met:<br><br>• Substantial sales or services also occur between the employer and a significant number of unrelated customers.<br><br>• The sales or service arrangement and the commission arrangement applicable to the related customer are:<br>    • bona fide and arise in the ordinary course of business; and<br>    • substantially the same in terms and in practice as those applicable to unrelated customers to whom the employer makes substantial sales or provides substantial services. | When applying any of the deferral election rules, the period of service is the same as that applicable to investment commissions to unrelated customers (see above). |

  