Should Your Company Pay the Additional 409A Taxes Owed by Your Employees?

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On February 8, 2007, the Internal Revenue Service made an usual offer to employers: on very short notice - by February 28, 2007 - employers could inform the IRS of their intent to pay the back taxes and penalties owed by (non-insider) employees who exercised backdated stock options under Internal Revenue Code §409A. Companies that missed the IRS "deadline" are in luck -- the program was in substance a bogus inducement to get companies to do what they could have done anyway -- and still can. And you will have openly alerted the IRS, and possibly the Securities and Exchange Commission, to the fact that your stock options program has historically included backdated options..

Perhaps your company can arrange matters so that the backdated options taxes of your key insiders can be lawfully paid. But some companies may decide that the better part of valor is to leave matters as they stand, and let employees, especially insiders, pay their own taxes. Others may decide to go even further, devising compensation plans for the future that are more transparent and less likely to arouse suspicion or resentment. For the future, they may even eliminate backdated options altogether.

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