

Performance Based Compensation is Non-Excludible Under 162(m) If Also Payable Under An Employment Agreement As Severance

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**Update of our February 8, 2008 Client Alert**

We alerted you on January 31, 2008 (and provided a further update on February 8, 2008), that the IRS now takes the position that compensation intended to qualify as deductible performance-based compensation pursuant to Section 162(m) of the Internal Revenue Code of 1986, as amended, will not qualify if the recipient's employment agreement provides for payment of the performance compensation upon a termination of employment without cause or for good reason, whether or not the performance metrics are satisfied (See PLR 200804004).

In a February 14, 2008, webcast addressing this PLR an IRS representative informed participants that the IRS is working on additional guidance to PLR 200804004 (likely to take the form of a revenue procedure or revenue ruling). It is expected that this guidance will be released in the near future.

**What Should You Do?**

Employers should continue to review their outstanding arrangements and past practices as we do not expect the IRS to reverse their position. However, as the guidance on which the IRS is now working will provide greater clarity around the issues raised by PLR 200804004, we do not recommend taking any action until publication of such guidance. We will publish additional information as it becomes available.

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