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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Q&A With Loeb & Loeb's Marla Aspinwall

Law360, New York (January 14, 2014, 1:30 PM ET) -- Marla Aspinwall is a partner in Loeb & Loeb's Los Angeles office where she concentrates her practice in the tax, ERISA, labor and securities aspects of executive compensation for publicly held, private and tax-exempt organizations, including employment agreements; nonqualified deferred compensation; and equity, retirement, incentive and welfare benefit plans. Aspinwall has extensive knowledge of insurance-funded executive benefits and estate planning arrangements. She also specializes in the tax and business aspect of agricultural cooperative organizations and has represented many large agricultural cooperatives.

Q: What is the most interesting or challenging tax problem you've worked on to date?

A: Bringing compensation arrangements into compliance with Internal Revenue Code section 409A has certainly been the most challenging exercise of my career. These regulations are amazingly complicated and far-reaching. There are, in fact, many types of arrangements for which it is impossible to determine how the regulations should be applied. The application to contingent participation rights in entertainment contracts is a good example.

Under section 409A, nonqualified deferred compensation, which is very broadly defined, is taxed at the time services are performed or, if later, when the deferred compensation vests (i.e., when it is no longer subject to a substantial risk of forfeiture), unless taxpayers comply with the extensive and complicated requirements of section 409A. However, it is not always clear when the right to compensation vests. It is unclear, for example, whether the right to share in the proceeds of a movie production vest upon completion of the services or not until the movie receipts come in.

If the requirements of section 409A are not met, in addition to immediate taxation of the deferred compensation, deferred amounts are subject to a 20 percent additional income tax penalty. While section 409A was originally intended to prevent top executives from manipulating the timing of their compensation, it has been interpreted to apply broadly to all classes of service providers, including all lower level employees, directors, teachers, actors, athletes, writers and musicians. The 20 percent penalty has to be paid by the worker or artist, not the employer. Section 409A penalizes even workers who may have no influence over the timing of payments and may have little ability to navigate complex tax rules.

Since section 409A's enactment in 2004, the U.S. Department of the Treasury and the Internal Revenue Service have issued thousands of pages of guidance in an attempt to interpret and apply this broad legislation to myriad industries and compensation structures. Despite the volume of regulatory guidance that has been issued under section 409A, the application of this complicated legislation to many industries remains unclear despite eight years of extensive introspection by the most highly qualified tax

advisors, as well as the Department of the Treasury and IRS. The application to the entertainment industry is particularly unclear and is having a chilling effect on the negotiation and renegotiation of entertainment deals.

Q: Currently, what is a pressing tax concern for your clients, and how are you addressing it?

A: The application of Internal Revenue Code section 409A in the entertainment context is a pressing problem for many clients. It is unclear to what extent contingent rights are subject to section 409A, and if subject how section 409A should be applied to such amounts. I drafted a white paper on behalf of the Los Angeles County and California State Bars Washington, D.C., delegation in 2009 in the hope of getting some clarification on these and other section 409A issues impacting the entertainment industry.

However, my discussions with the Department of the Treasury and legislative staff revealed little understanding of the entertainment industry or willingness to assist in their plight. However, the white paper I drafted this month seeking to reduce the California penalty tax for section 409A violations has been effective to inspire recently passed legislation in the form of AB 1173, which reduced the California tax penalty for section 409A violations from 20 percent to 5 percent, a small step admittedly but in the right direction.

Q: What do you anticipate being the biggest regulatory challenge in your practice in the coming year and why?

A: I expect the biggest regulatory challenge to continue to be the application of section 409A to entertainment entities and also to partnerships and limited liability companies generally since the current regulations reserve the issue of application to partnerships and simply say that the rules applicable to corporations should be applied by analogy to partnerships. A similar area of uncertainty is the application to loan-out entities which are common in the entertainment industry.

Q: Outside your own firm, who is an attorney in your practice area whom you admire, and what is the story of how s/he impressed you?

A: Robert Johnson of Munger Tolles & Olson is the attorney in my area of practice who has been a particular inspiration to me. He has acted as a mentor, advisor and friend for my entire career.

Bob has promoted my involvement in the Los Angeles County and California State Bar associations and many other professional organizations, such as the American College of Employee Benefits Counsel. He is always available to provide insight on particularly difficult legal issues. I am very grateful for his friendship and guidance over the course of my career.

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