

## Rosina Barker and Kevin O'Brien Publish Insights on Correcting 409A Document Failures

### **ATTORNEYS**

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### **PRACTICE AREAS**

Employee Benefits

Executive Compensation and  
Fringe Benefits

### **PUBLICATIONS**

April 12, 2010

Document Failures in the Section  
409A-Covered Plan: Correcting  
With and Without Notice 2010-6  
*BNA Pension & Benefits Daily*

April 12, 2010

Rosina Barker and Kevin O'Brien have published "Document Failures in the Section 409A-Covered Plan: Correcting With and Without Notice 2010-6," *Pension & Benefits Daily* (BNA, Inc. April 12, 2010)

Rosina and Kevin discuss correcting 409A document failures in nonqualified deferred compensation plans through the formal Notice 2010-6 program. In addition they discuss alternative cures, including:

- Correcting errors in nonvested plans under Prop. Treas. Reg. §1.409A-4 (where they address questions about the scope of the rule).
- Useful provisions in Notice 2010-6 allowing correction outside of its own formal program.
- Scrivener's error and other precepts of contract construction applicable when the written documents do not reflect the "plan," arguably allowing document correction to conform with the parties' intent outside of Notice 2010-6, at least in some circumstances.

They also explore the basic questions still besetting any practical discussion of correcting plan document failures, including the problems in identifying the "plan," the plan "document," and in many cases even the "failure."

They conclude with some general thoughts on drafting plan documents to minimize plan failures.