

LEGAL UPDATES

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COVID-19: Checklist of ESOP-Related Challenges

It's been a hectic three weeks of pretty much non-stop developments and activity, so I thought it might help to lay out a checklist of ESOP-related issues we've been discussing with many of you during the COVID-19 crisis. If we have not touched base on these and you wish to do so, please let us know.

Below, we have taken inventory of some frequently asked questions, and for those questions where the answers are short and fairly simple, we've provided them. For more ESOP/COVID information, see our earlier post on valuation issues.

Also, check out a short post that provides a checklist of broader issues that affect most companies. A lot of these questions are answered in postings on our website, but many of you have felt more comfortable discussing them. If you'd like to talk, please call us. Stay well!

Paycheck Protection Program

Q: Is the applicant the corporation or the ESOP?

A: The corporation.

Q: Must the ESOP trustee sign anything?

A: No.

Q: If I pay the 2019 or 2020 ESOP contribution to the trust during the 8 week period after the PPP loan is funded, will all of it count toward forgiveness?

A: Existing guidance does not answer this, but the question is not unique to ESOPs, so it seems reasonable to expect guidance. In the absence of guidance, it seems reasonable based on current guidance to count all of it, assuming none of it was counted for purposes of the loan amount.

Q: If my ESOP contribution is paid back to the company as a loan payment, will it count toward forgiveness?

A: Given that this is unique to leveraged ESOPs for which the company is the lender, it would not be surprising if no guidance is issued. In the absence of guidance, it seems reasonable to take the position that it does count.

Q: Are there any issues if not all of my PPP loan is forgiven?

A: Any PPP debt that is not forgiven could result in a breach of a covenant on another loan.

ESOP valuation issues

Q: What is the key issue at stake?

A: Most ESOPs will want to make sure that the value used for processing 2020 ESOP diversifications and distributions is not a grossly unfair value at the time of processing from the perspective of all participants taken as a whole.

Q: Should I buy time to figure out the estimated degree to which this crisis will adversely impact my ESOP stock value (if at all)?

A: Yes, for most of you, unless your ESOP diversifications and distributions during 2020 are expected to be small or you decide it is highly unlikely that an interim valuation date would be declared.

Q: If the prior year – end value seems to now be grossly unfair, is there anything I can do?

A: Consider declaring an interim valuation.

Q: When should a decision re: declaring an interim valuation date be made?

A: For most, it is premature – you don't yet know what is going to happen.

Q: What can I/must I do if I want to buy time to decide later whether to declare an interim valuation?

A: Delay diversification and distribution election processes by amending the ESOP as necessary and as permitted by law, and communicate with participants.

Q: What is the latest date I can realistically use as an interim valuation date?

A: The interim valuation date will need to be such that you have time to complete the valuation, solicit and receive diversification and distribution elections, and pay elected amounts by 12/31/2020.)

Q: If an interim valuation date is declared, will the valuation process be similar to the year-end one?

A: Yes, similar timeline, work, and cost.

Cash conservation

Q: What are my options to slow down ESOP distributions and push those liabilities to later years?

A: Most ESOPs can be amended to delay distributions if they don't already delay to the maximum extent permitted by the ESOP rules. However, the message that would send to participants would be "you can't commit on this ESOP" so this should be done only if the need is dire.

Q: May I slow down statutory diversification scheduled for 2020 beyond 12/31/2020?

A: No.

Q: My plan has a mandatory diversification (a/k/a "segregation") provision; must I do mandatory diversification during 2020?

A: No, but check your plan to see whether an amendment would be needed.

Communications

Q: What and when should I be communicating to my employees and others? Should I hire a communications professional?

A: Please refer to our earlier post for the importance of communications during this time.

Contact us

For more information on ESOPs during this unprecedented public health crisis, please contact Mark Welker or your Husch Blackwell attorney.

COVID-19 resource

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and unemployment, retailing, and supply chain management, among others.