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Attorney Advertising

Incentive Compensation for Key Employees

Qualified plans are great as a broad-based employee benefit. However, business owners sometimes need a more focused benefit program for their most important employees to incentivize them to remain long term with the company and foster its growth.

This article explores several alternatives that provide for targeted cash payments, none of which require the inclusion of a broad band of employees. Other significant alternatives include stock options and restricted stock grants.

Bonus Plan

The simplest approach is an annual cash bonus plan which can be totally discretionary. Alternatively, the employer can set aside a *predetermined percentage* of profits above a certain target or some other formula amount that is tied to the company's performance. The size of the pool may be made subject to a cap. After the year closes, the actual amount of the pool is calculated. The pool is then split up and distributed to the employees who are plan participants, but generally only to those who have stayed with the company through the end of the year.

It is very important that the definition of profits and/or your target formula be crafted carefully. The formula should provide for meaningful bonuses if the company does reasonably well and reaches achievable financial goals.

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Estate Planning for Same-Sex Couples in New York

When New York passed the Marriage Equality Act effective July 24, 2011 (the "Act"), New York became the sixth state to permit same-sex couples to marry, affording them many of the benefits different-sex marriages have, prominent among them property and inheritance rights. This will have a significant effect on estate planning and avoid certain inequities that have existed for years. For example, if a same-sex spouse now dies without a Will and has no children, his or her

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Incentive Compensation for Key Employees

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Deferred Bonus Plan

A Deferred Bonus Plan is similar to a Bonus Plan, but involves some deferral of payment which serves as "golden handcuffs." As in the formula Bonus Plan, the employer sets aside a stated percent of profits, profits above a certain target, or some other formula amount into a pool. However, unlike a Bonus Plan, bonuses are not distributed after the end of the year. Instead, the bonus pool is allocated to accounts of the participants, continues to be held by the company and is paid at a future date.

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Ensure Proper Administration of Your Loved One's Estate

Upon the death of a loved one, there are a number of important steps that must be taken.

Personal Representative and Asset Collection

If the decedent owned assets in his or her sole name, a personal representative (called either an executor or administrator) should be appointed to act on behalf of the estate. If the decedent died with a Will, a petition for probate will be needed to admit the Will and appoint the executor. If the decedent had no Will, a petition to appoint an administrator will be necessary.

Estate Checking Account and Asset Collection

Once a personal representative is appointed, he or she should collect and re-title the decedent's assets. An estate checking account should be opened. Checks payable to the decedent will need to be deposited and bills and administration expenses will need to be paid. Certain assets, such as real estate, personal effects or a closely-held business, may need to be appraised by a professional appraiser. If additional cash must be raised, the personal representative should evaluate which assets to liquidate.

State and Federal Estate Tax Returns

Depending upon the size of the decedent's estate, the personal representative may need to file state and federal estate tax returns and pay estate taxes. The filing threshold is $1,000,000 in New York, $2,000,000 in Connecticut, and $675,000 in New Jersey and $5,000,000 for federal estate tax returns. If there is a surviving spouse and the estate is less than $5,000,000, a federal estate tax return must still be filed to take advantage of the portability provisions to provide the surviving spouse with a credit equal to the deceased spouse's unused credit and the surviving spouse's $5,000,000 credit. In general, estate tax returns are due, and the estate tax is payable, within nine months after death. Failure to timely file estate tax returns and/or timely pay estate taxes can result in significant penalties and interest. Since the Internal Revenue Service audits a high percentage of taxable estates, there should be a detailed review of the decedent's assets.

Final Distributions

When the estate is ready to be closed, the estate assets remaining after payment of debts, taxes and administration expenses must be distributed to the estate beneficiaries. Depending on the particular situation, the personal representative's obligation to account to the beneficiaries may be satisfied with a simple distribution schedule. In other situations, a full income and principal accounting in judicial format, or even a judicial accounting proceeding, may be appropriate to fully protect the personal representative from future lawsuits regarding the estate. ■

Danziger & Markhoff LLP has an in-house estate administration department. Please call Harris Markhoff, Esq., or Michael Markhoff, Esq., with any questions about estate planning or estate administration.

Incentive Compensation for Key Employees

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A Deferred Bonus Plan involves three important design issues: (i) the vesting schedule, *i.e.*, how long must the employee stay with the company before the deferred amount is no longer subject to a risk of forfeiture; (ii) the period of deferral, *i.e.*, when will the cash incentive actually be paid; and (iii) the crediting of interest, *i.e.*, what earnings, if any, will be credited to the deferred amount.

Stock Appreciation Right (SAR) Plan

In this type of arrangement, the company grants to a participant the right to receive the *appreciation in value* of the company's stock. For example, if a participant is granted 10,000 units, and the stock appreciates to $3.00 from its original $1.00 per share, upon exercise, the participant receives $3.00 minus $1.00 or $2.00, times 10,000, which equals $20,000. SARs of private companies typically limit exercise to termination of employment or sale of the company.

The SAR must provide a methodology for determining value. Fair market value must be determined through a reasonable valuation method that meets standards set forth in IRS regulations.

Phantom Stock Plan

This type of arrangement is similar, but not identical, to an SAR. In a phantom stock plan, the company grants to a participant the right to receive *the full value* of a share of company stock on a distribution event. The participant has no voting rights and no right to access the company's books and records. Significantly, phantom stock plans are not freely exercisable by participants. Either the participant has to elect in advance when the right will be exercised or, in the alternative, the plan must provide for payment upon the occurrence of a stated event, such as termination of employment or a change in control. ■

Please contact Jay Fenster, Esq., for further information.

CMS Issues Revised Accountable Care Organization Regulations

As anticipated in our Summer 2011 Newsletter, on October 20, 2011 the Centers for Medicare and Medicaid Services (CMS), in response to widespread criticism of its original proposed regulations, issued revised final regulations regarding Accountable Care Organizations (ACOs) incorporating significant changes.

ACOs are designed to manage the care of a designated population of Medicare beneficiaries in a comprehensive manner, and to allow the ACO participants to share in any cost savings they may generate.

Among other things, the 700 pages of revised final regulations (i) reduce by half the number of quality measures required to be met to share in cost savings, (ii) modify one of the proposed ACO payment models to eliminate the risk-sharing aspects thereof, (iii) increase the potential bonuses which may be received by ACO participants, and (iv) provide for the prospective (as opposed to retrospective) assignment of Medicare enrollees to ACOs.

It should be kept in mind that, regardless of the health care community's reaction to the revised CMS regulations, they only pertain to Medicare patients and private payors are free to structure and implement their own programs to reward participants for the delivery of care in a high-quality, cost-effective manner. ■

Please contact Joshua S. Levine, Esq., with any questions about ACOs.

Estate Planning for Same-Sex Couples in New York

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estate will pass to the surviving same-sex spouse. Before the Act, the estate would pass to the parents or siblings of the deceased individual and the same-sex partner would have no rights to the estate. Also, the parents and siblings of the deceased same-sex spouse no longer have the right to challenge his or her Will.

For estate tax purposes, as with different-sex couples, when the first spouse dies, any assets left to a same-sex spouse will not be subject to New York estate tax due to the unlimited marital deduction. There will only be a New York estate tax upon the death of the surviving spouse.

However, as revolutionary as this change may be, state law changes have no bearing on federal law because the Defense of Marriage Act ("DOMA") does *not* recognize same-sex marriages. This means that same-sex couples cannot defer estate taxes until the surviving spouse dies and can only leave his or her spouse the first $5,000,000 of assets free from estate tax.

There are now tremendous opportunities for same-sex couples to effectively plan for the disposition of their estates, but as long as DOMA is in effect, the estate tax savings will only exist for New York purposes. ■

For additional information, please call Michael Markhoff, Esq.

In Our Firm

Good News to Share

We want to share with you the good news that our firm has recently received the following honors.

Best Law Firm:
Danziger & Markhoff LLP has been included in the 2011-2012 U.S. News - Best Lawyers list of Best Law Firms in the United States. The firm has received a metropolitan "Tier 1" ranking in the areas of Corporate Law and Trusts and Estates Law. A Tier 1 ranking is a special distinction that signals a unique combination of excellence and breadth of expertise. Fewer than 7000 law firms in the country received a Tier 1 ranking in any practice area.

New York Super Lawyers Magazine:
Michael Markhoff has been named by New York *Super Lawyers* Magazine as one of the top attorneys in New York in 2011 in the area of Estate Planning and Probate. Only five percent of the lawyers in the state are named by *Super Lawyers*.

The Best Lawyers in America:
Both Michael and Harris Markhoff have been selected for inclusion in *The Best Lawyers in America 2012*. Michael was selected in the field of Trusts and Estates and Harris was selected in the fields of Trusts and Estates and Corporate Law.

This publication is intended for general information purposes only. It is not intended to constitute individual legal advice to any specific client.

CASH BALANCE PLANS: HOW TO INCREASE YOUR TAX-DEDUCTIBLE PLAN CONTRIBUTIONS

A "Cash Balance Plan" is the integral component of an innovative retirement plan design which allows you to make substantially larger tax-deductible contributions than those permitted under profit-sharing and similar defined contribution plans (DC Plans). Cash Balance Plans provide for easily understandable individual account balances not otherwise available under a defined benefit pension plan. Each plan participant has his or her own account balance that is credited annually with a contribution and a specified rate of return.

Ideal candidates for Cash Balance Plans are businesses with two or more owners who may have different ages. In a Cash Balance Plan, similar or varying contributions can be made on behalf of each owner independent of their ages, and each owner will know the exact amount of the contribution attributable to him.

When a Cash Balance Plan is combined with a DC Plan, the combination of the two plans gives the business owner both an increased tax deduction and a substantial amount of flexibility as to each year's contributions.

When a business owner needs a substantially larger tax deduction, a stand-alone Cash Balance Plan is the answer.

The Table below illustrates how you can make an increased tax-deductible plan contribution to a Cash Balance Plan (see Row D) even after contributing the maximum $49,000 to a DC Plan. (Row A plus Row B equals the maximum $49,000).

The Table shows one example of an allocation maximized for the owner; the assumption is that the staff contribution will be as low as IRS rules permit, and the owner's compensation is at least $245,000.

Note also that depending upon the level of staff compensation, the Cash Balance amount that can be contributed for the owner (Row D) may be even larger.

When a business owner needs a substantially larger tax deduction, a stand-alone Cash

	Type of Plan or Plan Feature	Contribution Amount for Owner *
A.	Profit-Sharing Plan - Employer Discretionary Contribution	$32,500
B.	401(k) Salary Reduction Plan - Employee Discretionary Contribution	$16,500
C.	Additional "Catch-Up": Owner over Age 50	$ 5,500
D.	Cash Balance "Add-on" Plan - [On top of Employer's DC Plan]	$43,450
E.	Total Contribution: Owner under Age 50 [A+B+D]	$92,450
F.	**Total Contribution**: Owner over Age 50 [A+B+C+D]	**$97,950**

*Contributions can be significantly increased for Pension Benefit Guaranty Corporation (PBGC) cases.

Cash Balance Plans: How to Increase Your Tax-Deductible Plan Contributions

Balance Plan is the answer. Depending on the business owner's age, contributions can range from $75,000 to $200,000 (or more) each year. If the facts warrant it, we can even add on a DC Plan that will provide the owner with an *additional* $31,000 to $36,700 (depending on the owner's age). However, such plans require careful analysis and preparatory actuarial studies.

The most important factor is to ensure that the cost for covering the staff does not outweigh the benefit of the plan to the business owner. A thorough analysis of employee data combined with creative planning concepts often result in a successful outcome for the business owner. Obviously, it would be foolhardy for a business owner to think of proceeding without the benefit of such an in-depth analysis.

Proper design, implementation and administration of Cash Balance Plans can dramatically increase contributions on behalf of business owners. The increases range up to an additional $40,000 (or more in many cases), even when the business owners are already fully funding contributions under their existing DC Plans. The increases can even be up to $200,000 (or more) when a stand-alone plan is used. If you want to make a plan contribution for yourself in excess of $49,000, a Cash Balance Plan is the answer. ■

If you have any questions regarding Cash Balance Plans, please contact Ira Langer, Esq., or Andrew E. Roth, Esq.