Executive Compensation, Employee Benefits and ERISA Alert

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2020 Year-End Key Executive Compensation and Employee Benefits Considerations

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COVID-19 has, among other things, had an impact on executive compensation and employee benefits, and given rise to a number of new issues and considerations. These compensation issues present challenges for companies seeking to incentivize and retain key employees in the midst of the current economic conditions while balancing competing responsibilities to various stakeholders.

Below is a summary of certain executive compensation and employee benefits issues that companies, boards and compensation committees may want to consider or be aware of during these continued turbulent and uncertain times as they begin to approach year-end compensation decisions and a review of compensation levels and existing and new awards and programs.

Performance Goals and Metrics

- To the extent permitted by the applicable plan document or agreement, consider whether it is preferable to delay metric/goal setting with respect to awards (both short-term and long-term) to be made in 2021 in an effort to reflect more proper/reasonable incentives or goals. As an alternative, consider whether quarterly or semi-annual goals make more sense in lieu of annual goals to provide flexibility.
- Consider the impact COVID-19 has had on the business and on the performance goals. In circumstances where performance targets under previously granted awards have been significantly impacted, consider whether it makes sense, in light of retention concerns, to exercise discretion to adjust performance targets or amend the applicable governing documents to provide such authority. However, companies should proceed with caution since any actions taken now might not have the intended consequences in the long run.

Equity Plan Share Reserves/Annual Equity Grants

- Companies should review their equity plans and determine if sufficient authorized share capacity exists for their upcoming grants. Ultimately, companies may need to request shareholder approval for more shares for their equity plans at the next shareholder meeting as a result of higher burn rates.

Contact Information

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- Consider whether it makes sense to delay the annual equity grant process in an effort to provide the intended grant value, or to break up the annual award into smaller grants to be made over the course of the year.
- Consider determining the number of shares under equity-based awards based on a trailing average stock price instead of the closing price on the grant date as a means of averaging out extreme drops in stock prices on a given date, if permitted by the applicable equity plan document.

Compensation/Benefits Reductions/Restructuring

- Companies considering compensation or benefits reductions should carefully review their various compensation and benefits arrangements to evaluate the ability to effectuate, and implications of, any prospective compensation or benefits reductions.
- Companies may also want to consider the extent to which compensation may be provided in the form of equity or equity-based awards instead of cash in order to conserve cash.

Nonqualified Deferred Compensation

- Companies need to bear in mind that, as a general matter, Section 409A of the Internal Revenue Code requires deferral elections to be irrevocable. However, deferral elections may be cancelled due to an unforeseeable emergency or pursuant to a hardship distribution taken under a tax-qualified plan.
- Companies also need to consider when and whether a “separation from service” has occurred for purposes of Section 409A, which will depend on the particular facts and circumstances, and which may differ from determinations made related to an individual’s termination of employment from a common law standpoint.

Variable Hour Employee Benefits Eligibility

- Due to furloughs, layoffs, reduced hours or breaks in service, certain employees may not have sufficient hours during the 2020 measurement period to qualify for coverage during 2021. Companies need to consider whether to be more generous than what the law provides for and whether plan eligibility provisions need to be amended to provide coverage for certain groups/classifications on a nondiscriminatory basis.

Companies should consider any relevant key business, legal, tax, accounting, disclosure or other impacts or considerations in connection with the foregoing.

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