

Executive
Employment
Agreements:
Coordination
Issues

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Reminder

- Please note, nothing in this presentation constitutes legal advice. The information is offered only for informational or educational purposes, and it should not be relied upon as, or substituted for, legal advice.

Relevant Documents

- Term Sheet
 - Necessity
 - Content
- Offer Letter
- Employment Agreement

Restrictive Covenant Agreements

- Non-Disclosure Agreement
 - Confidentiality
 - Use of Third Party Information
- Restrictive Covenant Agreement
 - Non-Compete
 - Non-Disparagement
 - Non-Interference
- Proprietary Rights Agreement

Compensation and Benefits---Documents

- Document coordination
 - Multiple documents for many compensation and benefits arrangements
 - Equity compensation: plan document, agreement, grant notice, notice of exercise
 - Health and welfare benefits: plan document, summary plan description, provider contract, insurance contract
 - Retirement benefits: plan document, summary plan description, investment materials
 - Previous employment agreements with same executive or other executives

Compensation and Benefits---Definitions

- Definitions---different definitions in different documents can cause major problems
 - Cause
 - Good reason
 - Change in control
 - (Continued) service/(continued) employment
 - Employee/service provider/consultant
 - Disability

Compensation and Benefits---Releases

- Specific Issue: Releases and Section 409A
 - Severance often conditioned on signing of release; requirement often built into employment agreement
 - Timing may allow executive to manipulate taxable year of payment
 - Two approaches approved by the Internal Revenue Service
 - Fixed date
 - Taxable year straddle
 - Special attention from the Internal Revenue Service: Section 409A penalties apply

Compensation and Benefits---Releases

- Sample approved language---fixed date:
"The Severance shall be paid in a lump sum on the sixtieth (60th) day following the Executive's Separation from Service, provided the Release has become effective prior to such date."

Compensation and Benefits---Releases

- Sample approved language---straddle
"The Severance shall be paid or begin to be paid by the sixtieth (60th) day after your separation from service with the Company provided that you have signed a general release of claims and such release has become irrevocable before such payment is made or begins; provided, however, that if the period following your separation from service that you have to execute or revoke the release straddles two (2) calendar years, then the Company shall pay or begin to pay the Severance in the second of such calendar years, regardless of when you actually deliver the executed release to the Company, subject to the release first becoming effective."

Compensation and Benefits---
Severance, COBRA and ACA

- Post-termination employer payments (especially, premium payments) raise potential problems
 - Discrimination
 - ACA enrollment timing
- Simple solution: taxable lump sum payment
