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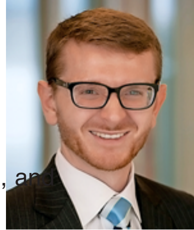
A Summary of Executive Compensation and Benefits Issues for Start-ups and Emerging Companies



By Regina Olshan, Esq., Joseph M. Yaffe, Esq., and Michael Wiesner, Esq.*

INTRODUCTION

Executive compensation in the emerging company space is based fundamentally on the dynamic between company executives (including founders) and outside venture capital investors. That dynamic has produced a market standard for emerging companies' compensation arrangements, to which companies that fundraise are often pressured to conform. Some companies adopt the market standard from the outset, while others do so only if and when they begin fundraising. In either case, a start-up's principal shareholders are often directly involved in establishing the company's executive compensation packages. The result is typically an uncontroversial compensation structure that is neither mysterious nor lavish, but which can be substantial if the venture is successful.

COMPONENTS AND FORMS OF EXECUTIVE COMPENSATION

Capital is the fuel that drives an emerging company's growth, and streamlined companies have a greater chance of surviving the often tenuous first years. Accordingly, the typical compensation staples comprise base salary and stock options, but may include other forms of compensation, depending on the specific behavior the company seeks to incentivize. A compensation program may include an annual bonus opportunity and/or additional incentive compensation in the form of time- and/or performance-based restricted stock (for corporations), restricted partnership interests or membership units (for partnerships or limited liability companies) or restricted share units.

Equity

As the first group to the table, founders often purchase cheap unrestricted equity because the company has little to no built-in value. Founders usually pay cash, which provides initial capital to the company. Subsequent outside executives may acquire unrestricted equity as well, albeit either at higher prices (reflecting additional enterprise value) or, if the equity is issued in exchange for the performance of services, with greater tax consequences. In any case, the acquisition of unrestricted equity triggers the one-year capital gain holding period.[1]

Companies sometimes allow executives to purchase equity with a promissory note (sometimes using the underlying equity as collateral), which triggers the capital gain holding period without requiring a cash outlay. Such promissory note must be "substantially full recourse" or the IRS may recharacterize the arrangement as a disguised option, disregard the taxpayer's claimed holding period and assess ordinary income taxes.[2] In addition, the loan must bear interest at least at the applicable federal rate and be repaid upon an IPO if the executive is a director, executive officer or equivalent.[3]

Stock Options

An option is the right to acquire a fixed number of shares at a fixed price for a fixed period of time. Options are commonly granted subject to a vesting schedule. Vesting may be time-based and/or event-based (i.e., dependent on the occurrence or non-occurrence of any condition, such as an IPO). Options may also be granted with an "early exercise" feature. Early exercise options may be exercised at vesting for unrestricted equity or prior to vesting for restricted stock that would generally pick up the remaining portion of the option vesting period in the form of a company repurchase right.

Properly structured options either (1) meet a series of requirements (the most important being that the option is granted with an exercise price at or above the company stock's fair market value on the date of grant) and

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* Regina Olshan and Joseph M. Yaffe are partners and Michael Wiesner is an associate at Skadden, Arps, Slate, Meagher & Flom LLP. Ms. Olshan is head of the Global Executive Compensation and Benefits Group and Mr. Yaffe is head of the West Coast Executive Compensation and Benefits Group. They advise public and private companies, management, boards of directors and executives across various industries worldwide on a full range of matters relating to employee compensation plans and arrangements.

[1] § 1(h), § 1223. See also § 1202, § 1045 (the "qualified small business stock" tax rules). All section references are to the Internal Revenue Code of 1986, as amended (Code), and the regulations thereunder, unless otherwise specified.

[2] Reg. § 1.83-3(a)(1). A full recourse loan is one in which the company may proceed against the executive's general assets to secure payment on the note.

[3] § 1274, § 7872 (with general exceptions for loans under $10,000); § 13(k) of the Securities Exchange Act of 1934 (repayment upon IPO for certain executives).

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are thereby exempt from § 409A, or (2) substantially limit when and how the option may be exercised, and thereby comply with § 409A (the latter options are in effect more akin to restricted share units, discussed below).[4] In either case, start-ups must take care to establish the value of their stock in connection with the grant of options.

For the IRS to accept a company's valuation without a trading market for its equity, the value determination must be done by ''the reasonable application of a reasonable valuation method.''[5] The regulations set forth three such methods, though no valuation resulting from any of the three methods may be safely applied beyond the earlier of (1) an event that may materially affect the value of the corporation (for example, the resolution of material litigation or the issuance of a patent) or (2) 12 months. The most common valuation method is a report prepared by an independent party qualified to value private company securities, colloquially known as a ''409A valuation report.''

The taxation of stock options is a fairly complex subject. Additional guidance is available in Olshan, R., Yaffe, J. and Wiesner, M., EXECUTIVE & DIRECTOR COMPENSATION REFERENCE GUIDE, *Executive Compensation and Benefits Issues for Start-ups and Emerging Companies* (2017).

Restricted Equity

Founders often subject all founders' equity to a time-based vesting restriction to keep all founders engaged and active. If all founders' equity has vested by the outside financing stage, new time-based vesting restrictions are usually imposed at that time for the same reason.

When a company issues restricted equity to any person, the equity-holder generally recognizes ordinary income at each date that the equity vests, measured as the difference between the equity value at vesting and the price paid, if any, for the equity that vested in that period. This is so even if the equity is not sold at vesting, a situation that generates ''phantom income'' because the holder has a tax bill but no additional cash on hand from the vesting. The equity-holder may escape this Kafkaesque taxation scheme by filing a tax election under § 83(b).[6] An § 83(b) election results in the taxpayer paying an up-front tax on the difference between the equity value at grant and the price paid for the equity, if any. An § 83(b) election does not affect the equity's actual vesting schedule, but does allow an equity-holder to pay tax at capital gains rates on any gain that would have accumulated between grant and vesting. A holder must file an § 83(b) election, if at all, within 30 days of the date the holder is transferred restricted stock — no exceptions.[7] No additional § 83(b) election needs to be filed in the case of a ''revesting'' that an outside investor may require, but there is no penalty for filing an unnecessary § 83(b) election.[8]

Restricted Share Units, Phantom Share Awards and Stock Appreciation Rights

Restricted share units (RSUs) are share-based awards that vest and ''settle'' (i.e., are satisfied) in either company equity or other property (e.g., cash). No § 83(b) election may be filed with regard to RSUs because an RSU award agreement is only a contract for the contingent future grant of some benefit rather than actual equity subject to vesting (such as restricted stock in a corporation). RSU awards may include the right to dividend-equivalent payments. Cash-settled RSUs are often referred to as phantom share awards. Stock appreciation rights (SARs) are similar equity-based awards but convey only a spread value (equal to the positive difference, if any, between the value of company stock at grant versus when the award is paid or, if applicable, when the SAR is exercised) and do not include the right to dividend-equivalent payments.

Over the last few years, there has been a notable uptick in the number of start-ups using dual-vesting RSUs, which are subject to a time-based vesting condition and also a secondary vesting condition (typically a liquidity-event condition), both of which must be satisfied for the award to vest and settle.[9] Such an award might provide that upon a liquidity event, the award will fully vest for any current service providers and will vest as to whatever portion had achieved time-based vesting for any former service providers.

§ 83(i)

The Tax Cuts and Jobs Act of 2017 introduced § 83(i). Section 83(i) allows certain option and RSU holders to defer taxes associated with option exercises or RSU settlement until the first to occur of the following events: (1) the date the resulting stock becomes transferable (including back to the employer), (2) the date the employee first becomes an excluded employee, (3) the date the corporation's stock becomes readily tradable on an established securities market, (4) the date that is five years after the first date the rights of the employee in such stock are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, or (5) the date on which the employee revokes the § 83(i) election.[10]

Section 83(i) elections can only be made with respect to ''qualified stock'' of an ''eligible corporation'' by a ''qualified employee.''

- ''Qualified stock'' means any stock in a qualified employee's employer, if such stock is received in connection with the exercise of an option or in settlement of an RSU, and such option or RSU was granted in connection with the performance of employment services during a calendar year in which the employer was an eligible corporation.[11] Qualified stock does not include stock the employee may sell to, or otherwise receive cash in lieu of from, the corporation at the time that the

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[4] For a comprehensive § 409A resource tool, see Olshan, R. & Schohn, E.F., et al., SECTION 409A HANDBOOK (2d ed., Bloomberg BNA 2016).

[5] Reg. § 1.409A-1(b)(5)(iv)(B).

[6] § 83(b). See Rev. Proc. 2012-29 (containing a model § 83(b) election).

[7] Reg. § 1.83-2(b).

[8] Rev. Rul. 2007-49. However, a transfer would be deemed to occur if a service provider exchanged substantially vested stock for substantially nonvested stock in either a reorganization described in § 368(a) or a taxable stock acquisition.

[9] This practice has existed for some time, but Facebook's (and later Zynga's) use of RSUs subject to both a time-based and a liquidity-event based vesting condition no doubt raised the awareness and acceptance of this type of award for entrepreneurs both within and beyond Silicon Valley.

[10] § 83(i)(1)(B).

[11] § 83(i)(2)(A)–§ 83(i)(2)(B).

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rights of the employee in the stock first become transferable or not subject to a substantial risk of forfeiture.

- "Eligible corporation" means, with respect to any calendar year, any corporation (1) of which no stock was readily tradable on an established securities market during any preceding calendar year, and (2) that has a written plan under which, in such calendar year, not less than 80% of all employees who provide services to such corporation in the territorial U.S. are granted stock options or RSUs with the same rights and privileges to receive qualified stock.[12]

- "Qualified employee" means an employee other than an "excluded employee" who agrees to meet such other requirements as the Secretary may determine. "Excluded employee" means, with respect to any corporation, any individual (1) who is a 1% owner at any time during the current calendar year or the 10 preceding calendar years, (2) who is or has been at any prior time the CEO or CFO (or held an equivalent position) or who bears a relationship to any such individual, or (3) who is one of the four highest compensated officers for any of the current calendar year or the 10 preceding taxable years.[13]

Most private companies will not fall under § 83(i) because a grant cycle in which options or RSUs are issued to at least 80% of U.S.-based employees would necessitate an unusually broad-based equity plan, even by start-up standards.

Start-ups that are "eligible corporations" are required to notify qualified employees of their ability to make § 83(i) elections when the qualified stock would otherwise be taxable to the employee. Absent reasonable cause, failure to timely provide such notice can result in a tax equal to $100 with respect to each qualified employee (up to $50,000 per calendar year).[14] Numerous exceptions to § 83(i) exist, so eligible corporations should review the applicable rules closely to determine their obligations.

Section 83(i) elections must be made no later than 30 days after the first date the rights of the employee in the qualified stock are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier. Section 83(i) elections are otherwise made in the same manner as § 83(b) elections.

Event-Based Incentive Programs

Incentive programs can be either "short term" or "long term," depending on whether the performance period spans more than one year. Incentive programs may also be event-based (e.g., to incentivize employees to work toward an exit or stabilize a start-up during a tumultuous period). Event-based bonuses can either be fixed (e.g., $100,000, payable if the employee remains in service for two years) or variable (e.g., 5% of the net exit proceeds over $500 million). While most event-based bonus plans require little or no cost to implement, start-ups should be wary of overcommitting themselves. M&A acquirors routinely deduct such payments from the deal price, reducing shareholder value upon exit.

[12] § 83(i)(2)(C).

[13] § 83(i)(3).

[14] § 83(i)(6); § 6652(p).

STRUCTURING EXECUTIVE COMPENSATION

Founders and Executive Officers

Founders almost always have a substantial initial equity position in the company. Founders' equity is either granted subject to a vesting schedule or has a vesting condition subsequently applied in connection with a later financing, and is nearly always the subject of § 83(b) elections. Founders typically receive little or no salary prior to any outside investment. A common founder's equity vesting schedule is monthly vesting over 48 months, subject to the founder's continued service to the company. If a company deviates from market standard (e.g., promises catch-up salary payments upon a financing or "single-trigger acceleration" of equity awards to the founder), then outside investors may either require the founder to restructure his or her rights, or lower the value of the investment by the amount of the liabilities.

Founders tend to shape their compensation based on what they think future investors will find fair. Non-founders tend to shape their compensation based on what they can negotiate from founders and/or current investors. Non-founders typically negotiate for equity, which they might receive on a smaller scale than founders. Current investors have the most to lose with regard to any dilution of their equity but also the most to gain if the non-founder is successful at the company. In either situation, the company and the executive often both favor "at-risk" compensation over salary because it provides non-founders with upside and reduces the enterprise's cash spend. An incoming executive equity or equity-based award vesting schedule often involves a "cliff" with no vesting for the first year of service, followed by monthly vesting (a 25% one-year cliff followed by 1⁄48 monthly vesting is common), often coupled with a repurchase right on equity upon the employee's separation from service. In this manner, the company is not stuck with former employees-turned-minority shareholders.[15]

In a company's fundraising stage, if founders or inside executives hold substantially or completely vested awards, then outside investors may condition their investments on the imposition of new vesting conditions on that equity. This action gives the investors some comfort that the key employees will not decamp the company immediately after the financing.

Board Members and Advisors

Independent outside directors often receive equity or equity-based awards with a vesting condition requiring their continued service on the board for periods ranging from one to four years. At each re-election to the board, such directors may be awarded an annual grant 1/4 to 1/3 the size of the initial grant, which generally vests ratably over each re-election term. Option-based compensation is substantially less common for directors of large companies.[16] Founders and investor representatives (e.g., representatives of venture capital investors

[15] The repurchase price is typically either fair market value (for good leavers) or the lower of fair market value or grant price (for bad leavers).

[16] See, e.g., Steven Hall & Partners, 2017 Director Compensation Study at 9 (finding that among the top 200 companies by revenue in fiscal 2016, outside director equity/equity-based compensation nearly always took the form of full-value awards

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who sit on the company's board) typically do not receive compensation for serving as board members, but may receive board-related travel reimbursement.

Some companies (often those in the technology space) retain an individual board advisor or assemble an entire board of advisors who have specialized expertise that can benefit the company. Advisors typically sign a modified form of consulting agreement that allows them to consult with other companies, and are sometimes compensated via an equity option grant, along with, in some cases, a cash fee. Travel and other direct expenses associated with providing the advisory services are typically subject to reimbursement. The cash fee is usually paid per meeting, and the agreement usually specifies the advisor's time commitment, e.g., four half-day to full-day sessions with the company per year. The cash fee may range in the thousands of dollars per meeting. The equity option grant is usually at the low end of the director grants, with lower-level advisors receiving grants at one-half that level, depending on the stature of the advisor and the expertise the advisor is bringing to the company.

Expectations During Fundraising

A start-up company can expect the following events to occur at each funding milestone:

- *Series A financing:* In addition to acquiring a large double-digit share of the company, the first outside investors will usually require the company to reserve an 8-15% equity pool for equity grants to employees and consultants, the combined effect typically being large enough to reduce the founders' ownership below 50% ownership post-financing. At this time, the founders may have vesting conditions imposed and may begin taking cash compensation if they were not already doing so.

- *Series B financing:* Current and new investors' joint investment will likely reduce the founders' ownership further, possibly down to the 25% mark. At this point, key founders will often begin drawing mid-range salaries and bonuses.

- *Series C financing:* Founders often balance reason and vision, and at this stage most accept that certain changes are usually needed to turn the enterprise into an execution-stage company. Outside executives tend to appear at this stage. Founders may be asked to step aside for outside experts or other ''proven commodities'' that the outside investors hand-select, which may include a new CEO, a VP of Sales, a CFO and/or a VP of Marketing or VP of Engineering.

- *Series D financing and beyond:* As a start-up matures and stabilizes, it usually needs to spend less equity to attract skilled managers. If, however, something has gone wrong and the company is in distress, it might find it needs to issue founder-level equity compensation for skilled outside executives to come in and save the ship.

ADDITIONAL VESTING CONSIDERATIONS

Vesting of Equity-based Awards

Vesting refers to the event that causes the holder's right in an award to no longer be subject to a ''substantial risk of forfeiture.''[17] Some awards settle immediately upon vesting (i.e., are immediately converted into cash or company equity), while other awards undergo a post-vesting delayed settlement or exercise period. For example, an award might provide that it becomes ''earned'' based on absolute total shareholder return over a three-year period. Once the period ends, settlement of the earned portion of the award may occur over a certain number of months or years thereafter, subject to the holder's continued service with the company, or an option or SAR, once vested, may remain exercisable for the remainder of its term.

Acceleration of Vesting

Most people subject to vesting wish to be free of it as soon as possible. It can be difficult to negotiate a departure from a company's standard vesting schedule; however, it is possible to negotiate for acceleration of vesting in certain special circumstances. Acceleration is either ''single-trigger,'' meaning it requires one event to become payable, commonly a change in control of the company or a qualifying termination of the holder's employment, or ''double-trigger,'' meaning it requires two events to become payable, commonly a qualifying termination of the holder's employment within 12 months after a change in control of the company.

Start-up investors are often unwilling to agree to single-trigger acceleration, particularly when the trigger is a change in control of the company. This is so because (1) M&A acquirors often make target companies pay for single-trigger liabilities; and (2) regardless of who pays for single-trigger acceleration, acquirors know that retaining an executive team that suddenly finds itself flush with cash is much more expensive than retaining an executive team with unvested equity awards.

Executives may find investors more receptive to double-trigger acceleration. Double-trigger arrangements usually provide an acquiror with sufficient comfort that the value built into the executives' equity or equity-based awards will cause the executives to remain with the company after the closing, and give the executives comfort in knowing that if the acquiror terminates them (or gives them good reason to resign), their awards are protected. This arrangement also satisfies investors because it motivates key executives to consummate a favorable acquisition but does not cause the acquirer to divert significant value from the acquisition into a compensation package for the executives.

THE GOLDEN PARACHUTE RULES: SECTIONS 280G AND 4999

Under § 280G and § 4999's ''golden parachute'' provisions (typically referred to jointly as § 280G), if in connection with a change in effective control of a corporation a ''disqualified individual''[18] will or may receive

(93%), followed by a mix of full value awards and options (6%) and options alone (1%)).

[17] § 83(c).

[18] § 280G(c). The term ''disqualified individual'' means any individual who is (1) an employee, independent contractor, or other person specified in regulations who performs personal services for any corporation, and (2) is an officer, shareholder, or highly-compensated individual (which means an individual who is (or would be if the individual were an employee) a member of the group consisting of the highest paid 1% of the employees of the corporation or, if less, the highest paid 250 employees of the corporation).

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payments in the nature of compensation, the aggregate present value of which is equal to or in excess of three times his or her ''base amount,''[19] then all such amounts over one times such base amount will be subject to a 20% excise tax to the disqualified individual and will lose any deductibility to the corporation. For example, if a disqualified individual's base amount equals $100,000, and such person receives $299,999 in the nature of compensation in connection with the change in control, then the § 280G analysis ends with no negative effect. However, if such person will or may receive $300,000 in the nature of compensation in connection with the change in control, then $200,000 (i.e., everything over one times such person's base amount) will be subject to a 20% excise tax to such person and the corporation will be unable to take a tax deduction on such amount, unless an exception applies (as discussed below).

The Internal Revenue Code presumes that agreements entered into or substantially modified within one year prior to the effective date of a change in control are parachute payments, and thus the entire total value of such agreements is counted for § 280G purposes, unless the company can rebut the presumption by clear and convincing evidence.[20] When the company can rebut that presumption, and for arrangements more than one year old, only the value associated with the acceleration itself is considered a parachute payment.

Executive compensation documents tend to include provisions addressing § 280G in one of three ways. Under the ''cut-back'' approach, the executive will receive a maximum of the executive's § 280G safe harbor (i.e., one dollar less than three times his or her base amount). Under the ''best payment'' approach, the executive will receive the amount that provides the greatest after-tax payment (be that amount one dollar less than three times his or her base amount or the full parachute payment). Under the ''gross-up'' approach, the executive will receive the full parachute payment amount and be ''grossed-up'' by the company for the excise taxes that he or she must pay on the parachute payments, plus the additional excise and other taxes due on such gross-up payment (due to this tax stacking, a gross-up can be an expensive proposition for the company).

Numerous types of enterprises are exempt from § 280G, including most partnerships, most limited liability companies, and entities that could qualify as small business corporations (also known as S corporations), determined without regard to whether the corporation (1) has any nonresident alien shareholders or (2) has actually elected S status.[21] Section 280G has an expansive concept of affiliates, and a § 280G analysis should look to all entities within the target enterprise's organizational chart.[22]

In the event a private company is not exempt from § 280G, private corporation executives may submit their parachute payment to a vote of the company's disinterested shareholders. As a prerequisite to the shareholder vote, the executive must agree to waive his or her parachute payment to the extent the shareholders do not approve it. An individual should only waive and submit to the shareholders payments over three times such person's base amount, less $1. For example, if a disqualified individual's base amount is $100,000 and such executive will or may receive a $1,000,000 parachute payment, such executive should submit $700,001 to the shareholders for approval. The shareholders must then be presented with detailed information as to each parachute payment that each disqualified individual may receive, including the circumstances under which such payment would be made (for example, upon a qualifying termination following closing, even if no such termination is planned). If the requisite vote is obtained, then the payments are exempt from § 280G. If the vote is not obtained, the executive is denied the payments that he or she waived in connection with the vote.

OTHER EXECUTIVE COMPENSATION BENEFITS

In bringing an executive into the emerging company, the principal components of executive compensation will often be cash, bonus opportunity, and equity or equity-based awards. Typically, when recruiting an executive from another geographic region, some additional minor benefits are added to the executive's compensation package. Start-ups also pride themselves on unexpected perquisites that, in general, represent a small cost to a small workforce, such as museum or gym discounts, a company cellphone, on-site laundry services, free lunches, etc. As a company matures, these benefits might be supplemented (at least to key personnel) with financial planning and tax preparation services, company-funded life insurance, car and driver, use of the company plane or unlimited airfare reimbursement, home security systems, personal security, etc. Though tax optimization strategies always exist, these mechanisms often have tax consequences, and some of these payments are subject to withholding. Accordingly, consulting with the company's tax accountants and/or outside counsel on the proper structuring and administration of these arrangements is important.

Whatever the precise compensation package for executives, directors, advisors and other independent contractors, it should be properly documented. There are usually several documents that make up the entirety of the executive compensation arrangements in the emerging company. When working solely with founders, their agreements will usually consist of a restricted equity purchase agreement, an § 83(b) election form, an employee handbook (when the company begins hiring

[19] § 280G(b)(3). The term ''base amount'' generally means a person's average annualized W-2 compensation over the five years ending on the year preceding the date on which the change in control occurs, or, if shorter, the period of time as the person has provided service to the company.

[20] Reg. § 1.280G-1 (Q/A-25). For example, if an option award pertaining to 1,200,000 shares containing double-trigger acceleration is issued to a disqualified individual in November 2017 with an exercise price of $1.50 and a change in control occurs in October 2018 at a purchase price equal to $6.00 per share, the award could be calculated as representing a $5,400,000 parachute payment unless the company could rebut the presumption that the agreement represents a parachute payment by clear and convincing evidence. A company could potentially rebut the presumption if the grant were part of its routine grant process.

[21] Publicly traded partnerships treated as corporations and non-publicly traded partnerships and LLCs that elect to be taxed as corporations, however, remain subject to § 280G. § 7704(a), § 280G(b)(5)(A)(i) (citing § 1361(b)); Reg. § 1.280G-1 (Q/A-45).

[22] See Reg. § 1.280G-1 (Q/A-46).

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outside employees), a confidential information agreement, and an arbitration agreement.[23] At the very least, start-ups should get ''outside executive ready'' by preparing the following documents:

- an employment agreement or offer letter (the latter no less a contract than one in a contract form),
- a confidential information agreement,
- an arbitration agreement,[24]
- an equity incentive plan, comprising one or more of the following forms: an equity option agreement, a restricted equity agreement, and a restricted share unit agreement, any of which might be time-based or performance-based (or both), and
- an employee handbook.

CONCLUSION

An optimal executive compensation program begins with large-scale design questions such as the company's cash burn rate, whether it is willing to issue equity to service providers, and what specifically it wants executives to do (e.g., work toward an IPO, bring a product to market or secure a key patent). From there a company should consider the different compensation and benefits components needed to achieve its goals. The package should be simple to maintain, tax efficient within reason and internally consistent (e.g., company-wide definitions such as ''Change in Control'' and ''IPO'' should be the same across all documents).

Compensation program communication is key, as poor messaging can cause suboptimal employee retention. As a company grows and its compensation program becomes more complex, it should take care to maintain clear program messaging. Employees base their retention decisions not on what the company offers, but about what the employees perceive that the company offers.

Optimally designed and optimally communicated programs should remain cognizant and adaptive to market changes. Particularly in the ultra-competitive start-up space, a company that carefully watches market trends has a greater chance to poaching key talent from its competitors (often on a surprisingly cost-efficient basis) instead of facing the sudden loss of talent itself. Speed is key in this regard. What was cutting-edge a decade ago (on-site dry cleaning, cafeterias or catering, sleeping pods and quiet spaces) has already yielded to the next generation of perks such as IVF treatment and other family planning services for employees and their partners, ''untethered'' remote working arrangements and financial planning advice for rank and file employees.

Start-ups that seek to truly maximize their human capital must design compensation programs with care, communicate programs with clarity and remain ready to boost their programs' retentive value with new and innovative forms of benefits as the opportunities arise.

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[23] It has become common to separate the arbitration agreement from the other employment or equity agreements to address the situation where the arbitration agreement is declared void due to unconscionability or based on public policy. This will allow the other agreements to continue in force without the risk of being negated because a central provision was declared void.

[24] As a proactive response to the #MeToo Movement, which went mainstream in 2017, some companies have explicitly excluded claims related to sexual harassment and assault from arbitration provisions in employment agreements, standalone arbitration agreements and employee handbooks.

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