

# Employee Benefits & Executive Compensation

## Practice Overview





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Today's competitive business environment is forcing companies to rethink how to attract and retain top talent without sacrificing business goals. Employee compensation and benefits are an employer's primary tools to attract and retain talented employees, but they are facing more scrutiny now than ever. Plan fiduciaries are under increased pressure to adhere to rigid standards in light of recent corporate scandals. Waves of employee benefits legislation and regulation threaten to swamp employee benefit plan administration.

Seyfarth Shaw's Employee Benefits & Executive Compensation Department is here to help. One of largest and most diverse departments in the country, we are prepared to assist companies with any matter affecting employee benefits. Our attorneys are experienced in the legal and consulting aspects of employee benefits and executive compensation plans as well as the business concerns faced by companies today. Our group includes attorneys who have worked as in-house employee benefits counsel for major corporations and as employee benefits and executive compensation consultants. We are a nationally recognized leader and our members are invited to speak at conferences and teach in advanced legal programs.

Our team assists clients with every aspect of their employee benefits needs—from designing, drafting, and implementing plans and agreements to counseling on compliance and fiduciary duties. We represent clients at every level—whether regional, national, or international—and have the experience and relationships to service a broad range of industries.

## Retirement Plans

As younger generations place more emphasis on private savings over government programs, retirement plans have become an increasingly important part of the employer's total benefits and compensation package. Our attorneys handle the entire spectrum of legal and operational issues related to all types of qualified and nonqualified retirement plans, including defined benefit and cash balance pension plans, 401(k) plans, and profit sharing plans.

### Defined Contribution Plans

#### 401(k)

The marketplace is becoming predominately focused on 401(k) savings plans as the primary retirement vehicle for employees, and our attorneys remain ahead of the curve in this area. Our team is well-versed in the design, operation, and fiduciary issues related to 401(k) plans. We advise clients on the many complex issues they face in this area:

**401(k) Fee Matters.** We are actively involved in advising fiduciary committees on issues related to the increased focus on fees charged to 401(k) participants. Navigating the field of ERISA obligations is difficult. Our attorneys educate fiduciaries on their ERISA obligations and advise clients regarding improvements they could implement to better position themselves to defend against future claims.

**Plan Design.** Plan design can have a big impact on a company's budget, compliance risk, and business practices. We work with clients in the design and implementation of plan features constructed to (1) reduce administrative burdens and costs, (2) coordinate with other existing or terminating retirement arrangements, (3) increase participation and contribution rates, (4) address non-discrimination testing risks, and (5) comply with new legislative requirements, including the Pension Protection Act of 2006.

**Employer Stock Funds.** Our team of attorneys has helped many of our publicly traded clients review the potential liabilities associated with maintaining an employer stock fund as an investment option under their 401(k) plans. We also advise clients regarding options for reducing those potential liabilities and assist publicly traded clients in converting existing employer stock funds into employee stock ownership plan components to take advantage of the favorable tax benefits related to the payment of dividends.

**Plan Transactions.** We assist clients in addressing 401(k) matters associated with merger, acquisition, divestiture, and other corporate transactions. This type of work can also include plan terminations, spin-offs, and mergers.

**Participant Communications.** A well-designed plan may not meet its full potential if participant communication is deficient. We assist clients in the design and implementation of effective participant communication programs for their 401(k) plans with more "user friendly" disclosures and processes, which helps to streamline delivery and reduce confusion among participants.

Our attorneys are experienced in the legal and consulting aspects of employee benefits and executive compensation plans as well as the business concerns faced by companies today.

## Employee Stock Ownership Plans (ESOPs)

Employee stock ownership plans are used for a variety of purposes. ESOPs can be used by public and private companies as a corporate finance tool to allow companies to borrow on a tax-favored basis. Owners of closely held businesses often use ESOPs as a financial and estate planning strategy because sales to an ESOP are tax-deferred or tax-free. ESOPs also can be used to acquire or spin off a company, to facilitate a management buy-out, and to provide a valuable compensation element for employees.

Public companies use ESOPs to provide an excellent benefit to employees, as well as to borrow funds on a tax-deductible basis and to generate tax deductions by contributions of company stock. Closely held businesses use ESOPs to diversify a portion of the owners' financial holdings, to buy out disgruntled shareholders or divorced spouses, and to borrow funds on a fully tax-deductible basis for capital improvements or acquisitions of other companies. S-corporations that are owned entirely by ESOPs are completely exempt from federal income tax.

Our lawyers are among the most experienced ESOP lawyers in the country, and we regularly serve as counsel for ESOP companies, ESOP trustees, and ESOP lenders. We have negotiated a wide variety of ESOP transactions and are recognized nationally for our work in ESOP structuring and finance. We counsel both public and private corporations, as well as trust companies and other financial institutions, on the use of ESOPs in numerous transactions, including leveraged buyouts, corporate stock repurchases, ownership-succession transactions, mergers and acquisitions, and hostile-takeover bids. Our experience representing all parties to ESOP transactions, combined with our broad range of experience in business transactions generally, enable us to successfully navigate the often complex planning considerations and negotiations involved in an ESOP transaction.

## Defined Benefit Plans

The law surrounding defined benefit plans is very complex and non-compliance can result in significant liability. Congress has repeatedly changed the playing field for these plans, most recently in the Pension Protection Act. Our team is extremely well-versed in the design, operation, and fiduciary issues related to defined benefit plans. Examples of recent work in this area include the following:

**Plan Design.** We assist clients in the design and implementation of plan features constructed not only to reduce plan costs and future liabilities, but

### ESOP COMPLIANCE

A company had not actively administered its ESOP for several years and was concerned with determining its options for dealing with the ESOP and any potential negative reactions.

- ▶ Our team conducted an audit of the client's ESOP and its administration, with subsequent advice to terminate the plan. We structured a redemption of company stock from the ESOP for cash and voluntarily submitted certain operational problems to the IRS. In order to proactively address any potential employee relations concerns, we helped prepare communications materials to update disgruntled participants on the plan's status. Distributions were made to terminated participants, and cash accounts of current employees were transferred to the company's 401(k) plan.

**Result:** The client no longer had to worry about any sandbagging effects of the ESOP, and was able to assign more resources to its current plan.

also to comply with new legislative and regulatory requirements, including the Pension Protection Act.

**Plan Investments.** When selecting investment strategies and investment professionals, plan fiduciaries need to be particularly mindful of their ERISA obligations and responsibility. In addition to advising clients on these matters, we negotiate with hedge fund and other investment managers and advise on limited partnership interests and other advanced investment techniques. We also advise plan fiduciaries regarding their ERISA obligations and responsibilities when considering terminal annuities and investment programs designed to reduce funding volatility.

**Plan Transactions.** Parallel to our transactional work specific to 401(k) plans, we assist clients in addressing defined benefit plan matters associated with mergers, acquisitions, divestitures, and other corporation transactions. This work also includes plan terminations, spin-offs, and mergers.

**Participant Communications.** Our attorneys assist clients in the design and implementation of participant communication programs for changes to their defined benefit plans, helping to ensure successful plan execution and administration.

## Hybrid Plans

Hybrid plans combine features of both defined benefit and defined contribution plans. A significant number of cash balance plans (one form of hybrid plan) have been established by converting a traditional benefit plan into a cash balance plan. For some employees close to retirement, the conversion to a hybrid plan may upset future expectations. This change in expectations has led to accusations of discrimination. The outcome of litigation in this area has been inconsistent and has increased the risk of sponsoring a hybrid plan. These issues have made crafting the proper hybrid plan a challenge.

Our attorneys understand these complex legal issues and the potential pitfalls surrounding hybrid plans and help clients manage the associated risks. We frequently assist companies to strategically devise plans that mitigate risks while achieving their business goals. Our attorneys have extensive experience in:

- Design and implementation of cash balance and other hybrid plans
- Plan administration and reporting issues
- Appropriate plan documentation
- Integration of the plan into an effective employee educational program
- Full support in ongoing management of the plan

## PENSION SPIN-OFF NEGOTIATIONS

Our client was buying a subsidiary of a large industrial corporation that included a spin-off of assets and liabilities for the acquired subsidiary employees. The seller's actuarial reports were prepared on a business-unit basis and showed roughly equivalent assets and liabilities for the portion of the pension plan that covered the subsidiary employees. Our client needed assistance reconciling the complex discrepancies that were present as a result of the available reports.

- ▶ Commencing a thorough due diligence process, we discovered that the reports furnished to our client obscured a sizeable surplus that actually existed in the seller's plans. We successfully negotiated a substantial allocation of surplus pension assets.

**Result:** Our negotiations resulted in a significantly better outcome related to the assets, including the assurance that our client would not be required to make contributions to the new pension plan for a number of years.

## Multiemployer Plans

Multiemployer plans, because of their size and complexity, offer unique situations and require comprehensive knowledge of both the business-specific and broader environments. Our attorneys understand those challenges and have many years of experience representing Taft-Hartley pension and welfare benefit plans, acting as sole counsel and co-counsel.

During our long tenure as counsel to multi-employer plans, we have developed a familiarity and a working relationship with all relevant federal agencies, including the IRS, the DOL, the Pension Benefit Guaranty Corporation, and the Department of Justice. We handle special or complex matters involving:

- Fiduciary duties under stringent and complex conflict of interest standards of state and federal laws
- Financially troubled plans
- Government investigations and litigation
- Defense of fiduciary-breach litigation (representing both plans and individual trustees)
- Withdrawal liability issues
- Real estate investments, including acquisition and construction of plan administrative facilities
- Workouts of non-performing loans
- Arbitration and deadlocked motions
- Plan mergers, spin-offs, and consolidations
- Assessment of sophisticated investments under the fiduciary requirements of ERISA and state law

Our attorneys also are well-versed in handling common benefits-related matters, including:

- Legal compliance and plan amendments
- Plan design and benefit improvement issues
- Claims processing
- QDRO processing
- Contracts with all service providers
- Monitoring of plan expenses
- Review of plan communications

- Legal issues related to plan investments and investment managers
- Delinquency-collection policies and procedures

### HIPAA PRIVACY AND SECURITY COMPLIANCE

Because of the nature of its business, a publicly traded medical information management company was required to comply with HIPAA privacy and security requirements for its health plan as well as at its corporate level. This presented considerable obstacles outside of the typical related issues when companies implement a HIPAA privacy and security program. To further complicate the situation, the company had employees in multiple states, making training a particular area of concern.

- ▶ With a complete understanding of the client's business and related operational issues, we were able to design and implement a compliance program that harmonized with its corporate compliance efforts.

**Result:** We were able to help the client achieve maximized efficiencies by tackling the compliance programs concurrently and in a parallel fashion. Further, we were able to construct and deliver the requisite training by webcast, allowing the client's employees in multiple states to attend simultaneously. These efforts resulted in minimal duplicative compliance requirements and significant cost savings to the client.

## Health and Welfare Benefit Plans

Identifying ways to provide cost-effective health coverage and welfare benefits can significantly impact a business's bottom line, as well as its employee relations, but the legal requirements can be overwhelming. Our attorneys help employers navigate these requirements to identify the optimal benefits for their workers. This enables the employer to better focus on everyday business concerns.

We assist companies in designing health and welfare benefit programs, drafting necessary plan documents and plan communications, and negotiating third-party administration agreements, insurance contracts, direct-contracting arrangements, and other provider agreements.

Clients turn to our team for advice on how to structure a flexible benefit arrangement or redesign a health program as a cost-efficient consumer driven health (CDH) arrangement for active employees or retirees through the use of health spending accounts (HSAs) or health reimbursement arrangements (HRAs). For companies interested in consolidating plan documents and streamlining annual reporting with the IRS, we help implement a consolidated or "wraparound" welfare benefit program. We can also help our clients determine whether funding any welfare benefit programs through a voluntary employee beneficiary association (VEBA) would be advantageous.

Our experience goes beyond these services as well. Attorneys in the group advise on all aspects of retiree welfare benefits, including strategies for reducing or eliminating obligations, and maximizing tax-advantaged funding vehicles for retiree plans.

Another area in which our clients look to us for in-depth experience is with respect to the privacy and security of medical information. Under sweeping changes imposed by the Health Insurance Portability and Accountability Act (HIPAA), employers must ensure

that their health plans maintain the privacy and security of their participants' protected health information, do not use or disclose such information except in limited circumstances, and provide individuals with certain rights concerning their health information.

Finally, we provide our clients with guidance on new federal and state laws and developing trends. For example, a new definition of "dependent" in the Internal Revenue Code, a new state law requiring employers operating in the state to maintain a cafeteria plan, or a U.S. Supreme Court decision validating same-sex marriages could have profound effects on welfare benefit programs.

## International Employee Benefits

As U.S. companies expand their global workforce, they must contend with the legal requirements and restrictions imposed on their workforces by all countries in which they do business, as well as those mandated in the United States. The key for management within a company is retaining the company's competitive edge for talent in non-U.S. jurisdictions and ensuring compliance with the laws in those countries. In this respect, we have extensive experience developing practical compensation and benefit alternatives for our clients in countries whose legal requirements challenge the company's accepted compensation structures.

As a company expands internationally, the total compensation packages it offers to its non-U.S. employees must also evolve to support the new directions and initiatives it pursues globally, regionally, and locally. We assist companies with foreign country compensation plan design and implementation while keeping them fully apprised of any legal roadblocks (such as changes in tax and labor law) and the creative solutions available. Additionally, we have focused experience in mobile employee strategies, including the relevant tax, social security, employee benefits, employment law, and other legal issues related to transferring executives abroad (outbound), as well as

the hiring of foreign nationals in the United States (inbound). To complement these counseling services, we draft and negotiate employment and consulting agreements, dual pay arrangements, noncompetes and confidentiality agreements, as well as equity compensation arrangements that coordinate with the underlying goals of the U.S. parent company's compensation strategies.

We are frequently called upon to assist multinational clients with respect to the employee benefit aspects of international mergers and acquisitions, and the impact of such transactions on the U.S. company's global workforce. We identify and resolve the issues surrounding dismissals, terminations, severance obligations and settlements, and the elimination or substantial revision of benefit plans (including the merger of comparable plans). This is done strategically in the context of the company's desire to obtain global benefits integration on a global scale, or alternatively, with individual local country programs and plans. Our team assesses the organization in this process and balances the total benefits package in light of the company's anticipated corporate change. Our in-depth understanding of the legal environment around the globe in the benefits area ensures that our clients attain a competitive, international employee benefits program.

The professional relationships we have developed with our international colleagues in more than 120 countries

are leveraged to the direct benefit of our clients. These relationships enable us to offer expeditious turnaround on legal issues, allowing our clients to rapidly respond to real-time benefit issues that transpire in other countries.

Our international services include assisting companies with:

- Global equity compensation extensions
- Mobile employee issues
- Immigration issues
- Employee benefit issues in international mergers and acquisitions
- International compensation packages
- Global retirement benefits integration or individually designed local retirement programs

## Board, Compensation Committee, and Other Fiduciary Advisory Services

Strict and complex ERISA rules and DOL regulations govern plan fiduciaries, such as trustees, plan administrators, benefit and investment committees, and company officers and directors. In light of the increased scrutiny on corporate governance, vigilance and adherence to these rules is more important than ever.



Our attorneys help companies fulfill their fiduciary responsibilities, serve their employees well, and avoid litigation and other claims. We assist clients in implementing proper corporate and plan governance and compliance with the fiduciary requirements for plan investments and administration.

While some of our clients retain us solely for assistance with their day-to-day employee benefits issues, others look to us to provide independent counsel to their Board of Directors (the "Board") and/or Compensation Committee. Our philosophy is to fully customize our approach for each Board or Compensation Committee. We typically focus on executive compensation, equity compensation, and other management compensation issues. In other instances, we are retained on retiree medical benefits or 401(k) plan class action litigation matters. Our team begins with a dialogue over the specific compensation issues currently challenging the company, and we then identify the relevant knowledge, strengths, and weaknesses within the Compensation Committee and/or Board. Finally, we develop an education strategy for filling the knowledge gaps, which can either be short-term targeted programs or long-term educational plans. Our objective is not only to counsel, but to provide the Board and Compensation Committee with the tools necessary to make educated and fully informed decisions regarding their employee benefit issues.

There is generally no limit to the legal areas in which our counsel may be sought. Areas in which we have advised Compensation Committees include:

- Compensation policies and philosophies
- Compensation Committee reports
- Fiduciary training (including the duties of care, loyalty, and candor as well as the business judgment rule)
- Compensation Committee structure (size, selection, charter)
- Best practices for interacting with management for meeting governance standards
- SEC proxy disclosure rules
- SEC reporting on forms 4, 8-K, 10-Q, and 10-K
- Stock exchange listing requirements and guidelines
- ISS and institutional investor proxy voting guidelines
- Code Section 162(m) and Code Section 409A compliance
- Tax gross-ups

## FIDUCIARY COMPLIANCE CONSULTING

A publicly traded client needed assistance with the design and implementation of fiduciary compliance programs for each of the administrative committees under its four retirement plans, including two collectively bargained plans.

- ▶ Our team undertook an initial assessment of the client's existing practices and procedures. We discovered that the company had not sufficiently adapted to changes in its business and growth. Following our completed assessment and evaluation, we provided the client with a manageable fiduciary compliance program, including the adoption of administrative committee charters, adoption of formal investment policy statements, fiduciary compliance training for the administrative committee members, a system for managing regular meetings, and adequately documenting fiduciary actions. We also assisted the client in engaging an independent third party to consult with the administrative committee on its review of plan investments.

**Result:** The client was able to efficiently and successfully implement a governance program that met fiduciary obligations. Procedures that were established helped the client to stay on track with the program without extraneous motions.

- Employment and severance arrangement standards and best practices
- Retention arrangements
- Use of noncompetes and nonsolicitations
- Clawback provisions
- Use of perquisites

## Corporate Transactions

Corporate acquisitions, divestitures or joint-venture transactions are part and parcel of today's competitive economy. However, all carry a host of complex—and sensitive—workplace issues. At Seyfarth Shaw, our attorneys are highly skilled at managing those issues in a manner that protects companies' financial interests, employee relations, and public image. We have particular experience uncovering the hidden liabilities of target employers, and we frequently serve as "special ERISA counsel" in such matters, even when our firm is not handling the corporate-law aspects of the transaction.

## Employee Benefits and ERISA Litigation

Our national ERISA and employee benefits litigation team has demonstrated experience in all aspects of benefits litigation, including complex class actions alleging breach of fiduciary duties, unilateral modification of retiree benefits for collectively bargained and salaried retirees, cash balance plan design flaws, failures to comply with severance pay and other employee welfare plans, early retirement incentive plan design flaws and violations, challenges to defined benefit plan terminations, failures to comply with COBRA and WARN, prohibited transactions, and other improper conduct resulting in precipitous stock value decreases or increases. Our national team has also successfully litigated claims involving reporting and disclosure issues, pension and welfare plan interpretation and benefit application, executive compensation, stock options, Taft-Hartley plans, and multiemployer plans.

## EXECUTIVE COMPENSATION AND DESIGN

A client was attempting to lure a senior executive from another company. A significant hurdle to this effort was that the executive would forfeit substantial retirement benefit opportunities if he left the other company.

- ▶ We helped the client construct a supplemental retirement package that was designed to make up for any lost retirement benefit opportunities, provided the executive satisfied certain business objectives.

**Result:** The client was successful in convincing the executive to accept the position by offering the comparable package.

We represent employers, plans, administrators and fiduciaries, including independent fiduciaries in courts at all levels, from state and district courts to the U.S. Supreme Court. We have defeated class certification, obtained summary judgment, and represented clients at trial in significant employee benefits matters. Many of our cases, which number in the hundreds, are regarded as leading cases in this area. We constantly strive to identify and respond to novel issues and legal theories to help avoid or successfully defend litigation. As a result of our early identification of revenue sharing as the "next wave" of litigation (following 401(k) employer stock drop cases), we now represent several plan sponsors and fiduciaries in class action litigation and regulatory investigations relating to 401(k) plan fee issues.

## Executive Compensation

Executive compensation practices are receiving unprecedented attention from the media, shareholders, Congress, the IRS, and the Securities and Exchange Commission (SEC). With the reshaping of the regulatory landscape that occurred in 2002 by Sarbanes-Oxley, in 2004 by the American Jobs Creation Act, and in 2005 by the Financial Accounting Standards Board and the SEC, our team has remained at the forefront of helping clients effectively manage their executive compensation programs while fulfilling compliance obligations.

Effective compensation planning requires a strategy that meets client needs while accommodating continual changes in tax, ERISA, labor, employment, corporate and securities laws, stock exchange rules, and accounting principles. As part of a full-service firm, our attorneys are uniquely positioned to draw upon the experience of their colleagues who practice in these other areas in order to provide comprehensive advice and counsel.

Whether the situation involves executive transition, change-in-control protection, management retention initiatives, performance incentive plans or any of the other myriad issues in this area, our team approaches executive compensation matters both strategically and technically to ensure that our clients' business needs are met. Our attorneys have considerable experience in an array of specific executive compensation plans, programs and agreements, including:

- Nonqualified supplemental retirement plans
- Deferred compensation arrangements
- Use of "rabbi" and "secular" trusts to fund such programs
- Executive employment and "golden parachute" agreements
- Executive separation agreements
- Cash- and stock-based, short- and long-term incentive programs such as phantom-stock plans, options plans (including those for non-employee directors) and performance-unit plans
- Designing severance and change-in-control programs ■

## About Seyfarth Shaw

Seyfarth Shaw was founded in 1945 by three lawyers and has grown to more than 800 lawyers across ten offices. We handle issues for our clients in all key areas including commercial litigation, construction, corporate and finance, employee benefits, environmental, government contracts, intellectual property, labor and employment, litigation, real estate, securities litigation, trade secrets, trusts and estates, and workouts and bankruptcy, among others.

Our success is the result of a constant, unrelenting focus on the needs of our clients. Our commitment to excellence and our belief in the strength of a team-based approach to the delivery of our services offers an atmosphere of creative and innovative thinking.

Our clients are our partners in business and we are committed to listening to their needs and to aligning the skills and abilities of our people to respond to those needs. Our clients range from *Fortune* 100 to midsize companies, and include publicly traded and privately held companies. We represent clients of all sizes across all industries and we are diligent in providing the same level of commitment to each client.

## Breadth. Depth. Results.

[www.seyfarth.com](http://www.seyfarth.com)

### Atlanta

1075 Peachtree Street, N.E.  
Suite 2500  
Atlanta, GA 30309-3962  
404-885-1500  
404-892-7056 fax

### Boston

World Trade Center East  
Two Seaport Lane  
Suite 300  
Boston, MA 02210-2028  
617-946-4800  
617-946-4801 fax

### Chicago

131 South Dearborn Street  
Suite 2400  
Chicago, IL 60603-5577  
312-460-5000  
312-460-7000 fax

### Houston

700 Louisiana Street  
Suite 3700  
Houston, TX 77002-2797  
713-225-2300  
713-225-2340 fax

### Los Angeles

Century City  
One Century Plaza  
2029 Century Park East  
Suite 3500  
Los Angeles, CA 90067-3021  
310-277-7200  
310-201-5219 fax

### Downtown

333 South Hope Street  
Suite 3900  
Los Angeles, CA 90071-1406  
213-270-9600  
213-270-9601 fax

### New York

620 Eighth Avenue  
New York, NY 10018-1405  
212-218-5500  
212-218-5526 fax

### Sacramento

400 Capitol Mall  
Suite 2350  
Sacramento, CA 95814-4428  
916-448-0159  
916-558-4839 fax

### San Francisco

560 Mission Street  
Suite 3100  
San Francisco, CA 94105-2930  
415-397-2823  
415-397-8549 fax

### Washington, D.C.

975 F Street, N.W.  
Washington, D.C. 20004-1454  
202-463-2400  
202-828-5393 fax

### London

Bankside House  
107 Leadenhall Street  
London EC3A 4AF  
44 (0) 207 763 2500  
44 (0) 207 763 763 2501 fax