



# Compensation Issues for Privately Held Companies

## Presented by:

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# Session Agenda

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- I. Overview – Matt Keene (8:30-8:45 AM)
- II. Key Issues in Exec Comp- Forms of Compensation – Allison Wilkerson (8:45-9:30 AM)
- III. Key Issues in Exec Comp- Best Practices – Matt Keene (9:30-10:15 AM)
- IV. Executive Compensation Data – Nancy Wiefek (NCEO) (10:15-10:30 AM)
- V. Break (10:30-10:45 AM)
- VI. Best Practices in Compensation Governance – Wendy Gilligan (10:45-11:15 AM)
- VII. Key Issues in Staff Compensation – Mike Hart (11:15 AM-12:00 PM)
- VIII. Table Talks or Q&A (12:00-12:30 PM)



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# I. OVERVIEW



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## II. KEY ISSUES IN EXEC COMP – FORMS OF COMPENSATION

# Forms of Compensation – Basic Summary

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## Typical Incentive Arrangements/Forms of Compensation

- Cash Compensation/Bonus Incentives
- Equity Awards
  - Full Value Awards
    - Stock Grants (outright or restricted)
    - Appreciation Awards
      - Stock Options (qualified or non-qualified)
- Synthetic Equity Awards
  - Full Value Awards
    - Phantom Stock
    - Restricted Stock Units
  - Appreciation Awards
    - Stock Appreciation Awards (SARs)



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# Forms of Compensation

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## Structuring Alternatives

- Transaction Award vs. Post-Transaction Plan
- Full value awards vs. appreciation awards
- Short-term, Mid-term, or Long-term
- Performance vs. Retention
- Participant flexibility
- Participant elective participation



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# Equity Awards

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- Actual ownership in a corporation
  - ESOP owned company or joint venture structure
- Receives dividends and voting rights
- Includes shareholder rights (information rights and dissenters' rights)
  - Shareholders agreement is necessary
- May have a capital gains tax component
- Structure considerations are important – less efficient in an S corporation



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# Pure Equity Awards—Stock Grants

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## Restricted Stock Grants

- Shares of employer stock are granted, but ownership is subject to restrictions (e.g., performance or time vesting)
- May have the right to receive dividends and right to vote before restrictions lapse
- Upon lapse of the restrictions, the grantee becomes a shareholder
  - May become subject to shareholder agreement
  - Receive dividends and voting rights
  - Receive certain statutory protections as a shareholder, including information rights and dissenters' rights
- Taxation considerations



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# Pure Equity Awards—Stock Options

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- Grant of a right to buy a share of stock at a given price (the “exercise price” or “strike price”)
- In most cases, the exercise price or strike price is equal to at least fair market value
  - The option has value only if the value of the company appreciates
- The compensatory portion (the “spread”) is the difference between the stock’s FMV at the time of exercise and the exercise price
- Incentive Stock Options (ISOs)
  - Significant legal restrictions and requirements to maintain status as an ISO
- Nonqualified Stock Options (NSOs)
  - An option that is not an ISO
- Tax considerations



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# Types of Incentive Compensation

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## Synthetic Equity

- Is not actual ownership in a corporation
  - No dividends
  - No voting rights
  - No right to information or dissenters' rights
- Value is paid in cash and determined based upon the value of the company at a set point in time
- All amounts are taxed as ordinary income
- Common Examples
  - Phantom Stock (full value award)
  - Restricted Stock Units (full value award)
  - Stock Appreciation Rights (appreciation award)



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# Equity-Based Awards – Phantom Stock

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- Award of an equity right, the value of which is determined by reference to a share of employer stock
  - Value is equal to full FMV of a share of stock
  - May be settled in stock or in cash
- Tax Considerations
  - Shares of phantom stock are taxable on settlement
  - Subject to § 409A



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# Equity Based Awards – Restricted Stock Units

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- Restricted stock units are similar to phantom stock except that awards are (commonly) paid in shares of the underlying stock
  - Participant has right to receive shares at a future date or upon lapse of a risk of forfeiture
  - RSUs may or may not have a dividend equivalent
  - RSUs carry no voting rights
- Tax considerations
  - Differs from restricted stock as there is not opportunity for a § 83(b) election as there is no transfer of property on grant
  - RSUs are taxable upon settlement



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# Equity-Based Awards—Stock Appreciation Rights

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- Participant receives a promise to pay the appreciation in value of a defined number of shares in the future
  - Deferred award is based on appreciation in the equity of the company over the term of the award
  - Participants can generally exercise SARs at any time after vesting
  - Participant generally receives excess of value over exercise price in cash
    - Value is similar to that of an option
    - In most cases, the exercise price or strike price is equal to at least fair market value
  - No risk of loss to participants
  - Can be paid in cash or stock-settled
- Tax Considerations
  - SARs are taxable at exercise
  - Can be designed to be § 409A exempt



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# Types of Incentive Compensation

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## Cash Awards

- Promise to pay an amount at a future date
  - Annual bonus plans
  - Long term incentive arrangements
- Amount may fluctuate based on performance but growth not necessarily tied to the value of the company (e.g., interest index)
- Employees may elect to defer some of their salary for future distribution
- All amounts are taxed as ordinary income
- Common Examples
  - Bonus amounts (short term or long term)
  - Incentive payments
  - Nonqualified deferred compensation



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### III. KEY ISSUES IN EXEC COMP – BEST PRACTICES

# Compensation Philosophy

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- Helps to evidence a reasoned process
- Often discusses:
  - Role of compensation at your company
  - Your targets versus market
  - The role of incentives (e.g., profit sharing or significant differentiation)
  - Alignment with business goals
  - Alignment with culture



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# Ownership Philosophy

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- What does it mean to be an owner?
- Is ownership by title?
- Is ownership by strategic contribution?
- Will the ESOP own all of the actual equity?
- Compare the Compensation Philosophy and Ownership Philosophy when designing incentives



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# Benchmark Compensation

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Compensation data exists, but can be hard to tailor to a given company. Use it as a guide.

- Are you a clear outlier—below or above the dataset?
- Does the data reflect your company?
- Are you losing people?

Consider the three main elements: base, bonus, LTIP



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# Long-term Incentives: Transactions

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- Often stock appreciation rights (“SARs”)
- Often include retention and performance SARs
- Retention SARs are time-based vesting
- Performance SARs vest on both time and attaining performance goals



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# Performance SAR Vesting Example



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## EBITDA AND PSAR VESTING RESULTS

<u>EBITDA Attained</u>	<u>PSAR Vesting %</u>
120%	100%
110%	90%
100%	80%
95%	75%
90%	70%
< 90%	0%

# Long-term Incentives: Transactions

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- Typical considerations:
  - Appropriate individual amounts
  - Are you replacing direct ownership?
  - Total pool size
- Overall context of transaction
  - Other transaction terms
    - Employment agreements
  - Transaction debt amortization



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# Long-term Incentives: Ongoing ESOPs

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- Is the ESOP sufficient?
  - Adequate value to executives (IRS caps)
  - New executives with smaller ESOP balances
  - ESOP seems too distant for younger workforce



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# Generations at Work

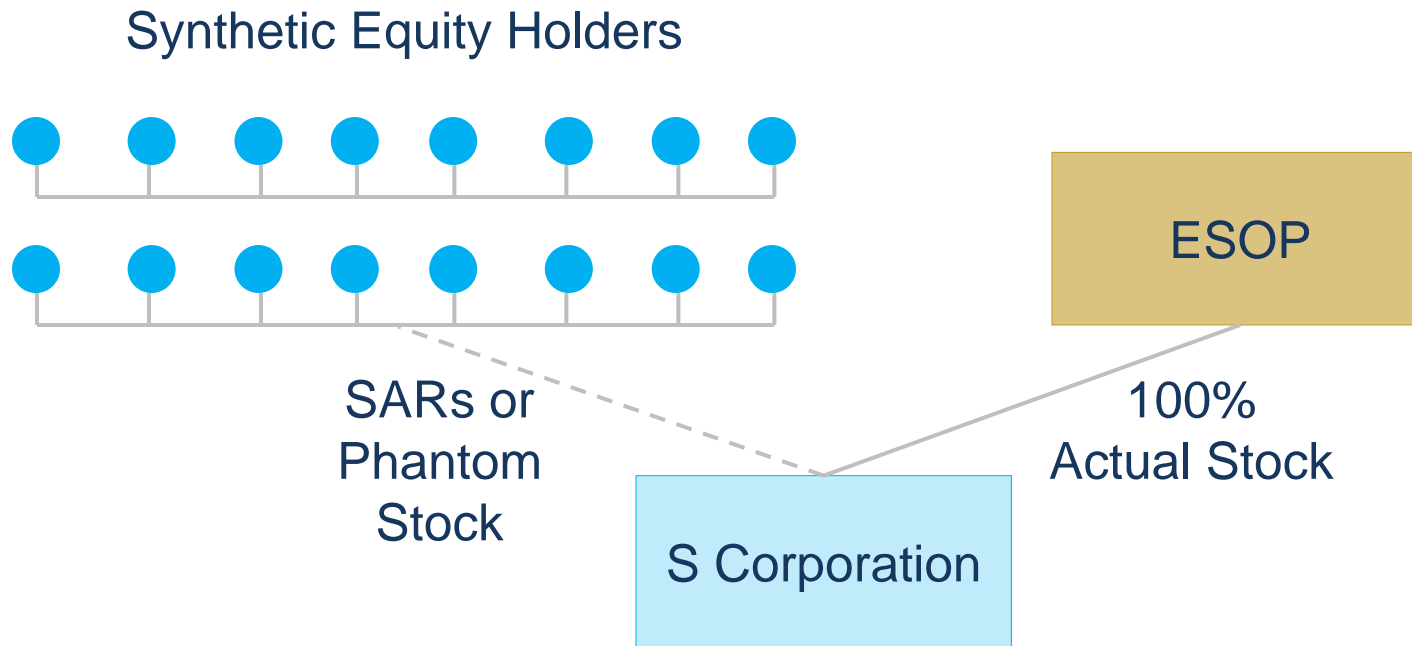


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Millennials	Generation X	Baby Boomers	Silent Generation
Invented the word: Work-Life Integration	Invented the word: Work-Life Balance	Invented the word: Workaholic	Invented the word: Lifer
Value open communication and positive reinforcement	Work smarter, not harder	Work ethic equals hours worked	Believe promotions, raises, and recognition should stem from tenure
Value leadership and training	Look for a person to whom they can invest loyalty	Less importance placed on productivity	Take pride in working long hours
Need personal fulfillment	Work is a source for lifelong learning	Value meetings	Loyal to employers, expect the same
Value job title and vacation time	Expect to enjoy their work and have fun doing it	Teamwork is critical to success	Posses superb interpersonal skills
Seek out co-workers who help them achieve	Value control of their time	Can be intimidated by computerized processes	Measure work ethic on timeliness, productivity



# 100% ESOP-Owned S Corporation



- Synthetic equity pool might be limited, which might also limit award duration
- Synthetic equity produces ordinary income



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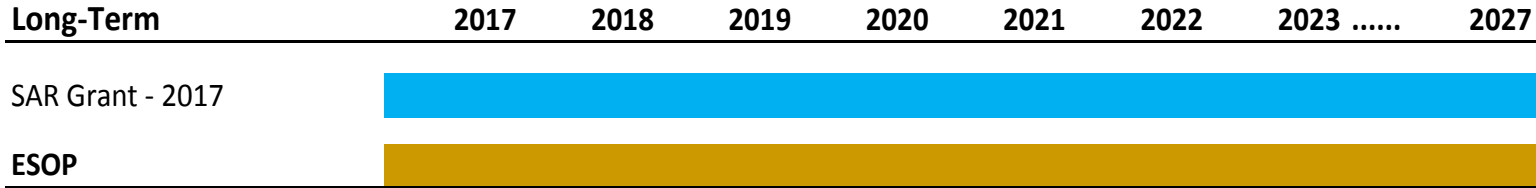




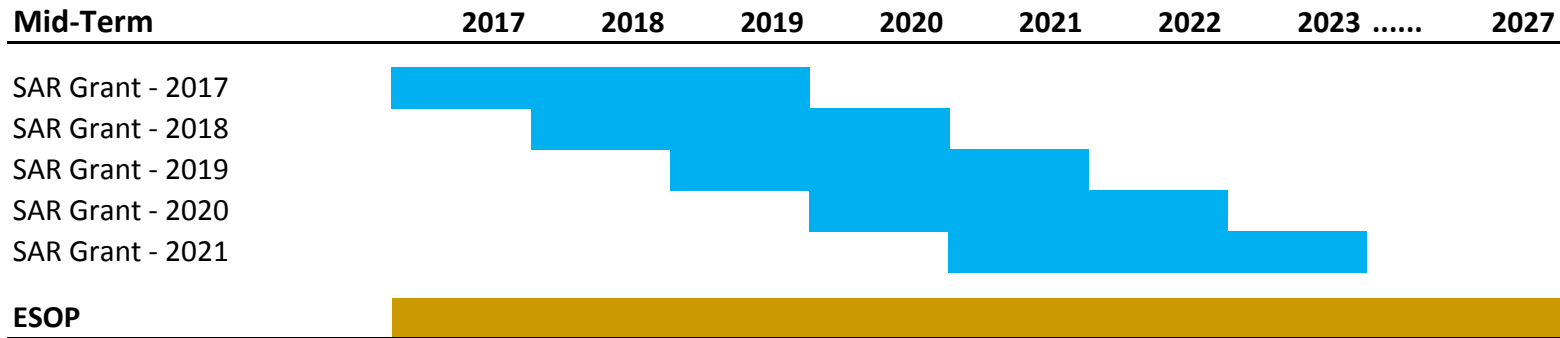
# Mid-Term and Long-Term Incentives



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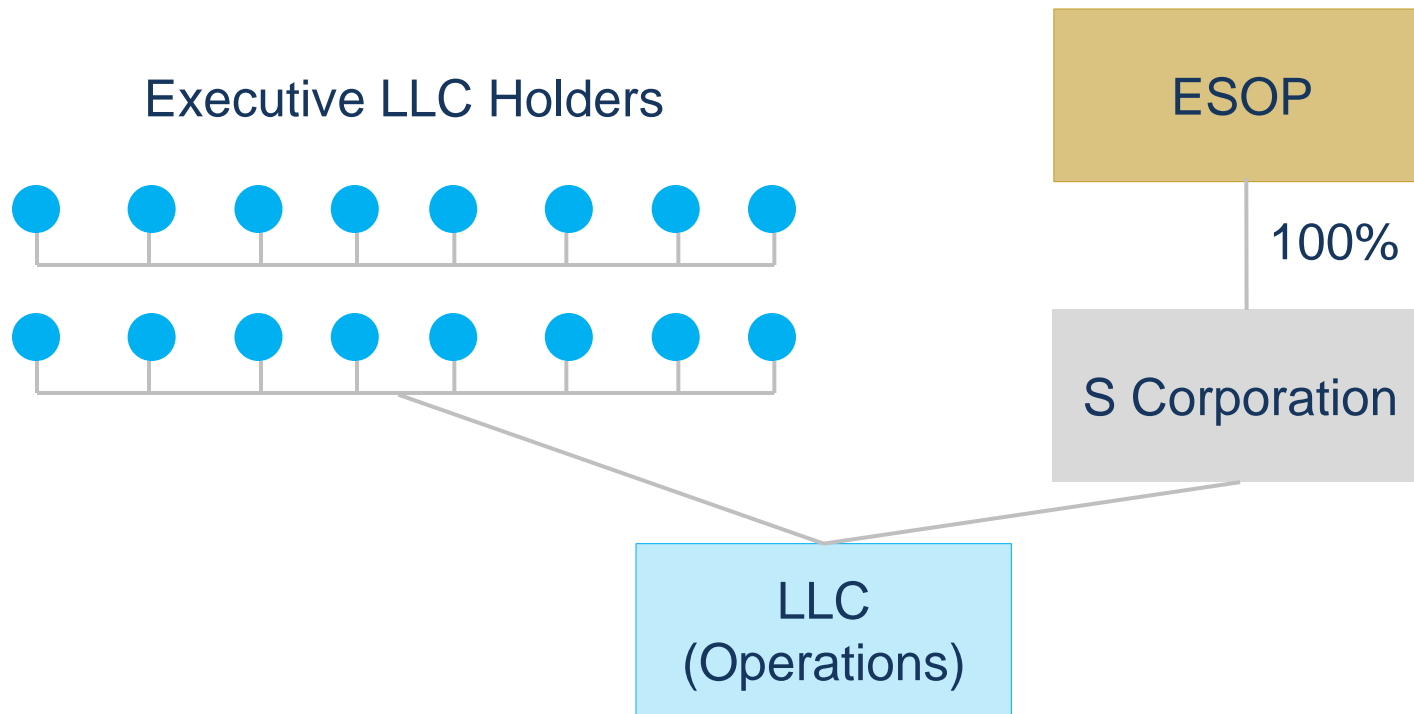


- Larger initial grant with longer-term duration



- Smaller annual grants: differing grant prices, vesting and payout dates

# LLC With ESOP



- LLC may be owned in any percentage by the ESOP vs. LLC holders
- LLC units are very flexible and can produce capital gain treatment





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## IV. EXEC COMP DATA



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V. BREAK (10:30-10:45 AM)

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## VI. BEST PRACTICES IN COMPENSATION GOVERNANCE

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# Why Do We Need Best Practices?

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- Board of Directors sets executive compensation
- Board of Directors has a duty to shareholders (including the ESOP) to maximize the value of their investment
- Best Practices gives the Board guidance (and protection)
  - setting executive compensation
  - monitoring the plan
  - dealing with real and potential conflicts of interest



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# Where Do Best Practices Come From?

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- Dodd Frank Act
  - Securities Exchange Commission Rules
  - National stock exchange rules (NYSE, NASDAQ)
  - Case law
- 
- All aimed at protecting shareholder value in publicly-traded companies
  - Not specifically applicable to privately-held companies, but useful guides to the “gold standard” in compensation governance



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# The Compensation Committee

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- The Board establishes a Compensation Committee and a committee “charter”
- The charter dictates:
  - The overall compensation philosophy
  - Whether the committee makes decisions or reports to the board
  - How many members are on the committee – min/max
  - How are members selected, qualifications
  - Rotation of committee members
  - Training for committee members



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# Other Compensation Committee Tips

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- Choose committee members carefully
- The more independent directors the better
- At least annual meetings with agendas and minutes
- At least annual meeting with Board of Directors
- Board should provide needed information and enough time for committee review before meetings
- Authority to hire help when needed
- Ability to observe industry and geographic compensation trends



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# Conflicts of Interest

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- Board setting comp for its own members
- Compensation of key employees related to board members

## How to avoid?

- Put the decision in the hands of the Compensation Committee (or at least get recommendations from the committee)
- Use an outside compensation consultant
- “Disinterested director” or shareholder approval



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# Disinterested Director / Shareholder Approval

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State laws vary, but contracts between company and interested director or officer are not void or voidable if:

- Material facts are disclosed and majority of disinterested directors approve, or
- Material facts are disclosed and shareholders approve in good faith, or
- The contract is fair to the company at the time it is approved



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# ESOP Trustee Input

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- May be necessary if shareholder approval is required
- May be necessary as part of a transaction if it impacts value or dilution
- May be desirable to get informal approval even if official approval isn't necessary
- Trustee may want advice of a compensation consultant, especially where internal trustee reports to officers/directors



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# Other Considerations

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- Do the ESOP purchase agreements limit executive compensation?
  - Prohibition on “excess” dilution
  - Specific dilution limits
  - Company performance targets
  - Vesting requirements
- Do the company’s articles or bylaws dictate how executive compensation is set or approved?



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# Good Governance Goals

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The overall goals are to:

- Match compensation to company goals (Grow? Sell?)
- Ensure compensation doesn't overly strain cash flow (and impact share value)
- Explore compensation alternatives
- Regularly assess compensation; is it still achieving its purpose?
- Ensure compensation doesn't violate existing agreements or other rules (ESOP transaction docs, bank loan, 409A, S-corp 2nd class of stock, articles, bylaws, conflicts of interest)
- **Get help when you need it**



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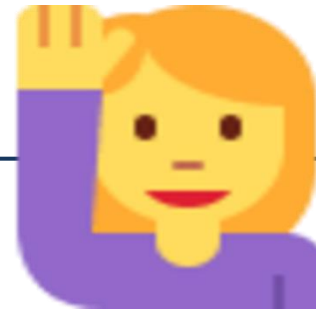
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## VII. KEY ISSUES IN STAFF COMPENSATION

# Getting to know each other

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By a show of hands, tell me about yourselves with these questions...

- Who in the room is a founder of the company ?
- Who in the room is an executive in your company ?
- Who in the room is Human Resources ?
- Who is on the ESOP Committee or Trustee?
- How many people here have **HIGH RISK** Tolerance?



# More About ME

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- I am a Baby Boomer: born in 1951, 3rd son out of 6 kids
- **HIGH RISK** Tolerance -5 Motorcycles
- Newspaper boy at 12 – lots of lessons
- Worked at Gas Station in High School
- Worked in Engineering firm HS & College
- Draft number 16
- Marched in first Earth Day parade 1970
- Went to Graduate School to avoid Vietnam
- Designed, built, and tested Solar Cooling system
- Started EEA with 3 Univ. of Texas Professors -1977
- Licensed PE in 48 states and D.C.
- Married 45 years with 4 daughters and 1 grandson



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# How good is your math?

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# EEA - ESOP History

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- I learned about ESOP legislation in 1975 during Grad School
- Started planning ESOP and gathering info 1992
- Formed ESOP in 2005
- Averaging 12% of wages into ESOP
- No debt, we have been prefunding each year
- 55% ESOP ownership currently
- Annual rebalancing currently 75% EEA shares 25% cash
- Goal to keep 2 years of repurchase obligation in cash
- Tentative transactions planned for 2018 & 2021



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# My Story

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Not impressed with former Employers

Started EEA to create a “Great Place to Work”



Professor Bill Lesso: one of my heroes

My lecture – the Role of Compensation in Industrial Motivation.

The best way to learn something is to have to teach it to others.



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# What I Learned

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The people that are overpaid are the unhappiest !

Why?

Most (85%) people value:

1. Job security – ( I will have a job )
2. Job satisfaction – ( I like what I do or the people )
3. Job equity – ( I am treated fairly )



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# Fear is the Enemy

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People who are overpaid are insecure and therefore disgruntled and unhappy. If you can not change jobs for the same or more money, you have anxiety.

People who are significantly underpaid – **CHANGE JOBS.**

The Happiest people are individuals who are slightly under paid and self-compensate by appreciating the “view out the window, the commute, their friends at work etc.” Knowing if they do not enjoy their work or feel valued, they can change jobs.



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# Keeping it Real

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- People assume the worst when they do not know the facts.
- People assume the underachievers are overpaid and the overachievers are underpaid.



*Secret pay policies **create** **mistrust** and **grow cancer** in companies.*



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# Good News & Bad News

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## Bad News

- People will choose a fixed salary or hourly rate over commissions or piece rate compensation even though they will make less money.
- Uniform bonuses do not work, the overachievers are under rewarded and underachievers are over rewarded. Everybody slows down.
- People are annoyed by individuals who are different from them, including gender, race, ethic, religious and cultural backgrounds.



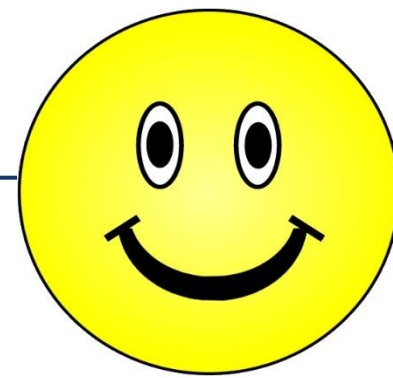
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# Good News & Bad News,

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## Good News

- Individuals respond to incentives and are more productive when given incentives.
- If individuals are economically linked they get along better and overlook petty differences. People work harder to get along if it pays.
- We are a competitive species; when we are measured and given opportunity to improve, we do better. Praise, recognition, more responsibility etc. are effective.



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# Why Not Both? - The EEA Strategy



- Give staff what they want – a ***fair, competitive wage*** so they feel secure.
- Give staff an ***incentive to perform*** at a higher level and share the added benefit.
- Tie individual incentives to group or company performance to economically link employees together.



# Our Approach: Share the Data, Be Inclusive

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- Create market mean salary structure
  - Use industry survey data and local insights
- Provide annual bonus based upon:
  - Individual contributions to profitability &
  - Company overall performance
  - Shared risk – no bonuses till min profits achieved
- Share in equity for the long term with ESOP
  - ESOP contribution % of salary with vesting
  - Seek and Value feedback from stakeholders



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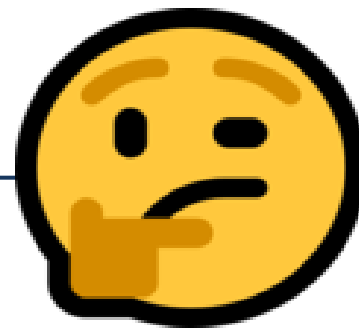


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# Philosophy

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Create stable long term company with continuous ownership renewal. Avoid or minimize debt. Stay in business with strong balance sheet.

Treat people fair, share the data – create low turn over culture where financial interests are aligned and productivity is rewarded. Invest in people, provide superior service to our clients/partners. Give back to the community and have fun.

Share in the short and long term value that we all create.

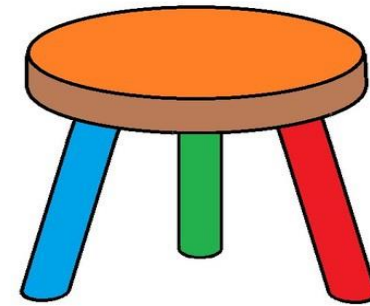


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# Three Legged Stool Strategy

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- ✓ Create and Maintain Sustainable Business – ESOP
- ✓ Grow the business – create advancement opportunities
- ✓ Be Fair – share financial data, pay for performance



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# Share Data

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Be thoughtful and transparent

But protect privacy

How we do it – aggregate data for groups

Give individuals their data to self assess

Offer to provide as much detail privately as requested

Provide narrative and reasons, but add in specific info



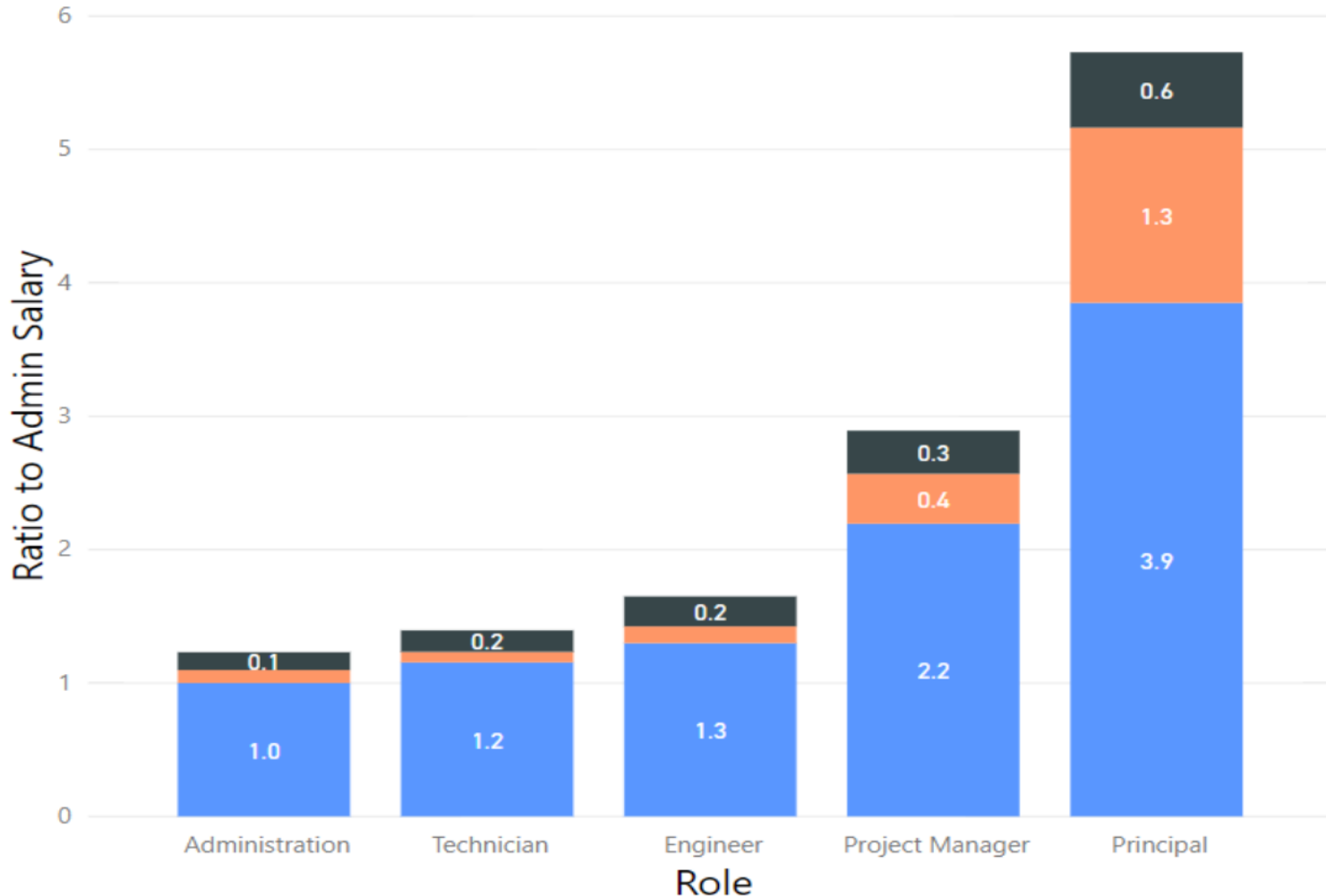
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# Example

## Total Compensation Ratio

● Ratio to Admin Salary ● Bonus Ratio to Admin Salary ● ESOP Ratio to Admin Salary



# Example

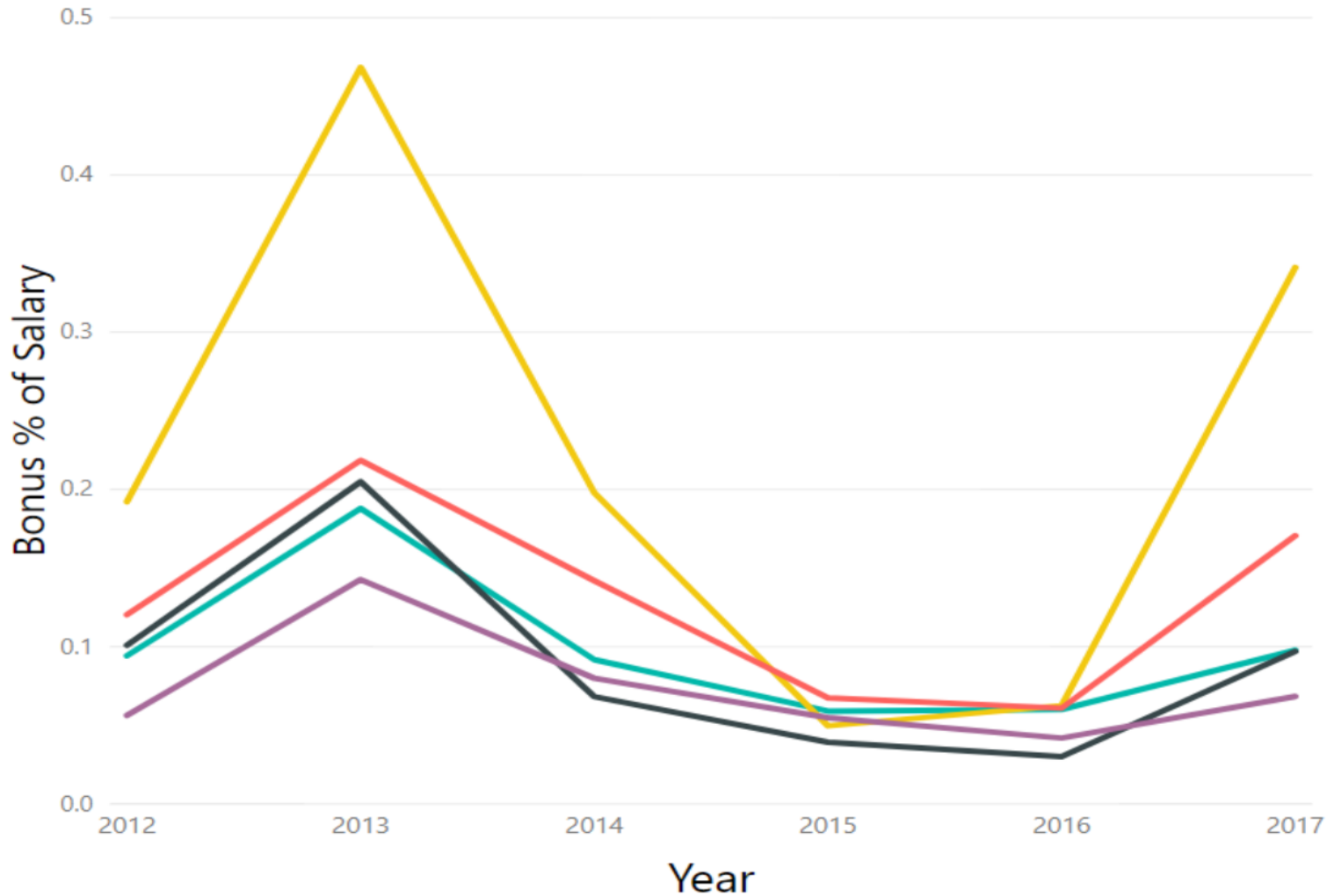


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## Bonus % of Salary by Year

Role Administration Engineer Principal Project Manager Technician





# Summary

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## Compensation is **about more than Money**

Be **Trustworthy** – even when you get disappointed

Be flexible, own your mistakes, fix your mistakes

Individuals desire Security

but not everyone makes the cut

be able to explain **why?**

Individuals want to be part of the Tribe

**Invest in culture** as well as payroll

**Think long term**, invite long term thinking

Former employees can be great friends



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# Don't Forget!

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## VIII. TABLE TALKS OR Q&A

# Allison Wilkerson



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**Allison Wilkerson** is a partner at McDermott Will & Emery in Dallas, TX. She focuses her law practice on employee benefits matters. She has extensive experience handling issues pertaining to the Employee Retirement Income Security Act of 1974 (ERISA) and employee stock ownership plans (ESOPs).

Allison focuses her ESOP practice on the design and implementation of ESOP transactions and provides ongoing legal counsel to ESOP-owned companies. She has been involved in hundreds of transactions, including leveraged buyouts, mergers, acquisitions, and the structuring and financing of ESOPs using private equity. She has advised employers on the implementation of nonqualified plans and executive compensation arrangements that complement the employee ownership structure and culture inherent in an ESOP-owned company. Allison also represents independent fiduciaries in their role as purchaser in an ESOP transaction as to their legal duties with respect to their representation of ESOP participants and beneficiaries.

Allison further focuses her practice on compliance issues and the Internal Revenue Code related to employee benefits, including qualified plans, nonqualified plans, and executive and deferred compensation. Allison provides relevant guidance as to administrative and operational matters, and assists clients with various benefit plan correction programs offered by the Department of Labor (DOL) and Internal Revenue Service (IRS).

Allison received her legal degree from the University of Texas at Austin, graduating with honors in 2002.



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# Matt Keene



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## PRESENT POSITION

Matt leads Chartwell's Executive Compensation Consulting practice. He works with privately held companies to obtain relevant pay data and achieve key goals for compensation programs, with a special focus on ESOP companies and equity-based incentives. His passion is helping privately held companies implement successful ownership transition strategies while aligning shareholders, executives and employees in the achievement of mutually beneficial outcomes. Over the past 25 years, he has worked with companies on all aspects of qualified and non-qualified plan origination, operation, and termination.

## MEMBERSHIPS AND DESIGNATIONS

Matt currently serves on the Board of Directors of the NCEO (National Center for Employee Ownership) and has previously held other leadership positions within The ESOP Association and the NCEO. Matt also participates in the National Association of Stock Plan Professionals and the American Council of Engineering Companies (ACEC).

Matt is a frequent speaker and writer at the national level on topics relating to executive compensation, ownership transition alternatives and qualified and non-qualified plan operational issues.

## PRIOR EXPERIENCE AND EDUCATION

Prior to joining Chartwell, Matt spent 10 years with a leading ESOP administration and consulting firm. Prior to that, he spent 12 years with a Big Four accounting firm where he worked in the National Tax Department advising field employees on rulings and developments affecting employers' compensation and benefits programs.

Matt received a Bachelor of Science in business administration and a Master of Accounting from the University of North Carolina at Chapel Hill.



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During Graduate School, I led a team of Engineers in the design and build of a solar powered air conditioning system using desiccant technology. Upon graduating, I managed the Commercial and Industrial Energy Efficiency Program for the State of Texas Energy Office. I've always been passionate about energy conservation and I realized I wanted to take that passion and start my own business. I joined with three of my favorite Graduate School Professors (Philip S. Schmidt, Gary C. Vliet, Jerold W. Jones) to create Energy Engineering Associates, Inc. in 1977. Our first project was helping to plan the technical aspects of the 1977 Texas State Energy Plan.

What really launched the firm was our work with Southwestern Bell's Building Energy Management Retrofit program in 1978. Our work provided a 54% savings with a 6 month payback. Following that success, I was invited by the Department of Energy to provide training for their Institutional Conservation Program, working with schools and hospitals across the county identifying energy retrofit projects. We helped building Owners and Engineers participate in the Federal grant matching program. We worked with a variety of clients, most notable The University of Texas at Austin and Texas A&M University. Our success in helping clients save energy resulted in EEA being invited to help solve other issues and design new buildings.

What excites me most is creative problem solving – when people say it can't be done. I thrive on finding the solution that hasn't been done before. With existing buildings representing 50% of the firm's work, we are used to getting dirty, taking measurements, troubleshooting what's really going on and finding the fix that costs much less than anticipated.

## Education

- B.S. M.E. University of Texas at Austin, 1974 M.S. M.E. University of Texas at Austin, 1977



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Wendy is a shareholder attorney at Employee Benefits Law Group PC. EBLG is a legal and consulting firm focused exclusively on guiding clients through the complete spectrum of employee benefits for over 25 years.

Wendy guides business owners and their advisors through ESOP transactions and employee benefits issues in non-ESOP mergers and acquisitions. From the transaction planning phase through closing, she represents sellers, buyers, fiduciaries and their advisors.

Wendy's practice includes qualified retirement plans and nonqualified deferred compensation plans, including 401(k) plans, restricted stock plans, phantom stock plans and stock appreciation rights (SARs) plans.

Wendy earned her J.D. from the University of California at Davis School of Law and her LL.M. (Master of Laws) in Taxation, cum laude, at the University of Alabama where she received the distinction of "Best Paper" in Deferred Compensation. She speaks regularly on ESOP transaction planning and execution, executive compensation, controlled groups, corporate governance and fiduciary issues.



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