Compensation Ideas within a Partnership or LLC Structure

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About Anthony "Tony" Eppert

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- Tony practices in the areas of executive compensation and employee benefits
- Before entering private practice, Tony:
  - Served as a judicial clerk to the Hon. Richard F. Suhrheinrich of the United States Court of Appeals for the Sixth Circuit
  - Obtained his LL.M. (Taxation) from New York University
  - Obtained his J.D. (Tax Concentration) from Michigan State University College of Law
    - Editor-in-Chief, Journal of Medicine and Law
    - President, Tax and Estate Planning Society

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Our Compensation Practice – What Sets Us Apart

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- Compensation issues are complex, especially for publicly-traded issuers, and involve substantive areas of:
  - Tax,
  - Securities,
  - Accounting,
  - Governance,
  - Surveys, and
  - Human resources

- Historically, compensation issues were addressed using multiple service providers, including:
  - Tax lawyers,
  - Securities/corporate lawyers,
  - Labor & employment lawyers,
  - Accountants, and
  - Survey consultants

Our Compensation Practice – What Sets Us Apart (cont.)

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- The members of our Compensation Practice Group are multi-disciplinary within the various substantive areas of compensation. As multi-disciplinary practitioners, we take a holistic and full-service approach to compensation matters that considers all substantive areas of compensation

Our Compensation Practice – What Sets Us Apart (cont.)

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- Our Compensation Practice Group provides a variety of multi-disciplinary services within the field of compensation, including:

Traditional Consulting Services

- Surveys
- Peer group analyses/benchmarking
- Assess competitive markets
- Pay-for-performance analyses
- Advise on say-on-pay issues
- Pay ratio
- 280G golden parachute mitigation

Corporate Governance

- Implement "best practices"
- Advise Compensation Committee
- Risk assessments
- Grant practices & delegations
- Clawback policies
- Stock ownership guidelines
- Dodd-Frank

Securities/Disclosure

- Section 16 issues & compliance
- 10b5-1 trading plans
- Compliance with listing rules
- CD&A disclosure and related optics
- Sarbanes Oxley compliance
- Perquisite design/related disclosure
- Shareholder advisory services
- Activist shareholders
- Form 4s, S-8s & Form 8-Ks
- Proxy disclosures

Design/Draft Plan

- Equity incentive plans
- Synthetic equity plans
- Long-term incentive plans
- Partnership profits interests
- Partnership blocker entities
- Executive contracts
- Severance arrangements
- Deferred compensation plans
- Change-in-control plans/bonuses
- Employee stock purchase plans
- Employee stock ownership plans

Traditional Compensation Planning

- Section 83
- Section 409A
- Section 280G golden parachutes
- Deductibility under Section 162(m)
- ERISA, 401(k), pension plans
- Fringe benefit plans/arrangements
- Deferred compensation & SERPs
- Employment taxes
- Health & welfare plans, 125 plans

International Tax Planning

- Internationally mobile employees
- Expatriate packages
- Secondment agreements
- Global equity plans
- Analysis of applicable treaties
- Recharge agreements
- Data privacy

Introduction

- The purpose of this presentation is to share practical ideas for incentivizing and retaining executives within a partnership or LLC structure. To that end, this presentation will discuss various compensation design issues associated with:
  - Grants of capital interests, profits interests and/or phantom interests to service providers;
  - How to structure employer-provided loans to service providers for the latter to purchase capital interests;
  - Appropriate structuring of vesting schedules, economic forfeiture provisions and certain employment conditions that can trigger employer-favorable repurchase rights (*i.e.*, terminated for Cause or quit without Good Reason); and
  - Annual or transaction-related cash bonuses

- For purposes of the following slides, all references to partnerships are intended to include LLCs taxed as a partnership, and vice versa

Background: Corporation v. Partnership

- Corporations
  - Equity incentives generally consist of common or preferred stock in the form of:
    - Restricted stock and/or stock settled RSUs (*a.k.a*., full value awards),
    - Stock options and/or stock-settled SARs (*a.k.a*., appreciation-only awards), and
    - Performance shares and/or stock-settled performance units
  - Additionally, synthetic equity (*a.k.a*., phantom equity) can also be used to create incentives that are comparable to equity ownership (though no actual equity is issued under a synthetic equity program)
    - Examples include cash-settled RSUs, SARs and performance units
- Partnerships
  - A partnership is not a taxable entity; instead, entity levels of income, deduction, credits, etc., are allocated to, and reported by, the partners
  - Partner allocations is a primary reason why the taxing regime for compensatory equity interests in the partnership context are more complex

Background: Partner v. Employee Classification

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- An individual cannot be both a partner and an employee in the same entity
- Thus, the beginning point of any analysis is to determine whether partner or employee classification is important
- If the individual is only an employee, then:
  - Any income to the recipient would be W-2 compensation that is subject to withholding;
  - Such W-2 compensation would be taxed to the employee at ordinary income rates and the partnership should be entitled to a corresponding compensatory deduction
  - The recipient could participate in any retirement plans that are sponsored by the partnership;
  - Any premiums paid for accident and health insurance, or for group term life insurance, could be excluded from the recipient's gross income by the employee participating in a 125 plan (*a.k.a.*, a cafeteria plan for the purpose of paying premiums with pre-tax dollars);
  - The value of meals that were furnished to the recipient for the partnership's convenience could be excluded from the recipient's gross income; and
  - Any fringe benefits that were provided to the recipient could be excluded from the recipient's gross income pursuant to Section 132

Background: Partner v. Employee Classification (cont.)

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- In contrast, if the individual is a partner of the partnership, then:
  - Any income would be reported on a Schedule K-1;
  - The partnership would not be required to withhold on payments to the recipient, however, any payments characterized as a "guaranteed payment" would be subject to self-employment tax;
  - The partner would have to make quarterly estimated tax payments (as opposed to having income withholding on wages);
  - The partner would be liable for the full amount of employment taxes as a self-employed individual (as opposed to the partnership paying 50% of such employment taxes if the individual were an employee);
  - If the partnership sponsored a retirement plan, the partner would be able to participate only if the underlying plan documents were amended to include partners (*i.e.*, typically, the standard retirement plan document does not include partners, so an amendment would be required);
  - Any premiums paid for accident and health insurance, or for group term life insurance, would have to be paid by the individual with his or her after-tax dollars (*i.e.*, a partner is not eligible to participate in a 125 plan/cafeteria plan, and therefore, cannot pay premiums using pre-tax dollars);

Background: Capital v. Profits Interest

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- Both the grant of a capital interest and a profits interest are equity-based awards, however, neither a capital interest nor a profits interest is defined in the Code

- A "capital interest" is generally defined as an interest that would provide the service provider with a share of the proceeds if the partnership's assets were sold at fair market value and then distributed to its partners
  - Such can take the form of restricted interests, options to acquire interests, conditional promises to be settled in equity (*i.e.*, RSUs, SARs and performance units)
  - A benefit of a capital interest is that it provides the service provider with enterprise value in the partnership as of the date of grant (*i.e.*, a full value award)
  - A drawback of a capital interest is the tax consequence associated with the receipt of a full value award

- The tax consequences to receiving a capital interest include:
  - To the extent it is vested (or is unvested with an 83(b) election), the service provider would recognize ordinary taxable income equal to the fair market value of the capital interest, minus any monies paid for such interest
  - Under Section 83, the partnership would be entitled to a compensatory deduction at the time (and in the amount) that the service provider recognized ordinary taxable income (as a planning note, consider whether the partnership agreement should allocate any compensatory deductions arising from the grant of the capital interest to only those partners that existed immediately prior to the grant)

Background: Capital v. Profits Interest (cont.)

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- A "profits interest" is generally defined as an equity interest other than a capital interest. It provides the service provider with a share of future partnership profits and NO interest in the capital of the partnership that existed prior to the date of grant
  - It is intended to provide an incentive for the service provider to pursue enterprise growth
  - Some of the benefits associated with receiving a profits interest include:
    - Favorable tax treatment for the recipient (no tax at grant or vesting),
    - It represents actual equity in the partnership,
    - The service provider will generally recognize capital gains treatment upon a sale of the partnership to a third party, and
    - The character of income at the partnership level is generally retained when distributed to the service provider

- Tax consequences to the service provider in receiving a profits interest include:
  - Under Rev. Proc. 93-27 and 2001-43, the service provider would not recognize any taxable income on the date of grant
  - Under Section 83 proposed rules and Notice 2005-43, the service provider would not recognize any taxable income on the date of grant if the liquidation safe harbor was timely elected
    - However, to the extent the interest is subject to a vesting schedule, the above would apply only if the service provider makes a timely 83(b) election
    - Due to the above, a most common practice is for the service provider to make a "protective" 83(b) election when the profits interest award is granted

Background: Profits Interest & Rev. Proc. 93-27

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- Receipt of a profits interest is generally not a taxable event to the recipient if Rev. Proc. 93-27 is satisfied. This means that a recipient is generally taxed only:
  - As the partnership allocates items of income, or
  - When subsequent appreciation from the date of grant is realized

- However, Rev. Proc. 93-27 would not apply, and thus receipt of a profits interest could be taxable, if any of the following apply:
  - The recipient disposes of the profits interest within 2 years of receipt;
  - The profits interest "relates to a substantially certain and predictable stream of income from partnership assets, such as income from high-quality debt securities or a high-quality net lease;" or
  - The profits interest is an interest in a publicly-traded partnership

- The impact of granting a restricted profits interest (i.e., one subject to a vesting schedule) was unclear under Rev. Proc. 93-27

Background: Profits Interest & Rev. Proc. 2001-43

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- Rev. Proc. 2001-43 provides that a grant of a restricted profits interest, or the vesting of such interest, would not be a taxable event if the requirements of Rev. Proc. 93-27 and Rev. Proc. 2001-43 are satisfied
  - In other words, whether an interest qualifies as a profits interest is tested at the time of grant without regard to whether the interest is subject to a vesting schedule

- Compliance with Rev. Proc. 2001-43 requires the following to be satisfied:
  - The service provider must be treated as the owner of the interest from the date of grant, including that the service provider take into account his or her distributive share of partnership income, gain, loss, deduction and credit associated with that interest;
  - Neither the partnership nor its partners may take any deductions (neither at grant nor at vesting) for the fair market value of the interest; and
  - All other conditions of Rev. Proc. 93-27 must be satisfied

Background: Profits Interest, Section 83 & Notice 2005-43

- Proposed regulations under Section 83 (the "***Proposed Regs***") and Notice 2005-43 were published in 2005 to govern the granting and vesting of a capital interest and/or a profits interest in a partnership
  - Notice 2005-43 contains a proposed Revenue Procedure that, if and when effective, would obsolete Rev. Proc. 93-27 and Rev. Proc. 2001-43
- The Proposed Regs provide NO distinction between a capital interest and a profits interest
- The Proposed Regs clarify that the principles of Section 83(b) would apply to capital and profits interests that are not vested (*i.e.*, those subject to a vesting schedule)
- Under the Proposed Regs, and absent a timely 83(b) election, a service provider would not be treated as a partner until his or her interest vests
- If the service provider makes an 83(b) election AND the partnership adopts the liquidation safe harbor (discussed on next slides), the service provider's ordinary taxable income would effectively be eliminated

Background: Profits Interest & Valuation Issues

- The valuation of a compensatory partnership interest is important because it dictates:
  - How much the service provider will recognize as ordinary income, and
  - How much the partnership will allocate to its partners with respect to the corresponding deduction
- Fair market value could be determined by:
  - 3rd party independent appraiser,
  - Someone knowledgeable within the partnership and following the rules comparable to inside valuations under Section 409A, or
  - Adopting the "liquidation safe harbor" under the Proposed Regs. and Notice 2005-43
- Under the liquidation safe harbor, fair market value is determined by the partnership's liquidation value
  - Generally, the liquidation value of a compensatory interest is the amount the service provider would receive if the partnership sold all of its assets at fair market value immediately after issuing the compensatory interest and then liquidated after paying all liabilities
  - May be elected for capital interests and/or profits interest

Background: Profits Interests & Valuation Issues (cont.)

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- Generally, the following elements must be satisfied in order to qualify under the liquidation safe harbor:
  - The partnership agreement (or other legally binding agreement) must contain certain provisions that:
    - Authorize the partnership to elect the safe harbor, and
    - Require the partners to comply with the safe harbor requirements
  - The partnership's tax matters partner must attach a document to the partnership's tax return in the year of election that states the election is irrevocable as to compensatory interests issued while the election was effective
  - The election cannot be effective prior to the date the partners executed the document implementing the election; thus, no retroactive elections are permitted
  - The partnership interest cannot be:
    - Related to a substantially certain stream of income;
    - Represent an interest in a publicly-traded partnership; or
    - Transferred in anticipation of a subsequent disposition (which is presumed if the interest is sold, disposed of, puttable or callable, within 2 years from receipt of the award, with the exception being the death or disability of the service provider)

Background: Profits Interests & Valuation Issues (cont.)

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- The safe harbor election is terminated upon the earlier of:
  - The date the qualifying elements are not satisfied
  - The date any party involved takes a position that is inconsistent with the election
  - The partnership affirmatively elects to revoke the safe harbor (filed by the tax partner on the partnership's tax return for the year of revocation)
- Once terminated, the safe harbor cannot be again elected until five years after the year the election was revoked
- The safe harbor might NOT be desirable upon a service provider's receipt of a compensatory capital interest (assuming it has value) because traditional valuation discounts would not be used (lack of marketability, minority interests, etc.)
- However, safe harbor treatment is likely desirable to a service provider receiving a profits interest because the receipt would have no value, which is the perfect time to make an 83(b) election

Background: Options

- Options can be granted in the partnership context
  - The use of options is uncommon in the partnership setting
- Options have the following tax consequences
  - As of the date of grant and/or the date of vesting:
    - The optionee would not recognize any taxable income
    - The option would not cause the optionee to be a partner
  - As of the date of exercise of the option:
    - The optionee would have ordinary taxable income equal to the spread between the exercise price and the fair market value of the underlying units as of the date of exercise
    - The partnership would be entitled to a compensatory deduction and would have to comply with applicable withholding rules
  - As of the date the underlying equity interest is sold:
    - Any future appreciation from the date of exercise would be captured by the optionee at short-term or long-term capital gains rates

Background: Phantom Interest

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- A phantom interest is typically a cash payment designed to mimic equity ownership
  - From the partnership's point of view, a benefit of using phantom interests is that, if properly communicated, it can create an employee-ownership culture without having to actually share equity
  - Another benefit is that the service provider is not required to file a Form K-1 because he or she is not a partner due to the receipt of a phantom interest
  - However, a drawback of a phantom interest is that it is taxed to the service provider at ordinary income rates (i.e., no opportunity for long-term capital gains)
    - Such drawback could be fully or partially negated if the partnership decided to share in the value of the compensatory deduction it recognizes by providing the employee with a cash bonus equal to spread between capital gains and ordinary income treatment

- Example of a cash-settled phantom unit
  - Grant 1,000 phantom units that vest when the partnership's price per unit is $50.00
  - The phantom units vests when the price per unit is $75
  - If settled at vesting, the participant would receive $75,000 (1,000 x $75)

- Example of an appreciation-only unit
  - Same facts as above except that the grant is an appreciation only award
  - If settled at vesting, the participant would receive $25,000 ([1,000 x ($75 - $50)]

Starting Point – What Is the Objective

- If the objective is to attract, incentivize and retain the service provider, then ask:
  - Is it important that the service provider be an equity holder, or is it important that the service provider "feel" like an equity holder
  - What "skin in the game" is required in order for the service provider to receive an equity award. For example:
    - Must the service provider purchase the equity with his or her cash or a promissory note, and if the latter, will the promissory note have any recourse liability to the service provider
    - Is "sweat equity" enough such that the equity award is granted to the service provider in exchange for his or her services
    - If a different equity award will be provided/purchased to/by the service provider with respect to different investment opportunities of the partnership, then should all such equity awards be cross-collateralized in order to avoid the service provider developing a win-win mentality with no share of the losses (*i.e.*, investment opportunities with a loss will work to offset gains realized in other investment opportunities)
  - Should the service provider be able to participate in distributions, and if yes, should such be limited only to tax distributions
  - Should a vesting schedule apply
  - Should the equity or non-equity award be used as consideration to support the rollout of restrictive covenants (*e.g.*, non-competition, non-solicitation, confidentiality and inventions assignment agreement)
  - Is it important to prohibit the service provider's access to the partnership's books/records
  - If equity is involved, will any of the following be used: rights of first refusal, puts and calls, drags and tags

Contract Terms: Vesting & Risk of Forfeiture

- The compensatory award would typically be subject to a risk of forfeiture until the vesting schedule is satisfied

- A vesting schedule could take the form of a time-based vesting schedule, or performance-based vesting schedule, or a mixture of both

- The types of risks of forfeiture include one or more of the following:
  - A forfeiture of the unvested award for failing to satisfy a time-based schedule (*e.g.*, vesting over a 4-year period with 25% vesting on each of the anniversaries of the date of grant);
  - A forfeiture of the unvested award for failing to satisfy a performance-based schedule (*e.g.*, failing to achieve an EBITDA target level);
  - A forfeiture of the unvested award for failing to consummate a contingent event, such as a change-in-control transaction or an IPO;
  - A forfeiture of both the vested and unvested award for failing to timely execute restrictive covenants (*e.g.*, a non-compete, non-solicitation, etc.);
  - A forfeiture of both the vested and unvested award for failing to timely execute the Operating Agreement or Partnership Agreement (applicable to equity-based awards);
  - A forfeiture of the vested and unvested award if the service provider’s employment with the partnership is terminated for Cause;

Contract Terms: Vesting & Risk of Forfeiture (cont.)

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- [Continued from other slide]:
  - A forfeiture of both the vested and unvested award if the service provider violates, as determined in the sole discretion of the partnership, any restrictive covenant; and
  - A forfeiture of both the vested and unvested award if the service provider fails to timely sign a waiver and release agreement at the time of his or her employment termination (*i.e.*, such agreement acting to release the partnership from all known and unknown claims that the service provider might otherwise have against the partnership)

- Consider too whether vesting of the award should be accelerated (partially or wholly) upon the earlier of certain events, including:
  - The IPO of the partnership (or upon the pre-IPO reorganization transaction if the partnership is converted to a C corporation immediately prior to consummating the IPO);
  - A change-in-control of the partnership; and
  - A termination of the service provider’s employment with the partnership due to his or her “disability”

Contract Terms: Partnership Repurchase Right

- Incorporated into the award agreement could be a provision that provides the partnership with the right of repurchase of any vested equity interest if the service provider’s employment relationship with the partnership is terminated
  - However, such is necessary only to the extent not addressed in the partnership agreement
- The amount of the repurchase could be at the then fair market value if the employment relationship is terminated:
  - By the partnership for other than Cause; and/or
  - By the service provider due to his or her disability; and/or
  - By the service provider for Good Reason
- In contrast, the amount of the repurchase could be for no value (or for nominal value) if the employment relationship is terminated:
  - By the service provider for any reason or any reason other than Good Reason;
  - By the partnership for Cause; and/or
  - By the service provider as the result of his or her death

Contract Terms: Other Provisions

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- Drag-along rights, tag-along rights and co-registration rights
  - These are typically set forth in the partnership agreement, but if not, then consider whether to insert them into the award agreement
  - Such would act to “drag” the service provider into a sale of the company (where the majority equity holder wants to sell and the service provider does not) or would allow the service provider to “tag” along in such transaction (where the majority equity holder intended to sell without the service provider and the service provider desires to sell)
- Voting proxy
  - A voting proxy can be implemented to the extent voting control is not otherwise addressed in the partnership agreement
- There are a number of ways to handle partnership distributions while the equity award is unvested, including:
  - Pay distributions at the same time distributions are otherwise paid to the equity holders of the partnership
  - Delay payment of the distribution until the underlying equity interest vests, but don’t forget to provide for a special tax distribution since the service provider will be taxed on his/her allocable share of the partnership’s income

Pointer No. 1: Consider a Gross-Up for Phantom Interests

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- The benefits of a phantom interest include:
  - The program is relatively easy to understand from both the partnership's and the service provider's perspective
  - The service provider is not burdened with a K-1 return as a result of his or her receiving the phantom interest
  - The partnership is entitled to a compensatory deduction

- However, a significant drawback of a phantom interest program is that it results in ordinary income tax treatment to the service provider (*i.e.*, no favorable capital gains treatment)

- A solution to the above problem (while maintaining the simplicity of a phantom program) is to have the partnership share with the service provider the value of the compensatory deduction it receives. The thought is as follows:
  - Generally, the value of the compensatory deduction to the partnership is greater than the spread between the service provider's ordinary taxable income rate and his or her capital gains rate
  - As a result, the partnership could use the value of the compensatory deduction to finance a cash bonus to the service provider, thus effectively providing the service provider with capital gains treatment if looking at it from his or her cash flow perspective
  - Since such bonus is taxable, the partnership could gross-up the bonus or leave the service provider to pay the tax on such bonus in order for him or her to retain some skin in the game

Pointer No. 2: Create a Full-Value Profits Interest

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- A profits interest award is essentially an appreciation-only award. But what if the business deal is that the service provider will receive, for example, 40% of the partnership? Unless other actions are taken, the grant of a profits interest to such service provider would not provide him or her with any share in the existing value of the partnership, and as a result, he or she would not really own 40% of the partnership's value

- **Potential Solution No. 1**
  - Grant a profits interest award to the service provider
  - Combine the above with a phantom full-value award that has a value appreciation ceiling, as follows:
    - The phantom award would be granted in connection with the grant of the profits interest award
    - The value of the phantom award would always be in-the-money and its value would have a cap such that its value could never exceed the "threshold value" that was determined in connection with the grant of the profits interest
    - Upon settlement of the phantom award, the service provider would receive a cash payment equal to, and limited by, the threshold value of the profits interest award
    - The phantom award would be taxed at ordinary income rates, but the timing of such taxation could be structured to occur at the same time the service provider receives the cash
    - <u>Illustrative Example</u>: Assume the partnership has a value of $1mm when the profits interest is granted and the parties intend for the service provider to own 40% of the partnership
      - The threshold value of the profits interest award would be $400,000
      - The phantom award would also equal 40% of the partnership's value, but with a cap such that the payout under the phantom award could never exceed $400,000

Pointer No. 2: Create a Full-Value Profits Interest (cont.)

- [Continued from the prior slide]

- **Potential Solution No. 2**
  - Grant a profits interest award to the service provider
  - Within the award, provide for a catch-up right that allocates all gains and profits of the partnership to the service provider until such service provider is economically on the same footing as he would have been had he initially been granted a full value capital interest
    - Illustrative Example: Assume the partnership has a value of $1mm when the profits interest is granted and the parties intend for the service provider to own 40% of the partnership
      - The threshold value of the profits interest award would be $400,000
      - The catch-up provision would allocate all (or a disproportionate percentage such as 60%) of the partnership's gains and profits to the service provider until his or her capital account is caught up to the total capital accounts as of the date the profits interest was granted
      - Once caught up, the service provider would participate at a rate of 40%

Pointer No. 3: Equity Award & Maintain Employee Status

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- Dual status of a partner and an employee cannot occur within the same entity
  - The service provider is either a partner or an employee, but cannot be both with respect to the partnership

- A service provider might complain upon learning that his or her receipt of a profits interest negates his or her employment status (*i.e.*, thus, no longer having the ability to use pre-tax dollars to pay medical plan premiums)

- A solution to maintaining employment status for the service provider would be to create a sister entity and:
  - Have the partnership grant a profits interest to such sister entity; and
  - Simultaneously grant a full value capital interest from such sister entity to the service provider, followed by his or her filing an 83(b) election; and
  - Ensure that the vesting schedules and the forfeiture conditions are mirrored for the above two grants

  OR

  - Grant the profits interest from the partnership to the service provider, and move the service provider's employment to a management entity

Pointer No. 4: Maintain Privacy of Books and Records

- The solution on the prior slide (Pointer No. 3), or some variation of the same, can be used in instances where the other members of the partnership do not want the service provider to have access to the books, records and other confidential financial information of the partnership

Pointer No. 5: Economic Forfeitures

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- As indicated on prior slides, and depending on state law, equity and phantom awards can be used as full or partial consideration to support the rollout of restrictive covenants
- In instances where service providers are balking at executing a non-compete, the partnership could design the restrictive covenants in a way such that any violation would cause a forfeiture of the equity or phantom award but would NOT permit the partnership to enjoin the servicer provider's behavior
- Put another way, and subject to state law, the service provider would be free to compete, but he or she would forfeit the equity or phantom award

Pointer No. 6: Loans at Least 50% Recourse

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- Many times a partnership will finance the service provider's purchase of a capital interest in the partnership with a loan
- The open question is whether such loan should be 100% recourse (favorable to the partnership) or 100% non-recourse but with recourse to the underlying equity (favorable to the service provider)
- Issue with 100% non-recourse loan
  - If the loan is 100% non-recourse, then a "transfer" of the equity did not occur for tax purposes at the time the loan proceeds were used to purchase the property
    - Since the service provider does not have the benefits and burdens of ownership (he or she can just walk away from the loan), the IRS views the purchase as nothing more than acquiring an option. As a result, if the property appreciates prior to the loan being repaid, then the service provider will have recognized ordinary taxable income
  - However, if the loan is recourse, then a transfer would have occurred at the time the loan proceeds were used to purchase the property
  - In between the above two is a grey area
  - Section 1.83-3(a)(2) provides that if the property is in "whole or substantial part" non-recourse, then it is deemed an option
  - Many practitioners believe that if the loan is 50% recourse and 50% non-recourse, that such satisfies the "substantial part" test and should be sufficient for the purchase to be respected

Don’t Forget Next Month’s Webinar

HUNTON ANDREWS KURTH

- Title:
  - Public Companies and ESOPs: Check Yes or No
- When:
  - 10:00 am to 11:00 am Central
  - July 9, 2020