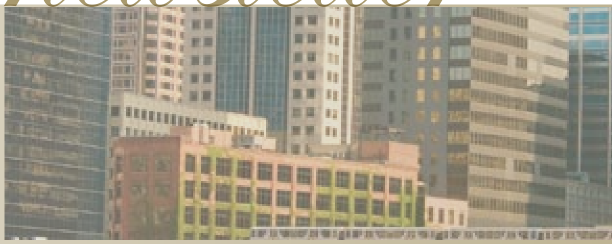
GOLAN & CHRISTIE

YOUR SUCCESS. OUR FOCUS.

newsletter

FALL 2009



SELLING SECURITIES IS A DANGEROUS BUSINESS

by Howard Z. Gopman

HOWARD Z. GOPMAN

The Securities Act of 1933 was enacted as an answer to the legendary stock market crash of 1929.

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The idea of disclosure is fundamental to the Securities Act of 1933.

The idea of disclosure is fundamental to this Act. This means that all the facts needed by a prudent investor for analysis should be presented by the issuer of the securities. The issuer is a technical term meaning the company whose securities are being sold. The US Securities and Exchange Commission does not review the actual merits of a security. Furthermore, just because the SEC has reviewed an issue, it does not mean that the investor has been guaranteed against a loss.

The SEC merely requires that all the facts that the issuer must disclose are truthfully stated and that no facts are concealed. The SEC does not classify securities as to whether they are conservative or speculative; the Commission merely wants to know that the true facts with regard to the issuer are available for the potential buyer's examination.

How does the SEC force the required disclosure? Generally, this is done by way of a registration statement. A registration statement must be filed by all issuers whose securities are to be offered for public sale. The only way to not file a registration statement is to have an exempt security or what is called an exempt transaction. Exempted Securities cover the Intrastate Offering Exemption of Sec. 3(a)(11) of the 1933 Act and the Regulation A Offering Exemption. Exempt transactions under Sec. 4(2) cover the Private Offering Exemption. These provisions for exempt securities and exempt transactions are important to know if you are a small company desirous of raising capital.

The exempt security and exempt transaction provisions are important for those who wish to raise capital because the costs of a public registration are generally prohibitive for all except very large deals. This is so because of burdensome legal, accounting, and printing costs. In addition, since a public deal is reviewed by the SEC's Washington office, there can be numerous delays in getting your deal approved - even if it is as pure as the driven snow. This is just the nature of doing business with Washington bureaucrats. Additionally, a prospectus, which is part of the registration statement in a public deal, must reflect all the pertinent facts disclosed in the registration statement. The prospectus is subject to the same disclosure requirements as the registration statement, and it is the document which must be delivered to a prospective investor.

After a registration statement has been filed with the SEC, the SEC reviews it. If the SEC thinks that the registration statement does not correctly detail all required facts, the Commission may call for the filing of any necessary correcting or additional amendments. Furthermore, the Commission has the power to issue a "stop order" and suspend the effectiveness of the registration statement until the deficiency is corrected by an amendment, if, after a hearing, the SEC finds that the registration statement is false and misleading, or incomplete with respect to material facts.

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ANNOUNCEMENTS

PETER M. KATSAROS

GOLAN & CHRISTIE IS PLEASED TO ANNOUNCE A NEW PARTNER TO THE FIRM:

Peter M. Katsaros brings to the firm 31 years of experience in civil litigation, including work in multi-million dollar commercial, tort, and employment litigation for both plaintiffs and defendants. He has been lead counsel in 34 trials and numerous appeals, and has handled civil litigation in federal and state courts in 20 states, as well as in England. Mr. Katsaros received his J.D. from the University of Chicago and University of Illinois, and his B.A. in Economics, summa cum laude, from Indiana University.

Mr. Katsaros has taught as a NITA faculty member in Trial Advocacy since 1984 and as Adjunct Professor of Trial Advocacy and Ethics at the Northwestern University Law School since 1990. He also has written extensively on jury instructions in fraud cases and defamation on the Internet. Mr. Katsaros is the co-founder of Speaking Legally, Inc., an Illinois MCLE consulting firm on the art of public speaking in a court room.

Mr. Katsaros' practice at Golan & Christie will focus on complex civil litigation: commercial, labor and employment, and torts.

SELLING SECURITIES IS A DANGEROUS BUSINESS

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As the above demonstrates, registering a security with the SEC is not exactly a lighthearted matter. It is time consuming and expensive and is only recommended for larger deals of at least $10 million.

The danger spoken of in the title arises because an investor who has been defrauded by a false registration statement can sue for damages. However, even more important is Section 24 of the 1933 Act which says that if any person willfully violates the 1933 Act or the rules and regulations established by the Commission, or if the person willfully, in a registration statement, makes an untrue statement of material fact or omits to state material fact, he can be convicted of a crime and upon conviction, can be fined not more than $10,000 or imprisoned not more than five years, or both. Indeed, selling securities is a deadly serious business, and there can be serious repercussions if you are not willing to spend the time, money, and effort to do the job right.

ABOUT THE AUTHOR

Howard Z. Gopman is Of Counsel to Golan & Christie LLP. His practice emphasizes securities law. He is a graduate of the University of Wisconsin Law School with a Doctor of Law degree. He also holds B.S. and MBA degrees from the University of Wisconsin-Madison. Gopman has written numerous articles for publication and has served as an instructor in corporation law and real estate law. His practice also includes general corporate law.

PROMOTING EMPLOYEE LOYALTY AND ACCOMPLISHMENT THROUGH EQUITY AND PERFORMANCE BASED COMPENSATION

by Justin W. Clark

Equity and performance based compensation plans are excellent methods for promoting loyalty and accomplishment among valued employees. Implementing some variations of these plans in this downtrodden economy may be particularly advantageous to cash strapped employers by providing an alternative to monetary compensation.

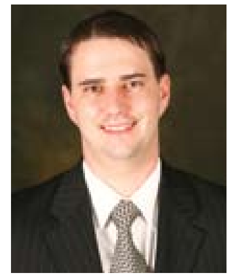
I. Introduction

Success in any business is substantially dependent upon attracting, retaining and motivating talented personnel. Equity and performance based compensation plans are exceptional techniques in this regard because they align employees' economic interests with those of the company and reward continued service. Although qualified plans such as 401ks provide tremendous tax advantages, contributions to such plans are limited in amount and they are not as effective in incentivizing employees to advance the company's goals. None of the incentive plans discussed in this article, however, change an employer's obligation to pay certain minimum wages and salaries to employees under applicable state and federal laws. Revising employee compensation should always be done with the assistance of legal counsel to avoid serious unintended consequences.

Compensation plans may either transfer actual ownership in the company ("equity plans"), give the employee the right to purchase the company's equity ("option plans"), or allow the employee to profit from the economic benefits of ownership without becoming an equity owner ("phantom plans"). Traditional compensation plans that involve transfers of actual ownership, or the option to purchase ownership interests, include stock options, restricted stock and employee stock ownership plans ("ESOPs"). The most common forms of phantom plans are stock appreciation rights and phantom stock units. With the exception of ESOPs, limited liability companies ("LLCs") and partnerships may implement equity plans, option plans and phantom plans in similar manners to corporations. For simplicity, the terms stock and shares will be used throughout the article despite the fact that LLC membership units or partnership interests could be substituted.

II. How Compensation Plans Operate

A basic equity plan entails transferring stock to employees and results in income to the employee and a compensation deduction for the employer. As discussed in Section IV, granted shares are often subject to restrictions and qualifications that must be met in order for the employee to become a full-fledged shareholder ("restricted stock"). A straightforward option plan grants employees the right to purchase a certain number of shares at a fixed price (the "exercise price") within a specified timeframe where the option becomes more valuable as the stock appreciates because employees are able to purchase shares at a below market price. Upon an employee's exercise of an option, the corporation issues shares in exchange for the exercise price and the employee's payment provides capital to the company on a tax free basis. A simple phantom plan might involve granting employees contractual rights to receive cash payments equivalent to the appreciation on a given number of shares over a fixed period ("stock appreciation rights").



JUSTIN W. CLARK

All of these types of plans incentivize employees to contribute to the company's success because the employees' plan awards become more valuable when the company prospers. Compensation plans containing restrictions and qualifications (such as the attainment of financial goals or continual service for a number of years) as preconditions for employees "vesting" under a plan act as additional motivators. The term "vest" or "vesting" refers to when the employee has earned the right to the compensation pursuant to the plan's terms due to the restrictions having lapsed and/or the qualifications having been met.

III. Comparing the Different Types of Plans

Since equity plans and option plans entail transferring actual ownership interests in the company, they often give rise to concerns about losing voting control and employees selling their shares to unrelated third parties. These concerns may be alleviated by funding plans with exclusively non-voting stock and subjecting the shares to non-transfer restrictions where only the company or existing shareholders may purchase the stock. A separate class of redeemable stock may also be created where the company has the right to repurchase the shares at its discretion. However, during periods when employees are shareholders, they are entitled to

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PROMOTING EMPLOYEE LOYALTY AND ACCOMPLISHMENT THROUGH EQUITY AND PERFORMANCE BASED COMPENSATION

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certain shareholder rights, including access to the company's financial information. Also, vested shareholders in an S Corporation must receive distributions on their shares proportionately to other shareholders in order to maintain subchapter S status.

As opposed to transferring ownership in the company, phantom plans require employers to tender cash in satisfaction of an employee's compensatory plan award. Aside from the right to cash payments, phantom plan participants never attain any rights of an equity owner. Option plans differ from equity and phantom plans in that they require employees to invest their own funds to purchase an ownership interest in the company and therefore may be effective for discerning which employees wish to participate in the company's continued growth.

IV. Restrictions and Qualifications upon Employee's Receipt of Plan Benefits

Equity, option and phantom plans often include restrictions or qualifications where the employee's right to receive plan benefits is conditioned upon the employee's continued service ("durational requirements"), the company's reaching certain financial goals ("performance requirements") or other criteria. If the specified requirements are not met, then the employee's rights under the plan lapse and are forfeited. Having durational or performance based requirements is advisable for incentivizing the employees to earn the financial benefits and for ensuring the plan's intended objectives are realized.

Durational requirements promote employee retention since employees would lose valuable economic interests upon leaving the company prematurely. Vesting under a plan with durational requirements may either contain a gradual vesting schedule or a 100% vesting at a designated time. Gradual vesting might involve situations where an employee is granted 100 shares of restricted stock under a plan and the employee will vest in 20 shares per year for each year that the employee remains with the company. Alternatively, the employee's vesting in a restricted stock award may be conditioned upon five continuous years of service and if employment ceases prematurely, then all rights under the plan are forfeited.

Plans may also contain contingencies such as vesting upon a change in control of the company's ownership as a secondary triggering event. By including such a triggering event, employees enjoy peace of mind in knowing they will be compensated in the event of an ownership change.

V. Tax Aspects

Compensation plans generally allow employers to take tax deductions and result in taxable income to employees. However, within each type of plan there are many different tax rules affecting the timing and amount of the deductions and inclusions. There are also numerous restrictions imposed upon plan terms under Code Section 409A. Analysis of these taxation issues is beyond the scope of this article; however, consulting with a tax advisor prior to the institution of any compensation plan is essential.

VI. Determining which Type of Plan Best Suits Your Company

Every business is unique and therefore determining the most advantageous type of plan is extremely fact dependent and requires thorough analysis. Some of the pertinent factors include the size of the company, the number of present owners, the company's long-term objectives and the characteristics of the work force. In considering the implementation of a compensation plan, employers should work closely with legal counsel to review the benefits and possible pitfalls of each type of plan (equity, option and phantom) in order to choose the plan that will best help your company achieve its goals.

EMPLOYMENT LAW ALERT

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT ("ICE") CRACKING DOWN ON FORM I-9 VIOLATIONS

ICE issues Notices of Inspection to 652 businesses

In a press release issued on July 1, 2009, ICE announced that it is launching a "bold, new audit initiative" by issuing 652 Notices of Inspection to businesses across the country that it believes may not be in compliance with employment eligibility verification laws and regulations. This number indicates that more Notices of Inspection were sent out in one day than were sent out in the entire 2008 fiscal year. When a business receives a Notice of Inspection, it has three days to pull together all Form I-9 files and other related documentation for auditing by ICE enforcement officers.

One Missouri business owner pleads guilty

The owner of one of the businesses targeted by ICE pled guilty on Septemeber 15, 2009 to the charges brought against his company. Russell Taylor of Bolivar, Missouri, operated Taylor-Made Roofing, which was investigated for employing illegal aliens through a contractor. The contractor had previously pled guilty and may be facing up to 5 years in prison. As part of the plea agreement, Taylor has agreed to forfeit $185,363 of company profits to the government, which will be paid in monthly installments for 30 months, and also pay a fine of $36,000, representing $3,000 for each of the 12 illegal aliens who performed work for the company over a two year period. Taylor has also agreed to 5 years of probation, rather than serving jail time, although his final sentence will be determined after a presentence investigation and sentencing hearing. Taylor allegedly knew that his contractor was hiring illegal aliens, and told the contractor that he thought they would get caught, but he did not do anything to prevent the workers from performing jobs for his company.

How to make sure your business does not receive an audit

All businesses, regardless of how many people they employ, are required to fill out and maintain accurate I-9 Employment Eligibility forms for all employees. Employers should also require all contractors to confirm that their hiring practices confirm with federal laws. However, once a business, whether through the Human Resources Department or some member of management, learns that a worker is not legally authorized to work in the United States, immediate steps must be taken to prevent that person from performing any additional work.

ARE BLACKBERRYS AND CELL PHONES CREATING A 24-HOUR WORKDAY?

The Wall Street Journal recently reported on two pending lawsuits brought by employees who alleged that their companies' policies regarding responding to work calls and emails required them to work after hours without pay. In one case, brought against T-Mobile USA, Inc., current and former employees allege that they were issued smartphones by the company and were then required to review and respond to calls, emails, and text messages from other employees at all hours, amounting to an average of 15 hours of extra work per week which was not compensated.

In the other case, a former CB Richard Ellis Group Inc. maintenance worker claims he was "handcuffed" to his company-issued cell phone because he was expected to quickly respond to messages at any hour. He also seeks pay for all time spent receiving and responding to work-related messages outside of regular business hours.

The issue in both of these cases is whether the employees were actually doing any work for their employers through the use of these mobile devices and, if so, how should it have been tracked and paid for. This type of debate was once raised by the use of pagers. The Department of Labor has said that employees generally do not have to be paid for carrying pagers, unless they are used so often that the employee's on-call time can't be used for personal pursuits. As of yet, there have not been any similar statements regarding employees' use of cell phones or Blackberrys.

The best way to avoid potential disputes is to have a clear policy in place which complies with all requirements under the Fair Labor Standards Act, and communicates to employees when they are really required to do work after hours and how that time spent working should be tracked. It is also essential to have documentation and support for which positions at the company have been classified as exempt, and therefore not eligible for overtime pay.

TO LEARN MORE...

If you would like additional information, please contact:

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GOLAN & CHRISTIE

newsletter

INSIDE THIS ISSUE:

This newsletter and others can also be viewed online at:

www.golanchristie.com/news.html

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GOLAN & CHRISTIE

YOUR SUCCESS. OUR FOCUS.

A COLLABORATIVE APPROACH

The attorneys of Golan & Christie offer sophisticated legal services to you and your organization in a supportive and collaborative environment. We are as much business partners as legal counsel—problem solvers as well as legal experts.

We are highly knowledgeable, accessible and reliable. And we come highly recommended: Our Martindale-Hubbard Peer Review Ratings, along with our membership in the Leading Lawyers Network and inclusion in SuperLawyers, underscore our professional ability, integrity and ethical standards.

OUR PRACTICE

Our practice covers many aspects of law and business, with an emphasis on the areas listed below:

- Business Law & Governance
- Commercial & Corporate Litigation
- Commercial Real Estate
- Employment Law
- Estate Planning & Taxation
- Finance
- Reorganization & Bankruptcy
- Property Tax Appeals

Golan & Christie is pleased to announce a new addition to our extended family:

Noelle Elizabeth Kuether joined us on Sunday, August 23 at 9:54 a.m., weighing 8 pounds, 2 ounces and measuring 20 inches.

Noelle is the second child of Golan & Christie paralegal Jason Kuether and his wife Jenny. She joins big sister Ava.

We wish the entire Kuether family much health and happiness