SJF Advisory Services

# BROAD-BASED EMPLOYEE INCENTIVE ARRANGEMENTS

## I. Equity-Based Compensation

### A. Nonqualified Stock Option ("NSO")

| Description | Restrictions | Tax | Accounting | Pros / Cons | Comments |
|---|---|---|---|---|---|
| Right to purchase stock from the issuer at a fixed price.<br><br>Holder may exercise at any time (after becoming exercisable). | To avoid being subject to Section 409A of the Internal Revenue Code (the "Code"):[1]<br>• exercise price must not be less than fair market value ("FMV") on date of grant,<br>• cannot be granted on preferred stock,<br>• must be granted on employer stock. | Holder:<br><br>No tax on grant or vesting.<br><br>At exercise, holder taxed on excess of FMV at time of exercise over exercise price. Ordinary income rate applies.<br><br>Issuer:<br><br>Gets equivalent deduction in tax year in which exercise occurs. | "Fair value" at date of grant amortized over vesting period. | Pros:<br><br>No tax on grant or vesting.<br><br>Unlike ISOs (see I.B below), may be granted to contractors and directors, as well as employees.<br><br>Cons:<br><br>No capital gain treatment.<br><br>Equity dilution.<br><br>Little incentivizing effect if stock significantly depreciates. | To assist low- to moderate-income employees to pay exercise price, award may allow for broker-assisted cashless exercise[2] or net-share settlement.[3]<br><br>Award may also provide for cash-settlement, in which case the award will be treated as a stock appreciation right or SAR (see below). |

[1] If a stock option is subject to Section 409A, the holder must pay ordinary income tax on vesting (rather than exercise) plus a 20% additional tax (unless the option is only exercisable on a fixed date, which decreases its value).

[2] In a broker-assisted cashless exercise, the holder borrows from a broker to cover the cost of the exercise price, taxes and broker commissions and simultaneously sells enough of the shares received on exercise to repay the broker. A cashless exercise does not work for private issuers (because there is no public market for the shares) or for ISOs (because the sale of shares results in a disqualifying disposition). It also can be problematic for executive officers of public companies because of the prohibitions on loans imposed by Sarbanes-Oxley.

[3] In a net share settlement, the issuer delivers to the holder the net shares without the use of a loan. That is, the holder receives that number of shares that equals the total number of shares issuable upon exercise minus that number of shares whose sale would be sufficient to pay the exercise price and taxes. A net share settlement does not work for ISOs because it is treated as a disqualifying disposition.

## B. Incentive Stock Option ("ISO")

| Description | Restrictions | Tax | Accounting | Pros / Cons | Comments |
|---|---|---|---|---|---|
| Right to purchase stock from the issuer at a fixed price.<br><br>Holder may exercise at any time (after becoming exercisable).<br><br>Must comply with requirements of Section 422 of the Code. | To avoid being subject to Section 409A of the Code:<br>• exercise price must not be less than FMV on date of grant,<br>• cannot be granted on preferred stock,<br>• must be granted on employer stock.<br><br>To comply with Section 422 of the Code:<br>• plan must be approved by shareholders,<br>• holder must be an employee,<br>• stock acquired on exercise cannot be sold for 1 year after date of exercise and 2 years after date of grant. | Holder:<br><br>No tax on grant, vesting or exercise (but spread at exercise included in computing alternative minimum tax ("AMT")).<br><br>On sale of stock, holder recognizes long term capital gain if holding requirements are met.<br><br>No withholding or payroll taxes.[4]<br><br>Issuer:<br><br>No deduction at grant or exercise (unless employee sells shares early in disqualifying disposition).<br><br>No withholding, but information reporting to IRS. | "Fair value" at date of grant amortized over vesting period. | Pros:<br><br>Holder can get capital gain treatment.<br><br>Cons:<br><br>To get capital gains treatment, must hold for 1 year after exercise.<br><br>Equity dilution.<br><br>May only be granted to employees, not contractors or directors.<br><br>Little incentivizing effect if stock significantly depreciates.<br><br>No issuer deduction, unless a disqualifying disposition occurs.<br><br>Holder can be hit with AMT liability (especially difficult to satisfy if stock depreciates significantly after exercise). | For ISOs (unlike for NSOs), broker-assisted cashless exercises and net share settlement, which can assist low- to moderate-income employees to pay the exercise price, do not work.<br><br>If ISOs are "cashed-out" on a change in control, they are subject to withholding and payroll taxes (and, because the holding requirements are not met, there is no capital gains treatment). However, employees who exercise their vested ISOs immediately prior to a change in control (as opposed to allowing them to be cashed-out) will avoid withholding and payroll taxes (but still will not get capital gains treatment). |

[4] Payroll taxes consist of Medicare (1.45% on all income, with no cap) and Social Security (6.2% on all income, subject to a cap – $102,000 in 2008).

## C. Restricted Stock

| Description | Restrictions | Tax | Accounting | Pros / Cons | Comments |
|---|---|---|---|---|---|
| Stock of the issuer that is issued and outstanding but subject to forfeiture unless specified conditions relating to continued employment and/or issuer performance are satisfied.<br><br>Stock can either be issued at no cost to the employee, or the employee can pay fair value for the stock. | None. | <u>Holder</u>:<br><br>Holder recognizes ordinary income at vesting equal to FMV of stock at vesting minus any amount paid by holder for stock. Capital gain holding period begins at vesting.<br><br>Holder may elect under Section 83(b) of the Code to be taxed at grant, based on value at grant. Capital gain holding period begins at grant.[5]<br><br><u>Issuer</u>:<br><br>Gets equivalent deduction in tax year in which employee recognizes income. | FMV at date of grant amortized over vesting period. | <u>Pros</u>:<br><br>If holder makes Section 83(b) election, gets capital gain treatment on any appreciation.<br><br>Holder receives some value even if stock price declines.<br><br>Less dilution than options.[6]<br><br>Holder usually receives dividend and voting rights.<br><br>Not subject to Section 409A.<br><br><u>Cons</u>:<br><br>If no Section 83(b) election is made, holder must pay tax at vesting.<br><br>If Section 83(b) election is made, holder must pay tax at grant (unless paid FMV for stock), and cannot deduct loss on forfeiture. | Low- to moderate-income employees are not likely to value restricted stock (*e.g.*, they may not have brokerage accounts or access to the forms and facilities attendant to stock ownership, and brokers may not want to handle such small accounts).<br><br>There are also liquidity issues in private companies. |

[5] However, in most cases, making an election is economically risky because of the possibilities of forfeiture and of the stock price declining.

[6] This is because fewer shares are required to give the same “value” of award.

## D. Stock Appreciation Right ("SAR")

| Description | Restrictions | Tax | Accounting | Pros / Cons | Comments |
|---|---|---|---|---|---|
| Right to receive the appreciation in the value of the issuer's stock over the period from grant to exercise.<br><br>May be payable in cash or stock.<br><br>Holder may exercise at any time (after becoming exercisable). | To avoid being subject to Section 409A of the Code:<br><br>• exercise price must not be less than FMV on date of grant,<br><br>• cannot be granted on preferred stock,<br><br>• must be granted on employer stock. | <u>Holder</u>:<br><br>No tax on grant or vesting.<br><br>At exercise, holder taxed on excess of FMV at time of exercise over exercise price. Ordinary income rate applies.<br><br><u>Issuer</u>:<br><br>Gets equivalent deduction in tax year in which exercise occurs. | <u>Stock-settled SARs</u>. "Fair value" at date of grant amortized over vesting period.<br><br><u>Cash-settled SARs</u>. "Fair value" throughout vesting period charged to earnings and marked to market (*i.e.*, "liability award" subject to variable accounting). | <u>Pros</u>:<br><br>No tax on grant or vesting.<br><br>Exercise does not require cash payment.<br><br>No equity dilution if settled in cash.<br><br>If settled in stock, less equity dilution than option.[7]<br><br><u>Cons</u>:<br><br>No capital gain treatment.<br><br>Little incentivizing effect if stock significantly depreciates.<br><br>Variable accounting if settled in cash. | |

[7] This is because, unlike with options, the holder receives shares only with respect to the appreciation and not with respect to the exercise price.

 

## E. Phantom Stock (aka, Restricted Stock Units ("RSUs") or Performance Shares)

| Description | Restrictions | Tax | Accounting | Pros / Cons | Comments |
|---|---|---|---|---|---|
| A contractual right to receive the value of a share of stock.<br><br>May be settled in cash or stock.<br><br>Conditions to payment generally relate to continued employment and/or issuer performance.<br><br>Award must specify payment date (*i.e.*, cannot be "exercised" at the election of the holder).<br><br>Can replicate synthetically all attributes of stock ownership (*e.g.*, dividend equivalents) except the vote and the tax advantage for dividends. | Unless the RSUs are settled on vesting, they are subject to Section 409A. If subject, they must have permitted settlement dates (*e.g.*, fixed date, termination of employment, change in control). | <u>Holder</u>:<br><br>No income tax upon grant or vesting (but employment taxes at vesting).<br><br>On settlement, holder taxed on value of cash or stock received. Ordinary income rate applies.<br><br>Dividend equivalents taxed at ordinary income rates (not dividend rate).<br><br><u>Issuer</u>:<br><br>Gets equivalent deduction in tax year in which exercise occurs or the dividend equivalent is paid. | <u>Stock-settled RSUs</u>. "Fair value" at date of grant amortized over vesting period.<br><br><u>Cash-settled RSUs</u>. "Fair value" throughout vesting period charged to earnings and marked to market (i.e., "liability award" subject to variable accounting). | <u>Pros</u>:<br><br>Income tax delayed until settlement rather than being due at vesting.<br><br>No equity dilution if settled in cash.<br><br>If settled in stock, no equity dilution until settled.<br><br>Very flexible – many design choices available.<br><br><u>Cons</u>:<br><br>No voting rights or dividend rate tax.<br><br>No capital gains opportunity before settlement. | |

## F. Employee Stock Purchase Plan ("ESPP")

| Description | Restrictions | Tax | Accounting | Pros / Cons | Comments |
|---|---|---|---|---|---|
| A qualified benefit plan that grants employees an option to purchase employer stock at a discount.<br><br>Provides favorable tax treatment under Code Section 423. | Plan must be approved by shareholders within 12 months before or after plan is adopted.<br><br>Options must be granted to all employees on nondiscriminatory basis.<br><br>Option exercise price cannot be less than the lesser of (i) 85% of FMV on date of grant or (ii) 85% of FMV on date of exercise. | <u>Employee</u>:<br><br>No tax on grant or exercise.<br><br>Tax on disposition of stock. If disposition occurs at least 2 years after date of grant and 1 year after date of exercise, any profit is long term capital gain.[8] Otherwise, employee pays ordinary income tax.<br><br><u>Employer</u>:<br><br>No deduction unless employee pays ordinary income tax due to early disposition, in which case employer gets equivalent deduction. | FAS 123R requires expensing unless:<br><br>(i) no lookback (*i.e.*, option exercise price is set with reference to FMV on date of exercise, not date of grant), and<br><br>(ii) discount is 5% or less (*i.e.*, exercise price is 95% or more of FMV on date of exercise). | <u>Pros</u>:<br><br>Favorable tax treatment for employees.<br><br>Because of discounted price, employees can profit even if stock price declines.<br><br><u>Cons</u>:<br><br>No employer tax deduction.<br><br>Employees must pay cash to purchase stock.<br><br>Generally used only for publicly traded stock. | Liquidity issue for low- to moderate-income employees can be addressed by withholding purchase price in installments through payroll deductions. |

[8] Except that the employee pays ordinary income tax on an amount equal to the lesser of (i) the excess of the FMV of the stock on the date of disposition over the amount paid for the stock, or (ii) the excess of the FMV of the stock on the date of grant over the exercise price.

 

## II. Cash Bonuses

| Description | Restrictions | Tax | Accounting | Pros / Cons | Comments |
|---|---|---|---|---|---|
| Right to receive a cash bonus based on attainment of performance targets.<br><br>Short-term bonuses have performance periods of 1 year or less (*e.g.*, annual, quarterly).<br><br>Long-term bonuses have performance periods of more than 1 year (generally, 3 or 5 years).[9]<br><br>Targets can be based on the performance of the employee, a division and/or the entire company. | To avoid being subject to Section 409A, the bonus must be paid within 2$^1/_2$ months after the end of the year in which the employee's right to the bonus vests.[10]<br><br>Under Code Section 162(m), compensation paid to covered employees[11] of public companies that exceeds $1 million is only deductible as performance-based compensation if it meets certain requirements.[12] | <u>Employee</u>:<br><br>Ordinary income in year of payment.<br><br><u>Employer</u>:<br><br>Gets equivalent deduction in year of payment (subject to Section 162(m)). | <u>Short-term bonuses</u>: Charge equal to bonus amount taken in year earned (even if paid in following year).<br><br><u>Long-term bonuses</u>: For each year during performance period, a charge is taken based on an estimate of the likelihood that the bonus will be earned. | <u>Pros</u>:<br><br>No equity dilution.<br><br>Very flexible – many design choices available.<br><br><u>Cons</u>:<br><br>No capital gains opportunity.<br><br>Unlike equity, potential upside is generally capped (*e.g.*, to 200% of base salary).<br><br>Imposes regular cash obligation on company. | For simplicity, bonuses for low- to moderate-income employees should be based at least in part on the performance of the individual employee or the employee's division. |

[9] A long-term incentive program ("LTIP") may provide for overlapping performance periods, so that after the initial period, bonuses can be earned each year. For example, in an LTIP with three-year overlapping periods, the first performance period could run from January 1, 2007 to December 31, 2009 (with payment in early 2010), the second performance period could run from January 1, 2008 to December 31, 2010 (with payment in early 2011), and so on.

[10] For example, if an employee's 2007 annual bonus vests as of December 31, 2007 (such that the employee's right to the payment is not forfeited on a termination of employment that occurs after December 31, 2007 and prior to the date in 2008 on which the bonus is paid), the bonus must be paid by March 15, 2008 to avoid being subject to Section 409A. An alternative would be to require that the employee be employed on the date of payment (in which case, the vesting date and the payment date would be the same). Another option would be to have the employee's 2007 bonus not vest until, say, January 15, 2008, in which case the bonus could be paid as late as March 15, 2009 without becoming subject to Section 409A.

[11] Covered employees for purposes of Code Section 162(m) include a public company's chief executive officer and its three other most highly compensated officers other than its chief financial officer.

[12] These requirements are generally met if (i) the performance goals are established by a compensation committee, consisting solely of two or more outside directors, on or before the date on which 25% of the performance period has elapsed, (ii) the material terms under which the compensation is to be paid are disclosed to and approved by a majority of shareholders, and (iii) after the performance period and prior to payment, the compensation committee certifies that the performance goals and any other material terms were in fact met.

 

# III. Retirement Savings Plans

## A. 401(k) Savings Plan

| Description | Restrictions | Tax | Pros / Cons | Comments |
|---|---|---|---|---|
| Defined contribution retirement savings plan qualified under Code Section 401(k) and subject to the Employee Retirement Income Security Act of 1974 ("ERISA").<br><br>Employees may elect to contribute to the plan on a tax-deferred basis.<br><br>Employer may provide matching contributions.<br><br>Employees direct investment of contributions by selecting from among an array of investments. | Pre-tax employee contributions are subject to Code limits ($15,500 for 2007).<br><br>Total of employer and employee contributions are limited to the lesser of 100% of compensation or the Code limit ($45,000 for 2007).<br><br>Employer contributions are subject to minimum vesting requirements (employee contributions are always vested).<br><br>Withdrawals while employed can only be made penalty-free after age 59$^{1}/_{2}$, with certain limited exceptions (*e.g.*, to pay for tuition, home or medical expenses).<br><br>Plan must meet certain nondiscrimination tests designed to ensure that a sufficient number of low- to moderate-income employees participate. | <u>Employee</u>:<br><br>No tax on contributions or earnings until withdrawn.<br><br>Ordinary income on permitted withdrawal.<br><br>Penalty of 10% on early withdrawal.<br><br><u>Employer</u>:<br><br>Gets equivalent deduction in year of contribution. | <u>Pros</u>:<br><br>Tax delayed until withdrawal.<br><br>Company has flexibility to change or eliminate match.<br><br>Plan may allow for loans.<br><br>Employer contributions can be subject to vesting (so have retentive value).<br><br><u>Cons</u>:<br><br>Administrative burdens (*e.g.*, nondiscrimination testing, filing and disclosure requirements).<br><br>Failing nondiscrimination test can lead to tax on contributions and plan disqualification. | To increase enrollment of low- to moderate-income employees, the plan may provide for automatic enrollment. Employees who elect not to participate must actively opt out.<br><br>There are ways to ease administrative burdens. *E.g.*:<br><br>• use prototype plan drafted by third party (to avoid having to obtain qualification letter from IRS),<br><br>• take advantage of safe harbor methods (to avoid having to test for discrimination) – but requires employer match. |

## B. Simplified Employee Plan (“SEP”)

| Description | Restrictions | Tax | Pros / Cons | Comments |
|---|---|---|---|---|
| Basic defined contribution retirement savings plan governed by Code Section 408(k).<br><br>Employer contributions are made to individual retirement accounts (“IRAs”) maintained for individual employees. | Contributions are limited to the lesser of 25% of compensation or the Code limit ($45,000 for 2007).<br><br>Employer must generally contribute same percentage of compensation for each employee.<br><br>Employees cannot make contributions.<br><br>Plan cannot allow for loans.<br><br>Withdrawals can only be made penalty-free after age $59\frac{1}{2}$, with certain limited exceptions (*e.g.*, to pay for tuition, home or medical expenses).<br><br>Employer cannot maintain another qualified retirement plan. | Employee:<br><br>No tax on employer contributions or earnings until withdrawn.<br><br>Ordinary income on permitted withdrawal.<br><br>Penalty of 10% on early withdrawal.<br><br>Employer:<br><br>Gets equivalent deduction in year of contribution.<br><br>May be eligible for tax credit of up to $500 per year for each of first 3 years for cost of starting plan. | Pros:<br><br>Tax delayed until withdrawal.<br><br>Employer can choose whether to contribute for a particular year and, if so, how much.<br><br>Administration is easier and less costly than 401(k) plan (*e.g.*, generally, no filing requirements).<br><br>Cons:<br><br>No employee contributions.<br><br>No loans.<br><br>Employer contributions are always vested (so have no retentive value). | Basically, a simplified version of a 401(k) plan.<br><br>After a time, employer may wish to establish a 401(k) plan (*e.g.*, to allow for employee contributions). If so, the SEP can easily be terminated, and employees can rollover their savings in the SEP to the 401(k) plan. |

## C. Savings Incentive Match Plan for Employees of Small Employers ("SIMPLE") Plan

| Description | Restrictions | Tax | Pros / Cons | Comments |
|---|---|---|---|---|
| Basic defined contribution retirement savings plan governed by Code Section 408(p).<br><br>Employer and employee contributions are made to IRAs maintained for individual employees. | Company cannot have more than 100 employees who earned $5,000 or more in the previous year.<br><br>For each year, employer must choose to contribute, generally, either 2% of each employee's compensation or 3% of the amount of each employee's contribution.<br><br>Employees can make contributions, up to the lesser of 100% of compensation or the Code limit ($10,500 for 2007).<br><br>Plan cannot allow for loans.<br><br>Withdrawals can only be made penalty-free after age 59 $^{1}/_{2}$, with certain limited exceptions (*e.g.*, to pay for tuition, home or medical expenses).<br><br>Employer cannot maintain another qualified retirement plan. | <u>Employee</u>:<br><br>No tax on contributions or earnings until withdrawn.<br><br>Ordinary income on permitted withdrawal.<br><br>Penalty of 10% on early withdrawal.<br><br><u>Employer</u>:<br><br>Gets equivalent deduction in year of contribution.<br><br>May be eligible for tax credit of up to $500 per year for each of first 3 years for cost of starting plan. | <u>Pros</u>:<br><br>Tax delayed until withdrawal.<br><br>Administration is easier and less costly than 401(k) plan (*e.g.*, generally, no filing requirements).<br><br>Employees may contribute.<br><br><u>Cons</u>:<br><br>No loans.<br><br>Employer must contribute each year.<br><br>Employer contributions are always vested (so have no retentive value). | Basically, a simplified version of a 401(k) plan.<br><br>If employer grows to have more than 100 employees, the plan can easily be terminated, and employees can rollover their savings into a new plan, such as a 401(k) plan.<br><br>Comparison to SEP:<br><br>• SIMPLE requires employers to contribute each year,<br><br>• SIMPLE is limited to employers with 100 or fewer employees,<br><br>• SEP cannot permit employee contributions,<br><br>• SEP limits total contributions to 25% of compensation. |

 

## D. Employee Stock Ownership Plan ("ESOP")

| Description | Restrictions | Tax | Pros / Cons | Comments |
|---|---|---|---|---|
| A plan and trust established by an employer that acts as a qualified defined contribution retirement savings plan. Similar to a 401(k) plan, except that contributions are invested in employer stock.<br><br>Stock in the trust is allocated to individual employee accounts.<br><br>May be "leveraged" or prefunded by using borrowed funds to buy shares, which are allocated to participants as the loan is repaid.<br><br>Subject to requirements of Code and ERISA. | Subject to the same annual contribution limits as 401(k) plan.<br><br>If a participant retires, distributions must start in the plan year following retirement.<br><br>If a participant's employment terminates other than by retirement, distributions generally must start no later than sixth plan year after termination of employment. (In leveraged ESOP, distributions of shares acquired through a loan may be delayed until the plan year after the loan is repaid).<br><br>Plan must meet minimum coverage requirements. | <u>Employee</u>:<br><br>No tax on contributions or earnings until distributed.<br><br>Ordinary income on distribution.<br><br>Penalty of 10% on distribution before age 59$^1$/2 (55 if terminated), unless rolled over into IRA or successor plan.<br><br><u>Employer</u>:<br><br>Contributions deductible up to 25% of aggregate compensation for all participants in plan.<br><br>In leveraged ESOP, employer can effectively deduct principal and interest.<br><br>Dividends can be deductible. | <u>Pros</u>:<br><br>Employee motivation increased through ownership.<br><br>Employer receives deduction on contributions.<br><br>Leveraged ESOPs provide additional employer tax advantages.<br><br><u>Cons</u>:<br><br>Equity dilution.<br><br>Private companies must repurchase shares of departing employees.<br><br>Allowing participant contributions may raise securities law problems.<br><br>Cannot be used in partnerships and most professional corporations.<br><br>Requires annual valuations. | According to the National Center for Employee Ownership, ESOPs are most often used to provide a market for the shares of departing owners of successful closely held companies, to motivate and reward employees, or to take advantage of incentives to borrow money for acquiring new assets in pretax dollars. |

 