United States

Employment

Labor Concerns

A claim for breach of contract could arise where an equity incentive plan is amended or discontinued. It is recommended that Plan provisions be drafted so as to preclude leased and/or temporary employees and independent contractors from claiming entitlements under the Plan (absent a specific intention to include these workers). Plans should be drafted to permit unilateral amendment or termination of the Plan, and employees should be required to acknowledge the discretionary nature of the Plan.

Employers may not deny, directly or indirectly, employees the opportunity to participate in the Plan based on any prohibited grounds of discrimination, including, among others, race, color, religion, sex, national origin, citizenship, age, disability, uniformed service or any other status protected by federal, state or local law.

Communications

Plan documents should be translated into English unless the participant speaks the language in which the documents are written. Most government filings must be made in English (although certain documents may be filed with a summary in English). Generally, the electronic execution of agreements may be acceptable under certain conditions.

Regulatory

Securities Compliance

Federal and state securities laws govern the grant of securities under employee benefit plans, including stock incentive plans. Under the US Securities Act of 1933 (the "**Securities Act**"), unless an exemption is available, any offer or sale of a security must be registered with the US Securities and Exchange Commission (the "**SEC**"). Note that the grant of an option is generally not considered to be a "sale" of either the option or the underlying security; however, the exercise of an option is considered to be a sale of the underlying security. The SEC has created a special exemption and a special registration process for offers and sales of securities in connection with employee benefit plans:

Reporting companies. Companies with a class of securities registered under the Securities Exchange Act of 1934 (the "**Exchange Act**") – which includes, among others, companies listed on a US stock exchange – are allowed to use a streamlined registration statement called a Form S-8. Form S-8 requires less disclosure than other SEC registration forms. To be eligible to use this form, the company must have filed all required reports during the preceding 12 months (or such shorter period as the company was required to file). The Form S-8 is filed with the SEC and is generally no more than ten pages long. Separate from the Form S-8, the company must deliver to employees a prospectus containing a description of the Plan, together with the company's most recent annual report.

Non-reporting companies. Private companies in the United States cannot use Form S-8. However, they are permitted to grant a limited amount of securities under employee benefit plans pursuant to a special exemption contained in Rule 701 under the Securities Act. There are no special information requirements for employees unless the value of securities issued in any 12-month period exceeds $5 million, at which point financial statements and other disclosure must be provided.

Reporting and non-reporting companies can use other exemptions that are available under the Securities Act. For example, the exemption for the issuance of securities to accredited investors under Regulation D may be available for grants to executive officers. Failure to comply with registration or exemption requirements may give employees rescission rights or the right to sue for damages if they no longer own Stock.

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While the SEC is responsible for enforcing of the United States Federal securities laws, each individual state has its own securities laws, referred to as "blue sky laws", and its own regulatory agency which administers the law, typically known as the state Securities Commissioner. Blue sky laws are often superseded by Federal law, particularly with respect to reporting companies, but they do apply to non-reporting companies. In addition, blue sky laws vary widely from state to state. Therefore, while most state blue sky laws have exemptions from registration for stock incentive plans that are exempt from federal registration, some do not, and a few require notice or a streamlined registration procedure. The laws of each state where any Plan participant resides must be checked prior to undertaking any securities offerings or sales in that state.

Foreign Exchange

There are no exchange controls in the US.

Data Protection

The US has no omnibus data protection law that reaches all personal data. Rather, it has a patchwork of sector-specific state and federal laws that regulate only certain classes of data. Outside the health care and background-check contexts, much employee information falls beyond the reach of these sector-specific laws. Nevertheless, a best practice in administering equity/benefit plans is to build into Plan enrolment forms a written consent; Plan participants should expressly authorize the use and disclosure of their data for all Plan purposes. Also, Plan administrators must comply with any privacy policy of a sponsor employer, and with document-retention laws that mandate retaining tax-related information for certain periods.

Tax

Employee Tax Treatment

Employee stock options are classified as either "incentive stock options," which are intended to qualify with the requirements of Section 422 of the Internal Revenue Code, or options other than incentive stock options, which are not intended to so qualify (referred to as "nonqualified stock options"). The grant of an option with an exercise price at least equal to the fair market value of the underlying Stock as at the date of grant is not a taxable event. However, the transfer of Stock to an employee upon exercise of his or her option may or may not give rise to taxable income to the employee depending upon whether the option is a nonqualified stock option or an incentive stock option. The exercise of a nonqualified stock option by an employee generally results in immediate recognition of taxable ordinary income by the employee in the amount by which the fair market value of the Stock purchased, on the exercise date, exceeds the aggregate exercise price paid. Any appreciation or depreciation in the fair market value of that Stock after the exercise date will generally result in a capital gain or loss to the employee at the time he or she disposes of the Stock.

Social Insurance Contributions

Amounts taxable upon the exercise of nonqualified stock options are subject to social security contributions to the extent the employee has not exceeded the applicable wage base. The employer is required to withhold the employee's portion of the social security taxes. The employer must then pay the employee's withholdings and the employer's contributions at the time the employee receives the earnings. Neither the exercise of an incentive stock option nor a disposition of Stock purchased under an incentive stock option (whether or not in a disqualifying disposition (described below)) is subject to social security contributions.

Tax-Favored Program

The exercise of an incentive stock option by an employee is exempt from income tax, although not from the alternative minimum tax, if the employee has been an employee of the employer at all times beginning with the option grant date and ending three months before the date the employee exercises the option (or twelve months in the case of termination of employment due to disability). If the employee has not been so employed during that time, the employee will be taxed as described above for nonqualified stock options. If the employee disposes of the Stock purchased more than two years after the option was granted and more than one year after the option was exercised, then the employee will recognize any gain or loss upon disposition of that Stock as capital gain or loss.

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However, if the employee disposes of the Stock prior to satisfying these holding periods (known as a "disqualifying disposition"), the employee will be obligated to report as taxable ordinary income for the year in which that disposition occurs the excess, with certain adjustments, of the fair market value of the Stock disposed of, on the date the incentive stock option was exercised, over the exercise price paid for the Stock. Any additional gain realized by the employee on the disqualifying disposition would be capital gain. If the total amount realized in a disqualifying disposition is less than the exercise price of the incentive stock option, the difference would be a capital loss for the employee.

If an employee's incentive stock option becomes exercisable for the first time in any calendar year for Stock with a fair market value in excess of $100,000, determined as of the grant date of the option, the employee will be taxed on exercise of the option as described above for nonqualified stock options to the extent of this excess.

Withholding and Reporting

Amounts taxable upon the exercise of nonqualified stock options are subject to income tax withholding and reporting by the employer on Form W-2. Neither the exercise of an incentive stock option nor a disposition of Stock purchased under an incentive stock option (whether or not in a disqualifying disposition) is subject to income tax withholding. However, income taxable upon a disqualifying disposition is reportable by the employer on Form W-2.

Additionally, an employer that in the preceding year transferred Stock to an employee upon the employee's exercise of an incentive stock option, must furnish the employee with a statement, and file a return within the Internal Revenue Service, that includes certain information concerning the employer, the employee, the incentive stock option and the Stock.

Employer Tax Treatment

The exercise of a nonqualified stock option by an employee results in a tax deduction for the employer equal to the amount of ordinary income reported by the employee. The exercise of an incentive stock option by an employee does not result in a tax deduction for the employer. If the employee disposes of the Stock purchased upon exercise of an incentive stock option in a disqualifying disposition, however, the employer is entitled to a tax deduction equal to the amount of ordinary income reported by the employee. In each case, the employer's tax deduction is conditioned on the employer's timely compliance with the Form W-2 reporting requirements described above.