



# **Webinar: Public and Private Company Compensation Trends & Developments**

**GIBSON DUNN**

## **PRESENTERS**

**Krista Hanvey  
Michael Collins  
Kate Napalkova  
John Curran**

**November 13, 2024**

# MCLE Information

The information in this presentation has been prepared for general informational purposes only. It is not provided in the course of an attorney-client relationship and is not intended to create, and receipt does not constitute, an attorney-client relationship or legal advice or to substitute for obtaining legal advice from an attorney licensed in the appropriate jurisdiction.

- This presentation has been approved for **0.5 transitional/non-transitional credit**.
- Participants must submit the form by **Wednesday, November 20th** in order to receive CLE credit.

**CLE Form Link:** [https://gibsondunn.qualtrics.com/jfe/form/SV\\_9XOuEwPcL6HHQOO](https://gibsondunn.qualtrics.com/jfe/form/SV_9XOuEwPcL6HHQOO)

Most participants should anticipate receiving their certificate of attendance in 4-6 weeks following the webcast.

All questions regarding MCLE Information should be directed to [CLE@gibsondunn.com](mailto:CLE@gibsondunn.com).

# Today's Panelists

**Krista Hanvey**



[Krista Hanvey](#) is Co-Chair of Gibson Dunn's Employee Benefits and Executive Compensation practice group and Co-Partner in charge of the firm's Dallas office. She counsels clients of all sizes across all industries, both public and private, using a multi-disciplinary approach to compensation and benefits matters that crosses tax, securities, labor, accounting and traditional employee benefits legal requirements.

**Michael Collins**



[Michael Collins](#) is a partner in the Washington, DC office of Gibson, Dunn & Crutcher. He is Co-Chair of the Executive Compensation and Employee Benefits Practice Group. His practice focuses on all aspects employee benefits and executive compensation.

**Kate Napalkova**



[Kate Napalkova](#) is a partner in the New York office of Gibson, Dunn & Crutcher and a member of the Employee Benefits and Executive Compensation Practice Group. Kate advises public and private companies, private investment funds, boards of directors and management teams on a broad range of compensation and employee benefits matters.

**John Curran**



[John Curran](#) is an associate in the New York office of Gibson, Dunn & Crutcher. He is a member of the firm's Corporate Department and a member of the firm's Executive Compensation and Employee Benefits Practice Group. His practices focuses on all aspects of executive compensation and employee benefits.

# AGENDA

---

**01** Private Company and Private Equity  
Compensation Trends

---

**02** Public Company Compensation Trends

---

**03** Compensation-Related Litigation, Regulatory  
and Enforcement Trends

---

# Private Company and Private Equity Compensation Trends

01

# Private Equity Compensation Trends

## Incentive Equity Structuring in Partnerships and DREs

- Most typical: profits interests / phantom equity
- Less typical: restricted capital interests / co-invest capital interests / options on partnership interests
- Common pitfall: A partner cannot also be an employee of the partnership
- Application to tiered partnership model: Individual who is both a partner of a partnership and an employee of a “disregarded” subsidiary of the partnership is treated as a partner for all purposes
- Consequences:
  - **To individual**: More onerous tax payment obligations; restrictions on participation in certain tax-favored employee benefit plans
  - **To company**: Reporting on K-1 rather than W-2; limitations on otherwise deductible compensation; risks of disqualifying tax-favored employee benefit plans
- Solutions:
  - Management aggregator structure
  - Causing employer entity or other entity in DRE chain to become regarded
- **N.B.** Management aggregator is used often, but is not always the most efficient from a cost-benefit perspective; consideration should be given to regarded entity approach and, in some cases, to treating the individual as a partner for all purposes



# Private Equity Compensation Trends



## Employee Ownership Models Take Center Stage



# Private Equity Compensation Trends

## Employee-Ownership Model

- Receiving increased attention in recent years
- Not a new concept; broad-based employee-ownership models have been around for many years
  - “Phantom” or “tracking” equity
  - Unitized or purchase-price based transaction bonus programs
  - ESOPs
- Often presented as “accessible” and “uncomplicated”, but require care in design and structure
  - IRC 409A and IRC 457A
  - Interplay with wage and hour laws; other labor laws
  - Multi-jurisdictional issues
  - Securities considerations
  - Optics and clear communication



# Public Company Compensation Trends

02

# Pay Trends

- **S&P 500 CEO pay increased 12.6% in 2023 to median of \$16.3M per Equilar Study**
- **Per FW Cook 2024 survey of 250 largest companies**
  - Performance-based equity still most prevalent (93%), followed by restricted stock (68%) and stock options/SARs (48%)
  - Average CEO pay mix 61% performance-based awards
  - Relative TSR still most prevalent performance metric for equity (though fewer companies (44%, down from 51% in 2019) are using it as sole metric)
- **Per Semler Brossy 2024 ESG+ Incentives Report**
  - 74% of S&P 500 companies incorporated ESG goals into 2023 incentive plans
    - Diversity and inclusion most prevalent (used at 54% of S&P 500), but shift to talent and retention or more holistic focus on human capital management
    - Environmental metrics used at 42% of S&P 500
  - Shift from discretionary adjustments to weighted metrics
  - Proxy disclosure of specific performance goals limited

# Public Company Compensation Trends

## **Dodd-Frank Clawback Policies**

Current and former Section 16 officers

- Triggered by an accounting restatement due to a company's material noncompliance with any financial reporting requirement under the securities laws (both "big R" and "little R" restatements)
- 3-fiscal year lookback and applies to compensation "received" on or after October 2, 2023
- Mandatory recoupment of excess amounts received over what would have been earned under restated results
- Limited recovery exceptions for impracticability (costs of enforcement would exceed the amount sought to be recovered), if recoupment would violate home country law, or would likely cause an otherwise tax-qualified retirement plan to fail to meet applicable requirements for qualification

## **Practical Application and Enforcement**

- Individual Acknowledgements
- Calculating Amounts Recoverable
- Means of Recovery: Offset or Repayment
- State Wage Law Compliance
- Tax Implications of Repayment
- Disclosure Obligations

# Public Company Compensation Trends

## Supplemental Clawback Policies

- 2024 FW Cook survey found that, among 45 large-cap companies, approximately 80% maintained an expanded or supplemental clawback policy
- Key Features:
  - Generally discretionary
  - Often triggered by a broader array of circumstances – for example, upon an employee’s misconduct generally, whether or not such actions contribute to the need for a financial restatement
    - DOJ Pilot Program Considerations
  - Can apply to a broader employee population (e.g., VP and above)
  - Can applying to broader forms of compensation, specifically time-based vesting cash and equity awards
    - ISS and Glass Lewis Considerations
- Disclosures & Filing Obligations (Two policies vs. combined approach)

# Public Company Compensation Trends

## Section 162(m): Covered Employees Expansion

Section 162(m) generally prohibits public companies from deducting compensation paid to certain “covered employees” in excess of \$1 million in any given tax year

Currently, Section 162(m) “covered employees” include:

1. Any individual who served as a company’s principal executive officer or principal financial officer at any time in the tax year
2. The Company’s next three highest compensated “executive officers” (as defined in the Securities Act of 1934) for the tax year (regardless of whether serving at the end of the tax year and regardless of whether the executive officer’s compensation is required to be reported in the company’s proxy statement for such tax year)
3. Any individual who was a covered employee for any prior tax year beginning after December 31, 2016
  - Accordingly, any individual who becomes a covered employee by way of sub-bullets 1 or 2 above remains a covered employee for all future tax years, regardless of the individual’s position within the company or his or her level of compensation – “once covered, always covered”

# Public Company Compensation Trends

## Section 162(m): Covered Employees Expansion (cont.)

- Effective for tax years ending after December 31, 2026, the American Rescue Plan Act (ARPA) expanded the population of “covered employees” to also include the **next five most highly compensated employees in the tax year** (the “ARPA Group”)
  - Will have a larger group of covered employees
  - Not limited to executive officers
  - Variable group year-to-year (will re-assess group annually)
  - Internal tax teams, in forecasting future deductions, must consider the impact of the covered employee expansion today

# Compensation-Related Litigation, Regulatory and Enforcement Trends

03



# Compensation- related Litigation, Regulatory and Enforcement Trends

## FTC Ban on Noncompetes

- FTC ban and notice requirement originally intended to take effect on September 4, 2024
- Ryan LLC v. FTC (N. D. Tex.) – prelim. injunction specific to Ryan LLC 7/3/24; rule set aside entirely 8/20/24
- ATS Tree Services LLC v. FTC (E.D. Pa.) – 7/23/24 injunction denied; FTC within statutory authority
- PA ruling preliminary and specific to ATS Tree Services, so TX ruling governs
- FTC appealing TX ruling
- In the meantime, state-by-state customization
  - Total bans: CA (+ new notice rule), MN, ND, OK
  - Restrictions: WA, OR, NV, CO, IL, VA, MD, RI, NH, MA, D.C.
  - Penalties – civil and in some cases criminal (e.g., CA; CO)

# Compensation- related Litigation, Regulatory and Enforcement Trends

## Regulation of Proxy Advisors

- 2020 – SEC rule; “notice-and-awareness” conditions; anti-fraud provision
  - “Notice”: Advisors to share reports with companies “at or prior to” sharing with institutional clients
  - “Awareness”: Advisors to include company rebuttals with factual or qualitative arguments in reports provided to institutional clients prior to annual meeting
  - Anti-fraud: Exchange Act Rule 14a-9, note (e) – new example of potentially misleading information
- 2022 – Implementation paused; rule rescinded in part; including “notice-and-awareness” and anti-fraud provision
- Heavily litigated, with both sides suing SEC
  - February 2024 – D.D.C. ruled in favor of ISS; SEC exceeded authority
  - June 2024 – Fifth Circuit ruled in favor of industry groups; SEC’s rescission of rule in 2022 was arbitrary and capricious (only vacated “notice-and-awareness” rescission, not anti-fraud provision)
  - September 2024 – Sixth Circuit ruled in favor of SEC

# Compensation- related Litigation, Regulatory and Enforcement Trends

## Stock-Based Compensation

- Whether stock-based compensation is part of regular rate of pay for purposes of calculating overtime (FLSA, state wage and hour laws)
- Recent lawsuits; so far generally focused in CA

## Focus on Perquisites

- SEC enforcement actions – disclosure
- IRS audit – tax reporting and withholding
- Focus on personal air travel; commuting costs

## Focus on Anti-Whistleblower Provisions

- September 9, 2024 – SEC announces settlement of enforcement actions against seven companies for violating SEC’s whistleblower rules; part of “sweep”
- Employment, separation, settlement agreements
- Waiver of right to monetary award; requirement to provide prior notice
- SEC not sympathetic to “savings” language



**GIBSON DUNN**