

Inside this issue:

TEA Has a New COO

Former White House Official Joins the Staff **3**

Advisory Committee on Administration

Understanding ESOP Audits; Part II **6**

Washington Report

Leadership changes at DOL & ESOPs **4**

Legal Update

ESOP Claims as a Plan Asset **8**

Ownership Advantage

Teamwork and Employee Ownership **5**

Presidents Column

A New Toolbox **10**

EMPLOYEE OWNED 2019



An Exciting New Conference Experience Awaits You in Las Vegas

Registration Now Open; A Wealth of New Opportunities Available

Registration is now open for Employee Owned 2019, the most important employee ownership conference of the year. Now with three days of programs and world-class keynote speakers, The ESOP Association is raising the bar on what employee owners should expect from a national level educational and networking conference. We hope to inspire you to soar to new heights, and give you the tools and insights to make an impact back home.

Check out just a few of the new and exciting opportunities you'll have during this incredible three-day experience.

General Sessions

Four high-level keynoters will challenge you to think in new ways about your business, your ESOP, and the competitive

advantages employee ownership can create if properly harnessed. From building your business into an innovation powerhouse, to learning the power of storytelling to unleash your ownership story into your community and the world, these sessions will transform the way you think of... everything.

Two of our keynoters are already booked: Stay tuned for information on the remaining speakers, who will be announced soon.

You may be wondering why the world's leading poetic voice, **Sekou Andrews**, is starting our conference and kicking things off on Thursday morning. After you've experienced his raw and inspiring talent, you'll understand and take away some profound lessons on business, leadership, and life. Andrews' performances have ranged from Oprah Winfrey's backyard (where the audience included President Obama) to keynote presentations at the

Two New Keynoters Announced for Employee Owned 2019



Sekou Andrews



Erica Dhawan

world's biggest and most important companies. No matter the venue, he delivers content that is deeply engaging and thought provoking.

A schoolteacher turned actor, musician, two-time national poetry slam champion, entrepreneur, and award-winning poetic voice, Andrews helps Fortune 500 companies with brand messaging and coaches executives and leaders on storytelling and speaking. He is in high demand with the world's most successful organizations - Google, Toyota, Nike, Cisco, LinkedIn, PayPal, TEDx, Capital One, Intuit, and the NBA to name but a few - and we are bringing him to share those talents with the Employee Ownership Community.



Erica Dhawan, the world's foremost expert on connectional intelligence, will offer a must-hear presentation that has been sweeping Wall Street and Silicon Valley. Dhawan helps organizations achieve unprecedented impact by harnessing the power of employee relationships and networks. Her approach to leadership and collaboration is perfect for employee owned businesses seeking to maximize the power of their ESOP for a competitive advantage in the market.

The co-author of the book, *Get Big Things Done: The Power of Connectional Intelligence*, she shows audiences how to maximize their potential and achieve breakthrough performance. She has spoken on global stages such as the World Economic Forum at Davos and SxSW, and has taught leadership at Harvard and MIT.

Chief Executive Series

New this year, ESOP company presidents and chief executives are invited to participate in a series of 14 small sessions, providing an exclusive environment for learning and sharing ideas. Included in these sessions are special, small-group, learning events with each of our keynote speakers—offering a unique opportunity to learn from these

leading business experts. In addition to the substantive and coaching sessions, three Chief Executive-only round table discussions will be an excellent opportunity for ESOP leaders to engage your peers in small group discussions about shared issues. Each revolving around a specific set of topics, we will provide a professional facilitator but you

The Voice of The ESOP Association

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provide the content, real life experience, and feedback for one another.

Also new: an Executive Lounge and Business Center—perfect for catching up on work or having impromptu, high-level discussions with other top executives.

No reservations or extra fees are required—all these optional activities for Presidents and Chief Executives are included with the price of registration.

Not Just a Trade Show

An entirely re-imagined experience, the ESOP Show and Innovation Stage will become the city center of the conference. Featuring the all-new Innovation Stage—a full-production presentation stage embedded into the show space—where individuals from ESOP companies and professional service firms will present the best of their ideas and we will broadcast those presentations live, nationwide on The Association platforms.

Interested in becoming a trendsetter and taking the stage? Contact our meetings staff at the National

Headquarters. Filling out this conference hub, new networking spaces, coffee bars, charging stations and a raft of additional booth space will ensure this space is the heart of Employee Owned 2019.

Pre-Conference Workshop

Know someone thinking of starting an ESOP? Considering one yourself? This workshop offers an overview of everything prospective ESOP companies need to know, all presented by the people who have been through it—other ESOP leaders. And this event is available to conference attendees at no additional cost.

After the workshop, Navigators will help attendees pick out the conference session(s) best suited to their individual needs.

For more information about the great new features at Employee Owned 2019—including our new Wednesday networking reception and special Employee Ownership Foundation event at the top of the Eiffel Tower—visit our website. Early bird registration ends September 23. €

Former White House Official Joins Staff

Kristie Mark Becomes The ESOP Association's First COO

The ESOP Association has added a new position to the staff—Chief Operating Officer—and has filled that role with a seasoned business and operations executive. Kristie Mark joined the staff on July 15, bringing with her uniquely impressive credentials.

Mark served as the Chief Administrative Officer in the Executive Office of the President during the Obama administration, and is known for her ability to help organizations navigate leadership, cultural, and financial transitions at a world-class level.

“The Board of Directors and I are thrilled that Kristie has agreed to join The Association staff,” said James Bonham, President and CEO of TEA. “Kristie’s breadth of experience, talent, and dedication will undoubtedly make a positive and enduring impact on the employee ownership community. She is one of the most talented people I’ve ever worked with, and I’m grateful she has chosen to join TEA’s staff of professionals.”

Immediately prior to joining TEA, Mark served as Chief Financial and Administrative Officer for the National Skills Coalition, a not for profit organization dedicated to improving workforce training and skills development



opportunities. In that role, Mark helped navigate the organization through a period of exponential growth—revenues more than doubled from \$4 million to over \$8 million and staff grew from 19 to 33.

As the Chief Administrative Officer in President Obama’s White House, Mark managed five divisions: Design and

Communications, Human Resource Management, Learning and Development, Library and Research Services, and Special Programs. In this role she provided administrative and business services to all components of the Executive Office of the President and its staff of roughly 4,000.

“Employee ownership is a natural extension of my work at the Skills Coalition and the White House, and I am very excited to make a contribution. It is a deeply important movement—especially at this point in our nation’s history when wealth inequality and retirement income insecurity are such pressing concerns,” Mark said. “The ESOP

Association is at an important stage in its life, and the chance to play a central role in shaping its future is very enticing for me.”

The new Chief Operating Officer position reports directly to the President and CEO. In her new role, Mark will be responsible for The Association’s finance and operations divisions, and will hold similar responsibilities for The Employee Ownership Foundation (EOF), The Association’s affiliated 501(c)(3) organization. [E](#)

Washington Report

What do leadership changes at DOL mean for ESOPs?

By James Bonham, President and CEO, The ESOP Association

The warning signs were blinking bright red earlier this year for the U.S. Secretary of Labor Alexander Acosta as he and his staff tried to navigate increasingly loud criticism from the business community and the White House over the slow pace of regulatory change within the department. But, after a contentious spring, it was the national uproar over billionaire hedge-fund manager Jeffrey Epstein’s indictment on human trafficking and sexual abuse that caused Secretary Acosta to find himself without the necessary friends he needed to stay in power. Acosta quickly came under criticism for his role in a 2008 agreement with Epstein on similar allegations. He resigned on Friday July 12.

For ESOPs, a change in leadership at the Department of Labor can have serious implications, particularly in regard to the use of the agency’s investigatory and rulemaking authorities.

Following this high-profile resignation in Washington, the parlor game of “who comes next and what does it mean?” has begun. Just hours after his resignation, articles and buzz were hitting the street trying to suggest the path ahead. For the most part, the early handicap is that Acosta’s departure will not likely cause any dramatic change in direction, but will almost certainly increase the pace of activity.

As of July 22, 2019 it is rumored that Eugene Scalia will be nominated by President Trump as the new Head of the Department of Labor. Scalia, the son of the late Supreme Court Justice Antonin Scalia, led the legal team representing the Chamber of Commerce and other securities and insurance group’s successful effort to overturn the Obama Administration-era fiduciary rule governing retirement accounts. He was the Chief Legal Officer for the labor department for George W. Bush.

Acosta’s replacement aside, this year, national media outlets have reported on the active role Acting White House Chief of Staff Mick Mulvaney has taken in the DOL agenda. In fact, Mulvaney tightened his grip on Acosta’s rule-making authority shortly after becoming Acting White House Chief of Staff in January, requiring three White House aides to sit in on all the agency’s regulatory meetings. Now, with Acosta gone, Mulvaney is eager to push administration priorities to finalize rules as early as possible in 2020, before the Presidential election.

The likely reason behind this new push is that Administration officials, and their Congressional supporters, could hold concern about the risk of regulatory changes being overturned in a new administration. The White House goal is to issue as many changes as possible and make them official in the Federal Register so that it will require Congress to change any new or modified regulation rather than Executive Action or a Congressional Review Act review.

While this sounds like a fertile environment for the ESOP community and its longstanding effort to secure regulatory guidance under ERISA for ESOPs, I would caution against expectations for significant developments. Mulvaney’s interest in making the DOL more responsive will almost certainly start with two key proposed rules to be finalized: overtime pay and joint employer relationships. While these rules may very well help ESOPs generically because they are businesses subject to the Fair Labor Standards Act (FLSA), they are not related to ERISA and our community’s need for regulatory guidance.

Perhaps however, our bigger problem in this new environment at DOL is one of optics and messaging. The administration may very well be sympathetic to our wish for greater regulatory clarity but, the ESOP community is actually seeking the opposite of what the Administration wants generically. We want more regulation, and the

administration has made it clear they want less. This makes it hard for Mulvaney and the other political appointees to press their overarching goals of less regulation, but in the next breath request more for ESOPs. They can, however, impact the pace of new investigatory actions and litigation.

Early this summer an edict was made that any new litigation brought by DOL enforcement attorneys must be reviewed by the Secretary’s office in advance. Typically, an administration would bristle if it were suggested that political appointees were potentially interfering in legal action. But in this White House, and with the Department of Labor, the idea of political oversight over career attorneys is tantamount to civilian oversight over the military. While Mulvaney and his political appointees may be reluctant

to mix messages on less versus new regulation, they are unlikely to see merit in a regulation by litigation strategy by career enforcement attorneys. So, all this to say, the most immediate tangible benefit for ESOPs during this leadership transition may very well be a reduction in enforcement action.

At this point in any administration – nearing the end of a term (first term or second term, doesn’t matter) – considerable energy is dedicated to getting done the things that can be done before the election interference. The Congress is also interested in advancing its agenda. For ESOPs, it may well be worth our effort to consider seeking a legislative directive for regulatory clarity at the Department of Labor. [E](#)

Ownership Advantage

Teamwork and Employee Ownership: Keys to Adapting Businesses

By Aaron Moberger, Cellar Manager, Harpoon Brewery

A common thread among successful employee-owned companies is that they adapt their businesses to new demands and situations. Our friends at Web Industries went from reaming paper to producing wire and cable, medical devices, and airplane fuselages. Likewise, AVID Products went from selling earbuds for airline passengers to audio devices for healthcare and educational purposes.

At Harpoon Brewery, we’ve had to make similar adjustments.

When Harpoon was founded in 1986 we produced two styles of beer. That seems mild by today’s standards, but it was outlandish at the time. Since then, we have grown to produce hundreds of styles *per year* and from one to five brands.

One of those brands is a hard cider brand and a line of hard seltzers with our friends at Polar Beverage. Called Arctic Summer, we expedited these products from concept to creation in less than a year—thanks to the teamwork that is so often a byproduct of employee ownership.

Making a New Product

Harpoon Brewery’s Cellar Team has faced its share of challenges over the past several years as we worked to build new brands and styles. However, our most daunting challenge yet was figuring out how to filter massive volumes of the 13 percent neutral alcohol base to add to our new hard seltzers.

Part of the challenge: Unlike producing beer, our goal when making seltzer is to *strip out* all the character in the liquid. When we are done, it should look and taste like

water. We put a premium on that purity, as we believe that it is what distinguishes our product from other hard seltzers on the market.

We worked with a trusted vendor to custom-make carbon filters to eliminate the color and flavors of the liquid. But, because of the expedited timeline, we were able to produce only one small trial batch. When we moved to scale up those efforts—filtering more than 100,000 thousand-gallon batches of liquid in only a few days—we had to confront a weak point in the process.

After several long days and late nights with our vendor, we engineered a different process that not only exceeded our specifications (which for a while seemed unattainable) but also resulted in a significant cost savings.

While the filtering challenge was our most substantial, it was still just the tip of the iceberg. Once we cleared the filtration hurdle, we faced many others.

On top of that, we still had to keep producing the product that got us here in the first place—beer—at our regular production levels.

Employee Ownership and Team Success

Despite such adversity our team performed impeccably, and after a few long weeks we were proud of every drop of product that left our facility.

Why do some teams succeed under pressure and others fail? Why did we succeed in this case? I think there are a number of factors that led to our success, and they all tie back to an employee ownership culture.

Dedication. Several members of our department came in to work double shifts on their days off.

Agility. Some operators who started their shifts thinking they might follow a normal cadence spent all their time pumping base onto tanker trucks, and the next operator on duty had to pick up those responsibilities when the dust settled.

Detail orientation. Among those who changed priorities, we had to keep sight of the minutiae that are critical to our success.

Priorities. Some things are *going* to slip through the cracks—we just need to make sure they aren't the important ones. The art, or science, of teamwork is extremely mysterious, but we must continue to try to discover it to unlock the advantages of employee ownership.

A New Way to Succeed

Good, cheap, fast—normally you get to pick only two, as the saying goes. If that saying held true in this case, it would have taken us years to engineer our product. But we had only months. We would have spent rather than saved money, which goes against our ethos of employee-ownership. Or we would have cracked under the pressure and made something we weren't proud of—and then had to decide whether or not to keep it.

Instead, we got to work and wound up with a good product made by measures that frequently cut costs on an accelerated time frame. Good, cheap, fast.

Why do some teams succeed under pressure and others fail? Why did we succeed in this case? I think there are a number of factors that led to our success, and they all tie back to an employee ownership culture.

Why didn't we have to pick two of the three? Because we committed to owning the process and the work required to succeed at every step.

The cellar team, of which I'm a part, was not alone in the hard work and innovation required to complete this project. All the other departments involved in our biggest product roll out to date have similar stories.

To me, that is the advantage of employee ownership.

This article was reviewed and approved by the Chair of the Ownership Culture Committee, Jason Wellman, Senior Relationship Consultant, ESOP Partners. 

Calendar of Deadlines and Important Dates

Aug. 7-9 [Employee Owner Retreat](#)

Nov. 13-15 [Employee Owned 2019 the Conference and Trade Show for ESOPs](#)

Dec. 1-4 [Leading in an Ownership Setting](#)

To see the full list of .ESOP Association meetings, visit us online at: www.esopassociation.org.

The determination of whether an audit is required is straightforward and usually can be made a year in advance, when the Form 5500 is filed for the prior plan year.

The first step is to figure out if you qualify as a large plan, since the rules state that large plans must have an audit. A large plan generally is defined as any qualified retirement plan with more than 100 participants (active and terminated) as of the *beginning* of the plan year.

Under most circumstances, a review of the numbers reported on page two, Item 6(f) of Form 5500 will determine if the plan will be required to have a plan audit the following year. (This must factor in the newly eligible employees who will become participants the next day, which is the first day of the plan year.)

There is an exception for plans that have been filing as small plan filers, with the number of participants ranging from 80 to 120 from plan year to plan year. If a plan qualifies for this exception, the plan administrator can defer the requirement for a plan audit until the plan year when there are more than 120 participants on the first day of the year.

Here are some examples of how to navigate this determination (and assumes the plan year starts on Jan. 1):

Scenario 1:

The 2018 Form 5500 reflects 95 participants at the end of the year and there are no employees eligible to enter on January 1, 2019. A plan audit is *not* required for the 2019 Form 5500 filing because there are less than 100 participants at the beginning of 2019.

Scenario 2:

The 2018 Form 5500 reflects 130 participants at the end of the year. The plan does not qualify for the small plan exception, since there are more than 120 participants. Therefore, a plan audit *is* required for the 2019 Form 5500 filing because there were more than 100 participants at the beginning of 2019 (regardless of the number of new participants on January 1, 2019).

Scenario 3:

The 2018 Form 5500 reflects 110 participants at the end of the year, so the plan administrator will need to determine whether the plan qualifies for the small plan exception based on the plan's specific demographics (and new participants on January 1, 2019) because the number of participants is between 80 and 100 at the beginning of 2019.

As these examples show, regardless of whether or not the audit is required, the plan administrator has sufficient information when the 2018 Form 5500 is filed to determine a year ahead whether an audit for 2019 will be required. If it is required, there is time to search for and engage a qualified plan auditor and prepare for the audit process to be conducted in a timely manner for the following year.

Waiting until after the 2019 plan administration is complete may be too late to locate and engage an audit firm that can schedule the audit timely.

Technical Challenges

At a more difficult level than simply planning ahead, there are various technical pitfalls that can contribute to a delay in the plan audit completion process. Some common examples include:

- Missing or unavailable plan documentation, due to delays in the appraisal and plan valuation process.
- Balances or transactions that are unsubstantiated.
- Discrepancies between certified information and company internal records.

In each of these instances, the auditor must assess if any include the risk of material misstatement to the financial statements, determine whether additional auditing procedures must be performed or disclosures noted, and facilitate communication with plan management for reconciliation and corrections.

Possible Errors

During audit fieldwork, auditors also may discover errors related to the plan's operation.

A frequently identified operational defect is the use of incorrect compensation when calculating employer contributions to the plan. The plan document contains a specific definition of compensation, including applicable inclusions or exclusions (such as bonuses, overtime, fringe benefits, etc.), and these are most often overlooked in the plan's daily operation.

Any operational error uncovered during the audit will result in disclosure to the plan administrator, who should correct it as soon as administratively possible. (It is important that the plan administrator review the compensation provided to the third party administrator, or TPA, to verify that the compensation provided is correct based on the plan document's definition.)

Another pitfall is the plan administrator's failure to adequately prepare for the plan audit. Auditors will provide a detailed list of the items they require to complete the audit. These may include: requested reports, personnel file information, supporting documents (such as cancelled checks and Election Forms for distributions and diversifications) as well as various internal control forms.

Auditors will be more efficient (and will require less time in your office) if the requested items are provided to them before fieldwork commences or when they arrive.

The good news is that there are several ways to correct late filings with the hope of never incurring the high potential penalties discussed above. The auditor and TPA may discuss the IRS's Employee Plans Compliance Resolution Systems (EPCRS) guidelines for correction of operational defects.

Advisory Committee on Administration

Understanding ESOP Audits, Part II

By Carla Neal Klingler, Blue Ridge ESOP Associates
Reviewed by Vicki Graft, Swerdlin & Company

This article is Part II of a discussion on the DOL-required plan audit for "large plans." Last month's Part I article stressed that the ESOP audit is a critical process to help ensure proper accountability of the plan and its operation. This article focuses on some challenges and pitfalls plan administrators may experience in the plan audit process.

Filing on Time

The biggest challenge centers on the timeliness of the audit process and filing Form 5500. Form 5500 is due seven months after the end of the plan year (but can be extended an additional two and a half months). Failure to file on the due or extended date, or filing without including audited financial statements, can result in significant late penalties from both the IRS and the DOL.

The penalty for filing Form 5500 late with the IRS is \$25 per day, up to a maximum of \$15,000. The DOL maximum penalty for late 5500 filing is adjusted annually. For 2019, it is \$2,194 *for each day the filing is late, with no maximum*. The DOL has warned that any Form 5500 filing will be considered "late" until it includes the required audit report. Even though penalties may be waived, there is no guarantee that either of those agencies will grant a penalty reduction or waiver for a late 5500 filing.

Do You Need to File?

One of the most easily avoided pitfalls—and one that often causes late 5500 filings—is the "surprise" when a plan administrator finds out that a plan is required to conduct its first audit. It's a particularly rude surprise if the news is delivered right before the Form 5500 is due!

If the plan sponsor knows that a filing will be late, the Delinquent Filer Voluntary Correction Program (DFVCP) should be considered. If the plan sponsor has not yet been notified by DOL that the filing is late, the Form 5500 can be filed with the “DFVCP” box checked and can voluntarily pay a reduced late filing penalty. For large plans, the maximum penalty would be \$2,000 for a single filing. The plan administrator must be pro-active and work closely with the plan advisors to file Form 5500 before DOL issues a late notice.

Hiring the Right Auditor

Other pitfalls include hiring an auditor who is unfamiliar with ESOPs, or who lacks plan audit experience. It’s important to spend the time hiring a qualified auditor. Here are some sample questions to ask any prospective auditor:

- How many plan audits do you perform?
- How many of your audits are for ESOP companies?
- How do you obtain continued plan audit training?

Legal Update

ESOP Claims as a Plan Asset -- Prohibited Transaction Concerns Raised by Private Plaintiff Settlements

By Allison Wilkerson, Partner, McDermott Will & Emery
Edited by Julie Govreau, Senior Vice President and Chief Legal Counsel, Greatbanc Trust Company, Lisle, IL

On October 26, 2017 Steven Brincefield (Brincefield) filed action against certain members of the board of directors of Morton G. Thalhimier, Inc. (Thalhimier) and Lance Studdard (Studdard), as special trustee of the Thalhimier sponsored Employee Stock Ownership Plan (ESOP). An amendment to the original complaint, filed on July 30, 2018, added new defendants to the alleged cause of action, several of whom were alleged to have provided services to the ESOP. By way of background, Brincefield worked for Thalhimier for most of his professional career, retiring in 2012, and participated in the ownership of the company through both outright stock holdings and as an ESOP participant. In 2016 the ESOP offered to purchase all non-ESOP held shares of common stock of Thalhimier, acquiring most of the issued and outstanding shares of stock held by non-ESOP shareholders. Brincefield declined to participate in this offer and retained his outside ownership.

In early 2017, Thalhimier disclosed that it had discovered the use of fraudulent accounting practices by a subsidiary that had failed to properly account for millions in dollars of expenses over a period of five years. The action caused a significant overstatement in the value of Thalhimier and

- Is your audit firm a member of the American Institute of Certified Public Accountants (AICPA) Benefit Plan Audit Quality Center?

Summary

ESOP plan audits are extremely unique and frequently complex. Being thoroughly prepared prior to audit fieldwork, and establishing efficient means to transfer necessary audit documentation can help alleviate delays in completing the plan audit.

Additional potential benefits of an audit may include identifying ways in which plan management could improve and streamline plan operations, strengthen internal controls, and help prevent future operational errors.

This article was reviewed and approved by the Chair of the Administration Advisory Committee, Dolores Lawrence, Managing Director at Blue Ridge ESOP Associates. 

resulted in the 2016 ESOP transaction occurring at an above fair market value purchase price. The 2016 ESOP transaction was unwound in an attempt to restore losses to the ESOP and place it back into the position it would have been in had the misstatement not occurred. Regardless of this action, the Thalhimier valuation plummeted.

Brincefield brought suit against the defendants identified above for a series of violations, including ERISA fiduciary breaches for causing the ESOP to enter into prohibited transactions relating to the valuation problem. After close to a year of legal wrangling, including a denied (in part) motion to dismiss entered largely in favor of Brincefield, the parties appear ready to settle all claims. The settlement would require payment of \$1,750,000 which will be split amongst Brincefield personally, his counsel, and the ESOP. Brincefield would also be required to cede ownership of those shares of Thalhimier stock held by him in his individual/outright capacity.

While the case may seem all but done, it is important to consider the steps that may have been taken to approve the settlement from the perspective of the ESOP fiduciaries. Because the Department of Labor (DOL) did not participate in the litigation, approval of the settlement likely included

extra scrutiny by the parties and a specially engaged fiduciary to ensure appropriateness. Failure to do so may mean that any such settlement/release of claims would subject the process to a claim that it was a prohibited transaction – hardly a satisfactory result and, perhaps, surprising to those who commonly see claims settled prior to conclusion of litigation!

Settlement/Release of Claims May be a Plan Asset

On December 24, 2003 the DOL issued Prohibited Transaction Exemption 2003-29 (PTE 2003-29) providing an exemption from certain prohibited transaction restrictions that may be imposed by ERISA on a plan seeking settlement of litigation. Without making a determination that the settlement of a claim is in fact the release of a plan asset, the DOL asserts that PTE 2003-29 was designed to provide some certainty as to actions that may be taken when a fiduciary seeks to settle litigation.

The general premise behind PTE 2003-29 appears to be that certain causes of actions that may be brought by, or on behalf of, a qualified retirement plan for damages may, in fact, be assets of the plan. To the extent that a settlement of such action releases a party in interest from further liability, this release or settlement may constitute a prohibited transaction. E.g., if a retirement plan has the right to sue the trustee and wishes to settle such claim with the trustee, the plan may be viewed as selling an asset (the right to future claims/monetary damages) for the benefit of a party in interest (the trustee). Absent certain protections, this action would run afoul of the ERISA standards prohibiting sales of assets among a plan and a party in interest. PTE 2003-29 provides a fiduciary with a roadmap to determining the appropriateness of accepting a settlement without exposing him/her/it to further scrutiny under these rules.

Is PTE 2003-29 Needed

The requirements of the exemption do not appear to have been an area of significant focus by ESOP fiduciaries in recent years. One such reason may be that the exemption does not appear to be necessary (or even really applicable) in instances where the DOL approves a settlement. The DOL would generally be the regulatory authority asserting a prohibited transaction; if the DOL agrees with the settlement, the matter is closed.

ERISA Section 502(h) provides that the DOL must receive a copy of all private rights of actions brought by a participant, beneficiary, or fiduciary and the Secretary has the right to intervene in such actions. As a result, the DOL has on a number of occasions joined private plaintiff litigation involving ESOPs so final settlement in such event is approved by the DOL. The PTE is unnecessary in this instance and it exempts out “settlements authorized by

the [DOL] pursuant to PTE 94-71...and judicially approved settlements where the [DOL] or the Internal Revenue Service is a party pursuant to PTE 79-15.”

However, the DOL may be reticent to join litigation where plaintiff’s counsel appears well suited to the case or the cause of action is for a low dollar amount. Government resources are limited and it seems that the DOL may be happy to allow plaintiff’s to take the laboring oar in these matters. A settling party in interest may find itself facing later scrutiny as to any settlement decision and facing potential liability for a prohibited transaction to the extent the DOL ultimately decided the release of claims/settlement was inappropriate.

Compliance with PTE 2003-29

Compliance with PTE 2003-29 can provide a useful tool in reviewing a proposed settlement for protection against a later claim of engagement in a prohibited transaction. Requirements generally include:

- There must be a genuine controversy involving the ESOP.
- The fiduciary approving the settlement must be independent, have no relationship to any of the parties involved in the litigation, and acknowledge status as a fiduciary with respect to settlement. Noteworthy, to the extent the ESOP trustee has been made a party to the litigation, the ESOP trustee, even if otherwise an independent fiduciary, is not independent for PTE 2003-29.
- While a fiduciary is not required to negotiate the settlement and may, instead, simply review the requirements, the fiduciary must make an affirmative decision to accept or reject the proposal. Passive acquiescence will not meet the standard.
- The settlement must be reasonable and consider the likelihood of full recovery, the risks and costs of litigation, and the value of foregone claims.
- The terms of the settlement must be no less favorable to the ESOP than comparable arms-length terms and conditions would have been agreed to by unrelated parties under similar circumstances.
- There may not be any evidence of collusion in favor of a party in interest.
- The settlement must be included in a written agreement or consent decree.
- Special rules must be abided by for acceptance of noncash recoveries.
- Record retention requirements must be met for a period of six years.
- Certain other requirements must be included if the settlement includes an extension of credit.

Summary

To the extent a claim for damages or relief might be a plan asset, fiduciaries would be well advised to educate themselves on the requirements of PTE 2003-29. Under the plan asset analysis above, not only are litigation settlements potentially plans assets, but also releases of claims negotiated between a fiduciary and other party in advance of litigation. As private plaintiff causes of action rise and

as fiduciaries seek recompense outside of the expensive and time consuming court system, it may be prudent and worthwhile to undertake the formality of compliance with PTE 2003-29 to avoid later claims of engaging in a prohibited transaction which may expose the fiduciary to further liability without (possibly) an ability to bring in the original bad acting party who has received a release of claims from the retirement plan in question. [E](#)

President's Column

A New Toolbox

By James Bonham, President and CEO, The ESOP Association



I still remember the first personal computer I ever owned. In many ways, that same basic model was the first PC anyone owned – an Apple II. Mine was the fancy Apple IIc that was supposedly portable because it was a little smaller in size and if you unplugged everything and turned it on the side, it had a

flip-handle that made it look like one of the old-fashioned business briefcases, but with a keyboard. That was back in 1984, and Apple had not yet mastered the art of design. But I thought it was amazing.

What that PC could do 35 years ago, as you might imagine, is almost comical compared to what modern computing capabilities are today. And when you think about the great distance we have come as a society in that time – economically, technologically, socially, politically – you can take measure of the magnitude of change we experience in our lives.

There are always moments in our journeys that stand out as pivotal in the truest sense of the word. And when I take a moment to reflect upon the changes being undertaken by the Board of Directors and the professional staff at TEA this year, I expect that 2019 will stand out as one of those pivotal years in the journey of The ESOP Association.

Summer is typically a fairly sleepy time for most Washington, DC trade associations. The rush of spring events and lobbying fly-in days have passed, Congress is generally focused on spending bills and committee work before heading out of town for the Fourth of July and August district work periods, and the crush of fall conferences and budget planning have not yet kicked in. However, this summer is anything but sleepy at TEA headquarters in Washington as we are putting together a

new toolbox to replace the old systems, and technologies, that have been in use in many ways since the beginning of The Association back when that Apple IIc was cutting edge.

Without any doubt, the change being undertaken is necessary operationally (the antiquated phone system has crashed five times since March!). But in my view, far more important than basic operations is the exponential new value TEA will be able to provide back to our members and chapters in programs and services once we are done.

Over the next six months, you will begin to catch glimpses of these new capabilities as we add tools to our toolbox, or replace the tools that are simply worn out and causing problems. At the end of this month we start with new telephony, video conference, and computing technology that will lay the foundation in preparation for our new Association Management System (AMS).

That information technology architecture is receiving its first true overhaul in nearly two decades, and at its core it is the root cause of many of the biggest frustrations I have heard from our membership. It is not a simple process to undertake, and it comes with risk of some level of operational disruption along the way. But that overhaul will enable exciting new online and mobile capabilities for learning, collaboration, and applied research for both TEA and the Employee Ownership Foundation.

Our Chapter leaders will find a robust new set of tools that make it much easier to organize your programs, meetings, and connect with one another.

Corporate members and their employee owners will be able to more easily access useful information, training, education, and collaborate with peers.

Our professional members will be able to better market themselves, and share best practices, stories of success, and most importantly identify opportunity and help to catalyze the growth of ESOPs in America.

And, for the public, we will be able to communicate much more effectively, and broadly, the value of ESOPs to our economy and for employees. That means better advocacy and public policy at all levels of governance will follow.

In the end, The ESOP Association is a service organization with the purpose of facilitating employee ownership. This summer our focus is on rebuilding a toolbox that is modern, robust, and, when put in the hands of creative and

dedicated professionals, will be used to advance employee ownership in ways we can't even imagine today.

It was a hard day when I boxed up that old Apple IIc and took it to the donation center. But I had a new IBM desktop and this company called Microsoft was changing the way we interfaced with computers through a program they called "Windows". It was hard, but change is good and takes us to places we could never even imagine before. [E](#)

Mark Your Calendar

Save the date to make sure you don't miss these world-class gatherings from the ESOP Association

National Events



Employee Owner Retreat

August 7-9, 2019
Double Tree Hotel
Chicago, IL



Employee Owned 2019

November 13-15, 2019
Paris Las Vegas Hotel and Casino
Las Vegas, NV



The Professionals' Forum

February 6-7, 2020
Westin Canal Place
New Orleans, LA



The National Conference

May 21-22, 2020
JW Marriott
Washington, DC



CEO Leadership Program

July 12-17, 2020
University of Pennsylvania
Philadelphia, PA

Regional Conferences

2019 Midwest Conference

Illinois, IA/NE, Minnesota/Dakotas, & Wisconsin Chapters
September 11-13, 2019
DoubleTree by Hilton
Minneapolis, MN

Multi-State Conference

Pennsylvania/Delaware & NY/NJ Chapters
September 18-20, 2019
Kalahari Resort
Pocono Manor, PA

Great Lakes Regional ESOP Conference

Indiana, Michigan & OH/KY Chapters
October 17-18, 2019
Kalahari Resort & Convention Center
Sandusky, OH



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