
TABLE OF CONTENTS

PREFACE.....	V
TABLE OF CASES.....	XXV

PART 1. INTRODUCTION

Chapter 1. Executive Compensation: The Big Picture	3
A. Controversy and Policy Questions	3
1. What Is the Real Issue?	4
2. Agency Issues	5
3. Weaknesses in the Agency Explanation	8
4. The Level and Growth of Executive Compensation	9
5. “Outrage Constraints” (or Lack Thereof).....	10
6. The Ratchet Effect.....	11
7. The Opposing View	12
8. Scale Disparity	14
9. Conclusion	14
B. Defining the Subject: Who Are “Executives?”	15
C. How Much Are Leaders Worth?	16
D. Sources of Regulation	19
Cases and Readings	21
Lucian Bebchuk and Jesse Fried, “Pay without Performance: The Unfulfilled Promise of Executive Compensation”	21
Note.....	30
Question.....	31
Steven N. Kaplan, “The Real Story Behind Executive Pay: The Myth of Crony Capitalism”	31
Note.....	37
Charles M. Yablon, Bonus Questions: Executive Compensation in the Era of Pay for Performance	37
Richard A. Posner, “Are American CEOs Overpaid, and, If So, What If Anything Should Be Done About It?”	42

PART 2. PRELIMINARIES

Chapter 2. Money and Tax Deferral	53
A. The Time Value of Money.....	53
1. The Metaphorical Bank Account.....	53
2. Multiple Years	54
3. Interest Rates	55
4. Multiple Payments	56
B. The Timing of Taxation	57
1. The Effect of Income Taxes.....	57
2. The Prototypical Deferral Situation	59
3. Different Employer and Employee Tax Rates	60
4. Constructive Receipt Doctrine.....	61
5. Economic Benefit Doctrine	61
6. Cash Equivalence Doctrine	63

7. Assignment of Income.....	64
Cases and Readings.....	64
Frank v. Commissioner	64
Note.....	68
Questions.....	68
Revenue Ruling 60–31	68
Notes	73
Question.....	74
Lucas v. Earl	74
Cowden v. Commissioner	75
Notes	80
Chapter 3. Background Regulatory Principles	81
A. Employee Benefit Plans.....	81
1. Retirement Plan Design	81
a. The Traditional Pension Formula.....	82
b. Taxonomy of Retirement Plans: Defined Benefit vs. Defined Contribution Plans.....	83
c. 401(k) Plans	84
Question.....	85
d. Vesting	85
e. Early or Late Retirement.....	87
2. Qualified and Nonqualified Retirement Plans.....	88
3. Qualified Plan Rules.....	89
a. The Anti-Discrimination Rules	89
i. The Minimum Coverage Rule.....	89
ii. Supplementary Rules.....	90
iii. The 401(k) Rules (a Special Case).....	91
b. Aggregate Limits of Section 415.....	91
c. Miscellaneous Other Qualified Plan Rules.....	91
d. Governmental and Nonprofit Employers.....	92
4. Welfare Benefit Plans.....	92
a. Common Types of “Welfare Benefit Plan”	93
i. Health Insurance Plans	93
ii. Life Insurance Plans	93
iii. Disability Plans	94
iv. Accident Plans	94
v. Termination Pay (Severance) Plans.....	94
vi. Fringe Benefits	95
vii. Cafeteria Plans	95
5. ERISA.....	96
a. Overview	96
b. Procedural ERISA Requirements.....	96
i. Written Plan Document	96
ii. Participant Communications.....	96
iii. Form 5500	97
c. Substantive ERISA Requirements.....	97
d. Fiduciary Requirements	98
e. Funding Requirements for Defined Benefit Plans.....	98

- f. ERISA Enforcement and Preemption 98
- B. Securities Regulation..... 99
 - 1. Offers and Sales of Securities..... 99
 - 2. Regulation of Public Companies 100
 - 3. State Regulation..... 101
- C. Federal Taxation of Employers 101
 - 1. Generally 101
 - 2. Tax Accounting and the Matching Principle 102
 - 3. Special Deduction Limits..... 103
 - 4. Reasonable Compensation Rule 103
- Cases and Readings 104
 - Steven A. Sass, “The Promise of Private Pensions” 104
 - Notes 107
 - Benaglia v. Commissioner 108
 - Notes 112
 - David A. Pratt, “Pension Simplification,” from Symposium on
the Future of Employee Benefits Law 112
 - Note..... 114
 - Question..... 114

PART 3. EXECUTIVE COMPENSATION

Chapter 4. Categories and Design of Executive Compensation 119

- A. Characteristic Elements of Executive Compensation 119
 - 1. Bonus Arrangements 120
 - 2. Deferred Compensation 120
 - 3. Stock-Based Compensation 121
 - a. Rationale..... 121
 - b. Types of Stock Awards 122
 - 4. Perquisites 123
 - 5. Contractual Arrangements..... 123
- B. Theories of Compensation Design..... 124
 - 1. “Incentive” Compensation Generally 124
 - 2. Bonuses 125
 - a. Subjectivity: The Vagaries of Performance Evaluation 126
 - b. Objectivity: The Vagaries of Accounting Statements 126
 - 3. Stock and Equity-Based Awards..... 128
- Cases and Readings 129
 - Michael Doran, “The Puzzle of Non-Qualified Retirement Pay:
Optimal Contracting, Managerial Power, and Taxes” 129
 - Note..... 131
 - Frey v. Workhorse Custom Chassis, LLC 131
 - Notes 132
 - Michael Gibbs, “Designing Incentive Plans: New Insights from
Academic Research” 133
 - Fischer Black, “Fact and Fantasy in the Use of Options” 142
 - Notes 146

Chapter 5. Nonqualified Deferred Compensation: Taxation and Regulation	149
A. Design	149
B. Income Tax Treatment	151
1. Section 409A	151
a. Constructive Receipt Revisited	151
b. Enactment of Section 409A	152
c. Definition of “Nonqualified Deferred Compensation”	153
d. Short-Term Deferral Exception	154
e. Fixed Payment Date	155
f. Substantial Risk of Forfeiture	156
g. Rabbi Trust Abuses	156
h. “Specified Employee” Provisions	156
i. Corrections	156
j. Liable Party	157
2. Section 83 and Rabbi Trusts Revisited	157
a. Economic Benefit Doctrine and Section 83	157
b. Rabbi Trusts	157
c. Section 409A Reforms Aimed at Rabbi Trusts	159
d. Participant Investment Direction	159
e. Secular Trusts	160
C. ERISA Treatment	160
1. ERISA Funding Exemptions	160
a. Funding Requirement	160
b. Top-Hat Plans	161
c. “Excess Benefit Plans”	161
d. Severance Plans	162
2. Lack of Forfeiture Protection	162
3. Other Parts of ERISA	163
a. Plan Disputes; Preemption	163
b. Standard of Judicial Review	163
c. Reporting and Disclosure	164
d. Anti-Alienation and Domestic Relations Orders	164
D. Employment and Withholding Tax	164
E. Accounting Issues	166
Cases and Readings	166
Note	179
Demery v. Extebank Deferred Compensation Plan	179
Notes	186
Question	187
Peck v. Selex Systems Integration	187
Notes	192
Comrie v. Ipsco, Inc.	192
Michael Doran, “Time to Start Over on Deferred Compensation”	197
I.R.S. Revenue Procedure 92-64	200

Chapter 6. Equity-Based Compensation: Structure, Taxation and Regulation 211

A. Types of Equity-Based Compensation 211

 1. Outright Grants 211

 2. Stock Options 212

 3. Cash Awards Valued by Reference to Stock 212

B. Tax Treatment 212

 1. Transfers of Property; Section 83 212

 2. Tax Treatment of Options Generally 213

 3. Tax Treatment of Qualified Options 215

 4. Employee Stock Purchase Plans 215

 5. Section 409A and Stock Options 216

 6. Tax Treatment of Cash Awards Valued by Reference to Stock 216

C. Securities Regulation 216

 1. Public Companies Can Register on Form S-8 217

 2. Exemptions Available to Private Companies 217

 a. Regulation D 217

 b. Rule 701 218

 3. Stock Received May Be Restricted 219

D. Shareholder Agreements 219

E. Partnerships and Limited Liability Companies 220

 1. Profits Interests and Capital Interests 221

 2. Awards to Employees 221

 3. Carried Interests 224

F. Accounting Issues 224

 1. Cash Compensation 224

 2. Grants of Stock 224

 3. Options 225

 4. Backdating Scandals 227

Cases and Readings 228

 Crowder Construction Co. v. Kiser 228

 Notes 242

 Diamond v. Commissioner 242

 Campbell v. Commissioner 248

 Question 255

 Revenue Procedure 93-27 256

 Notes 257

 Louisiana Municipal Police Employees Ret. Sys. v. Countrywide Fin. Corp. 257

Chapter 7. Perquisites and Other Forms of Compensation 273

A. Perquisites and Fringe Benefits 273

 1. Flight Benefits 274

 a. Taxation 274

 b. Securities Law Disclosure 275

 c. FAA Rules 277

2.	Other Fringe Benefits	277
a.	Employer-Provided Housing and Other Miscellaneous Benefits	277
b.	Clubs	278
c.	Security Services	279
B.	Health and Life Insurance	279
1.	Employer-Provided Health Insurance	279
a.	History	279
b.	Insurance Features	280
2.	Nondiscrimination Requirements	281
a.	Self-Insured Plans: Code Section 105(h).....	281
b.	Insured Plans: ACA.....	282
3.	Resultant Landscape for Executives.....	283
4.	Life Insurance	283
a.	Tax Rules	284
b.	Split-Dollar Insurance	284
	Cases and Readings	286
	Sherry v. Commissioner	286
	Benaglia v. Commissioner.....	290
	Notes and Questions	294
	Churchill Downs v. Commissioner	295
	In the Matter of Tyson Foods, Inc. and Donald Tyson: Order Instituting Cease-and-Desist Proceedings	302
	Notes	311

Chapter 8. Employment Regulation and Employment

	Agreements	313
A.	Legal Duties in the Absence of Agreement	313
1.	Employment-at-Will Doctrine	314
2.	Employment Discrimination and Other Employee-Protective Laws.....	315
a.	Title VII.....	315
b.	Age Discrimination	315
i.	Overview	316
ii.	Mandatory Retirement for High Executives	316
iii.	Cost-Justification Rule for Benefits	317
iv.	Exceptions for Early Retirement Subsidies.....	317
v.	Waivers	318
c.	Disability Discrimination	318
d.	Other Legal Restrictions.....	319
3.	Employee Duties	319
4.	Employees and Independent Contractors	320
B.	Employment Agreements	321
1.	Basic Elements.....	321
a.	Position and Title	321
b.	Compensation and Benefits.....	321
c.	Severance.....	322
d.	Term.....	322

- 2. Termination Benefits (Severance) 323
 - a. Generally..... 323
 - b. “Cause” 323
 - c. “Good Reason” 323
 - d. Distinguishing Severance Benefits from Deferred Compensation: ERISA and Code Section 409A 323
- 3. Other Terms 324
 - a. Indemnification and Directors’ and Officers’ Insurance 324
 - b. Enforcement; Attorneys’ Fees..... 325
- C. Noncompetition and Other Restrictions 325
 - 1. Enforceability 326
 - 2. Confidentiality; No-Hire Clauses 326
- D. Separation and Release Agreements 327
 - 1. Separation Agreements 327
 - a. Severance Benefits 327
 - b. Restrictive Provisions 327
 - c. Supercession of Existing Agreement/s 328
 - 2. Releases 328
- Cases and Readings 329
 - Lark v. Post-Newsweek Stations 329
 - Notes 337
 - Question..... 337
 - Gollberg v. Bramson Publishing Co. 338
 - Note..... 341
 - Raymond v. Boehringer Ingelheim Pharmaceuticals, Inc. 342
 - Lowndes Prods. v. Brower 347
 - Notes and Questions 352
 - Solari Industries v. Malady 353
 - Notes 361
 - Question..... 362

PART 4. GOVERNANCE AND REGULATION

- Chapter 9. State Business Organization Law 379**
- A. Introduction 379
- B. The Corporate “Business Judgment” Rule 379
 - 1. Background of Rule 379
 - a. Duties of Directors 379
 - b. The Business Judgment Doctrine 380
 - c. Indemnification and Waiver 381
 - 2. Application to Executive Compensation 382
 - 3. Litigation Obstacles Under Delaware Law 382
 - 4. Compensation of Directors Themselves 383
- C. Non-Corporate Entities 383
 - 1. Partnerships 384
 - 2. Limited Liability Companies 385
- Cases and Readings 386
 - In re Citigroup Inc. Shareholder Derivative Litig. 386
 - Notes 391

Espinoza v. Zuckerberg	392
In re Walt Disney Company Derivative Litigation.....	399
Notes	411
Question.....	411
J. Robert Brown, Jr., “The Irrelevance of State Corporate Law in the Governance of Public Companies”	412
Melvin Aron Eisenberg, “The Divergence of Standards of Conduct and Standards of Review in Corporate Law”	419
Seinfeld v. Slager	422
Lilia Volynkova, Note: “ <i>Seinfeld v. Slager</i> : The Delaware Chancery Court’s New Legal Standard for Reviewing Directors’ Decisions About Their Own Pay”	425
Thomas M. Madden, “Do Fiduciary Duties of Managers and Members of Limited Liability Companies Exist as with Majority Shareholders of Closely Held Corporations?”	429
Chapter 10. Public Companies: Regulation and Disclosure	435
A. The Board of Directors and Compensation Committee.....	436
1. Board of Directors	436
2. Compensation Committee	436
B. Federal Securities Regulation.....	439
1. Compensation Disclosure	439
2. Short-Swing and Insider Trading and Reporting	440
3. <i>Ad Hoc</i> Legislation, 2000–2010.....	441
a. Sarbanes-Oxley	442
b. Pension Protection Act of 2006: Executives of Companies with Underfunded Defined Benefit Plans	442
c. Executives of Government-Assisted Companies: TARP and Health Insurance Reform	442
d. The Geithner Principles.....	443
4. Dodd-Frank (Financial Industry Reform of 2010): Compensation Committee Independence, “Say on Pay,” and Claw-Backs.....	443
a. Compensation Committee.....	444
b. Say on Pay	444
c. Claw-Back Rights	444
d. Comparison of Compensation with Financial Performance.....	444
e. CEO Pay Ratio.....	445
5. Corporate Attorney Obligations: “Reporting Up”	446
C. Federal Tax Regulation: Code Section 162(m).....	447
Notes	448
D. Effectiveness of Regulation	449
E. Nongovernmental Regulation	449
1. Accounting	449
2. Shareholder Activism	450
3. Stock Exchange Rules.....	451
Cases and Readings	452
Questions.....	475

Shaev v. Saper.....	476
Question.....	486
I.R.S. Revenue Ruling 2008–13.....	487
Note.....	491
David I. Walker, “The Challenge of Improving the Long-Term Focus of Executive Pay”	491

PART 5. SPECIAL EMPLOYER CATEGORIES

Chapter 11. Government, Nonprofit and Non-U.S. Employers	497
A. Exceptional Tax Rules for Deferred Compensation: Sections 457 and 457A.....	497
1. Section 457.....	498
2. Section 457A.....	500
3. Section 409A Revisited	500
Question.....	501
4. Other Issues for Expatriate Executives.....	501
B. Government Employers.....	502
C. Regulation of Nonprofit Employers	503
1. State Regulation.....	504
a. Not-for-Profit Corporations	504
b. Board of Directors	505
c. Executive Compensation.....	505
d. State Attorney General Enforcement	506
e. Derivative Litigation.....	506
2. Federal Tax Rules	507
a. Loss of Exemption	507
b. “Intermediate Sanctions” (Excise Taxes).....	507
3. Churches.....	508
Cases and Readings.....	509
People v. Grasso	509
Note.....	517
Wooden v. Highmark, Inc.	518
Note.....	523
Consuelo Lauda Kertz, “Executive Compensation Dilemmas in Tax Exempt Organizations: Reasonableness, Comparability, and Disclosure”	523
Notice from Office of the Attorney General, Commonwealth of Massachusetts	526
Henry B. Hansmann, “The Role of Nonprofit Enterprise”	528
Thomas Lee Hazen and Lisa Love Hazen, “Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors’ Fiduciary Duties”	530
Brian Galle and David I. Walker, “Nonprofit Executive Pay as an Agency Problem: Evidence from U.S. Colleges and Universities”	537
Notes	544

Chapter 12. Financial Institutions and Other Specially Regulated Entities	545
A. Financial Institutions	545
1. The Rationale for Special Regulation	545
2. The Dodd-Frank Act	547
3. “Carried Interests” in Investment Funds	549
B. Health Care Providers	550
C. Federal Contractors	551
D. Expatriated Companies	552
Cases and Readings	553
Hampton Rds. Bankshares, Inc. v. Harvard	553
Eric D. Chason, “The Uneasy Case for Deferring Banker Pay”	559
Alan J. Wilensky, “The True Story About the Taxation of Carried Interest”	570
Note	573
Douglas A. Kahn and Jeffrey H. Kahn, “In Defense of the Current Treatment of Carried Interest”	573
Question	575
Note	575

PART 6. TRANSACTIONAL ISSUES

Chapter 13. Executive Compensation in Mergers and Acquisitions	579
A. Agreements in Contemplation of Acquisition: Change of Control and “Stay” Arrangements	579
1. Change of Control Agreements	579
2. Single-Trigger vs. Double-Trigger	580
3. Definition of “Change in Control”	581
4. Section 280G	583
5. “Stay” Bonuses	585
B. Transactional and Negotiating Issues	586
1. Transaction Structure	586
2. Hidden Liabilities; “Due Diligence”	588
3. Representations	589
4. Closing Conditions	590
C. Executive Compensation Transactional Problems	590
1. Current Compensation and Incentive Awards	591
2. Disposition of Executive Options and Other Equity Awards	591
3. Assumption or Supercession of Employment Agreements	592
Cases and Readings	592
Campbell v. Potash Corp. of Saskatchewan	592
Note	602
Question	602
Cline v. Commissioner	602
Question	611
Bruce A. Wolk, “The Golden Parachute Provisions: Time for Repeal?”	611

AT&T Corp. v. Lillis.....	615
Notes	621
INDEX	627