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Beyond the Paycheck: Modern Strategies to Attract and Keep Top Talent

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Employees are the backbone of most organizations, and in today's market, it is increasingly important to be competitive to attract and retain top talent. From a company's perspective, this is a focal point because turnover of key personnel is costly, not only in dollars, including the costs of recruiting and training replacements, but also in the loss of institutional knowledge. Turnover could also trigger key-person provisions in investor or lender documents and—if a company is in the midst of a transaction—delay the deal, all of which affect the bottom line. While companies are becoming more creative in their recruiting and retention tactics, there are many legal considerations associated with how different compensation incentives can be structured, and careful forethought is critical. Failure to design these incentives properly can create tax liabilities and litigation exposure, including claims under the Employee Retirement Income Security Act of 1974.

Employers are struggling to keep talent as the labor market remains competitive. Many employees resist return-to-office mandates and prefer a hybrid environment, so if your business can sustain a hybrid or remote workforce, it is more likely to attract and keep key talent. As part of the hiring process, employers also need to be aware of increasing regulatory headwinds, such as the growing number of states requiring pay transparency in job postings and restricting the use of non-competition covenants or, at a minimum, narrowing when they can apply.

When looking to retain and incentivize a workforce, the paycheck is only the opening bid. The right package depends on a company's life cycle, industry, and ownership structure. What works for a pre-IPO (initial public offering) startup rarely suits a mature public company. Yet a consistent toolkit has emerged across these differences. Below, we examine the arrangements we see most often in practice, the trends shaping them and the issues that general counsel and business leaders should weigh before implementing them.

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Equity and Other Long-Term Incentives

Equity remains the centerpiece of most incentive programs. Depending on the company's stage, awards may take the form of restricted stock, stock options, restricted stock units, or other share-based awards. The type of award is only part of the story; the features attached to it are often what set a company apart.

- **Incentive stock options.** Incentive stock options (ISOs) may be granted only to employees and offer meaningful tax advantages. If the requirements of section 422 of the Internal Revenue Code of 1986, as amended (the Code), are met, no regular income tax, payroll tax, or withholding applies at exercise, and if the shares are held for at least two years from grant and one year from exercise, the entire gain is taxed at long-term capital-gains rates. The catch is that the exercise spread is an alternative minimum tax (AMT) adjustment item, which, to the extent that the AMT applies to an individual, can leave an employee with a significant tax bill on illiquid stock. ISOs are most common at seed, early-stage, and growth-stage companies, particularly in the technology and life-sciences industries, where growth expectations are high and the common stock's value is still low.
- **Early exercise.** Early-stage and technology companies also frequently permit early exercise, allowing option holders to exercise unvested options for restricted stock that vests on the original schedule. For stock options, early exercise paired with a timely section 83(b) election lets the holder recognize income when the spread is small and start the capital-gains holding period sooner. In some markets, notably Silicon Valley, early exercise is viewed as industry standard and we have seen it become a negotiating point in corporate transactions. Companies should note, however, that early-exercised ISOs raise technical complications that, combined with the AMT rules, can produce adverse tax results, so companies should consult with counsel to understand these risks.
- **Extended post-termination exercise periods.** As private companies stay private longer, another trend we saw become popular a few years back is extended post-termination exercise periods (PTEPs) with companies such as Quora and Coinbase as early adopters. Option holders typically have 90 days after termination (other than for death, disability, or cause) to exercise vested options, and holders who have chosen not to exercise to avoid paying tax on illiquid stock may forfeit what was meant to be a key retention tool. To address this, companies are offering extended PTEPs, which can be based on (i) a fixed period (typically one to three years, but up to the option's expiration date), (ii) a graded schedule tied to years of service, or (iii) individual negotiation upon termination. Three cautions are worth noting: ISOs exercised more than three months after termination generally lose their preferential tax treatment, subject to special rules for death and disability; extending the PTEP of an ISO after grant is treated as a new grant and

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may convert it to a nonqualified stock option (NSO); and longer exercise windows increase overhang and cap table complexity.

Phantom Equity

Entities that cannot or prefer not to issue actual stock, including limited liability companies (LLCs), partnerships, S corporations, and closely held C corporations, often turn to phantom equity, which can mimic the economics of ownership without issuing shares. Awards may be full value (paying out based on equity value or a percentage of transaction proceeds) or appreciation-only (paying out based on value above a threshold set at grant, similar to an option-exercise price). Awards may also be subject to vesting or continued employment requirements to incentivize employees to remain with the company. Because phantom equity is essentially a cash bonus, it is taxed as ordinary income without the possibility of capital-gains treatment, and it must be carefully drafted to comply with or be exempt from section 409A of the Code. Noncompliance with section 409A of the Code can result in immediate taxation of the deferred amounts, plus an additional 20 percent federal tax and interest, borne by the employee, which can quickly turn a retention tool into an employee-relations problem. With private-equity firms moving steadily into professional practices, such as medical practices and accounting firms, phantom equity is likely to become an increasingly common tool for rewarding key employees without issuing actual ownership interests.

Retention Bonuses and Clawbacks

Retention bonuses, typically cash (or, less commonly, equity) payable if the employee remains employed through a specified date, are among the most direct short-term retention tools available. Employees value their certainty. For cash bonuses, the payout does not fluctuate with stock value, and cash awards involve no exercise cost, AMT exposure, or liquidity concerns. Companies use them to secure key talent through a transaction, restructuring, or other pivotal time, and the award is typically forfeited if the employee leaves or breaches restrictive covenants before the retention date. Like phantom equity, retention bonuses are generally taxed as ordinary income, and they can require cash at a time when it may be tight.

Retention bonuses are often referred to as “golden handcuffs” because payout is conditioned on the employee remaining continuously employed through the retention date. To maximize retention value, some companies pay the bonus up front, subject to repayment if employment ends before the retention date. Employees prefer this structure, but it carries real risk for the

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employer. Practically, recovering paid amounts without the employee's cooperation is difficult. Legally, states increasingly disfavor these arrangements. New York's Trapped at Work Act, signed by Governor Kathy Hochul on December 19, 2025 (as amended February 13, 2026), takes effect in the next few months, and generally prohibits employers from requiring employees, as a condition of employment, to agree to repay money if employment ends before a stated period. The amended law expressly permits repayment of certain bonuses not tied to specific job performance, but not when an employee is terminated for a reason other than misconduct, or the job's duties or requirements were misrepresented. California prohibits clawbacks of amounts that constitute earned wages, and other states, including Illinois and Massachusetts, have laws that may limit the enforceability of clawbacks. The safer approach is to provide that the bonus is not earned until the retention date and to pay it only then. Any repayment provision should also be reviewed for section 409A compliance.

Change in Control Benefits

For later-stage companies contemplating a sale, change in control benefits, such as deal bonuses, enhanced severance, equity acceleration, COBRA (Consolidated Omnibus Budget Reconciliation Act) subsidies and outplacement services, can keep key employees in place through closing. These benefits may be "single trigger," paid upon the change in control alone, or "double trigger," paid only upon a qualifying termination within a specified window before (typically three to six months) or after (typically 12 to 24 months) the transaction. Single-trigger arrangements are disfavored by investors and by proxy advisors such as Institutional Shareholder Services Inc. and Glass, Lewis & Co. at public companies. Double-trigger arrangements can support retention by protecting employees who experience a qualifying termination in connection with a change in control. The trade-offs are that retention value fades if no transaction materializes, and buyers often treat these payments as transaction expenses that reduce the purchase price. A notable example comes from Elon Musk's acquisition of Twitter, where certain Twitter executives had generous double-trigger severance arrangements, but their entitlement to those benefits became the subject of litigation after they were terminated following the acquisition.

Broad-Based Non-Cash Benefits

Compensation, in whichever form it takes, is only part of the equation. Companies are increasingly using broad-based benefits and perquisites to deliver value without additional cash

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compensation and to reach the entire workforce, not just key employees, to support engagement and culture across the organization. Notable trends include:

- **Remote work.** Flexibility, normalized during the COVID-19 pandemic, remains a valued benefit. Many companies have adopted hybrid schedules, often requiring only three to four days in the office, and remote arrangements are now a frequent point of negotiation, with many employees seeking fully remote positions. Recently, however, the pendulum may have begun to swing back, with Amazon, JPMorgan Chase, and Google among the major employers scaling back on remote work.
- **Fertility, family-planning, and caregiving benefits.** Family-formation and caregiving benefits are among the most visible trends in employee benefits. Offerings include coverage of assisted reproductive technology for medical and elective reasons (including egg freezing), paid parental leave for birthing and non-birthing parents, doula support, adoption and surrogacy assistance, backup childcare, and paid leave to care for ill family members. Employers such as Starbucks, Amazon, and Apple have been at the forefront of this offering. These benefits signal to current and prospective employees that a company values its people beyond the work they perform. Some of these benefits are becoming legal requirements as well. California and Illinois, for example, require certain employers to provide bereavement leave for reproductive loss, such as miscarriage, stillbirth, or an unsuccessful adoption, surrogacy, or fertility treatment; and similar legislation has been proposed in other states, including New Jersey, New York, and North Carolina.
- **Student-loan matching.** With many employees carrying significant student debt, some employers are adopting the student-loan-matching feature of the SECURE 2.0 Act of 2022. For plan years beginning after December 31, 2023, employers may make matching contributions to an employee's 401(k), 403(b), governmental 457(b), or SIMPLE IRA plan based on the employee's qualified student-loan payments, as if those payments were elective deferrals. Employers offering retirement contributions tied to student-loan payments include Abbott Laboratories, Verizon, Chipotle Mexican Grill, Comcast, and eBay, although overall adoption remains modest, in part due to administrative complexity.
- **Health and wellness benefits.** Wellness offerings continue to evolve well beyond the traditional gym stipend to include nutritional counseling, weight-loss programs, biometric wearable devices, expanded mental-health resources and, increasingly, coverage of GLP-1 medications for weight loss. In fact, a 2026 Goldman Sachs Ayco survey found that 54 percent of surveyed employers covered GLP-1s for weight loss for the 2026 plan year. These benefits help employees, and healthier, less-stressed employees miss less work and perform better, benefiting both employees and the company. The downside is that these benefits are costly, can be difficult to scale back without harming morale, and make return on investment challenging to measure.

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Companies use the tools above as the carrot to get employees in the door and keep them there. Another tool is the stick, making it harder for employees to leave by requiring them to sign restrictive covenant agreements, which may include post-employment non-competition covenants and non-solicitation covenants covering employees and clients or customers. Many states have their own laws governing non-competes and non-solicits, so this is not a one-size-fits-all approach. Some states, such as California, generally prohibit employment-related non-competes, although there are certain statutory exceptions that allow non-competes in limited circumstances, while others, like Massachusetts, permit them only in limited circumstances and impose very specific requirements. A number of states, such as Illinois, will enforce a non-compete only if the employee's compensation exceeds a certain threshold. Courts in some states, notably Delaware, are also increasingly unwilling to enforce or blue-pencil (rewrite) overly broad covenants, so care should be taken to draft restrictive covenants narrowly, as overly broad provisions may be found void in their entirety.

Technology is also reshaping how employers recruit and retain talent. Employers are increasingly using automated employment-decision tools to screen, hire, and evaluate potential employees. At the same time, states and localities are responding by passing laws regulating the use of artificial intelligence (AI) in employment and hiring, primarily focused on preventing discrimination and bias, creating accountability, and ensuring transparency. As with restrictive covenants, these rules vary by jurisdiction. Employers using these tools should identify any applicable state or local laws and ensure that they comply with the associated requirements. AI is also changing the other side of the table with more employees using AI to help negotiate their offer letters, employment agreements, separation agreements, and related documents. As a result, employees are becoming savvier about what to ask for, and employers are finding that they must be more flexible and creative than in the past. This can also lengthen the negotiation process.

As this article illustrates, employers face many considerations as they determine how best to attract and retain top talent. This is an ever-shifting landscape, and employers should continue to monitor market trends and developments in the law and consult counsel before implementing new programs. Staying ahead of these developments not only helps employers retain key talent, but also helps the company avoid unnecessary complications in transactions and financing relationships.

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