



# Market Trends 2017/18: Employee Stock Ownership Plans (ESOPs)

A Lexis Practice Advisor® Practice Note by  
Rebecca G. DiStefano and Jeffrey S. Kahn, Greenberg Traurig, P.A.



Rebecca G. DiStefano



Jeffrey S. Kahn

## OVERVIEW

This market trends article covers employee stock ownership plans (ESOPs), which are a combination of a tax qualified retirement plan and a corporate finance tool and addresses recent trends in ESOPs relating to the design and structuring of the transaction, setting the price of the ESOP shares, and governing the post-ESOP company. Although sometimes misunderstood, ESOPs can be a very effective form of exit strategy and corporate succession structure for family-owned and closely-held businesses in the United States.

An ESOP is a form of employee retirement benefit plan governed by the Internal Revenue Code (IRC) and the Employee Retirement Income Security Act of 1974 (ERISA) designed to invest primarily in securities issued by the employee's company, or the sponsoring company. Although an ESOP transaction is not always considered by closely held business owners ready to sell, studies show ESOPs have significant potential to create economic stability, significant retirement benefits for employees, increase corporate growth at the same time while enabling business owners a gradual exit and source of liquidity. Provisions of the IRC give businesses and employees major tax incentives to establish ESOPs.

## DEAL STRUCTURE AND PROCESS

### Benefits of ESOPs

According to the non-profit organization the National Center for Employee Ownership (the NCEO), which tracks economic trends in employee ownership:

- ESOP companies are 25% more likely to stay in business.
- Employee-owners were four times less likely to be laid off during periods of recession.
- Employees in ESOP companies may have greater retirement accounts.
- Wages may be up 5%-12% higher in ESOP companies.

It should also be noted that unlike other defined contribution plans governed by ERISA (like 401(k) plans), retirement benefits under ESOPs are 100% company funded and employees do not invest any of their own funds.

The majority of ESOP companies are not public companies and thus do not file Securities and Exchange Commission (SEC) reports. In view of this lack of ongoing public disclosure, their structures may be less well known than business sold in the public avenue. Due to the ESOP's perceived and actual complexity, the M&A

professional community and the middle-market business sector have often discounted or ignored the potential opportunities offered by an ESOP. Although economic data positively correlates employee-ownership, corporate growth, productivity, and sustainability, recent studies show that ESOP buyouts and stock purchases account for possibly as little as 1% of the business owner exit/M&A market in the United States.

The opportunities afforded by an ESOP may be overlooked in succession planning and exit discussions, due to the lack of knowledge about ESOPs other than by a relatively select group of financial and legal professionals. Given the potential for significant tax efficiencies of the transaction for the sponsoring company, the sellers and employees and the potential for long-term corporate growth, employee retention, and satisfaction, an ESOP should be discussed as an exit strategy alternative in any conversation involving succession planning or a sale.

### **Leveraged ESOP Structure**

The ESOP trustee (Trustee) serves as the buyer, with the often closely-held group of founders, or the company, serving as sellers of the corporate stock, in the typical ESOP transaction. The ESOP Association statistics provide that 75.4% of ESOP-owned companies used a leveraged financing structure, meaning borrowed funds were utilized to acquire employer shares held by the ESOP trust. In a leveraged ESOP purchase, the funds for the Trustee to purchase shares are often borrowed from the company's existing senior lender or a private equity lender, with the selling shareholders providing additional subordinated debt financing of the purchase price through the ESOP trust's issuance of notes in favor of the sellers. The ESOP trust does not have the means to repay the loans to the senior lender, mezzanine lender, or sellers for the purchase of the employer stock other than through internal loans and contributions funded from the sponsoring company. Thus, the company will make cash contributions to the ESOP trust over the life of the loan to enable the ESOP to make principal and interest payments on the funds borrowed to purchase the employer shares. The sponsoring company often later assumes the debt the ESOP trust owes to the selling shareholders through a refinancing of the seller notes. The senior lender releases the purchased shares used as collateral as the debt is repaid and shares are then allocated to the accounts of participating employees over time. This is only one example of a typical leveraged ESOP financing structure. In a non-leveraged ESOP structure, the shares or cash are contributed from the employer company to the ESOP trust.

### **Trends in ESOPs**

ESOP transactions and governance involve specialized processes whose structures and operations must comply with the IRC and ERISA, and the oversight of the Department of Labor (DOL) and the Internal Revenue Service (IRS). Over the last several years as the size of ESOP transactions has increased, some of the processes related to ESOPs have undergone change due to an increase in DOL proceedings against ESOP trustees, private litigation, and intensified DOL reviews of sponsoring employer securities valuations.

### **ESOPs 2017-2018 and Beyond: Recent Statistics**

An advocate of employee ownership, the NCEO estimates there are approximately 6,669 employee stock ownership plans covering around 14 million employees, and holding total assets of an estimated \$1.3 trillion. NCEO further estimates that employees in the United States beneficially control about 8% of corporate equity. Recent data reveals that the slight majority of ESOPs (3,477 companies) are C corporations with the remaining (3,192) as S corporations.

## **Recent Trends in ESOP Structuring**

### **Timeline**

For calendar fiscal year-end companies, many ESOP transactions are third and fourth quarter transactions with closings during December to enable a clean fiscal-year end transition from management ownership to ESOP ownership. Businesses and Sellers can receive significant tax benefits in the year a company implements an ESOP transaction, which also ties into year-end planning.

Ideally, the transaction timeline should provide four to six months (or additional time dependent on complexity) from beginning to end. The timeline begins with initial planning stages, selection of the financial advisory firm to the company which performs financial modeling, the selection of a law firm with ESOP experience, the design of the retirement plan provisions and an independent trustee interview process with a number of candidates and engagement of the trustee. A thorough careful process is very important and requires the allocation of sufficient time to enable the trustee to select its own valuation advisor and legal counsel and to conduct due diligence. Significant time is also needed to design the ESOP, and complete the ESOP transaction.

If the transaction involves a tender offer, corporate restructuring, or other corporate redemption of shares, the timeline should be expanded.

## **DEAL TERMS**

### **Up-tick in 100% owned ESOP Transactions**

There is a recent trend towards implementing a 100% buyout of the selling shareholders by the ESOP either in one stock purchase and/or a stock redemption transaction or in multiple stages over time. One major reason for this trend is that because of the financial magnitude of the complete 100% buyout, there is a greater need for new sources of capital. Private equity firms are becoming more interested in ESOP transactions to provide additional mezzanine capital for larger transactions, and management sellers often participate in junior lending or mezzanine financing through the issuance of debt. The other major reason for the trend towards 100% owned ESOPs is that a subchapter S corporation (S Corp) that is 100% owed by an ESOP will be exempt from paying federal income taxes.

### **Synthetic Equity**

In a typical ESOP transaction, the Trustee is an independent passive investor and must rely on the continuity of current management to run the Company. Retaining key management is thus very important. Management Incentive Plans, providing in some cases stock appreciation rights with deferred cash payouts, are commonly implemented at the time of adoption of the ESOP to provide additional upside to key members of management in 100%-owned structures. These deferred compensation plans are typically granted to both retain key employees and provide incentive for performance in a reasonable percentage tied to outstanding equity on a fully-diluted basis.

### **Warrants in ESOP Transactions**

Redeemable warrants with company-elected call features are most often used to provide sellers additional value for providing debt financing to the transaction. The terms of the warrants should be carefully designed to avoid overly dilutive terms affecting shareholder plan valuations. Providing warrants to selling Shareholders aligns their incentive for company growth with the ESOP and saves the company important cash flow immediately following the closing.

### **Call Right upon Notice of Exercise**

Warrants most often give the ESOP-owned company the ability to call the warrant upon exercise by the warrant holder. The reacquisition of equity by the warrant holder through the exercise of the warrant, although theoretically possible, is generally not intended in typical ESOP structures.

### **Call Right upon Debt Retirement**

The warrants may often contain a right triggered at the time that the Company has repaid in full its senior bank loan. Upon the bank repayment trigger, the Company would have a window of opportunity, for a specified period, to pay the warrant holders in cash the excess of the fair market value of the equity at the time over the warrant strike price.

## **CORPORATE GOVERNANCE TRENDS**

A common misperception of employees (and some members of management) new to the ESOP-owned structure is that the employees, as participants in the plan, will self-govern the company. In reality, the exiting founder and majority shareholder along with the existing management team often continue to manage the company immediately following the sale transaction, while also continuing to participate in governance at the board of directors' level. However, as ESOP companies mature, many companies increase the involvement of employee owners through participation on committees.

### **Essential Governing Board and Committees**

Following the close of the ESOP sale transaction, more formalized corporate governance procedures and practices should be implemented. Although ESOP company governance is dissimilar in many aspects from public company governance the trend is clearly for an increase in governance when compared to the pre-transaction operations of these closely held companies. Conscious design and recruiting for the corporate boards and committees may likely be occurring for the first time in the history of the company, especially in the case of a family-owned business or sole shareholder sale to the ESOP where informality has prevailed (though likely due to necessary resource allocation and without fault of the prior owners).

### **Trustee as Stockholder Representative**

One of the ESOP trustee's primary responsibilities as shareholder representative is voting the ESOP shares to select the ESOP company board of directors. In addition, the trustee, is responsible for managing the assets of the ESOP trust and establishing, based on the recommendation of an independent valuation advisor, the annual ESOP stock price.

The legal landscape is shifting toward the ESOP trustee negotiating additional contractual provisions to facilitate expanded involvement and discretion in the election of directors including the ability to nominate director candidates. Whether trustees will in practice exercise such discretion and interact in the annual meeting elections process remains to be seen.

### **Board of Directors' Composition**

Use of independent or outside directors on ESOP boards has been required for some time by trustees by contractual provisions. Although not a new concept, increasing the use or number of outside directors on the ESOP company board may be gaining favor generally in view of recent DOL and private class action litigation further discussed in this article. Outside directors with no family relationship with former management or employment history with the ESOP company will be viewed more favorably by the DOL during an ESOP investigation. An outside director will likely be most effective if they are experienced or familiar in the ESOP

company's specific industry. The independent director should, support the concept of an employee-owned company. Independent directors enhance the credibility of boards and build trust among the management and employee constituents, providing additional resources to the corporate boards overall.

### **ESOP Committee**

The ESOP committee may consist of members of the board of directors and non-board members of management. In some cases, however, state corporate statutes addressing committee composition and formation may not allow non-board members to serve on or cast votes on a committee of the board.

The ESOP committee may initially include sellers of securities to the ESOP and will ideally include the board member closest to the corporate treasury and financial department with a reasonable understanding the inner-workings of the ESOP. The committee should also include a board member with an open line of communications with the human resources department and rapport with plan participants generally. The ESOP committee is often the Plan Administrator (a requirement under ERISA) thereby having plan operation duties and other responsibilities as outlined in guidelines or a charter which vary by company. Most often, they include the responsibility for delivery of a summary description of the plan, an annual report on account balances, and reports on amendments to the plan, and completing the annual government filing (Form 5500). The ESOP Committee is also usually responsible for communications to plan participants and employees' introduction and orientation to the ownership plan.

In practice, the ESOP committee is the board's and executive management governing body interacting on an ongoing basis with the plan participants. Thus, the members of this committee are vital to the existence of the ownership structure.

### **Compensation Committee**

There is also a trend for Boards of ESOP companies to create compensation committees. The compensation committee of the board of directors in many ESOP structures is a contractual requirement imposed by the trustee in a shareholders' agreement among the ESOP trustee, the sponsoring company, and the company sellers. The committee is commonly charged with managing an incentive plan, the sellers' future compensation, and the management team's compensation in a manner that ensures that executive compensation is reasonable and aligns the executive team and the plan participants to maximize share value.

Members of the compensation committee are usually members of the full board tasked with compensatory decision making. Consideration should be given to inclusion of independent, non-executive management members on this committee. Independent members of the compensation committee will be viewed more favorably by the DOL and may also satisfy lending requirements.

### **Nominating Committee and Audit Committee**

The nominating committee and the audit committee are most often formed in public companies filing disclosure reports with the SEC. ESOP companies should also consider forming nominating and audit committees to select candidates enhancing the independence of boards and eliminating conflicts of interest with the past members of management who may continue to hold senior or mezzanine debt. Audit committees in ESOP companies will ideally focus on the ESOP financial reporting requirements under ERISA.

ESOP company nominating and audit committee guidelines and charters are not driven by stock exchange requirements, generally, if the company is not publicly traded. Naming an outside director as chair of the nominating and audit committees, however, will eliminate actual or perceived conflicts of interest.

## **INDUSTRY INSIGHTS**

NCEO publicly available data indicates that while ESOPs are represented in many industries, approximately 50% are in the services (28%) and manufacturing (22%) industries. Other industries notably represented with ESOP plans include finance/insurance/real estate (an aggregate of 17%), construction (11%), wholesale trade (9%), and retail trade (6%).

## **LEGAL AND REGULATORY TRENDS**

### **New Tax Act Considerations**

The Tax Cuts and Jobs Act (115 P.L. 97, 131 Stat. 2054) (the Tax Act) was signed into law by the President on December 22, 2017. Under the Tax Act, the nominal corporate tax rate was reduced to 21 percent for tax years after Dec. 31, 2017, eliminating higher rates up to 35 percent. The Tax Act will have some effects regarding how ESOP companies administer their plans, although the Tax Act did not otherwise make significant changes to the regulation of ESOPs. Most significantly, the Tax Act preserves the ESOP tax exemption for S Corps from income and unrelated business income taxes.

### **Post-Tax Act, More ESOPs May Elect to Remain C Corps or Convert**

The lowered corporate tax rate beginning in 2018 will be beneficial to ESOPs which are C Corps by potentially increasing available cash. A lower C Corp tax rate could result in a greater net profit, assuming other performance metrics are otherwise equal. The greater net profit has the potential to increase the value of the shares owned by the C Corp ESOP and the value of the individual ESOP participants' accounts.

With the Tax Act's lower corporate rate, it is possible that more newly structured ESOP-owned companies are likely to remain a C Corp at the transaction or convert from an S Corp to a C Corp in an attempt to enhance the company's share value while affording IRC Section 1042 tax treatment to shares sold by the company's selling shareholders, where available.

### **Repurchase Obligations Will be Monitored**

The Tax Act's lower corporate tax rate could increase the sponsor company's stock value which, in turn, may affect a company's ESOP repurchase obligation or the requirement that ESOP employee stockholders have their ownership redeemed for cash due to retirement, death, disability, age diversification, and other triggering events. In light of the new tax rate, management may consider whether ESOP repurchase obligation studies will need to be updated to ensure that sufficient cash is available to meet the repurchase obligations to employees.

### **Main Street Employee Ownership Act**

The Main Street Employee Ownership Act was signed by the President on August 13, 2018. This law is a confirmation of strong bi-partisan congressional support for ESOPs. It is designed to make it easier for small companies to use the Small Business Administration (SBA) to finance the transition to ESOP ownership.

### **DOL ESOP Litigation**

During the last several years, the DOL has been involved in litigation scrutinizing valuations of employer securities and fiduciary standards of due diligence in sales to an ESOP. In 2017 alone, the DOL participated in at least 23

proceedings, specifically analyzing and criticizing the valuation of employer securities, which were compiled and summarized by the Plan Benefits Security Division. Further, in the exercise of its oversight, the DOL regularly audits newly-adopted ESOP company books and records and may examine fiduciary independence issues, valuation process issues, and the trustee's engagement in the valuation due diligence process as a determinant for purchase price. For additional information, see [Employer Securities and Real Property ERISA Investment Rules](#).

A challenge for ESOP companies is that the DOL has not issued meaningful regulations or consistent guidance on ESOPs for many years. The closest thing the ESOP community has to such guidance are the DOL's position in litigation or settlement agreements. This was the case in 2014 when the DOL set forth a trustee's proper fiduciary process in its seminal settlement with GreatBanc Trust Company (GreatBanc).

The 2014 settlement between the DOL and GreatBanc became the standard operating procedure for parties in an ESOP sale transaction in which the ESOP is purchasing or selling employer securities that are not publicly traded. The standard procedures are set forth below.

For additional information, see [Employer Securities and Real Property ERISA Investment Rules](#).

### **Hire a Qualified Valuation Advisor**

In all purchase and sale transactions, the ESOP trustee should hire a qualified valuation advisor, prudently investigate the valuation advisor's qualifications; take reasonable steps to determine that the valuation advisor receives complete, accurate, and current information necessary to value the employee securities; and prudently determine that its reliance on the valuation advisor's advice is reasonable before entering into any transaction in reliance on the advice.

### **Document Valuation and Reasonableness**

Under the *GreatBanc* standard, the trustee must request that the valuation advisor document in the valuation reports certain items (including reasonableness of the company's projections) in light of the company's five-year historical averages and the five-year historical averages or medians of peer public companies.

### **Obtain Financial Statements**

The trustee must request the company provide the trustee and valuation advisor with audited unqualified financial statements prepared by a certified public accountant for the preceding five fiscal years. In the event that audited unqualified financial statements are not available for any of the preceding five fiscal years, the trustee must determine whether is advisable to rely on the unaudited or qualified financial statements and the risk posed by such reliance.

### **Ensure no Conflicts of Interest**

The trustee should engage a valuation advisor free from conflicts of interest (i.e., consider the valuation professional's prior engagements for the company undertaking the ESOP transaction). The trustee should prepare a written analysis addressing the reason for selecting the valuation advisor; a list of the valuation advisors the trustee considered and discussion of the qualifications the trustee considered; a list of references checked and discussion of the references' views on the valuation advisors; a summary of any potential valuation advisor's involvement in prior criminal or civil proceedings; and an explanation of the bases for concluding that the trustee's selection of the valuation advisor was prudent.

### **Evaluate the Valuation Report**

The trustee should engage in a fiduciary review process related to documentation of its reliance on the valuation report including comparing the valuation report with the due diligence information in its possession, determining whether conclusions are consistent with the available data and analyses.

### **Restrict Leverage**

The trustee must not cause an ESOP to engage in a leveraged stock purchase under circumstances in which the principal amount of the debt financing the transaction exceeds the fair market value of the stock acquired which that debt, without regard to the interest rate or other terms of the debt used to finance the transaction.

### **Consider Claw-Back Arrangement or Purchase Price Adjustment**

The trustee should consider in its evaluation whether it is appropriate to request a claw-back arrangement or other purchase price adjustment to protect the ESOP against possible adverse consequences in the event of significant corporate events or changed circumstances.

### **Create and Preserve Records**

Finally, under the *GreatBanc* standard, the trustee should create and preserve records of the negotiated transaction to be maintained for a period of six years. These records should include how each member of the trustee's fiduciary committee voted on the proposed transaction and be signed and certified by each member of the voting committee and other trustee personnel who made any material decision in connection with the proposed transaction.

### **Recent Valuation Cases – First Bankers' Trust and Reliance Trust Settlements**

More recently, subsequent to *GreatBanc*, the DOL has continued to express concerns that valuations must not rely on overly aggressive growth projections, which could lead to the employee ownership plan overpaying for shares of employer stock. Four recent DOL settlements with an ESOP trustee have expanded and delineated fiduciary processes, especially with respect to hiring a valuation firm to evaluate the ESOP sponsor's securities, the trustee's due diligence, and analysis of the plan sponsor's business risks and projected financial performance. In 2017, the DOL entered into settlement agreements to resolve three lawsuits with First Bankers Trust Services Inc. (FBTS), the trustee of three ESOP-owned companies alleging that FBTS violated ERISA and breached its fiduciary duties when it approved stock purchases by three ESOPs.

### **Risk Factors Must be Analyzed and Commercially Reasonable Term considered**

As part of the FBTS settlement agreements, the ESOP trustee defendant agreed to pay \$15.75 million to the plans and to design procedures to enhance and ensure proper compliance in the future for handling ESOP transactions, including due diligence procedures. These FBTS settlement agreements provide that in selection and oversight of a valuation advisor the trustee must document the steps it takes to receive complete, accurate, and current information from the valuation advisor. Furthermore, the settlement agreements require (i) additional oversight of the valuation advisor's analysis, (ii) a description of the risks factors and uncertainties facing the ESOP company which could cause the financial performance to fail to meet projections relied on by the valuation advisor, and (iii) an analysis of whether the terms of the ESOP loan are as favorable as the terms of any loan between the company and any executive of the ESOP company made within the two years preceding the transaction.



### **Critical Analysis of Company Projections**

The FBTS settlement agreements require the ESOP trustee to perform additional critical analysis of the company's financial projections, and to request new and reasonable projections from management, or reject the transaction.

### **Additional Due Diligence of Prior Management Transactions**

Further, the FBTS settlement agreement provides the ESOP trustee fiduciary is required to ensure that in the course of due diligence the valuation advisor will obtain information about any transaction by the sellers in company stock and any prior defaults within the past five years by the company under its financing arrangements. The trustee must also obtain management letters and valuation-related information provided to the Internal Revenue Service within the prior five years.

### **Trustee Indemnification**

In September 2018, Reliance Trust Company entered into a Consent Judgment with the DOL (*Acosta v. Reliance Trust Company, Inc.* Civil Action File No.5:17-CV- 00214-D) representing a complete settlement, based on the DOL's claim that the Trust overpaid for ESOP shares in the purchase of Tobacco Rag Processors. The Consent Judgment makes it clear that Reliance cannot seek indemnification from either the ESOP or the Company for any fees or expenses they incurred in defending the litigation or the DOL investigation.

### **Private Litigation**

In addition to DOL enforcement activity, private litigation activity in the past two years has focused on valuation process. In the recent *Constellis* case, *Brundle v. Wilmington Trust N.A.* (E.D. Va. 2017), the district court ruled that the *Constellis* Group employee stock ownership plan overpaid for the private company causing damage to the ESOP for which the trustee was held liable for \$30 million. The district court stressed in its memorandum opinion that ERISA fiduciaries cannot blindly rely on valuation professionals they hire without a significant level of investigation. The court's decision rested on outlined allegations that the ESOP trustee, in this case, did not adequately investigate the ESOP transaction valuation advisor's report and overlooked earlier valuation reports prepared by other advisors and the disparity in stock value between the two reports, thus failing to discharge its duty to ensure that the sale was for "adequate consideration" defined in ERISA as the fair market value of the asset as determined in good faith by the trustee. The trustee in the *Constellis* case has filed an appeal which is pending on the date of this article.

### **Additional Trends in ESOP Transactions**

In the wake of private litigation and enforcement activity alleging that indemnification contracts benefiting trustees are void against public policy under ERISA, there appears to be a decreasing and narrowed use of indemnification provisions for ESOP trustees. It may be the case that an indemnity payment to a trustee for defense costs to settle disputes, where wrongdoing may not be admitted or denied in the settlement, will become the subject of litigation and demanded to be voided. Recent court decisions voiding indemnification clauses have driven an increase in fiduciary insurance liability coverage integrated into transaction documents.

The authors further note there appears to be an increase in use of representation and warranty insurance in ESOP transactions, which may be highly beneficial to both the seller and buyer. This increase may be related to an overall increase and acceptance of this insurance product in acquisitions generally resulting from new insurers entering the market, and more competitive terms. The use of reps and warranties insurance is intended to enable the transaction parties to eliminate the seller indemnity for prolonged periods or altogether, subject to carve-outs for certain types of liabilities including tax liabilities. This insurance can provide a highly streamlined process for the buyer processing claims expeditiously with limited seller involvement.

Finally, there is a trend towards a longer and more detailed trustee selection process also driven by the plaintiff's bar litigation and enforcement activity given that trustees are increasingly litigation targets. Thus, ESOP trustees are currently revisiting their roles with their current ESOP company clients with a view to litigation risk and loss exposure analysis, and ESOP-owned companies are reviewing existing engagements with their trustees reassessing the role and responsibilities the ESOP trustee will play in the company including the appointing and electing members of the board of directors and voting the ESOP shares.

## **MARKET OUTLOOK**

The market outlook for ESOPs is highly favorable as comprehensive studies have in the past and continue to evidence that ESOP companies have a distinct advantage over non-ESOP companies in longer company life cycles, increasing sales, longer employment periods and in providing more employee benefits. The M&A professional community is expected to react and evolve in light of the recent increase in DOL and private litigation in several ways during the latter part of 2018 and beyond. Trustee engagement agreements will likely begin to place additional conditions on the engagement providing the trustee with the limited ability to exercise greater oversight and responsibility even in instances of a directed trustee, and afford the trustee some discretionary decision making in limited circumstances. The trustee will be inclined to more vigorously negotiate indemnification agreements and insurance provisions to the extent allowable within the limits of ERISA and DOL case precedent, although such agreements may not absolve trustees from their fiduciary responsibilities under ERISA by holding trustees harmless from breaches of fiduciary duty. ESOP companies will gradually begin to implement more formalized corporate governance procedures, including more formalized annual meetings and annual meeting documentation. ESOP trustees will become more involved in nominations of board of director members and committee members, while trustee liability insurance coverage will expand to cover potential litigation costs. Specifically, ESOP trustees moving forward will be likely to consider procedures to avoid a contractual ceding of shareholder control and more carefully accept engagements outlining their involvement in the board of director governance, director selection and elections process.

**Rebecca G. DiStefano**

**Shareholder, Greenberg Traurig**

Rebecca G. DiStefano concentrates her practice in the areas of securities regulation, corporate finance, and mergers and acquisitions law and serves on the firm's Blockchain Task Force. Rebecca counsels public and private companies in private placements (including tokenized securities offerings), registrations, and crowdfunding under the JOBS Act of 2012 and the Securities Act of 1933, continuing disclosure requirements of the Securities Exchange Act of 1934, initial and continued listing of securities on the stock exchanges and electronic quotation systems and the creation and organization of non-U.S. regulated pooled investment vehicles including hedge funds, private equity funds, venture capital funds, and funds of funds. Rebecca regularly represents clients in structuring and executing leveraged and non-leveraged ESOP transactions and assists her ESOP clients in corporate governance best practices on an ongoing basis.

**Jeffrey S. Kahn**

**Shareholder, Greenberg Traurig**

Jeffrey S. Kahn is a member of Greenberg Traurig's Global Benefits and Compensation Group and is Co-Chair of the firm's ESOP Practice Group. A member of the New York and Florida Bars and rated AV Preeminent by Martindale-Hubbell with more than 30 years of broad employee benefit experience, his practice focuses on retirement plans and the design and implementation of Employee Stock Ownership Plans (ESOPs). A noted speaker and author, Jeff frequently speaks before professional, charitable, financial, and business audiences on ERISA, ESOPs, and other employee benefit subjects. Jeff is listed in the 2010-2018 editions of *The Best Lawyers in America* in the category of Tax Law.

*Learn more*

**[LEXISNEXIS.COM/PRACTICE-ADVISOR](https://www.lexisnexis.com/practice-advisor)**

This document from Lexis Practice Advisor®, a comprehensive practical guidance resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis®. Lexis Practice Advisor includes coverage of the topics critical to practicing attorneys. For more information or to sign up for a free trial, visit [lexisnexis.com/practice-advisor](https://www.lexisnexis.com/practice-advisor). Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.

