NCEO
NATIONAL CENTER FOR
EMPLOYEE OWNERSHIP

ISSUE HIGHLIGHTS

- Have you heard people saying the number of ESOPs is declining? The real story is more complicated. Take a look at page 3, where we dig deeper into ESOPs, 401(k) plans, acquisitions, and public companies.
- New research examines the 17% of ESOP companies that terminated their plans between 2014 and 2017. See page 4.
- Incentives for ideas often don't work well, but employee-owned Walman has a system that has consistently produced lots of good ideas. See page 6.
- Rosendin Electric First Person: "Ever since I started my career in IT in 1992, I have been looking for a company like Rosendin." Read Peter Jolly's story on page 7.
- How to make acquisitions by ESOPs work better: Read lessons from research and an ESOP holding company on page 8.
- Employee surveys are a useful tool to evaluate CEOs. See a sample survey on page 12.
- Lots of businesses think of themselves as family, but being in an ESOP is more like being in a community. See the "Owners' Page" on page 15.
- Share your expertise with employee-owners nationwide through an NCEO webinar. See the back page for details.

RESOURCES CONTACT SHARE
CASE STUDY OWNERS' PAGE

EMPLOYEE OWNERSHIP REPORT

NOVEMBER–DECEMBER 2019
VOLUME XXXIX, NO. 6

CALIBRE SYSTEMS

Effective Health Care in ESOP Companies

Health care is a major cost for any company, but when employees are owners, the company has extra reason to create and maintain a plan that is good for employee health and company financial performance.

ESOP companies have a wide variety of health care plans. Some self-insure, providing an especially strong incentive to reduce claims. Others have HSA plans that couple high-deductible policies with a contribution of varying sizes by the company to the employee's HSA account. That also can encourage employees to be more careful about healthcare costs. Other companies have more traditional plans, with rates determined in part by company experience. Finding the right balance of plans, and periodically reassessing them, is essential.

Read how CALIBRE Systems handles this on page 5

CASES AND RULINGS

DOL Takes Strong Pro-Employer Stance

Department of Labor Brief in IBM Stock Case Argues Securities Law Rules Should Be the Basis for Whether to Disclose Adverse Information: In an Aug. 18, 2019, amicus brief to the Supreme Court in the case of *Jander v. IBM,* the Department of Labor argued that the proper standard for determining if a fiduciary should disclose insider information affecting company stock in a retirement plan should be what securities law requires.

The brief argued that the case should be remanded to a lower court to make a decision on this basis, rather than, as in prior decisions, about whether disclosure would do more harm than good, the standard most courts have used under *Dudenhoeffer.* The DOL argued that "Absent extraordinary circumstances, ERISA's duty of prudence requires an ESOP fiduciary to publicly disclose inside information only when the securities laws require such a disclosure…Although the parties largely focus on the third consideration—whether a prudent fiduciary could not have concluded that disclosure would do more harm than good—the proper analysis should be informed by the requirements and objectives of the securities laws. The federal securities laws provide a comprehensive scheme of public disclosure rules designed to protect investors…There is no sound reason to adopt a different set of disclosure rules to protect those investors who also happen to be investors through an ESOP, or the ESOP itself. Accordingly, a prudent fiduciary could not rely on ERISA as a basis for declining to disclose

Cases and Rulings continues on page 10

THE NCEO is a self-sustaining nonprofit membership organization that provides practical resources and objective, reliable information on employee stock ownership plans (ESOPs), equity compensation plans, and ownership culture. Our publications, meetings, webinars, and research are designed with you in mind.
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TAKING STOCK

Great Ideas from the Fall ESOP Forum

By Loren Rodgers, ***NCEO Executive Director***

I'm writing this the day after the Fall ESOP Forum, the NCEO's sold-out main fall event. There were some great ideas presented there I wanted to share with everyone.

The event covered topics from the basics to advanced issues to culture, so every participant took something different home with them, but a common theme of the conference was that it allowed people to do something–make a decision, form a plan, avert a problem–that they weren't able to do when they arrived in Salt Lake City.

One piece of advice from a company speaker was to assemble your advisors into a roundtable. Bring your administration firm, your appraiser, your trustee, and your legal advisor together into the same room at the same time, and ask them to help you get ahead of the curve. They all work with other ESOP companies, and they all know your company, so together they can foresee challenges that might be coming down the road and come up with creative, holistic solutions to help you meet them.

An update about progress with implementing the Main Street Employee Ownership Act came in the presentation by Eric Hicklin of Atlantic Capital Bank, who outlined the new loan process by which the Small Business Administration is making loans to support ESOP transactions. He also included case studies, including one company that used an SBA-backed loan plus a seller note to create a 51% ESOP-owned company. He described a second transaction under the new law in which a 100% ESOP-owned company used an SBA-backed loan to refinance an existing loan and help the company manage its repurchase obligation.

Another simple culture insight was to focus on pronouns. Monitoring whether people say "it" or "they" when talking about the company, or whether they say "we" says a lot about how strong a company's ownership culture is.

Another pearl of wisdom is that most companies are not including one key topic in their ESOP education programs: valuation. It's tempting to avoid valuation because it is complex and confidential, but if employee-owners understand how they contribute to profit and how profit changes stock price, then they know how they affect their own financial future. As Will Rodriguez of Vision Point Capital argued in his presentation, "if $1 in profit has a $5 impact on value, and if 500 employees can each save $1,000 per year, in expenses, together they have created $2,500,000 in value."

During the keynote presentation, Daniel Goldstein, the CEO of employee-owned Folience, showed the audience a small blue card that employee-owners there all carry. It's called a "license to act," and it's a written reminder that when people see something that should change at the company, they should act.

Another insight was about financial projections. Companies often stress-test themselves by scenario-testing what happens if they fall far short of their projections, but they should also explore what happens if they far exceed their projections. They should know what dramatic growth will mean for their ability to hire people, to manage the repurchase obligation, and to continue to have stock available for allocation to a much larger work force.

Another simple culture insight was to focus on pronouns. Monitoring whether people say "it" or "they" when talking about the company, or whether they say "we" says a lot about how strong a company's ownership culture is.

A personal heart-felt thank you to everyone who joined us at the Fall ESOP Forum. I learned from you and was inspired by your expertise, passion, and stories. ■

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REPORT

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MEET THE STAFF

Scott Rodrick

Marking 25 years on staff at the NCEO this year, Scott Rodrick is the NCEO's director of publishing and information technology. He designed and created the NCEO's present line of publications and is the author or coauthor of several books. He is an attorney and served at the U.S. Department of Labor before coming to the NCEO. After obtaining a master's degree in music from UCLA, he earned his J.D. from California Western School of Law. In 1994, when there were fewer than 30,000 websites, Scott created the NCEO's first website. ■

RESEARCH

Trends in the Number of ESOPs

The total number of ESOPs has been in slow decline over the past several years, dropping from 7,138 plans in 2010 to 6,660 in 2016 (the most recent year for which reliable data is available from the Department of Labor). But these overall numbers hide key trends in closely held companies that are more encouraging.

Both the number of ESOP participants and the total amount of plan assets have increased despite the drop in the number of plans, and there has been a small increase in the number of private company stand-alone ESOPs. ESOP companies have also been on an acquisition binge, and we think more companies have been sold to an ESOP company than there are new ESOPs each year. Here we take a closer look at the numbers to understand the decline in more detail. We find evidence that the population of ESOPs in private companies is more durable than previously believed.

One likely factor in the drop in ESOPs is the trend toward consolidation in the U.S. economy as a whole. The rising dominance of a few big players in the technology, retail, and telecom industries is well known, but consolidation is a major force in a broad variety of industries. Research by IBISWorld, for example, highlights gas stations, cigarette and tobacco, and medical device manufacturing as industries in which the total number of firms is falling despite revenue growth. 2015 saw the highest dollar amount of merger and acquisition (M&A) activity in history, according to the Institute for Mergers, Acquisitions and Alliances. And the role of smaller businesses in the economy is dwindling: the share of workers employed in businesses with under 50 employees declined from 32.4% in 1989 to 27.4% in 2014, according to census data.

The drop in ESOPs, then, is likely connected to larger trends. But we can learn more by looking at where the decrease is concentrated within the ESOP universe. Separating plans sponsored by private companies from those sponsored by public companies, and separating ESOPs with 401(k) features (KSOPs) from standalone ESOPs, changes the story significantly, as shown in Figure 1.

This data shows that the number of ESOPs in private companies—what many would think of as typical ESOPs—has held close to constant since 2014. The decline in ESOPs has been driven largely by declines in the number of plans in public companies. (Public-company ESOPs make up approximately 10% of all ESOPs.)

Looking at total participants tells a loosely similar story, with a steep decline in the number of participants in standalone ESOPs at public companies but a substantial increase in participants in private-company, standalone ESOP participants.

The recent decline in KSOPs and public company ESOPs (categories that have significant overlap, and even standalone ESOPs are often used to match 401(k) plans) is probably a result of concern about potential litigation exposure over a concentration of stock in retirement plans. That has happened in 401(k) plans even more, with about a third as many offering company stock as did at the peak of this practice in the early 1990s. Litigants have largely failed in court, but companies may have decided the risks are too great.

These numbers should be heartening: ESOPs in private companies appear to be holding steady or growing in number, even as the total number of plans shrinks thanks to sharp declines among publicly traded companies. ■

Note: We include companies and subsidiaries of companies traded on the NYSE, NASDAQ, or AMEX in our classification of public companies. Companies that trade over the counter are not included. We identify public companies using historical tables from NASDAQ and Compustat, and via individual web searches.

FIGURE 1.
Percentage changes in number of ESOPs, 2014–2016

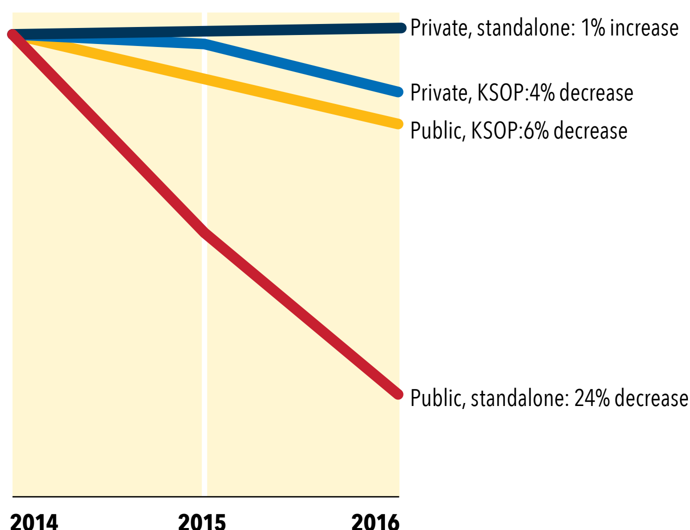
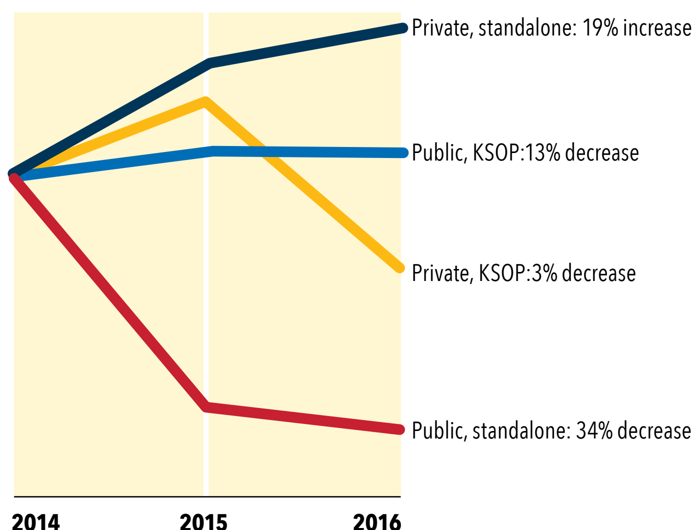


FIGURE 2.
Percentage changes in total ESOP participants, 2014–2016



Patterns in ESOP Terminations

In the article on page 3, we explored what is happening to ESOP numbers overall. A major part of the reason ESOPs are not growing as quickly as many would hope is that plans are terminated. That is true, of course, for all retirement plans as companies are sold, go out of business, or the sponsor decides to eliminate the plan.

New analysis of Form 5500 data over the time period of 2014 to 2017 examines the 17% of ESOP companies that terminated their plans. These plans are smaller than the universe overall, but otherwise not strikingly different.

Beginning with a list of all ESOP companies that filed for their plans in 2014 (6,384), we find that as of the 2017 filing year, 4,924 are still active (77%). Among the rest, 1,061 had terminated (marked the "final filing indicator" on the Form 5500) or have not filed for the ESOP for at least three years. There are 399 plans that can't be determined and will require more investigation into possible name or EIN changes.

Across the 1,061 terminated plans, 10% were publicly traded. The majority were non-leveraged (63%), with 37% leveraged. Most had fewer than 100 participants (75%). Thirty-six percent were S corporation ESOPs.

As shown in Figure 1, companies with terminated ESOPs come from a mix of industries largely in keeping with the breakdown of ESOP companies overall.

FIGURE 1.

Industries of Terminated ESOPs Versus All ESOPs

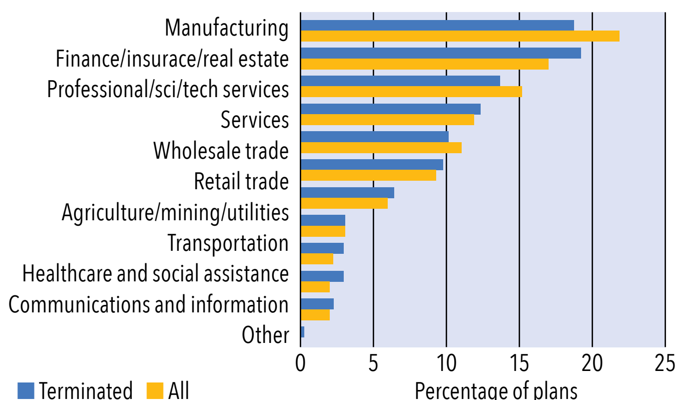


TABLE 1.

CHARACTERISTIC	ALL	TERMINATED PLANS
Publicly traded	10%	10%
Leveraged	46%	37%
KSOP	16%	13%
Large (100 or more participants)	43%	25%
S corporation ESOP	47%	36%

The age of the plans at companies that terminated did not differ markedly from those still active.

TABLE 2.

	ALL PLANS	TERMINATED PLANS
Before 1999	48%	48%
1999 – 2008	33%	36%
2009 – 2014	19%	16%
n	6,383	1,061

Companies with terminated plans did tend to be smaller, with a median number of active participants of 18 compared to 57 among the whole group of ESOP companies. The number of employees impacted by these plan terminations is roughly 508,000 (active participants).

TABLE 3.

	ALL PLANS	TERMINATED PLANS
Median active participants	57	18
Median total participants	80	36
n	6,384	1,061

The data do not tell us why these terminations occur. That is a topic we may turn to in the future. ■

New Survey Shows Gen Z/Millennials in ESOPs More Confident About Retirement

A new report by John Zogby Strategies conducted for the Employee Owned-S Corporations of America (ESCA) provides evidence of the positive impact of ESOPs on younger workers (ages 22 to 40). It comports strongly with research conducted by the NCEO with large sample of younger workers (see *Employee Ownership and Economic Well-Being* at www.ownershipeconomy.org/).

The Zogby report is based on a nationwide sample conducted online of 402 non-ESOP Gen Z/Millennials and a second survey of 203 ESOP Gen Z/Millennials conducted online from employees at ESCA member companies.

They find 59% of Gen Z/Millennials in ESOPs expect to retire sometime between the ages of 55 to 65 compared to just 33% of these younger workers who don't have an ESOP. Moreover, 56 percent of these younger ESOP workers had at least six months' salary saved for retirement, compared to 26% in the comparison group. In addition, 81 percent of younger workers in an ESOP strongly feel they "have a personal stake in the company's success compared to 41 percent among this age group not in an ESOP. ■

Effective Health Care in ESOP Companies

Continued from page 1

At the 2019 annual conference, Laura Giangiuli of CALIBRE Systems talked about how this 900-employee, 100% ESOP-owned management consulting and information technology company has successfully managed its health care system.

Laura Giangiuli

Giangiuli told attendees that the first step is to define your compensation philosophy and how health care fits into it. At CALIBRE, the vision is to cover all locations with the best value for employees and the company, meeting or exceeding market-based expectations. They want to "provide education, tools, and resources to all employees to create engaged healthcare consumers as well as provide best-in-industry benefit plans to establish CALIBRE as an employer of choice."

CALIBRE has done exceptionally well in managing its healthcare outcomes. Its average four-year medical cost trend is -2%/year, and its eight-year is 3.5% year. That compares to an eight-year national trend of 7.0%/year.

More of Giangiuli's advice on how to manage health care follows.

Gathering Data

Gathering good data is the first step. What is the company's overall medical expenditure? How much of it is due to chronic conditions? How many high-cost claims do you have, and how many are ongoing? What is the average cost per claim? How much do you spend on pharmacy costs, and how does that compare to total costs? How much of pharmacy usage is generic drugs?

Assess your loss ratio compared to your vendor's book of business. Look at your top cost drivers and if they are controllable. Drivers include such issues as:

- Ongoing conditions
- Chronic conditions
- Preventable/lifestyle conditions
- Top 10 prescriptions
- Name brand vs. generic drugs
- Mail order vs. monthly prescriptions
- Provider usage (emergency room vs. urgent care, emergency room vs. personal physician visits or telehealth visits).

Finally, assess what your population looks like and how it compares to the national average. How many employees are receiving age/gender specific screenings? Do you have gaps in care? Do you have claims that could have been prevented or minimized through wellness visits or routine care?

Controlling Costs

You should hire a benefit broker who understands your vision, advocates on your behalf, and provides analysis. Identify companies and programs in your community that you can use to benefit or augment a wellness plan or provide services for your employees. Data on how employees use and might use wellness programs can be used to craft an effective program. Identify employee champions who can help drive the program. Consider having onsite health screening programs. Wellness programs often do not work as hoped, so be prepared for trial and error.

As owners, your employees have a stake in health care outcomes. Provide ongoing education to your employees through such things as lunch and learns, interactive decision-making tools, annual plan data, total compensation statements, and annual claims and plan performance data.

A major component of health care costs is lack of preventive care. For a variety of reasons, employees may put off or avoid going to primary care (copays, time, not wanting to hear bad news, etc.). But employees with active primary care relationships experience a 40% lower rate of emergency room service and 33% lower in-patient admissions resulting in a 1% to 3% reduction in total program cost. They also avoid an average of $700 per year in costs for high-risk individuals with diabetes and $2,000 per cardiac patient. About 40% of people prescribed blood pressure medication do not take their medication. So making sure people understand the health and cost implications of this care avoidance is perhaps the biggest potential area for savings.

It is also important to ensure your employees understand their plans and provide open enrollment meetings. Make sure to remove barriers to care through such conveniences as telehealth, mail order prescriptions, etc. These can make it easier for employees to get preventive care before a condition becomes more difficult to manage.

Some key metrics to educate people about include:

- Weight/BMI
- Cholesterol
- Fasting blood sugar
- Thyroid function
- Discuss age/gender-specific screenings
- Mammogram
- Cervical cancer
- Colonoscopy
- Prostate cancer
- Lifestyle/family history risk factors

Of course, healthcare is a very personal issue, and companies need to be sensitive in how this information is conveyed and who conveys it—whether someone in the company or an outside expert.

The collective impact of all these efforts can be substantial, both in health and cost outcomes. In 2015, Giangiuli negotiated a contract that saved $1.4 million on CALIBRE's benefit costs across all plans. This savings allowed CALIBRE to save $400,000 in the annual budget, which in turn let them create and hire sales directors and VP, business development positions, which led to the highest annual sales in the history of the company ($254 million). ■

Incentives for Ideas at Walman

Founded in 1915 and with an ESOP that is over 25 years old, Walman provides diverse products and services to the optical industry, including eye wear, contact lenses, and education. The company is also a distributor of optical instruments and runs a buying group. Walman's 1,100 employees work in 34 locations, with the greatest number in the Brooklyn Park, MN, manufacturing lab, which runs 24 hours.

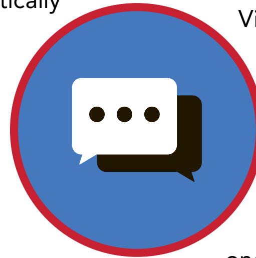
Walman has long focused on getting ideas from its employee-owners. Paying employees for ideas is an old idea itself, and one that research shows often does not work very well, generating a limited number of very limited ideas. But these studies did not look at ESOP companies, where employees have a long-term interest in how the company does, not just a short-term payoff. Placing the incentives within a corporate culture that values employees may also change the motivational context. Walman certainly seems to bear that out.

The New Visions program at Walman, which the company has sponsored for over 25 years, pays employees up to 15% of the profit generated by their suggestions in the first year after implementation. Over 770 ideas have been submitted since the program's inception, and one submitted by veteran employee Doug Kryzer resulted in a $40,000 payout.

The New Visions program provides cash incentives based on simple and clearly defined rules. All employees except company officers and people on leaves of absence are eligible to fill out a one-page suggestion form, indicating the issue being addressed, a solution, and a description of the benefit to the company, including the estimated net savings or profit. The program manual says that eligible suggestions contain all four of the following elements:

- Identifies a problem, a potential problem or an opportunity for the company.
- Presents a solution and potential benefit to the company.
- Identifies where the suggestion has an application.
- The New Visions program form is signed by the suggester(s), includes the suggester's printed name and is received and dated in the New Visions database.

Sketches, photographs of models and copies of proposed form changes, statements of financial benefit to the company, etc., if appropriate, must be attached to the form at the time of submission. Items are automatically ineligible when they concern personnel policies, when they are already being considered, when they have already been submitted, or when they include a problem without a solution. Ideas that conflict with company values, company policy, or the company's legal or contractual obligations are also ineligible. (Companies should consider allowing submissions just to identify problems. Just because someone does not have a solution does not mean that identifying a problem is not an essential first step).



The size of the reward depends on whether the suggestion is tangible or intangible. The program manual defines intangible suggestions as ones that "do not result in direct net savings or net profit, cannot be estimated, but improve employee safety, customer relations, customer service, public relations or working conditions." Tangible rewards are almost uncapped. If a suggestion is adopted, Walman will pay the employee or employees an amount between $50 and $50,000; the actual amount "shall be no more than 15% of the first year's estimated next savings or profit."

If the New Vision committee believes that the size of the savings is uncertain, it may pay the reward in two parts, with the second made after the impact of the suggestion can be observed. Intangible suggestions receive an award based on a point system, up to a maximum of $1,000. In addition, anyone who has submitted an eligible suggestion is entered into a quarterly drawing for $500.

An individual or a group may submit suggestions. If a suggestion is submitted by more than one person, only the first person submitting the suggestion is eligible for a reward. Salaried employees may submit applications, but they will be eligible for a reward only if the suggestion is not related to that employee's responsibilities. Each branch (a branch is a headquarters department or a location outside Minneapolis) has a branch coordinator, who is a non-manager and serves as the liaison for the Employee Ownership Committee and the New Vision committee. The branch coordinator receives a reward equal to 10% of the reward received by the suggester, as long as the coordinator was named on the suggestion form.

An employee fills out the one-page form and hands it in to his or her branch coordinator, who helps the employee improve the idea, if necessary. The suggestion is sent to company headquarters and forwarded anonymously to the New Visions Committee Administrator. The idea is then forwarded to the New Visions Committee, which is composed of non-executive employees. It's important to note that the idea is presented to the committee with the employee's name and any specific branch information removed. The committee finds this integral to the decision-making process. The idea is then researched and vetted, which can sometimes take months. If the idea is adopted, the evaluation committee hands it to a task force responsible for implementing the idea within 45 days. Both the employee and his or her branch coordinator receive letters of acknowledgement at each step in the process. Quarterly communications highlight adopted ideas.

Aside from being an ESOP, the structure of the Walman program succeeds because it has a specific structure that involves research, feedback, and gets non-management employees involved at every stage of the process. It's an incentive system by and for employee-owners. ■

"first person"

Peter Jolly, *IT Helpdesk Manager, Rosendin*

Ever since I started my career in IT in 1992, I have been looking for a company like Rosendin. Growing up, my father instilled a strong work ethic in me, and a loyalty to the company where you work. My father worked for an aircraft manufacturer that was loyal to its employees, and it showed in his attitude and approach to work. As I began my career, I looked for a company like my father's. Sadly, it would take me another 26 years to find it.

I lived in the D.C. metro area, where there were a lot of opportunities in contract positions working for the federal government. I obtained one of these positions and soon discovered that not all companies were like my father's. I quickly learned that there isn't a requirement for companies to care about their employees. It seemed that, to most, you are simply one of many individuals who could be filling the seat. Still, I did well in this environment, learning a lot and excelling in each position. Through time, I noticed that even though the companies that I worked for were not loyal to their employees, the customers we worked for were and, for a time, I was satisfied.

As my career progressed, I moved from D.C. to the San Francisco Bay Area, once again searching for a workplace that I could call home.

In 2018, I came across Rosendin. At the time, I didn't fully understand what "employee owned" meant. After interviewing with Rosendin, I did my research into what it was all about. The more research I did, the more excited I became at the thought of working for this company. When I received my offer for employment, I didn't hesitate to jump at the opportunity.

Working for an employee-owned company is different. When I worked in government contracting, I struggled with the amount of money I saw wasted. My nature is to look out for ways to save a company money, and most employee-owners have this same mindset. Employee-owners are cautious about what is being spent because, ultimately, it's our money that we're spending. At Rosendin, we're aware of the bottom line; we consider what is in the best interest of the company in everything we do. For me, the surprising part isn't the way employee-owners think, but it's the connection that those thoughts and ideas bring to the employees.

Rosendin is a big family, and I'm part of this work family that stretches across the country. I don't know everyone, and I probably will never have the chance to meet each member of my new family. I swell with pride when I meet a new person in our company or see the Rosendin logo on a truck next to me on the interstate. I feel the sense of accomplishment for my part in the work that we do. When we complete a job, I know that in some small way, my Rosendin family and myself were all a part of it.

Words cannot express how proud I am to be one of many Rosendin employee-owners. I hope that in the future when my son begins his career path, that he feels the same passion that I did from my father—the desire to work for a company, like Rosendin, that truly cares and values its employees. ■

On January 1, 2000, the employees purchase the entire company from the Rosendin family, making Rosendin Electric, Inc. an employee-owned company.

"As a 100% employee-owned company our culture is about an environment where everyone can be their best. We care, We listen, We share, We excel, We innovate. These are our core values and we embrace them."

—Tom Sorley
CEO, Rosendin Electric

The NCEO is looking for other stories that put a human face on employee ownership. Please contact Tim Garbinsky (TGarbinsky@nceo.org; 510-208-1310) to learn more.

How to Make an Acquisition by an ESOP Company Successful

At the 2019 annual conference, Suzanne Cromlish, an assistant professor of management at Saint Xavier University, and Tracy Pratt, communications and PR manager of Fusionfarm, a division of ESOP-owned Folience, discussed how to make acquisitions by an ESOP company successful.

In 2017, Cromlish studied ESOP acquisitions for her Ph.D. dissertation at Case Western Reserve University. One, involving 442 ESOP transactions, reported that 95% of survey respondents from both acquiring companies and targets said the transactions were successful. In a follow-up study she did of non-ESOP and ESOP M&A consultants, respondents said that 91% of the ESOP acquisitions met expectations compared to 73% of non-ESOP company acquisitions. Similarly, 43% of the ESOP company acquisitions exceeded expectations while only 23% of the non-ESOP acquisitions did. Studies of acquisitions in general show about half do not meet expectations.

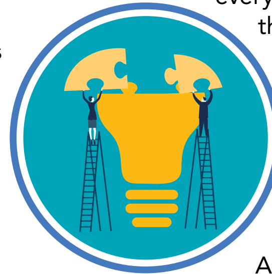
The ESOP acquisitions that failed did so because of a poor choice of target, lack of integration, and overestimating the value of the target. In some cases, key people at the target left, making the acquisition more difficult. The most successful acquisitions had similar high-involvement cultures and shared common values about how employees were treated.

Based on detailed interviews with target and acquiring company executives, Cromlish concluded that the key elements of success were companies that:

- Embrace strategic planning
- Seek shared vision and values
- Share concern for welfare of employees
- Use open-book management strategies
- Embrace open-door communication
- Encourage employee engagement

Practical steps post-acquisition included detailed due diligence, setting up a system for sharing accountability among the target's and acquirer's management, cultural integration, appreciating the emotional impact of the acquisition, and post-acquisition reinvestment.

ESOP companies worked hard to make the acquisitions succeed. They did PowerPoint presentations, held one-on-one meetings with the target company employees, installed hot lines, and set up dedicated contacts to work with across the companies. Target company management was usually retained and trained in the culture of the acquiring company.



Steps to Succeed

The best acquisitions rely on a series of teams to work on integration. Be prepared to spend considerable time on this. The teams should have representation from the target and the acquirer.

Pratt builds communication plans for ESOP acquisitions. She says target company employees will often be apprehensive about being acquired, even when they are now going to become owners. Acquirers need to spend considerable time and resources on educating employees about the acquisition, the new culture, what the acquiring company's expectations are, and what rights employees will have as part of the new company. It is especially important to clarify how the ESOP and other benefit plans will be integrated.

Vendors and customers may also be apprehensive, she says. Taking the time to set up a dedicated team to work with these groups is essential. Similarly, managers need to set up a team to work on strategy and overall integration.

Folience, a 100% ESOP-owned holding company headquatered in Cedar Rapids, Iowa, has done a number of acquisitions. Folience now owns media, manufacturing, and printing companies. Each new company is folded into the ESOP. For instance, in 2018, it acquired Cimarron Trailers, a 135-employee trailer manufacturer in Oklahoma. Pratt met with senior Folience managers and Cimarron managers prior to the rollout to determine how the acquisition would be communicated and to help set priorities for the integration process.

The communication process included a communication playbook that kept everyone on the same page with the same messaging and talking points. A communication schedule kept everyone on track. Handouts and gifted ESOP items gave everyone something tangible to cement that they were now part of a family of owners. A video set the tone for small group discussions and offered an important perspective–peers (not leaders) talking about belonging to an ESOP. External communications included press releases and emails to external audiences. Small group sessions after the announcement kept conversation flowing in a more personal manner.

The Folience/Cimarron acquisition went a lot smoother than previous Folience acquisitions because of planning and effective communication.

Emotions can run high in acquisitions, and employees can become distracted. Leaders knew what to say and when to say it. They were also more conscious of what their audience cared about. Whether it was a group of managers or workers on the manufacturing floor, they were able to customize the message to what employees wanted to hear, which allowed them to engage with greater impact. Knowing that employees might only hear part of the announcement, attention was also given to ensuring they had information they could take home and discuss with families.

Post-acquisition, Folience continues to build a culture of communication among its ESOP companies. Emails from the CEO keep the companies informed at a high level. Newsletters from the Folience ESOP Committee (written by employees from all Folience companies) keep employees informed about ESOP culture and other news. Posts to an internal Facebook group laud member company big wins, employee accomplishments, and other ESOP news.

Effective communication helps people deal with change, and how people deal with change drives business outcomes. ■

The Year in ESOP and 401(k) Company Stock Litigation

The number of new ESOP cases making it to court continued to decline in the period from June 30, 2018, to June 30, 2019, with just 13 new cases. The table below shows the issues that were involved in the cases. Several cases involved more than one issue, so the number does not add to 13. The data are from the NCEO's recently updated annual review, *ESOPs and 401(k) Plan Stock Litigation Review, 1990-2019*.

Valuation	8
Standing	4
Who Is a fiduciary?	3
Indemnification	2
Arbitration	1
Public company stock drop	1
Claims against providers	1
Eligibility	1
Tolling	1

There were also several settlements in cases that had reached court in prior years, all on valuation. None of the ESOP cases broke new ground. Defendants in the valuation cases all either lost or, more commonly, reached settlements, usually for a relatively small fraction of the plaintiffs' claim. As we have reported elsewhere, fewer DOL investigations have been undertaken as well in recent years. Providers differ on how much comfort this provides.

On the 401(k) front, there were just three new cases, all of which favored the defendants, and two appellate decisions of prior cases upholding lower court rulings favoring defendants. Plaintiffs in two different lawsuits over stock in IBM got conflicting judgments from the Second and Sixth Circuits. The Supreme Court has decided to take up the case. If plaintiffs prevail, pleading standards under *Dudenhoeffer* could be expanded.

Following are key decisions in the ESOP cases.

Indemnification

Acosta v. Reliance Trust, No. 0:17-cv-04540- SRN-ECW (D. Minn. Jan. 7, 2019) ruled that Reliance Trust could not bring the estate of a now-deceased owner into a lawsuit in an alleged overvaluation case, even though the seller had agreed to reimburse the ESOP in the case of a judgment on excess valuation.

McMaken v. GreatBanc Trust, No. 1:17-cv-04983 (N.D. Ill. Apr. 3, 2019) ruled that GreatBanc could not dismiss a motion on indemnification even though the plaintiff's value has arguably not been harmed by the valuation.

Plan Operations Issues

HC4, Inc. Employee Stock Ownership Plan v. HC4, Inc, 4:15-CV-872 (S.D. Tex. July 12, 2018) granted summary judgment to HC4, which was sued as the fiduciary for the company's failed ESOP because decisions that were made that drove the company to bankruptcy were made not as a fiduciary, but under the business judgment rule.

Hurtado et al. v. Rainbow Disposal Co., Inc. Employee Stock Ownership Plan, 8:17-cv-01605-JLS-DFM (C.D. Cal, July 9, 2018) refused to grant summary judgment to the executives and ESOP Committee of Rainbow Disposal, as well as GreatBanc Trust and various other individuals in a case involving whether employees should have been able to direct the voting of their shares over a purchase by Rainbow of two other companies. The judge ruled that in an ESOP that owned almost all the stock, it is not possible to say per se that company assets are not plan assets.

Brown v. Wilmington Tr., N.A., No. 3:17-cv-00250 (S.D. Ohio July 8, 2018) ruled that a former employee cannot be forced to go through an arbitration clause regarding her ESOP account.

Vigeant v. Meek, No. 0:18-cv-00577-JNETNL (D. Minn. Nov. 17, 2018) ruled that the actions of the Lifetouch executives in selling the company were reasonable given the financial hardships the photography company experienced in the changing market for its products. The judge also ruled against the argument that Lifetouch stock was too risky to be in a retirement plan.

Cunningham v. Wawa, Inc., No. 2:18-cv-03355-PD (E.D. Pa. Jan. 10, 2019) ruled that employees could pursue a lawsuit against Wawa over changes that required former employees to sell their shares. The judge agreed that the change did not violate the anti-cutback rule, but agreed that plaintiffs had sufficiently alleged a case that a change from stock to cash can, in effect, only be done prospectively.

S Corporatio Issues

Petersen v. Commissioner of Internal Revenue, No. 17-9003 (10th Cir. May 15, 2019) upheld a lower court ruling that an S corporation using accrual accounting must wait until wages are received by an ESOP participant before deducting them.

Tolling

Foster v. Adams & Assocs., Inc., No. 3:18-cv-02723-JSC (N.D. Cal. Feb. 26, 2019) ruled that the tolling period does not begin until employees have actual knowledge of a breach.

Valuation

In *Acosta v. Reliance Trust Co., Inc.*, No. 5:17-cv-00214-D, (E.D.N.C. Sept. 18, 2018), Reliance Trust agreed to pay $4.5 million to settle a DOL lawsuit that alleged the investment banking firm caused the ESOP at Tobacco Rag Processors, Inc., by, among other things, relying on overoptimistic financial projections to approve the company's value.

In *Acosta v. Potts*, No. 2:16-cv-00612-JLG-CMV (S.D. Ohio Oct. 17, 2018), the DOL and Thomas Potts agreed to a settlement of $465,000, pending additional amounts that may be recovered pending litigation with the fiduciary insurer, because the defendants have insufficient funds.

In both *Acosta v. Zander Group Holdings, Inc.*, No. 3:17- cv-01187 (M.D. Tenn., Sept. 10, 2018) and *Acosta v. Saakvitne*, No. 18-2019 BL18093 (D. Haw. Jan. 18, 2019) courts refused to dismiss companies, sellers and companies as fiduciaries because they may have tried to influence the valuation. ■

CASES & RULINGS

HIGHLIGHTS:

- Labor Brief in IBM Case Takes Strong Pro-Employer Stance
- Post-Drop in Share Price Due to Leverage Not a Fiduciary Violation
- ESOP Settlement Decision Contains Detailed Court Explication of Calculation of Damages
- Wawa Granted Appeal in ESOP Case
- Trustee Can't Use Claims Release to Avoid Litigation

Continued from page 1

information that he is required by the securities laws to disclose, and thus for concluding that to do so would do more harm than good to the fund and its participants and beneficiaries. But by the same token, a prudent fiduciary could conclude that not disclosing information that the securities laws do not require him to disclose would be consistent with the objectives of the securities laws, and thus that disclosure would do more harm than good."

This alternative approach would arguably present as stiff or stiffer a challenge for plaintiffs as the "more harm than good" standard. Plaintiffs could prevail, but it would be an uphill battle. The DOL argued that "to be clear, the fact that a prudent ESOP fiduciary without a personal securities-laws obligation to disclose would rarely, if ever, have an ERISA-based personal duty to publicly disclose inside information does not mean that he has no ERISA-based duty to do something in response to inside information suggesting that the employer's stock is not a prudent investment."

Claim Based on Post-ESOP Drop in Shares Due to Leverage is Decisively Rejected: In *Lee v. Argent Trust,* No. 5:19-cv-00156-BO (W.D.N.C., Aug. 7, 2019) a district court ruled that a post-transaction drop in the value of Choate Construction's ESOP stock value from $198 million to $65 million did not indicate a fiduciary violation by the plan's trustee, Argent Trust. The court ruled that the drop was due to the leverage used to buy the shares. The court said the plaintiff was not harmed by the transaction, nor did she allege any additional harm from the post-transaction drop in value. Moreover, the judge said that she "fundamentally misunderstood" the nature of the transaction. The judge wrote that rather than focusing on a simple before and after comparison, "it is better to conceive of this transaction, as defendants have argued, as being comparable to the purchase of a mortgage-financed house" in which the equity value naturally declines.

The strong conclusion is one of the first times a court has specifically ruled that the mere fact that stock value drops after a sale because of leverage is not a fiduciary violation.

$6.5 Million Judgment in Sentry Equipment Case: In *Pizzella v. Vinoskey,* No. 6:16-cv-00062, (W.D. Va., Aug. 2, 2019), a district court imposed a $6.5 million judgment in an ESOP valuation case. An ESOP had bought the remaining shares of Sentry Equipment in the transaction for $21 million. The court ruled that the ESOP trustee, Evolve Bank and Trust, relied on an investigation of the transaction that was "rushed and cursory" because of the desire to close the transaction quickly. Part of the dispute revolved around whether to use a capitalization of earnings method, as was the case here, or discounted cash flow (DCF), which the DOL's expert argued was usually the appropriate standard (generally, which method to use depends on how much past earnings best predict future earnings). The court said that the DCF standard was more common by a "small margin," although it did not suggest the basis for that. The court also disagreed with the control assumptions because, even though the ESOP had 100% ownership, certain elements of the transaction, such as including the prior owners' remaining involvement, reduced the trust's effective control. Other factors included how various costs were calculated and the assumed weighted average cost of capital. The court also said that Evolve showed no evidence that it tried to negotiate the price.

Additionally, the court ruled that the seller, Adam Vinoskey, has co-fiduciary liability because he knowingly participated in Evolve's breach of duty by making no effort to accept a lower price. This appears to be a novel conclusion that could implicate sellers in ESOPs more generally in cases such as this.

The decision contains one of the most elaborate explications of damages in an ESOP case. The judge did not find the DOL's valuation expert's persuasive, and ended up concluding that the co-fiduciaries were responsible for a $6.5 million payment transaction rather than the $11.5 million the DOL sought.

Wawa Gets Appeal of ESOP Case: In *Cunningham v. Wawa, Inc.,* No. 19-8029, (3rd Cir., order granting petition to appeal, Aug. 13, 2019), Wawa convinced an appeals court to review a lower court ruling that certified a class of 1,000 who claimed they were improperly prevented from keeping their Wawa stock until they turned 68. Wawa agreed the employees could challenge the stock price, but not a change in provisions in the plan to move employees out of stock after termination. Wawa argues that the "right-to-hold" claim is a function of how much individuals relied on information provided by Wawa that members of the loss claim were misleading, so only individuals can sue. For instance, one of the plaintiffs admitted that the information did not support the claim.

GreatBanc Can't Use Release to Avoid Fiduciary Litigation: In *McMaken v. GreatBanc Tr. Co.,* No. 1:17-cv-04983 (N.D. Ill., Aug. 21, 2019) a district court ruled that GreatBanc cannot use a release signed by the plaintiff Michael McMaken from claims against Chemonics or any of its fiduciaries when he left the ESOP-owned firm Chemonics. The court ruled that GreatBanc was a fiduciary for the ESOP trust and its reading of the release was too broad. GreatBanc had contended that its status as a fiduciary included being a fiduciary to the company. ■

OWNERSHIP NEWS

HIGHLIGHTS:

- New state employee ownership center
- Bishops endorse employee ownership
- SBA undermining Main Street Employee Ownership Act loan rules
- New fund for employee ownership
- Sanders wants employees to be able to buy newspapers before mergers

North Carolina Employee Ownership Center launches

The North Carolina Employee Ownership Center (NCEOC) has officially opened its doors. Its interim director is longtime NCEO member and frequent speaker Anne Claire Broughton. According to its press release, the "the NCEOC provides education around Employee Stock Ownership Plans (ESOPs), worker cooperatives, and Employee Ownership Trusts (EOTs) as strong exit options that also preserve jobs and community impacts…The Center is the first of many investments expected to be made by the Employee Ownership Expansion Network (EOX), a national nonprofit focused on increasing the number of employee-owned enterprises across the U.S. by seeding and supporting a network of state employee ownership centers using the pilot center in Pennsylvania started in 2016 by the National Center for Employee Ownership as a model." The Democracy at Work Institute and the Industrial Commons also provided initial funding.

Active state centers now exist in Colorado, Massachusetts, New Jersey, Ohio, Vermont, California, and Indiana. Colorado and Massachusetts are supported by state government. Contact Tim Garbinsky in our office at TGarbinsky@nceo.org for more information about state centers and how to encourage them in your state.

U.S. Bishops Council Endorses Employee Ownership

In its annual Labor Day statement, the chairman of the U.S. bishops' Committee on Domestic Justice and Human Development, Bishop Frank J. Dewane of Venice, Florida, pointed to a 1919 bishops statement that strongly endorsed employee ownership.

"In contrast to monopoly power," Dewane said, "employee ownership gives workers access to the fruits of private companies, and in the best instances, gives meaningful ways to participate in management… Recent research has shown the great benefits of employee ownership to workers, including higher wages than otherwise comparable firms, more stable employment, more job training opportunities, opportunities to participate more in firm decision-making, better benefits, and much more wealth over the course of one's career. This holds true for low- and moderate-income workers as well."

The statement is titled "On the Hundredth Year of the United States Bishops' Program of Social Reconstruction."

Mixed Messages on Main Street Employee Ownership Act

Congress passed the Main Street Employee Ownership Act in 2018 to make it easier for ESOPs in small businesses to access SBA loan guarantees. It also directed the SBA and SBDCs to do outreach on ESOPs.

SBA regulations, however, did not follow congressional intent on many issues. The bill was drafted so that the SBA administrator "may, as deemed appropriate" drop a requirement that employees had to provide a minimum percentage of equity for the deal out of their own pocket. The expectation was that the SBA would do this (bills are often written this way with respect to regulatory changes). The law also said that ESOP loans could not qualify for the SBA's preferred lender program, which allows banks in the program to process SBA loan guarantees instead of the company having to go through the cumbersome process of SBA approval. The SBA has set aside a very small number of loans that do not qualify for this program, including ESOPs. The expectation was that that would be changed, but the SBA chose not to retain the requirement that ESOP loans go through the SBA itself.

Next steps in trying to change this are being considered. Let us know if you have had positive or negative experiences with the SBA under the new law.

But all the news is not discouraging. At the NCEO Fall Forum, Eric Hicklin of Atlantic Capital Bank said he has had good success with the new law and the SBA and has been able to process ESOP loans with very favorable outcomes for sellers.

Over Half of Employees Say Stock Plans Matter When Changing Jobs

Over half of the 1,400 employees surveyed by E*Trade say stock plan access was an important consideration when changing jobs. Forty-six percent of baby boomers value the awards compared to about 57% of the three other age groups reporting.

Sanders Wants Employees to Be Able to Bid on Media Companies Before Mergers

In an Aug. 26 editorial in the *Columbia Journalism Review,* Sen. Bernie Sanders said that if elected, his administration would require that "before any future mergers can take place, employees must be given the opportunity to purchase media outlets through employee stock-ownership plans—an innovative business model that was first pioneered in the newspaper industry."

Currently, ESOPs own the *Cedar Rapids Gazette*, the *Dubuque Herald,* and the *Daily Herald* papers in suburban Chicago. The companies also own other media businesses, and, separately, a chain of Midwest radio stations is owned by ESOP-owned Eagle Communications. The first ESOP was set up in 1956 (well before ERISA—it was called a Kelso plan then) at Peninsula Newspaper Group. That company was ultimately sold profitably. An ESOP also owned the *Peoria Journal Star,* which was sold successfully in 1996 when it was unable to fund its repurchase obligation in the face of exceptional growth. For decades, employees also owned the *Omaha World Herald* and the *Milwaukee Journal* through broad-based stock purchase plans. Both papers were ultimately sold. Less happily, an ESOP briefly owned the massive Tribune Company (the *Chicago Tribune, Los Angeles Times,* and many other media outlets), but that deal ended in bankruptcy and the courts, although the employees did not actually lose any money in the deal. ■

Evaluating the CEO in an ESOP Company

By Corey Rosen, *NCEO Founder*

As a board member in a number ESOP companies,* one of the key issues I have worked on is evaluating the CEO, a core task for any board member.

Employee surveys can help in this task. Ideally, the survey is either administered by a third party or by an outside board member. Survey tools like SurveyMonkey can be used and the results sent first only to an outside board member or members. These boards members can then decide whether to share the actual results with other board members and/or the CEO. They may decide only to present the aggregate numbers, the numbers plus a summary of key comments, or the entire set of results. People taking the survey should be told in advance how this will be done. Some employees may be concerned that their comments will be recognized even if anonymous, but my experience shows that people are generally very direct.

Boards need to decide who will get the survey. In a small company, that could be everyone, but it probably does not make sense to ask people who have little if any contact with the CEO to provide feedback. Among the group that does have contact, boards may want to limit the feedback to managers and/or supervisory personnel. A survey size of about 15 actual respondents or more will provide more reliable data and more anonymity for respondents.

CEO evaluations may be sensitive to company financial performance issues the CEO does not in fact control, and outlier comments should be viewed with great caution. The most useful information typically comes from recurring themes, such as whether the CEO is open to new ideas or is not managing problem people.

The board should meet to discuss the results and decide how to present them to the CEO. After the discussion, it often is a good idea for employees who took the survey (and maybe all employees) to be given a summary of how the CEO will act on suggestions that were made. ■

**Fees for Corey's board work are paid to the NCEO to support its activities.*

Sample CEO Survey

The survey below is available to copy in the documents library in the members are of the NCEO web site.

We suggest that each question should be answered with these options:

1. **Performs well above expectations**
2. **Performs above expectations**
3. **Performs at expectations**
4. **Performs below expectations**
5. **Performs well below expectations**

In addition, there should be a **comment box** for each option and a general comment section at the end.

Creating a Vision and Plan for the Company

1. [CEO name] has shown clear vision in correctly anticipating business trends, opportunities, and priorities affecting the company's prosperity and operations.

2. [CEO name] leads the company in setting philosophy that is well understood, widely supported, consistently applied and effectively implemented.

3. [CEO name] has performed as an admirable role model for the organization.

Operations and Structure

4. [CEO name] has accurately identified and analyzed problems and issues confronting the organization.

5. [CEO name] has established an effective organization structure, ensuring that there is management focus on key functions necessary for the organization to align with its mission

6. [CEO name] has organized and delegated work effectively.

7. [CEO name] has accurately supervised performance monitoring and performance control to ensure accountability at all levels of the organization.

8. [CEO name] has achieved the company's financial goals and market share targets.

Organizational Climate

9. [CEO name] is flexible and open to new ideas, welcomes feedback and criticism and manages in a transparent style.

10. [CEO name] has motivated and encouraged high employee morale and loyalty to the organization, and facilitated teambuilding and cohesiveness among the company's employees to achieve the firm's vision.

11. [CEO name] ensures the ESOP culture is effectively communicated.

12. [CEO name] ensures that the company contributes appropriately to the well-being of its community and industry, and represents the company in community and industry affairs.

Strategy and Corporate Performance

13. [CEO name] has achieved the company's financial goals and market share targets.

14. [CEO name] has accurately identified and analyzed problems and issues confronting the organization.

15. [CEO name] leads in developing appropriate strategies for the company and in securing and allocating financial, technical and human resource required for these strategies.

16. [CEO name] ensures the development of a long-term strategy that maximizes opportunities and considers risks; establishes objectives and plans that meet the needs of customers, employees, and all corporate stakeholders.

General Comments

17. Name up to three things you think [CEO name] can improve on in the next year (be as specific as possible).

18. Name up to three things you think [CEO name] and/or the company should focus on that are not necessarily a current focus right now.

19. Additional comments

EMPLOYEE OWNERSHIP Q&A

Q Who sets the pay of board members in an ESOP company? Does the trustee have any role?

A The board determines its own pay. The trustee (especially if it is an outsider) might provide useful input on this but does not make the decision. However, if the pay is egregious, the trustee should object. The trustee would have to sue to block the pay levels, and that can be a hard case to win, but hopefully the discussion on this issue will result in an appropriate level of pay.

Keep in mind that surveys of board pay that are based on public or pre-IPO companies should not be used as comparisons. These companies are not financially comparable. The NCEO or a trade association survey would be more useful. (The NCEO's *2019 ESOP Executive and Board Director Compensation Survey* was released in June. The summary is in the members area; the full report is available for purchase.)

Q Our board is supposed to monitor the trustee in their work overseeing the valuation. How do we do this?

A ESOP company boards do have a fiduciary duty to monitor the trustee's work on overseeing the appraisal process. The trustee should meet with the board after the report is finalized to explain the results, answer questions, and describe the process used to evaluate the report. The NCEO publishes a checklist for an appraisal review by the trustee in the members area document library. You can ask the trustee to fill that out and explain any areas of concern. Trustees in particular should show that they made sure the appraiser was getting accurate and preferably stress-tested financial projections, is using appropriate methodologies and assumptions, and is assessing the effect of the repurchase obligation.

Whether the trustee should provide the report to the board is more controversial. Some trustees insist this is a work product only for them and fear the board might pressure the trustee to make changes, making the board more directly a fiduciary. Most trustees are comfortable with the board seeing at least the key sections of the report, however. Reading the report allows the board to see if there are troubling issues. If so, they should be raised with the trustee, not the appraiser. The board should not lobby for changes, but if it is not satisfied with the trustee's response, it may need to reconsider if the trustee is doing the job properly.

Q If a company has insurance on its key people, can it have the ESOP own this insurance?

A It may seem attractive to have the ESOP buy key-person life insurance and have the ability to pay the premiums with tax-deductible dollars. The ESOP trust is the beneficiary and gets the proceeds upon death of the insured–typically a large account of one or more participants. The proceeds of these policies can be used to buy back stock from highly paid people's accounts if they die. Policies could also be structured to build up cash value inside of the policy to be used to buy back shares from these key people even if they do not die. This is done by "borrowing and surrendering" against the policy build up. This is similar to how corporate-owned life insurance (COLI) is often used.

It is not, however, a good idea for the ESOP to own cash value build up policies, although potentially less problematic to buy term coverage policies. There are multiple complications for an ESOP trustee to take into account when considering this investment decision. It is an investment decision, subject to the prudence standards of ERISA.

First, the ESOP trustee must consider the investment quality of any policy. The DOL has generally taken the position that cash value life insurance is not a good investment relative to other investments due to the cost of the insurance feature. Analyzing the value of an insurance policy as an investment is difficult. The death benefit must be analyzed as being only an "incidental benefit" under the Code, and the rate of return on the money spent on premiums must be compared with alternate, more conventional retirement plan vehicles.

It is true that the insurance feature makes it possible to buy back shares from decedents' accounts, but this is legally the obligation of the company, not the ESOP trust. The trustee must make investment decisions based on what serves the "exclusive benefit" of plan participants as shareholders, not what benefits the company. A trustee might have to decide whether the company appears unable to honor its responsibility before purchasing insurance. The choice of term insurance would have to be evaluated as a risk hedging expense. Once again that is a challenging analysis to support.

Second, if a beneficiary does die, the ESOP trustee must decide to buy back the shares, or recycle the shares within the trust, using the proceeds of the policy. This means the entire trust benefits from the death benefit proceeds, but the liquidity goes into all participants' cash accounts, which then are exchanged for shares of the decedent's account. The ESOP trustee is entitled to simply treat the death benefit as a cash return on investment and leave the company to still buy back the shares. The trustee should not commit in advance to using the policy proceeds to fund repurchase obligation because of price or timing issues. So the company could end up having to repurchase the shares, or it could direct the trustee to buy them, but run the risk of a lawsuit.

Q We are doing a second-stage ESOP transaction and setting up a floor-offset plan to protect people who leave before the debt effect goes away. Does the trustee have to approve? Are there requirements for who must be covered?

A The trustee does not have to approve but should make sure the plan complies with ERISA. There are no minimum requirements for who can be covered. Many companies cover employees over 55 who die, become disabled, or retire within five years, but it could be an older age or even limited to retirement age and/or death or disability. Be sure to discuss the plan with your ESOP attorney and plan administrator and make sure the floor price is adjusted for downturns in stock price that would have occurred absent the debt. ■

COMPANY & MEDIA HIGHLIGHTS

- Dublin, New Hampshire's **Yankee Publishing** has sold 30% to its employees through an ESOP. The owners of the famed publisher of The Old Farmer's Almanac has been family-owned for 84 years and now had 17 concurrent family owners prior to the ESOP, including Jamie Towbridge, Yankee's president and CEO. According to Towbridge, the selling owners were unanimous in selling to an ESOP, saying "The alternative would probably have been to sell the assets off to different buyers, breaking up the company, and perhaps moving pieces elsewhere. That was unacceptable to us. We didn't like the idea of good-paying jobs leaving New Hampshire." The company will continue to sell to its 85 employees over time and is not anticipating a change in management.
- ESOP community stalwart **King Arthur Flour** has announced that it is raising its hourly minimum wage to $15 an hour. This is up from the company's previous minimum wage of $12.50 for seasonal workers, as well as being an increase from the minimum wages of both Vermont and New Hampshire, the two states where the majority of King Arthur's employees reside. Vermont's current minimum wage is $10.78, while New Hampshire's is $7.25.

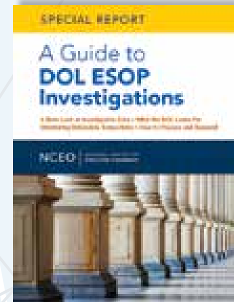
  The raise in minimum wage, which took effect shortly after being announced, includes full-time, part-time, and seasonal workers, and won't result in any reduction of benefits, medical coverage, 401(k) contributions, or profit sharing. Co-CEO and chief human resource officer of King Arthur, and NCEO board member Suzanne McDowell describes the raise as part and parcel of their commitment to their employee-owners, saying "King Arthur Flour is a Certified B Corporation, and we've always been committed to our stakeholders. We've been thinking about (raising entry-level wage) for a while and the timing was right to do it."

  The raise will affect about 20% of King Arthur's 365 current employees, as well as the 30 to 50 seasonal employees the company will add before the holiday season.
- Bowling Green's **Owl's Head Alloys** has begun transitioning to a 100% employee-owned ESOP. President David Bradford described the decision to sell to an ESOP as, in part, strategic, saying "We are very excited to be moving into the next chapter of our company's history in a way that will take our successful business model to a new level. Sharing ownership with employees through our ESOP enhances our strategy of retaining top-talent to serve our customers." Ultimately, Bradford sees the ESOP benefiting all stakeholders, from the company, to the customers, to the employees, saying "The ESOP will allow us to build on our excellent reputation and focus on the career development and stability of our employees. It provides a smooth transition of ownership while also providing individuals an opportunity to build their personal savings. In a market where there is a shortage of talent, more financial security means that our employees can spend more of their energy on offering our customers a superior level of service." ■

NCEO BOOKSHELF

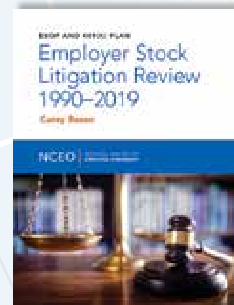
The NCEO is the leading publisher of books and other materials on employee ownership and ownership culture. For a complete listing, plus online ordering, visit us at NCEO.org.

A Guide to DOL ESOP Investigations



This publication provides the first comprehensive analysis of Department of Labor ESOP investigations ever conducted, the result of a multi-year effort by the NCEO to obtain data on these investigations. It also includes a case study illustrating how to make transactions more defensible; remarks by the DOL's Tim Hauser; and a discussion of how much ESOPs are at risk, DOL investigative practices, investigation outcomes, valuation issues, and preparing defensible forecasts. Visit NCEO.org/r/DOLguide for details or to order. (31 pp.)
$50 for members, in print or PDF format

ESOP and 401(k) Plan Employer Stock Litigation Review 1990–2019



This 95-page publication categorizes, describes, and summarizes 377 ESOP lawsuits (317 in private companies and 60 in public companies) between 1990 and 2019. One public company case and 12 private company cases were added for the 2019 edition. The publication also categorizes all the court decisions in 401(k) company stock cases from 1990 through mid-2019 and provides brief summaries for decisions starting in 2010. Appendices discuss the Dudenhoeffer case, plus key elements in recent DOL fiduciary process agreements. Visit NCEO.org/r/litigation for details or to order. (95 pp.)
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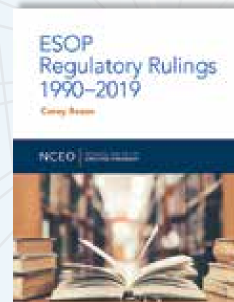
ESOP Regulatory Rulings 1990–2019



Now updated for 2019, this publication provides practitioners and other interested people with a summary of rulings and regulations on ESOPs and related plans. It includes guidance from the IRS and the DOL through IRS private letter rulings (PLRs), DOL advisory opinions, DOL field assistance bulletins, IRS Technical Assistance Memoranda, and similar pronouncements such as the "ESOP Cadre" guidance. The 2019 edition adds an IRS "issue snapshot" and a revenue procedure. Visit NCEO.org/r/rulings for details or to order. (36 pp.)
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OWNERS' PAGE

Employee Ownership as Community

For most employees, especially of large public companies, the company is a collection of individuals. Employee efforts to help the company may help them to get promotions or a bonus, but in most cases have little direct effect on other employees. In fact, often employees compete with one another for job security and advancement.

Many privately owned companies think of themselves as families. Often, these companies have a history of family members being owners, and more often still owners who think of employees as a kind of extended family.

That can be great for employees. It can mean employees are treated with more dignity and respect. But being called a family often does not translate into a culture where employees are provided regular information about how the company is doing, asked to take responsibility for moving the company forward, and provided both a structure and an expectation that they should identify problems and contribute ideas to make that happen.

Becoming an ESOP company changes that. As an employee-owner, you are not part of a family. You are part of a community. You share a common interest with other employee-owners in making sure the company makes money. Your efforts help everyone's accounts grow. By actively participating in sharing ideas and identifying problems, you create a model for other employees to build on, and if lots of you do this, the research shows your company will be far more successful. You also have some rights as a community member. Some of these come from ESOP law. Rules about vesting, how stock is valued, how the trustee has to make sure the plan is operated for the benefit of employees, when you will get a distribution, and what you can vote on are all baked into the law. On top of that, many ESOP companies voluntarily give you additional rights, such as sharing financial information about the company overall and data about how your particular work group is doing and setting up structures where employees can meet to share ideas and make decisions about their work.

As a member of the community, though, you now also have obligations to your co-owners. Doing your job effectively, showing up on time, being engaged at work, and identifying problems and sharing ideas are now part of what you owe to those you work with. Just looking out for your own interests first doesn't work. The highest expectations now may come not from your supervisors, but from your colleagues.

Being part of a community like this can make work enormously better than what it is in most companies. Over the last few decades, people have become more disconnected from communities, whether it is their

neighborhoods, their towns, organizations they belong to, religious groups, PTAs, and more. Back in 2000, a best-seller by Robert Putnam was titled *Bowling Alone.* It described how even then community involvement was fading away. In 2011, Sherry Turkle published another best-seller, *Alone Together,* about the isolating effects of social media. An employee-owned company, however, can be a genuine community of shared interests, goals, and purpose. Research shows that people who are in strong community networks are significantly healthier physically and psychologically. Workplaces that cut down on top-down, do this because I told you so management and replace it with flatter, more high-involvement systems produce similar results.

As an employee-owner, you are also part of a broader community of employee ownership companies. If you have been fortunate enough to go to an employee ownership event, you can see this in action. People enthusiastically share experiences and enthusiasm about what employee ownership can do. Employee ownership companies also are unusually open to helping other companies—even in their industry—learn what has and has not worked for them. For many leaders of employee ownership companies, this becomes a cause, not just a way to do business.

This is especially important in the U.S. today because of concerns from people on all sides that the economy needs to work better for people. The median retirement account for an employee not working for a government agency is 0. That is not a typo. Sixty-one percent of these employees either work for a company with no retirement plan at all or a 401(k) plan in which they do not participate. And most of those who are in a plan won't end up with enough money to retire at a level of income close to what they had when working. ESOP participants do far, far better. While we do not have specific comparable data on ESOPs, there is good reason to believe ESOP companies do a lot better.

That all means that employee-owners are making a real contribution to the larger society by creating a model others can follow—and in so doing, build communities for many millions more people. ■

Member companies are encouraged to share this and other pages with employees.

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