9 Unique Employee Benefits: Stock Options, ESOPs, Etc.

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I. [9.1] SCOPE OF CHAPTER

Gone are the days when employees were simply compensated with cash and uncomplicated employee benefits such as health insurance plans and pensions. Today, the unique forms of employee benefits that were once reserved for executives are commonplace for even entry-level workers. The most striking example of this expansion of different and more complicated forms of employee benefits is stock options. In the last 10 to 15 years, stock options have become a commonplace form of employee benefits and are now a household name as a result of the dot-com boom of the late 1990s and early 2000s. Other complicated forms of employee benefits such as employee stock ownership plans (ESOPs) and deferred compensation have also become more commonplace. It is essential for the family law practitioner to become conversant in the types and characteristics of these various forms of employee benefits and to also design discovery plans that ferret out the existence of these often lucrative benefits.

The purpose of this chapter is to describe and discuss the various types of employee benefits that have become more commonplace, to identify the features of these benefits, and to discuss the best approaches to addressing the division of these assets in the event of a divorce. In addition, this chapter is designed to provide practical assistance to the family law practitioner in quantifying the nature and extent of these benefits through public information as well as formal discovery.

II. STOCK OPTIONS

A. [9.2] Defining Key Terms

A "stock option" is the contractual right to purchase a share of stock in a company at a specified price (the exercise or "strike price") at a certain point in the future (the vesting date) until a date certain (the expiration date). Generally, the strike price, vesting date(s), and expiration date(s) are set at the time of the stock option grant. Stock options typically have a vesting date that is the date on which the stock options can be exercised at some point in the future after the grant or after certain conditions occur (*e.g.,* additional years of continued employment). Once an option becomes exercisable, it is a vested stock option. It is important to identify the grant date for each group of stock options, the schedule based on the conditions set for vesting, the price for which the stock option can be exercised, and the date of the expiration of the stock option.

Stock options commonly fall into two categories: incentive stock options (also referred to as "statutory stock options" or "qualified stock options") and non-qualified stock options (also referred to as "non-statutory options"). It is very important to identify whether a stock option is an incentive stock option or a non-qualified stock option, as the tax implications that result from the granting and exercising of these options differ as discussed further below.

B. [9.3] Stock Options as Marital Property

Prior to the enactment of §503(b)(3) of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, *et seq.,* on January 1, 2002, Illinois case law had held that stock options do not constitute property for the purposes of division in the event of a divorce unless and until the stock options are exercised. In *In re Marriage of Evans,* 85 Ill.2d 523, 426 N.E.2d 854, 55 Ill.Dec. 529 (1981), the Supreme Court held that the employee spouse's right to receive future payments from an employer that were contingent on future events were not property under the meaning of the IMDMA and were not susceptible to being divided. The court's decision was essentially based on the court's conclusion that the non-employee spouse had not presented evidence of the value of the stock options, and so the court was unable to treat the stock options as property and divide them between the parties.

Subsequent cases interpreted *Evans* to hold that stock options were not property and had no value whatsoever until they are exercised by the employee spouse. *In re Marriage of Moody,* 119 Ill.App.3d 1043, 457 N.E.2d 1023, 75 Ill.Dec. 581 (1st Dist. 1983). *See also In re Marriage of Frederick,* 218 Ill.App.3d 533, 578 N.E.2d 612, 161 Ill.Dec. 254 (2d Dist. 1991); *In re Marriage of Isaacs,* 260 Ill.App.3d 423, 632 N.E.2d 228, 198 Ill.Dec. 169 (1st Dist. 1994); *In re Marriage of Peters,* 326 Ill.App.3d 364, 760 N.E.2d 586, 260 Ill.Dec. 169 (2d Dist. 2001). The courts held that the trial court could not place a value on stock options or subject them to immediate division. The court in *Frederick, supra,* held that a court should retain jurisdiction for the purposes of allocating the proceeds from the exercise of stock options when and if the stock options were exercised in the future. 578 N.E.2d at 619 – 620.

IMDMA §503(b)(3) provides that all stock options granted after the marriage and before a judgment for dissolution of marriage, whether they are vested or unvested or whether their value is currently ascertainable, are presumed to be marital property. The marital property presumption can be overcome by showing that the options were acquired by a method listed in IMDMA §503(a) (nonmarital property exceptions). Pursuant to IMDMA §503(b)(3) a court must allocate the stock options between the parties at the time of the dissolution of marriage, even though the value of the stock options may not be then determinable and the division of the stock options may not occur until some future date. In making an allocation of stock options, the court is required to consider, in addition to the factors set forth in IMDMA §503(d), both the circumstances underlying the grant of the stock option (whether the grant was for past, present, or future efforts) and the length of the time from the grant of the option until the option is exercisable.

As IMDMA §503(b)(3) is newly enacted, there is little or no interpretive or illustrative case law with respect to the treatment of partially vested or wholly unvested stock options or restricted stock grants at this time. Since the statute now requires the court to allocate the options at the time of judgment, there must be a determination of a marital portion and then a percent allocation of this portion between spouses. *See Frederick, supra,* for an example of a case in which this methodology was used.

As a practical matter, one would expect that stock options, both vested and unvested, are likely to be addressed by future courts with the application of a *Hunt* style formula. *In re Marriage of Hunt,* 78 Ill.App.3d 653, 397 N.E.2d 511, 34 Ill.Dec. 55 (1st Dist. 1979). In order to allocate certain pension plan benefits when the employed spouse accumulated retirement benefits both before and during the marriage the court in *Hunt* recommended allocating the payments between marital and nonmarital property by multiplying the present value of the payments at the time of the divorce by a fraction whose numerator was the number of months or years of the marriage during which benefits accumulated, and whose denominator was the total number of months or years during which the benefits accrued prior to the divorce. 397 N.E.2d at 519. See discussion of the application of the *Hunt* formula to the division of stock options in Michael W. Kalcheim, *Apportioning Stock Options at Divorce: A Detailed Guide,* 91 Ill.B.J. 454 (2003). See also David S. Rosettenstein, *Options on Divorce: Taxation, Compensation Accountability, and the Need to Look for Holistic Solutions,* 37 Fam.L.Q. 203 (2003).

C. [9.4] Valuation and Division

In most instances, stock options are not assignable or transferable to someone other than the grantee even in the event of a divorce. Because of this, an immediate division of stock options is generally not possible. Alternative mechanisms must be used in order to transfer the benefit of the stock options to a spouse in the event of a divorce. Valuing and providing for the buyout of stock options is generally more practical when the stock options at issue are vested and easy to value, as in the case of stock options granted in a publicly traded company. When stock options are not vested, or a stock's value is not easily determined at the time of the divorce, a reserved jurisdiction approach is generally the most equitable approach to dividing stock options between divorcing spouses.

The valuation and buyout approach mentioned above ascribes a current value to stock options, allocates the options to the employee's spouse, and awards offsetting assets to the non-employee spouse. For example, in the case of a publicly traded security, the current fair market value of the security would be reduced by the cost of the exercise of the option, or the strike price. The resulting value is the gross value, or "intrinsic value," of each stock option. However, generally speaking, the exercise of stock options is a taxable event, and the gross value of the stock options would have to be reduced by the taxes due upon the exercise as discussed further in §9.5 below. This approach to the valuation of division completely disentangles the parties financially on the date of the divorce.

There are other methods for valuing stock options, specifically valuing options that do not have an easily ascertainable value. Various economic models have been developed to value such stock options, such as the Black-Scholes method, which values a stock option based on several components or value indices, including historical data regarding the performance of the stock, the historical valuation of the stock, interest rates, and the length of time until vesting. However, these types of valuation approaches are very complex and generally considered to be very speculative. The valuation approach used by the granting employer may be an appropriate value on which division can be based. It is important that inquiry be made of the employer who has granted a stock option with respect to what, if any, approach is used by the company in valuing the stock options granted to employees.

When a stock option value is not ascertainable or the stock options are unvested, or there are other variables making immediate buyout impractical or impossible, a reserved jurisdiction approach is often used in the division of stock options, and this approach has now been codified by IMDMA §503(b)(3). For example, the employee spouse would hold some portion of the stock options in constructive trust for the benefit of the non-employee spouse until such time as the stock options are vested and/or exercisable. For an example of a case in which such a constructive trust was imposed, *see Callahan v. Callahan,* 142 N.J.Super. 325, 361 A.2d 561 (1976). Upon the vesting of the options, the non-employee spouse would have the right to direct the exercise of the options. In this instance, a specific allocation of certain stock options should be made to the non-employee spouse, and a formula should be developed to assign each party's obligations with respect to the cost of exercise, including the payment of federal and state income taxes incurred as a result of the exercise.

D. [9.5] Tax Implications

To qualify as an incentive stock option, a stock option must meet certain requirements when it is granted and certain requirements during the period the option is held by the optionee until the option is exercised. Prop.Treas.Reg. §1.422-2(a)(1). For options granted before June 10, 2003, see former Prop.Treas.Reg. §1.422A-2(a)(1)(ii). There are no tax consequences to the employee resulting from either the exercise or the grant of a qualified stock option. In addition, the employer has no tax consequence as a result of the grant or exercise of an incentive stock option. More importantly, the resulting gain on the sale of a qualified stock option required as a result of the exercise of the option receives favorable capital gain treatment. While the exercise of a qualified stock option is not a taxable event, the exercise may result in an item of adjustment for alternative minimum tax purposes. However, most stock options are non-qualified stock options, and result in two taxable events: (1) upon the exercise of the stock option, and (2) upon the ultimate sale of the stock acquired by exercising the option. Upon the exercise of non-qualified stock options, an employee will be taxed on the difference between the fair market value of the stock and the strike price. This difference will be taxed as ordinary income and is subject to the applicable federal, state, Social Security, Medicare, and local income tax withholding requirements. The taxation of non-qualified stock options is governed by Internal Revenue Code §83. Upon the ultimate sale of the stock received through the exercise of either a qualified stock option or a non-qualified stock option, the tax basis of a qualified stock option is the original exercise price, while the tax basis for a non-qualified stock option is the fair market value of the non-qualified stock option stock at the time of the exercise of the option.

In May of 2002 the Internal Revenue Service issued a ruling clarifying the tax treatment of stock options and similar deferred compensation incident to a divorce. Rev.Rul. 2002-22, 2002-1 Cum.Bull. 849, addresses both the timing and recognition of gain and the responsibility for tax liability upon the exercise of the option or receipt of the deferred compensation. Rev.Rul. 2002-22 provides generally that the transfer of a qualified stock option or a non-qualified stock option between divorcing spouses is not a taxable event pursuant to §1041 of the Internal Revenue Code. In addition, the Revenue Ruling clarifies that a non-employee spouse who is awarded the ownership rights of the grantee spouse with respect to stock options shall be taxed upon the exercise of stock options and the sale of the resulting stock in the same fashion as the granting spouse.

III. ESOPs

A. [9.6] Defining Terms

A "qualified retirement plan," commonly known as an "employee stock ownership plan" or "ESOP," is another means of awarding stock ownership to employees. An ESOP is a type of qualified retirement plan governed by the Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. No. 93-406, 88 Stat. 829, and has many of the same features of a profit-sharing plan. Essentially, an ESOP borrows on the credit of a company for the purpose of investing in the company's own securities. In some instances a company sets up a trust fund into which it contributes new shares of its own stock or cash to buy existing shares. As plan contributions are made to repay the loan, a number of shares are released and allocated to the individual accounts of the employee participants. Participants usually receive their account balances in cash or in company stock when they terminate their employment. Regardless of how the plan acquires this stock, the shares in the trust fund are allocated to individual employee accounts. Many ESOPs have vesting schedules that require an employee to stay with a company for a period of years before realizing one hundred percent of the value of his or her account. As with stock options and other types of retirement accounts, issues arise with respect to the character of an ESOP interest as marital or nonmarital when the vesting in the plan takes place both prior to and after the marriage.

B. [9.7] Valuation and Division

ESOPs are qualified retirement plans and are therefore subject to qualified domestic relations orders (QDROs) when benefits are divided incident to a divorce. This allows for the direct assignment or transfer of the employee's benefits to the non-employee spouse. When an employee spouse has a vested interest in an ESOP in a publicly traded corporation, the fair market value is generally readily ascertainable. In such cases, the division of the ESOP pursuant to a QDRO can be treated in the same fashion as a defined contribution retirement account. However, when the ESOP interest is in a privately held company, valuing the ESOP interest becomes much more difficult. Private companies that have ESOPs are generally required to have independent valuations of their shares of stocks performed in order to form a basis for buying employees out of ESOPs upon their retirement. Discovery needs to be issued to the granting company in order to ascertain the basis it uses to ascribe value to the participant's ESOP interests.

C. [9.8] Restricted Stock

Typically, employers offer employees grants of rights to their stock at a certain future point based on certain conditions. When grant conditions are satisfied, the employee receives stock, which may or may not have additional restrictions that must be satisfied before the stock becomes marketable. A grant condition may require the employee to complete future years of service or achieve certain goals before restricted stock is issued. Once all conditions are met, the restricted stock becomes marketable or transferable. Plans generally are taxed to the employee at ordinary income rates at the fair market value of the restricted stock when it becomes transferable (corporate culture can also come into play when considering the transferability of this type of stock award as the sale of the stock may be frowned on and could impact the employee spouse's standing within the company). The tax implications of restricted stock grants differ depending on the restrictions and, therefore, it is wise to consult an accountant. If the stock is held and later sold, the transaction would result in a capital gain or loss above or below the value at which the stock became marketable. If a grant of unvested restricted stock occurs before marriage but the stock vests during marriage, or the grant is given during marriage and the actual vesting occurs following a divorce, classifying and dividing the asset raises other issues.

IV. [9.9] DEFERRED COMPENSATION

Employee deferred compensation plans and supplemental executive retirement plans comprise another common class of employee benefits. Generally, deferred compensation plans provide an employee with pretax cash compensation in the future for past, present, or future services. Payouts may be in a lump sum at the end of a term or more often over a period of years in the future. Most supplemental executive retirement plans are similar to defined benefit retirement plans, which begin paying benefits at a certain retirement age and continue for life.

A. [9.10] Marital, Nonmarital, or Contingent Property Right

Several issues may arise in a dissolution of marriage action when an employee spouse has an interest in a deferred compensation plan. The first is whether the employee spouse's rights under the plan are marital, nonmarital, or contingent property rights. The characterization of an employee's interest in these plans depends on the same principles as for stock options. The timing of the marriage, when the deferred compensation was earned, and when the option will be paid must all be considered for a meaningful analysis.

B. [9.11] Valuation and Division of Benefits

The property rights of an employee spouse are difficult to value in some circumstances. Many deferred compensation plans provide for an amount to be paid in certain future years. If these amounts are readily definable, the stream of future payments may be discounted to a present value. Value arguments also must consider the tax implications of when payments are received.

Supplemental executive retirement plans generally are not qualified plans. As such, they cannot be divided by a QDRO. Clearly, the court may compensate the non-employee spouse with an offset of other marital property. A court may also provide a payment based on a formula when the deferred compensation is ultimately received. The drawback to this approach is continued financial entanglement.

If the supplemental executive retirement plan is in pay status during the pendency of the case, most jurisdictions treat plan benefits as property, not income. The employee spouse's company, although not obligated to recognize a QDRO and divide the pretax benefits between the employee spouse and the non-employee spouse, may, nevertheless, agree to do so and provide a separate check to each party on an ongoing basis. As long as the employee treats both payments as one hundred percent taxable to him or her, the employer should have little reservations in providing this service (of course, when this approach is used, the taxes paid by the employee spouse should be factored into the division between the parties). The employer may require a court order similar to a QDRO before voluntarily committing to such terms. Any such order should clearly reflect the employee spouse's tax liability so as not to confuse it with a division under a QDRO.

V. MISCELLANEOUS PERKS AND BENEFITS

A. [9.12] Phantom Stock Plans

A company can provide an employee with certain forms of additional cash compensation, such as phantom stock plans and cash bonus plans. A phantom stock plan ultimately provides an employee with cash in lieu of stock, but the amount is linked to growth in company stock. If a company's stock has risen during the period, the employee receives a cash bonus in the amount the phantom stock has appreciated. The benefit is taxed to the employee at ordinary income tax rates. Other, more traditional bonus plans provide an employee with a cash bonus in addition to the recurring income based on company performance, the individual's performance, and/or other identified factors.

If a phantom stock bonus or cash bonus is not paid to an employee during a divorce case but it is earned by personal efforts expended during the pendency of the divorce, it may be argued that the bonus should be treated as property subject to a percentage division much like stock options or deferred compensation. Phantom stock plans usually are offered only to certain high-level executives and are linked to an increased value of company stock.

Only if the cash bonus is in the form of a guaranteed level of payment can one argue justifiably for a division of the bonus as property. Generally, however, the bonus will be considered a component of the employee spouse's income, which is relevant to his or her ability to pay child support and/or alimony because the bonus is so speculative.

Often cash bonus plans are linked to the employee's performance during a certain period with a component of the company's overall performance. With cash bonus plans, the first step is to quantify the factors on which the level of bonus is calculated. How the cash bonus is calculated and when it will be paid will determine whether the benefit should be treated as additional income to the employee or a current asset subject to division. For high-level executives in publicly traded companies, specific written instruments may set out the anticipated level of the bonus in a separate employment agreement.

Lower-level employees may be entitled to a bonus at their superiors' discretion. In such situations, the attorney in a divorce situation should depose the employee in charge of setting the bonus and gather discoverable information on past bonuses, such as tax returns and the like, which may provide a basis for predicting future bonuses. An employee's pay stubs will show bonuses earned during the year as well as in prior years.

B. [9.13] Life Insurance and Disability Income

Employers routinely offer life, disability, and health insurance to all employees. Generally, life insurance is term and thus has no cash value. The non-employee spouse may attempt to claim insurance proceeds as security for child support, alimony, and other obligations of the employee spouse. Another frequently overlooked benefit is disability insurance, which pays a sum to the employee spouse when he or she is disabled and unable to work. Health insurance may reimburse the employee for some medical, dental, and other expenses and extend similar coverage to his or her dependents.

The employee spouse should be obligated to name the non-employee spouse and/or children as beneficiaries of any life insurance policy to secure various support obligations. In addition, the employee spouse should be obligated to provide a portion of his or her disability payments in the event that he or she is unable to provide adequately for the support of the non-employee spouse and/or children. Disability payments would be paid directly to the employee spouse with the court's judgment or marital settlement agreement providing benefits to the non-employee spouse and/or children.

The terms and conditions of the employees' health insurance plan will help to identify issues of importance to the non-employee spouse and children. Because a non-employee spouse is no longer considered a dependent after the divorce, COBRA provisions of the employees' health insurance policy should be reviewed. The attorney should confirm that the non-employee spouse and children are covered during the pendency of the divorce case. If both spouses are employed and covered by a company health insurance plan, both policies must be analyzed to determine who should cover the children. The nature and extent of health insurance coverage will affect each spouse's obligation to maintain coverage for the children and pay unreimbursed and uninsured medical, dental, psychological, orthodontic, and other expenses.

Following a dissolution of marriage, if a non-employee spouse has difficulties securing benefits, such as reimbursement for medical expenses for the parties' children, the attorney should ask the court to enter a qualified medical support order, which will require the employee's plan to honor and process the non-employee spouse's claims for reimbursement.

C. [9.14] Cafeteria Plans

A "cafeteria plan" or "flexible benefits plan" is a fringe benefit that allows a participant employee spouse to choose among employer-provided taxable and nontaxable benefits. This flexible compensation allows an employee to divert salary to employee benefits on a pretax basis. An employee may then use pretax dollars to pay his or her share of insurance premiums, deductibles, coinsurance payments, or uncovered medical bills. In addition, the employee can set aside money to pay for dependent care expenses, including daycare, which would otherwise be paid with after-tax dollars. Employees generally may choose between one or more benefits on an annual basis. Amounts allocated on a pretax basis for unreimbursed medical expenses, daycare expenses, and the like are forfeited if not used during the plan year.

Before discovering the nature and extent of an employee spouse's cafeteria plan and evaluating its availability, it is important to understand how such benefits will affect the pending divorce, especially if the attorney represents the primary custodial parent. The employee spouse's participation in such a plan will affect his or her income available for alimony or child support. The more pretax income that is diverted for these plans, the lower the employee spouse's income. In addition, the employee spouse's benefit elections will depend on each spouse's obligations to maintain health insurance and pay other expenses for the children, such as unreimbursed medical or dental expenses, orthodontia, psychological expenses, daycare, and the like. Usually in the context of settlement or trial, it is important for the parties and/or the court to understand these benefits so that issues relating to the children and their expenses can be resolved in the most efficient manner.

D. [9.15] Expense Account Reimbursements

Other perquisites include expense accounts that create a personal benefit to the employee, such as reimbursement for the use of a cellular phone, a company car or airplane, club memberships, relocation reimbursement, and cash compensation for unused vacation days.

An employee spouse's use of an expense account impacts a divorce case on many levels. Many employees use personal funds while traveling for business. The employer later reimburses the employee in full or in part. The non-employee spouse's attorney should review an employee's bank account records for these deposits to confirm that reimbursements are not simply accumulated over time, which could result in a considerable amount of undocumented marital money that is not reflected on account statements.

Expenses incurred in selling a home, such as brokerage commissions, capital gains taxes, and moving expenses, may be reimbursed by the employer if the move is business related. If an employee spouse contemplates selling a residence during the pendency of a divorce or soon thereafter, the attorney must identify whether and to what extent costs will be reimbursed. Reimbursements will affect the equity in the home, which ordinarily may be reduced by closing costs. These types of reimbursements generally are taxed to the employee as ordinary income, and some employers provide additional funds to cover anticipated income taxes on them.

E. [9.16] Unused Vacation Days

Additional compensation for unused vacation, sick, and personal days is becoming a popular way to reward employees. This compensation should be added back to the employee spouse's gross income when calculating his or her ability to pay child support or alimony. Unused days that have accrued on or before the date of the parties' dissolution of marriage are benefits that may be divided between the spouses as property if and when they are received.

VI. DISCOVERY STRATEGIES

A. [9.17] Informal Discovery

Your discovery strategy may vary slightly for each specific type of employee benefit, but generally the steps are the same. The first step will be to gather as many relevant documents as possible. Explore informal discovery methods by gathering as much relevant public information as possible. Public companies' annual reports give helpful information about the highest executives as well as general information about employee plans and available benefits.

With respect to stock options specifically, since IMDMA §503(b)(3) requires the court to analyze the option agreement and circumstances underlying the grant, in addition to eliciting testimony from members of the grantor company, gather as much documentation as to the purpose of the grant as possible. Depending on the size of the company, one can anonymously procure annual reports to shareholders, a principal document used by public companies to disclose corporate information, such as the terms and conditions of certain employee benefit plans, including stock option grants. A proxy statement, usually created by the company, is intended to provide stockholders with information to enable them to vote in an informed manner.

The Securities and Exchange Commission (SEC) retains filings made by companies and certain shareholders, which may provide terms and conditions of employee benefit plans. These filings are available upon request from the SEC branch offices or on the Internet at www.edgaronline.com. The Form 10-K is an important SEC report that must be filed within 90 days after the close of the company's fiscal year. The Form 10-K provides a comprehensive overview of the company for the past year, including such information as company history, organization, nature of business, equity holdings, earnings per share, subsidiaries, and other pertinent financial information.

Companies also are required to file a Form 10-Q or quarterly report, which provides a continuing view of the company's financial position throughout the year. The filing is due 45 days after each of the first three fiscal quarters. Companies also are required to submit a Form 11-K, which is an annual report of employee stock purchases, savings, and similar plans. Schedule 13D, known as a "statement of ownership," must be filed with the SEC by any person or persons reporting beneficially owned shares of common stock in a public company. When requesting these documents, be sure to ask for any amendments to these filings.

In instances in which information regarding a company's employee benefits is not published to the public (and even in instances when there is information available to the public), a phone call to the Human Resources Department of the employee spouse's company can often glean a great deal of information. When asking for available forms or sample QDROs for the company's qualified retirement plans, for example, a few follow-up questions about other employee benefits may well be answered.

Informal discovery allows a divorce practitioner to gain an immediate advantage in litigation by gathering information without the notice requirements of formal discovery. Obtaining public information early on educates the attorney, allowing him or her to streamline formal discovery. In addition, informal discovery helps to test the trustworthiness of the employee spouse's subsequent disclosures of assets, liabilities, and income.

B. [9.18] Formal Discovery

Generally, you will begin formal discovery with a request for documents from the employee spouse. To the extent that the employee spouse's responses are incomplete, documents should be procured from the employer or other third parties. A records-only subpoena should be issued first, requesting that documents be produced in lieu of a deposition at which actual sworn testimony is taken. This allows you to analyze the full extent of relevant documents before deciding what, if any, testimony is required. An employee spouse's performance evaluations are often a good source of information about benefits granted to the employee as the benefits are often referenced in the employee's performance reviews as they are granted.

It is helpful to identify a proper deponent for the employer who is knowledgeable about all matters you plan to investigate as early in the process as possible. A subpoena to the employer should request that a knowledgeable employee be designated to provide all pertinent information. There may be some level of discretion on the part of the employer in terms of information provided, such as payment of benefits. If a benefits agreement between the employee and the employer is silent as to certain terms and conditions, consider deposing a key officer or other employees of the company to clarify and expand on information contained in the documents.

To conserve valuable deposition time, informally interview key members of the company to obtain a general overview of benefits whenever possible. An outstanding records-only subpoena may help motivate the employer to cooperate. The informal interview is not the preferred method of discovering information, but it may give you at least a starting point in identifying what additional documents exist and which key individuals to depose.

Generally, each employee benefit is the subject of a particular formal document, copies of which are needed for a full understanding. Examples of employer-generated documents include summary plan descriptions, annual statements of employee benefits, an employee manual, or a schedule describing the employee's right to receive certain benefits. Benefits may be referenced in a written employment contract. When dealing with privately held companies, periodic valuations may be done to help determine the value of benefits that are dependent on the price of the employer shares.

When quantifying health insurance benefits, confirm coverage by procuring the insurance card and identifying the provider, plan type, policy number, and group number. If a non-employee spouse is covered under a spouse's health plan, the necessary information may already be available to the non-employee spouse through the health insurance company, obviating the need for formal discovery.

A cafeteria plan will require an employee to make an annual election of benefits; these forms are routinely discoverable and will explain the nature and extent of the employee spouse's elections. The employer's expense reimbursement forms, canceled reimbursement checks, financial statements, cash disbursement journals, and general ledgers reflect the expense reimbursements paid out to employees. The employee's personal bank account statements may also reflect whether reimbursement checks were actually deposited.

If the spouse is an employee or co-owner of a closely held corporation, he or she is likely to incur expenses that are reimbursed by the company but beneficial to the individual. For example, some employees are reimbursed for expenses associated with a cellular phone, an automobile, club memberships, and/or a company airplane used for business and pleasure. Some jurisdictions recognize that a portion of these expenses should be added back to the employee spouse's net income for purposes of calculating child support and alimony. This add-back is necessary because the employee receives personal benefits that could otherwise be received in cash.

To quantify expenses that are reimbursed by the company, analyze credit card statements (for both personal and corporate cards), expense reimbursement reports, detailed company financial statements (including profit-and-loss statements, cash disbursement journals, general ledgers), flight logs, and any employee manuals or other documents describing the perquisites provided to employees. These documents are discoverable from many sources, including the employee spouse, the employer, the employer's accountant, and the specific financial institution or club. This investigation is particularly important if the employee works for or is an owner of a closely-held corporation because the employee has considerable discretion as to the range of perquisites provided. Usually you will need to depose the employee and a member of the employer company to help quantify personal components of reimbursements.

VII. [9.19] CONCLUSION

A thorough knowledge of common employee benefits is essential to comprehensive discovery. Practitioners should explore informal discovery by gathering as much publicly disseminated information as possible. The Internet is a powerful tool in gathering SEC filings as well as other company information. Informal discovery, however, is no substitute for formal discovery procedures, such as requests for production of documents and depositions.

The following is a list of employee benefits that may be available to an employee spouse:

□ Stock options

□ Restricted stock grants

□ Stock appreciation rights

□ Phantom stock plans and stock options

□ Stock-based bonus or incentive programs

□ Profit-based bonus or incentive programs

□ Performance-based bonus or incentive programs

□ Life insurance

□ Disability insurance

□ Disability income programs

□ Holiday/vacation programs (including payments for unused time off)

□ Childcare benefits and/or subsidized or on-site daycare

□ Transportation and/or parking subsidies

□ Company vehicle

□ Auto lease or purchase programs

□ Health club benefits, on-site and/or subsidized programs

□ Employer-subsidized wellness programs, including weight loss, stop smoking, exercise, stress relief

□ Country club/golf/tennis club memberships

□ Frequent flier miles

□ Sports tickets (baseball, football, etc.)

□ Subsidized cafeteria or meal programs

□ Employer-provided or subsidized CPA, tax, and/or financial planning services

□ Employer-provided or subsidized legal services

□ Employer-provided products or services (*e.g.,* appliances, electronics, security systems, telephone service, etc.)