CEO Divorce: Protecting The Executive And The Company

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Amazon survived the Bezos divorce last year, but the drama showed how executive splits can turn ugly and put their companies at risk.

While every divorce case has its own facts and set of circumstances, the divorce of a high-level executive of a publicly traded company presents unique challenges that ordinary working-class spouses, well-paid professionals and even closely-held business owners seldom face. These cases present complex business, tax, employment and financial issues. There are also issues of public disclosure, privacy, insider information, and SEC issues, just to name a few. The fortunes of the marital enterprise are undoubtedly tied to the executive's employment status. Therefore, both parties have an incentive to negotiate a resolution in a way which does not jeopardize the value of the company, the nature of benefits earned or accruing, or the employment status of the executive.

The Need for Privacy

Among the most important issues that an executive client is most concerned about is privacy. While the filing of a complaint for divorce in court is often one of the first steps toward ending a marriage, the reality of the filing is that it makes the divorce a public matter. This could result in concerns about, and lack of confidence in, the leadership of the company and could therefore indirectly impact the value of the stock. This is unnecessary, as the substantive contested issues, including division of assets, as well as issues of both spousal and child support, can usually be negotiated and agreed upon in advance of the filing of a complaint for divorce. This will often mitigate the risk of any publicity.

It is incumbent on the parties' respective counsel to ensure that the very fact that a divorce negotiation is proceeding must remain confidential, to say nothing of the potential disclosure of any information which might be salacious. This means that internal communications within a law office must be limited to only those individuals who are vital to the case, and the use of the parties' names may even need to be cloaked, depending upon the public persona of the individual. Additionally, in the event that a public disclosure does occur, a plan must be put in place to mitigate any damage that might occur to either the reputation of the executive or his or her company.

The Complexity of Compensation Packages

Most executives receive compensation in the form of a salary, as well as significant other forms of compensation tied to company performance and longevity. Compensation benefits come in many forms and are very complex. Often these assets are nontransferable. They create ties that bind spouses together well beyond the divorce. Ensuring that the executive spouse gets the benefit of those assets requires technical knowledge. When a divorce occurs, it is imperative that both spouses, and their counsel, have a thorough understanding of the entirety of the compensation arrangements. This typically requires a detailed review of all written employment contracts as well as deferred compensation written plans.

A common form of compensation which executives receive is through the issuance of Restricted Stock Units ("RSUs"). The issuance of this type of award allows the company to reward the executive by tying compensation to the future increased valuation of the company's stock. Since these awards typically have a vesting schedule associated with them, the employee is rewarded for remaining at the company for longer periods of time. Because these awards are subject to a vesting schedule, there are typically awards that have not yet vested at the time of the divorce; nonetheless, these awards were granted during the marriage and are still subject to distribution between the spouses. Furthermore, because these RSUs are typically nontransferable, detailed language must be incorporated into any divorce agreement to allow the non-executive spouse to direct the executive as to when the vested RSUs should be sold. This results in continuing obligations among the spouses for a period that may extend well beyond the divorce, not to mention a continuing need to reconcile the parties' respective obligations to any tax liability associated therewith.

Since executives are often recruited to move to other companies, it is not uncommon for unvested compensation benefits to be surrendered upon departure. The executive is usually compensated with comparable benefits being granted by the new employer. If a property settlement agreement is entered into based upon the receipt of a share of the benefits which remain unvested from the old employer, the non-executive spouse must ensure that he or she is likewise aware of, and perhaps entitled to, any awards from the new employer which were granted to compensate for the surrendered benefits from the old employer. This requires sophisticated drafting within the property settlement agreement, as well as an analysis for determining how much, if any, of the grants from the new employer rightfully should be shared with the former spouse considering that much of the benefits of employment with the new company are for services rendered well after the marriage has ended.

Caution is suggested when hiring counsel when an executive is divorcing. It is important to retain counsel that understands the financial and legal nuances of these employment packages, which are unique to the executive. The complex business, tax and financial issues must be addressed thoroughly in a highly analytical manner.

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