

Proceed with Caution When Modifying Equity-Based Performance Awards

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Most equity-based performance awards for employees that will vest at the end of 2020 were granted well before the COVID-19 pandemic began (in fact, many were granted two years or more before the pandemic), and none of the performance metrics for these awards likely anticipated the havoc the pandemic has caused to the companies' financial and stock performance. In many cases, the pandemic has rendered these equity-based performance awards worthless to employees because the performance metrics are not even remotely achievable. Yet, employees have been working harder than ever to meet the challenges of the pandemic. Some employers looking for ways to continue to reward and retain employees are eyeing modifications of existing equity-based performance awards to either lower the target and stretch performance goals or to eliminate the performance requirement completely, at least for awards vesting in 2020 (making the awards solely time-based). Before proceeding with any such modifications, some items employers should consider include:

1. Any modification of existing awards for named executive officers will require disclosure to shareholders and could cause backlash from shareholders and shareholder advisory groups like ISS or Glass Lewis.
2. Modification of target and stretch goals may be impossible to do with any accuracy as the impact of the pandemic continues to be uncertain. If the modified performance goals also become impossible to achieve, the awards may remain worthless to employees, potentially causing additional employee relations issues.
3. Some plans have limitations on the acceleration or modification of awards. Employers should confirm that any proposed changes would be permitted by existing plan terms.

In lieu of modifying existing awards, employers should also consider whether larger awards could be granted during the first quarter of 2021 with shorter performance periods to "make-up" for any awards that do not vest in 2020. Regardless of what path employers choose, they should work with their compensation consultants and outside counsel to ensure that any modifications are consistent with market best practices and comply with both applicable law and the terms of the employer's equity plans.