



Trending Executive Compensation Issues In Bankruptcy

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*The views expressed by Ms. Lambert do not necessarily reflect the views of the United States Department of Justice.

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11 U.S.C. §
503(c)1-3

(c) Notwithstanding subsection (b), there shall neither be allowed, nor paid--

(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that--

(A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;

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(B) the services provided by the person are essential to the survival of the business;
and

(C) either--

(i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or

(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

(2) a severance payment to an insider of the debtor, unless—

(A) the payment is part of a program that is generally applicable to all full-time employees;
and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made;

or

(3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

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Pre-bankruptcy bonuses

- According to the GAO, during 2020, 42 Chapter 11 debtors paid over \$160 million in pre-bankruptcy bonuses to senior management within months of the petition date.
- Pre-bankruptcy bonuses are not covered by Section 503(c) and are generally only recoverable as preferences of fraudulent transfers under Sections 547 and 548.
- An investigation by Reuters uncovered that thirty-two (32) of the forty-five 45 large corporate debtors either approved or paid bonuses within six months of their petition date. Those cases included Hertz Global Holdings, Inc., J.C. Penney Co., Hi-Crush Inc., Whiting Petroleum Corporation, and Chesapeake Energy.

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