



## Employee Stock Ownership Plans (ESOPs)

Foster Swift has developed a robust and extremely active ESOP practice over the last 30+ years, advising ESOP clients with regard to various succession planning, legal compliance, and fiduciary issues. We currently represent 30-35 active ESOPs on an ongoing basis and are involved in 6-10 ESOP transactions per year. Our ESOP team has a depth of experience that includes areas of expertise in corporate law, finance, ERISA, and executive compensation. We represent companies, selling shareholders, trustees, and boards of directors in various industries.

Foster Swift is routinely involved in ESOP transactions with issues ranging from initial implementation to second-stage transactions to final sales to strategic buyers. Our ongoing ESOP consulting services include:

- ESOP design and establishment
- Plan documentation and amendments as necessary
- Guidance about operational and administrative issues
- Department of Labor fiduciary duties
- Representation in ESOP transactions
- Compliance issues
- Disclosure obligations
- Reporting obligations
- Education for employees about a company's ESOP
- Tax planning for ESOP transaction
- ERISA regulation guidance
- Executive compensation planning in coordination with ESOP formation
- Compliance review
- Assistance with Department of Labor or Internal Revenue Service audits

We would welcome the opportunity to talk with you about whether an ESOP would be a good fit for your company.

### **Overview and Benefits**

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#### **ATTORNEYS**

##### **Shareholder**

Mindi M. Johnson

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##### **Associate**

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Employee Stock Ownership Plans (known as “ESOPs”) are qualified retirement plans that invest primarily in employer stock. The ESOP operates as a separate legal entity from the company and may serve as a potential buyer of the company. ESOPs offer the following advantages:

- ESOPs are a tool to attract and retain talent
- ESOPs provide retirement benefits to ESOP participants
- ESOPs encourage employees to promote the success of the business
- ESOPs can provide a liquidity for the selling shareholder
- ESOPs provide additional tax planning opportunities to companies and selling shareholders

### **Disadvantages of ESOPs**

While there are many benefits to establishing an ESOP, there are some disadvantages too. For example, the ongoing expense of operating an ESOP can be high, and there are numerous fiduciary duties that must be fulfilled. Additionally, there are several legal and compliance requirements that must be satisfied. These obstacles show that an ESOP is not a good fit for every company.

### **Ideal ESOP Candidate Company**

The best ESOP candidates are those companies where the shareholder is committed to succession and employee goodwill without requiring an immediate payout. If the company is financially stable and has a healthy cash flow, low debt, and increasing profits, these factors will contribute to a successful ESOP transition.

It is often preferred that the management team remain in place following a new ESOP formation. This stability in management is crucial to the success of the business following a transaction.

Generally, companies with 25+ employees are the “right size” for an ESOP. We have assisted clients with many more than 25 employees, and we have assisted clients with fewer than 25 employees.

### **ESOP Transactions**

A typical ESOP transaction is often designed in the following manner:

1. Selling shareholders sell employer stock to the ESOP
2. ESOP pays for the employer stock with funds obtained from the company, an outside lender or the selling shareholders
3. Selling shareholders may reinvest proceeds from the transaction, potentially with significant tax benefits
4. ESOP Trust is a new shareholder of the company and employees/participants are beneficial owners of the employer stock
5. Company’s Board of Directors and management team continue to operate the company



The process can also be modified based on how the transaction is funded. For example, the ESOP may be funded through company contributions, shareholder financing, or bank financing. Special rules allow a strategy that permits the company to pay a bank loan with pretax dollars.

The parties involved in every ESOP transition include the shareholders, attorneys, trustee and independent appraiser. Foster Swift attorneys have represented selling shareholders, companies, fiduciaries, boards of directors, and trustees in these transactions.

Foster Swift attorneys are active members in the National ESOP Association and the National Center for Employee Stock Ownership. Our firm was instrumental in establishing the Michigan Chapter of the ESOP Association. We welcome the opportunity to discuss with you the benefits of an ESOP and whether an ESOP would be a good option for succession planning and providing retirement benefits to your employees.

### **PUBLICATIONS & ALERTS**

Important Developments for ESOP Fiduciaries, *Foster Swift Employment, Labor & Benefits Quarterly*, Spring 2010

"S" Corporations + ESOP: A Powerful Tax Advantaged Exit Strategy, *Foster Swift Employment, Labor & Benefits Quarterly*, July 2009

Employee Stock Ownership Plans (ESOPs) Continue to Flourish, *Foster Swift Employment, Labor & Benefits News*, December 2008

### **NEWS**

Johnson Presents on ESOPS as a Succession Strategy, September 22, 2020

Johnson Selected to "Women in the Law" Class of 2018, *Grand Rapids Business Journal*, August 2, 2018

44 Foster Swift Attorneys Named to 2016 Best Lawyers in America® Roster, August 21, 2015

### **EVENTS**

Be Intentional About Your Repurchase Obligation, *ESOP Association - Great Lakes Regional Conference*, October 17, 2023

Navigating the New Normal for ESOPs, *ESOP Association- Michigan Chapter*, April 11, 2023

Be Intentional about your Repurchase Obligation, *ESOP Association*, October 19, 2022

Moving Forward: Succession Planning for Your Business, *Michigan Movers Association*, February 16, 2022

Be Intentional about your Repurchase Obligation, *ESOP Association Great Lakes Regional Conference*, September 28, 2021

Best Practices for Corporate and ESOP Governance, *ESOP Association Great Lakes Regional Conference*, September 27, 2021

ESOPS: A Trending Business Succession Strategy, *MICPA Learning Showcase*, June 15, 2021



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ESOP Basics - Who, What, Where, When, How & Why?, *5TH Annual Great Lakes Regional ESOP Conference*, October 17, 2019

Ask the Experts ~ A Q&A for Non-Management Employee Owners, *2019 Spring ESOP Conference: Michigan Chapter of the ESOP Association*, April 17, 2019

Executive Deferred Compensation Arrangements in ESOP Companies, *2019 Spring ESOP Conference: Michigan Chapter of the ESOP Association*, April 17, 2019

Hiring, Investigating and Discipline/Discharge in the Law, *Foster Swift: Developing Labor Law Update*, February 7, 2018

Second Stage ESOP Transactions, *The National Center for Employee Ownership*, May 26, 2015

Working with Your Third Party Administrator to Avoid Common Administrative Errors, *Michigan Chapter of the The ESOP Association*, March 30, 2015

An Introduction to ESOPs, *WEBINAR: The National Center for Employee Ownership*, December 2, 2014

Second-Stage ESOP Transactions, *National Center for Employee Ownership (NCEO)*, March 25, 2014

ESOP Sustainability for CEOs and CFOs, *ESOP Association - Michigan Chapter Meeting*, October 22, 2013

ESOP: The Cliffs Notes' Version, *Michigan Chapter of the ESOP Association*, March 13, 2013

Understanding & Updating Your ESOP Documents, *Michigan Chapter of the ESOP Association Annual Spring ESOP Conference*, April 11, 2012

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