

THE BONUS PENALTY

ISSUE

Senior managers at large financial institutions that have accepted federal funds are facing public outrage, shareholder revolt and pressure from public figures to forego or give back bonus monies. In the span of a few days in late March:

- President Obama met with 15 top bankers, all government bailout recipients, and a major point of discussion – and disagreement – was appropriate compensation.
- A lawsuit was announced on behalf of AIG shareholders demanding company executives return millions of dollars in bonuses, dividends and other perks and seeking the removal of top level management.
- *The Wall Street Journal* reported that activist investors are planning to block the reelection of the AIG director who chairs the board compensation committee.

IMPACT

This issue threatens to impact the Directors & Officers (D&O) and Employment Practices Liability (EPL) policies of companies that have not touched a dollar of federal bailout money. Directors and officers face intense scrutiny from shareholders who will seek to satisfy themselves that all facets of executive compensation are aligned with the best interests of the company. They may also take action if they believe

executive compensation is not adjusted when companies show reduced returns for shareholders.

Will executives of organizations that retrospectively change compensation practices seek recourse? Consider the language in a leading EPL carrier's definition of *wrongful termination or treatment*: "...any adverse change in the terms or conditions of an Employee's employment or status, which is alleged to be unlawful or is alleged to be in breach of an agreement relating to the Employee's employment or status." This leads to the possibility that executives will engage in litigation against their own company.

ACTION

- Know your contractual obligations.
- Access experts: under your EPL policy you may have access, free of charge, to a major employment law firm.
- Know who's on first: since both D&O and EPL coverages may come into play, consider that EPL policies are generally written as primary coverage, while D&O are excess of other insurance. Be ready to coordinate key provisions of coverages, such as claim triggers and notice requirements.
- Understand that compensation issues are going to remain in the spotlight and be prepared.

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