

# Overpaying for Company Stock Lands ESOP Fiduciaries in Hot Water

## Labor & Employment Law Update

By Kelly Haab-Tallitsch on April 7, 2016

The U.S. Department of Labor (DOL) recently announced a \$1.1M judgment in favor of employees in the Gruber Systems Inc. Employee Stock Ownership Plan (ESOP). The department filed suit against Gruber Systems Inc., a California corporation, and its CEO in May of 2015 alleging they caused Gruber ESOP participants to lose money when the ESOP bought company stock at considerably more than fair market value. The DOL alleged that money used to fund stock purchases to shore up the company during financial troubles should have been used to fund the retirement accounts of Gruber employees. The consent judgment requires Gruber and its CEO to return \$1.1 million to the Gruber ESOP and pay \$220,000 in civil penalties, and permanently bars them from serving as a fiduciary or service provider to any ERISA-covered employee benefit plan.

The announcement of the Gruber consent judgment came on the heels of another DOL suit filed January 20, 2016, against Florida-based Commodity Control Corp. to recover losses to its ESOP due to alleged overvaluation of the company stock. In 2009, the owners of Commodity Control sold their entire ownership interest to the Commodity Control Employee Stock Ownership Plan resulting in the ESOP owning 100% of the company. In its complaint, the DOL alleges the ESOP overpaid for the company stock due to a failure on the part of the defendants, including the former owners, the company and the ESOP, to obtain an accurate and current appraisal of the company stock. The DOL is asking the court to require the defendants to restore the losses to the ESOP and to require the former owners to disgorge any payments or proceeds they received from the sale of their stock to the ESOP.

These targeted suits by the DOL illustrate the department's continued focus on ESOPs, and valuations of private companies in particular.

So how can you stay out of the headlines as an owner or manager of an ESOP company or other ESOP fiduciary?

Ensure an accurate valuation of your company with the following guidelines:

1. Choose your valuation advisor carefully. Use a reputable source that won't be influenced by conflicts of interest.
2. Provide complete, accurate, and up-to-date information and data to the valuation advisor.
3. Check and double-check the valuation report you receive and assess it for consistency and accuracy. Review assumptions about growth projections, financial statements, business risks and other factors that might influence stock value, and make sure it's reasonable.

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