

A guide to Employee Benefit Trusts (EBTs)

Service area / [Trusts and Private Wealth](#)

Location / [Guernsey Jersey](#)

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Introduction

A well-structured employee incentive arrangement operated through an EBT, can still deliver real value to a company and its employees.

Jersey has considerable experience of administering EBTs and is supported by modern trust law and robust courts. When added to the tax benefits which may accrue, Jersey is an attractive jurisdiction in which to locate an EBT, whether the employer company is based in a single country or is multi-national.

The purpose and nature of an EBT

The purpose of an EBT is to incentivise and reward employees. By aligning the interests of employees with those of the shareholders, the intention is to encourage loyalty and commitment on the part of the employees and a desire to see the company perform well. Companies benefit from dedicated and motivated employees who in turn may expect greater reward from the successes of their employer.

An EBT usually takes the form of a discretionary trust of which all the employees of the company (or its group) are beneficiaries. The trustees normally have broad powers under the terms of the trust in relation to the operation of the EBT which enables various types of benefits to be delivered. This can include the granting of share options or satisfying share awards and paying cash sums to beneficiaries.

Whilst the beneficial class is typically wide, an EBT can nevertheless be used to benefit a select group of employees (eg senior management), depending on the company's objectives.

When administering an EBT, trustees are guided by recommendations from the company, although they are not bound by them. Such recommendations can include suggestions as to the type of assets to hold in the EBT (eg shares in the company), requests to purchase shares from employees who are leaving or the granting of benefits to employees who have achieved benchmark objectives. It is also common for trustees to be asked to satisfy awards granted to employees by the company. In this regard it is incumbent on trustees to ask questions and check the basis of the recommendations to ensure they are happy to agree to them eg if awards are for different values, what are the reasons for this?

Types of arrangements which can be operated through an EBT

EBTs can be flexible and allow different types of benefits to be delivered to beneficiaries, both share based and cash based.

Examples include:

- Conditional share awards
- Restricted share awards
- Share options
- Phantom awards
- Cash payments

The types of arrangement operated through an EBT are tailored to the needs and objectives of the company and these often change over time, depending on the market and what competitors are offering their employees. Increasingly awards include a performance element, and this is compulsory in certain sectors in the UK.

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A company can operate one or more of the types of arrangement referred to above through an EBT, with the EBT being used to 'warehouse' shares pending the vesting and satisfaction of awards. It is common to use an EBT in this way following an acquisition or reorganisation of a business or where the company is working towards an exit event eg a listing on a stock exchange or a private sale of its shares. Equally a company may simply wish to establish an EBT as a way of incentivising its employees.

The benefits of using an EBT

There are a number of advantages to using an EBT, which include:

- The assets held in an EBT are bankruptcy remote. This means should the company go bankrupt (or any analogous event occurs), the company's creditors cannot gain access to these assets. Instead, the assets remain in the EBT to be used for the benefit of the beneficiaries, which can be very reassuring to beneficiaries. Usually, the company (and any group companies) are expressly excluded from benefit under the EBT.
- An EBT can be used to create an internal market in shares. This is particularly useful for private companies, where there is no ready market for shares which are forfeited or required to be sold by leavers. In an internal market, the trustees can acquire such shares (whether or not for consideration) and recycle them for future awards.
- The use of an independent trustee. It is common for companies to appoint an independent third party, typically a professional trustee, to act as the trustee of an EBT. Since trustees are required to act in the interests of the beneficiaries, this can give comfort to beneficiaries that their interests are being looked after. It also avoids potential conflicts of interest (real or perceived), which can arise if an entity related to the company acts as trustee.
- Tax benefits. An offshore EBT based in Jersey or Guernsey, providing it has no Jersey or Guernsey resident beneficiaries, can accrue income and capital value, free from domestic tax.

Tax

The tax treatment of EBTs including contributions to and benefits received from EBTs is usually very relevant to the employer and the beneficiaries. It is therefore important that detailed tax advice is taken at the outset so the arrangements to be operated through the EBT can be designed to meet the company's objectives and so the tax implications are clearly understood. There can be tax implications for both the company and the employee beneficiaries, depending in each case where they are based.

Tax legislation can change throughout the life of the arrangements operated through an EBT and it is therefore often necessary to take regular tax advice to ensure the parties are aware of the latest tax implications for the beneficiaries of an EBT. This is also the case where a company has a mobile workforce, where local tax legislation and an employee's personal circumstances will need to be considered separately.

Ancillary issues

When considering establishing an EBT, there are a number of ancillary issues to check. These include:

- Determining who should be included in the class of beneficiaries. Are there any legal, securities or tax issues which require the class to include certain persons or which limit who can be a beneficiary eg is the EBT to be an 'employees' share scheme' for the purposes of the UK Companies Act 2006 and /or a trust which is compliant with section 86 of the UK Inheritance Tax Act 1984?
- Obtaining local advice on the EBT and the arrangements to be operated through it. Are any consents required to establish the EBT and/or for awards to be granted? For example, if equity based arrangements are to be operated through the EBT, will any of the scheme documents constitute a prospectus for which regulatory consent is required and if so, is an exemption available?
- Checking the interaction (if any) between employees' contracts of employment and the arrangements to be operated through the EBT. Usually there is an express provision that any awards do not form part of an employee's contract nor are they pensionable.
- Ensuring the trustees have sufficient powers in the trust instrument to administer the arrangements to be operated through the EBT.
- Ascertaining, where a company is multinational, whether the same types of arrangements can be operated in the different jurisdictions, as there may be legal and/or tax reasons why this is not possible or why the arrangements need to be adopted in a particular way.

Conclusion

EBTs still play an important role for companies, whether seeking to achieve employee incentivisation or security for employees in a tax beneficial manner or otherwise.

Our legal team here at Carey Olsen has considerable experience of advising on the establishment of EBTs and the legal issues relevant to ongoing administration of arrangements operated through them and can guide companies and trustees through the process and the issues which can arise, in conjunction with the tax advisors.

Continued



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