AACA ANNUAL FORUM · TOTAL REWARDS IN A GLOBALLY CONNECTED WORLD

Pay Under Pressure

Governing Executive Compensation Risk in a Globally Connected World

Jeremy Sharp

Partner | Hall Benefits Law

aaca
ATLANTA AREA COMPENSATION ASSOCIATION

HBL

Today's Speaker

Jeremy Sharp

Partner
Hall Benefits Law

What I work on

- Executive and equity compensation
- ERISA top hat eligibility and plan structure
- Section 409A operational compliance
- Section 280G and change-in-control planning

Hall Benefits Law

- National boutique ERISA, benefits, and executive compensation firm
- Plan governance and compliance calendars
- Transactional support in M&A

Serving clients nationwide · Atlanta · Cleveland · Los Angeles · Philadelphia · Phoenix · Sacramento · San Francisco

ROADMAP

Four Questions, Forty-Five Minutes

1. **Why is pay under pressure?**
   Where global disruption lands, and why it concentrates on executive pay — ~8 min

2. **Who is in the plan?**
   ERISA top hat status — a continuous test, not a one-time filing — ~8 min

3. **Does it run the way it reads?**
   Section 409A — operational integrity and a closing correction window — ~9 min

4. **What happens at the deal?**
   Section 280G — the 3× cliff, IRS enforcement, structuring before signing — ~6 min

36 minutes of material, with the final 9 for questions — though please flag anything urgent as we go.

PART 1

Why Is Pay Under Pressure?

The operating environment

Where global disruption actually lands — and why it concentrates on executive compensation

1

THE ENVIRONMENT

Pressure Is an Operating Condition, Not a News Cycle

Healthcare cost inflation

Trend outrunning the budget

Trade and tariff volatility

Input costs and workforce planning in flux

Regulatory whiplash

Rules changing faster than plan documents

AI workforce disruption

Role redesign and new retention risk

Pay transparency

Pay decisions made in public view

Geopolitical shocks

Conflict, climate, continuity, mobility

"Employers need more help than ever … because of all of the factors that are making everything so confusing." — John Doyle, CEO, Marsh

Source: BenefitsPRO, "The Era of Polycrises" (Jan. 2026).

THE TRANSMISSION

How That Pressure Becomes Your Problem

1

Pressure rises

Cost, disruption, and uncertainty arrive at once — competing for one budget.

2

Key people get harder to hold

Retention risk lands in the roles you can least afford to lose.

3

So the company makes promises

Deferred compensation. Equity acceleration. Retention bonuses. Severance.

Every one of those promises is governed by the three doctrines in this session — and in each of them, when something goes wrong, the tax lands on the executive rather than on the company that designed the arrangement.

That asymmetry is why these are governance questions for this room, not technical questions for the tax department.

ENFORCEMENT AND LITIGATION

Three Enforcement Fronts, One Question

IRS on parachutes

- An active campaign targeting 280G payments in M&A
- 20% excise tax on the executive, plus a lost deduction

The exposure moves to the executive personally

Top hat status challenged

- Participants sue to unlock ERISA Title I remedies
- Turns on eligibility breadth, not on design intent

No clean fix — funding the promise triggers constructive receipt

The leading indicator

- The plaintiffs' bar has spent two years testing benefit plan governance records
- It found them thin — and pay files are thinner

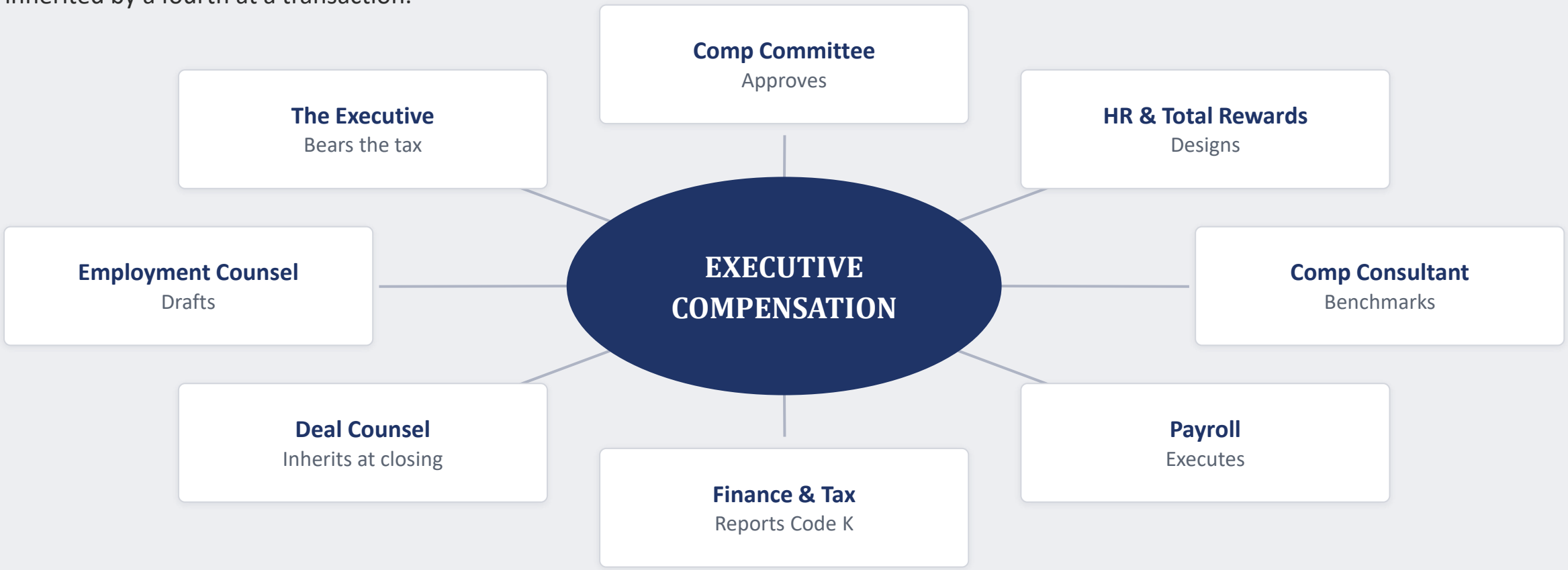
The same playbook is moving toward executive pay

All three ask the same question: show me your process. In none of them is the defense “we made a good decision.” The defense is a contemporaneous record of how the decision was made.

COORDINATION

Where Executive Pay Decisions Actually Live

No single function owns an arrangement end to end — it is designed in one place, documented in another, executed in a third, and inherited by a fourth at a transaction.



Nobody in this picture has the whole view — and the handoffs are where the exposure sits.

FAILURE AND RESPONSE

Where It Breaks, and What Fixes It

WHERE IT BREAKS	WHAT FIXES IT
Documents nobody re-reads	Document review on a cycle
Decisions with no record	Rationale written when you decide
Design drifts from administration	Reconcile paper to payroll
The deal clock outruns diligence	Model before terms harden

Every fix is a calendar item, not a project — and all four live on one calendar.

THE BRIDGE

Three Doctrines, One Arrangement

The same arrangement is tested three separate times across its life. A failure at any stage moves the tax onto the executive.

FRONT END

Who is in the plan?

ERISA Top Hat Status

Is the arrangement exempt from ERISA at all? Tested continuously against a changing workforce.

ONGOING OPERATION

Does it run the way it reads?

Section 409A

Do elections, timing, and payments actually match the document — year after year?

EXIT EVENT

What happens at the deal?

Section 280G

An all-or-nothing cliff at a change in control, modeled before signing.

The employer designs the arrangement. Under 409A and 280G, the executive pays for the mistake.

PART 2

Who Is in the Plan?

ERISA Top Hat Status

Whether the arrangement is exempt from ERISA at all — and why the answer can change without anyone deciding to change it

2

STAKES

What Is Actually at Stake

Lose the exemption and the arrangement becomes an ERISA pension plan — subject to rules it was never designed to satisfy.

Participation, vesting, funding

Minimum standards hit an arrangement built on selective eligibility and unfunded promises.

Fiduciary duties and reporting

Full fiduciary responsibility attaches, and Form 5500 and SPDs replace the top hat statement.

Participant remedies

Participants gain ERISA causes of action, federal jurisdiction, and fee-shifting.

There is no clean fix. Funding the promise to cure the problem triggers constructive receipt and immediate taxation.

And it is not a set-and-forget test. Every promotion, hire, reduction in force, and acquisition moves the analysis.

THE TEST

There Is No Safe Harbor — and No Magic Number

ERISA exempts unfunded plans “maintained primarily … for a select group of management or highly compensated employees.”

What the law does not give you

- “Top hat” appears nowhere in the statute
- Neither ERISA nor DOL regulations define the phrase
- The courts set the parameters — fact-driven and circuit-dependent

Two traps worth naming

- **The number you know is the wrong number.**
  - Code §414(q) does not apply here. You can be inside the group earning less, outside it earning more.
- **“Primarily” means purpose, not headcount.**
  - DOL Opinion 90-14A reads it as the plan's purpose.

Build the eligibility list to the DOL position. You do not get to choose the circuit your dispute lands in.

WHAT COURTS MEASURE

The Three Questions a Court Will Ask

QUESTION 1

Is the group small enough?

- Courts compare the share of the workforce eligible. There is no bright-line cap
- Demery: 15.34% survived, but “at or near the upper limit”
- **5% is comfortable. 15% is the edge.**

QUESTION 2

Are they really management?

- Duties and influence decide it, not titles or salary grades
- Carrabba: too broad. Accardi: need not stop at the C-suite
- **Narrower than every manager. Broader than the C-suite.**

QUESTION 3

Highly paid — relative to whom?

- Compared to your own workforce average, not a statutory figure
- Simpson: $194,092 was not highly compensated next to partners
- **2× the workforce average is the floor.**

Some circuits add a fourth question — could the participant negotiate the deal? Document the negotiation, not just the pay, and you satisfy every version of the test.

A defensible file explains why each participant is in the group — not merely that the group is small.

HBL

ACTION ITEMS

What to Do About It

1	**Re-test the group every year**	Headcount, promotions, and reductions in force all move the percentage and the pay ratio.
2	**Write the rationale when you add someone**	Duties, pay relative to the workforce, and evidence of the negotiation — recorded at the time.
3	**Treat every acquisition as a re-test**	New participants, new plans, and a changed denominator.
4	**Coordinate with the comp committee**	Before the award cycle. Eligibility granted for retention is where the group stops being select.

Top hat status is a condition the plan has to keep satisfying — not a box checked at adoption.

PART 3

Does It Run the Way It Reads?

Section 409A Operational Integrity

Whether day-to-day administration actually matches the document — and what it costs when it does not

3

FRAMEWORK

What It Covers, and What Failure Costs

Any plan or arrangement — written or unwritten — that may permit compensation earned in one tax year to be paid in a later tax year.

Your population is bigger than your plan list

- Offer letters, retention e-mails, board minutes, informal bonus deals
- None of them sit where you look for deferred compensation documents
  - Excluded: qualified plans, vacation and sick leave, short-term deferrals, statutory options, restricted stock, SARs

What a failure costs

- All vested deferred compensation taxable now — the whole balance, not just the error
- An additional 20% federal tax, plus a separate California tax
- Interest from the date the amount vested
- **And it is charged to the executive, not the employer**

"Vested" means not subject to a substantial risk of forfeiture — not conditioned on continued service.

OPERATION

The Rules That Actually Get Broken

Elections

- Initial election in the tax year before the pay is earned
- It must fix both the timing and the form of payment
- Deferring again later means 12 months out, 5 years further, 12 months ahead

Distributions

- Six permitted events only — fixed date, separation, disability, emergency, change in control, death
- Key employees of public companies wait 6 months after separation

Acceleration

- Timing is fixed at the initial election and cannot be moved up
- “Haircut” provisions — early access for a penalty — are prohibited
- Only a few narrow exceptions exist

The most common failure is not a bad election. It is a good election that payroll never implemented — and a key employee list nobody refreshed.

CORRECTION

The Correction Window — and How Fast It Closes

Relief covers inadvertent operational failures only — and what it costs depends entirely on when you find it.

Corrected …	Income tax	20% penalty	Interest
Same tax year as the failure	**None**	**None**	**None**
The following year — non-insiders only	Yes	**None**	**None**
By the end of the second year	Yes	Yes	**None**
More than three years after the failure	**No correction program is available at all**		

Insiders

Directors, officers, and 10% owners get no following-year relief.

Small amounts

Separate relief by year two under the 402(g) limit.

Still unvested?

Often curable with no consequence at all.

The whole case for an annual self-audit sits in the distance between the first row and the last.

ACTION ITEMS

What to Do About It

1	**Self-audit operations every year**	The same-year correction is effectively free. Every year you do not look, you trade it for a 20% tax.
2	**Audit the payments, not the document**	Pull the deferral files, the payroll registers, and the actual distribution dates.
3	**Sweep the whole population in**	Offer letters, retention agreements, severance, and board-approved bonus promises.
4	**Refresh the specified employee list**	Annually, and after mid-year promotions.

An annual 409A audit is a calendar item, not a project — and the cheapest insurance in executive compensation.

PART 4

What Happens at the Deal?

Section 280G Transactional Compliance

Excess parachute payments at a change in control — an all-or-nothing cliff on an unforgiving clock

4

MECHANICS

Why It Matters Now — and How the Cliff Works

Why now

- **The IRS is actively looking.**
  - An LB&I campaign is targeting 280G parachute payments in M&A.
- **The penalty is doubled.**
  - A 20% excise tax on the executive, plus loss of the company's deduction.
- **The safety net is gone.**
  - Gross-ups have virtually disappeared — the cost now sits with the executive.

THE 3× CLIFF

Payments reaching 3× the base amount — average W-2 pay over the prior five years — trigger the tax.

Base amount: $500,000

Parachute payments: $1.6M — 3.2× base

Excess parachute payment: $1.1M

Result: $220,000 excise tax on the executive, plus the lost deduction.

At 2.99× nothing happens. At 3.0× the entire excess is taxed. One dollar decides it.

Who is covered: officers, greater-than-1% shareholders, and the top 1% of highly compensated employees — private companies too.

PLANNING AND EXECUTION

Staying Below the Line — and What Trips Deals Up

What deals actually do

- Target 2.5–2.99× cash multiples, staying below the cliff
- Use double-trigger equity vesting — both a change in control and a termination
- Add cutback provisions capping payments at 2.99×, in place of gross-ups
- **Model before signing, while the structure can still change**

What trips deals up

- **Single-trigger equity acceleration.**
  - The top pitfall — it almost guarantees crossing the line, and it is buried in plan documents.
- **Inputs left out of the model.**
  - SERP benefits, deferred comp acceleration, and undocumented transaction bonuses all count.
- **Missed withholding and reporting.**
  - The excise tax goes on Form W-2, Box 12, Code K — its absence is what the IRS looks for.

Document everything relied on: board resolutions, compensation studies, and the rationale behind any carve-out.

THE SYNTHESIS

One Calendar Covers All Three

All three doctrines fail for the same reason, and all three are prevented by the same discipline: a dated schedule with a named owner.

EVERY YEAR

- Top hat re-test — percentage and pay ratio
- 409A self-audit against payment records
- Specified employee list refresh
- Offer letter and award template review

ONGOING

- Election windows opened and closed on schedule
- Minutes that capture the analysis, not just the outcome
- Eligibility rationale written as each participant is added
- Payroll confirmation that elections were implemented

WHEN SOMETHING HAPPENS

- M&A signing — 280G modeled before terms harden
- Acquisition — top hat re-test on the combined workforce
- New executive hire — 409A screen of the offer letter
- Plan amendment — document and operational review

Nothing on this calendar is difficult. Everything on it is what was missing in the cases we just looked at.

Four Things to Take Away

1

Pressure produces promises.

Disruption drives retention risk, and retention risk drives exactly the arrangements these three doctrines govern.

2

Top hat status is a test, not a filing.

Re-test every year, and treat every acquisition as a re-test event.

3

Most 409A failures are operational.

The same-year correction is free — but only if you look. After three years there is no program at all.

4

280G is an all-or-nothing cliff.

Model it before signing, structure below 3×, and remember the gross-up is gone.

In all three, the defense is the same: a contemporaneous record of how the decision was made.

Questions & Discussion

We welcome questions now, and offline follow-up any time after the Forum.

Jeremy Sharp

Partner, Hall Benefits Law

jsharp@hallbenefitslaw.com

Hall Benefits Law | Serving clients nationwide

Atlanta · Cleveland · Los Angeles · Philadelphia · Phoenix · Sacramento · San Francisco

www.hallbenefitslaw.com

aaca
ATLANTA AREA COMPENSATION ASSOCIATION

HBL