

# ESOP SETTLEMENTS SHED LIGHT ON DOL'S EXPECTATIONS FOR ESOP FIDUCIARIES

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**Practices & Industries**

Employee Benefits

The Department of Labor (“DOL”) recently settled three lawsuits against First Bankers Trust Services (“FBTS”) alleging that FBTS, as trustee for three Employee Stock Ownership Plans (“ESOP”), breached its fiduciary obligations under the Employee Retirement Income Security Act of 1974 (“ERISA”) in connection with FBTS’ approval of stock purchases by the plans. In total, the settlements require FBTS to restore \$15.75 million to the plans. Most notably, FBTS also agreed to an extensive set of procedures it will follow when handling any future ESOP transactions. In addition to the settlement with FBTS, DOL recently reached a proposed settlement agreement with James F. Joyner III, a special trustee for an ESOP. The proposed settlement in that case outlines similar (but not identical) procedural requirements for the special trustee to follow in the future.

The settlements provide detailed procedures for the ESOP trustees to follow on each of the following topics:

- Selection of valuation advisors
- Oversight of valuation advisors
- Reliance on company financial statements
- Fiduciary review process, including documentation requirements
- Document preservation
- Fair market value constraints
- Consideration of using a claw-back or other arrangements to protect the ESOP
- Use of other professionals
- Control over shares (only addressed in the FBTS agreement)
- Insurance coverage (only addressed in the Joyner agreement)

The settlement agreements make clear that the procedures outlined are not intended to specify all of, or in any way supersede, the ESOP trustee’s fiduciary obligations under ERISA. While the settlement agreements are non-binding on third parties, they provide important insight on DOL’s due diligence expectations for ESOP fiduciaries.

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*Acosta v. First Bankers Trust Services, Inc.*, (S.D.N.Y., 2017); *Acosta v. First Bankers Trust Services, Inc.* (S.D.N.Y., 2017); *Acosta v. First Bankers Trust Services, Inc.*, (S.D.N.Y., 2017); *Acosta v. BAT Masonry Co., Inc.*, (W.D. Va., 2017) (proposed settlement with J. Joyner III).