

Do you have to pay a bonus following the termination of employment?

This is the time of year when many companies determine bonus payments for the preceding year and set targets or review language for the upcoming year. A bonus is commonly intended as a performance tool to reward and incentivize an employee who has or is expected to contribute to the success of the organization and/or achieve performance objectives.



Shana French and Brian Wasyliw
LEGAL VIEW

As a tool to reward and motivate, an employer may seek to tie bonus entitlement to active employment status. Unfortunately, in many cases, employers have been unsuccessful in precluding a bonus claim from a former employee. Whether the exposure is in respect of a *pro-rata* claim by an employee who has left before the end of the relevant bonus period, or a claim for lost bonus opportunity during the period of applicable notice, many employers are surprised to discover there is serious risk of a significant payment to a former employee in respect of these bonus claims.

A common mistake an employer may make is failing to have a written bonus plan at all, or using an outdated or “dusty” written plan or policy an employee may, or may not, have seen.

Another common (and easily remedied) error is using language in the plan the employer believes will provide the necessary protection, but the language has not been updated to reflect the current state of the law. Although many written bonus plans state the employee immediately ceases to be eligible for a bonus in the event of termination of employment, this isn’t enough to preclude a court from awarding a former employee damages in respect of a bonus claim.

Many employers may think this risk isn’t relevant to them as their bonus program is “discretionary” and so a former employee cannot

make a claim in the event of termination. An employer might even believe having the bonus plan set out in writing will compromise the plan’s status as “discretionary.”

In both cases an employer may still be liable for a “discretionary” bonus, creating an unwelcome surprise in litigation.

Can a bonus be “discretionary”?

Absolutely. A bonus may be discretionary, and if it is, an employee who makes a claim for wrongful dismissal damages won’t be awarded damages in respect of any bonus.

What makes a bonus discretionary? The drafting of the plan and its implementation are key – much more is needed than simply stating the bonus is discretionary.

A bonus is more likely to be considered discretionary if its payment and amount are not tied to something an employee has done or achieved, it is not automatically awarded year over year, and it does not comprise a meaningful component of an employee’s annual compensation (an annual bonus comprising, say, 25 per cent of annual compensation is less likely to be considered “discretionary”).

It is also advisable to have writ-

ten terms, even for a discretionary bonus plan — if only to reinforce the bonus is discretionary and an award in one year will not entitle an employee to an award in subsequent years.

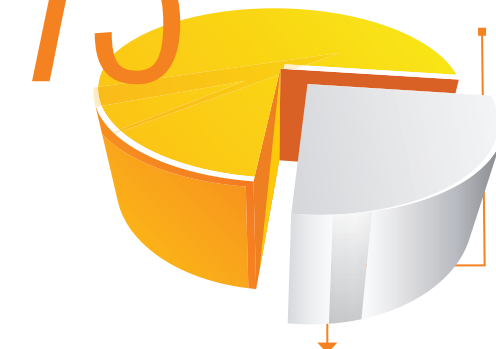
Problems arise when the employer sets a performance target, which may include measurable criteria, to determine bonus eligibility and/or the amount of bonus. Similarly, a bonus will look less discretionary when an employee receives payment every year and views it as a meaningful part of his annual compensation.

It should also be noted that in many jurisdictions across Canada a non-discretionary bonus is considered wages under employment standards legislation.

It is therefore important for an employer to understand how the standards may characterize the employer’s bonus program, particularly as it may impact other calculations — such as vacation pay and termination pay.

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75% Percentage of firms that hand out bonuses



6 industries with biggest bonuses

Industry	Bonus
Energy and mining	\$10,000
Hardware and networking	\$9,000
Software and IT services	\$8,000
Consumer goods	\$7,500
Finance	\$7,100
Retail	\$6,000

Source: LinkedIn

Typical bonus ranges for selected jobs

Job title	Bonus range
CFO	\$5,068-\$57,945
CTO	\$2,564-\$51,324
Vice-president, sales	\$5,027-\$51,278
Vice-president, HR	\$7,861-\$50,000
Vice-president, marketing	\$4,875-\$34,591
HR manager	\$894-\$11,933

Source: Payscale Canada

More court rulings on bonuses

Paquette TeraGo Networks Inc., 2016 CarswellOnt 12633 (Ont. C.A.): The motion judge awarded the employee 17 months’ notice and based damages on salary and benefits — not bonuses — because the bonus plan required an employee to be “actively employed” when the bonus was paid. The appeal court found the motion judge erred in focusing on the wording of the bonus plan. The dismissed employee had a common law right to damages based on his complete compensation package. The plan did not expressly limit entitlement to a bonus because had the employer provided proper notice, the employee would have received the bonus.

Lin v. Ontario Teachers’ Pension Plan Board, 2015 CarswellOnt 7878 (Ont. S.C.J.): The employee was awarded 15 months’ notice for wrongful dismissal. He was entitled to two types of bonus typically paid out in April but was terminated in March 2011, before the bonus for 2010 was paid out. A year earlier, the employer introduced a requirement that to be eligible for bonus payments, a worker had to be actively employed at the time of payout. This was a material change to the employment agreement to which the employee refused to consent. The court awarded the bonus on three grounds: First, the worker was entitled to the bonus he would have earned during the notice period and any requirement to be “actively employed” at the time of payout was unfair. Second, the limitation language was not valid because it was a significant change to which the employee had refused to consent. Third, the limiting language was an unenforceable “penalty clause.” Because an employee is entitled to compensation for work done, enforcing the language would unjustly enrich an employer at the worker’s expense.

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Review bonus language yearly Make it convenient

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Entitlement on termination

Frequently, an employer will rely on a term in its bonus plan requiring “active employment” as a condition of eligibility, or stating eligibility will cease in the event of termination of employment whether voluntary or involuntary. Recent case law from the Court of Appeal for Ontario, and the Court of Appeal of Alberta, confirms such language alone will not achieve its objective and needs to be more clear and explicit if it is to eliminate an entitlement to bonus during the notice period.

When employment is terminated without cause, the employee is entitled to be put in the same financial position in which she would have been had she been given proper notice. This includes all compensation, benefits and any bonus the employee would have earned during the applicable notice period.

In the case of statutory notice, the amount of notice (if any) will depend on the language of the applicable employment standards legislation. In the case of common law notice, in the absence of an employment contract limiting entitlement on termination to the statutory minimum, a court will determine common law or “reasonable” notice. Once the reasonable notice period has been determined, the next step is to clarify

whether there is any language in the employment contract (including the bonus plan itself) that specifically excludes bonus from the entitlement assessment.

It is important to remember an employee is entitled to damages at common law for failure to give reasonable notice. The question is whether the employee would have an entitlement to any bonus payment had he been working during that period of reasonable notice.

If the objective is that “active employment” be a condition of bonus entitlement, courts appear to require clear and unambiguous language that directly addresses and limits both the common law entitlement to notice of termination and entitlement to bonus-related damages during that period. Absent this type of language, an employee will generally be entitled to any bonus payment that would have otherwise been paid during the period of notice.

Practical strategies

While it may seem an employer has few options to protect itself from liability for the bonus entitlement of a departing employee. Fortunately, this is not the case.

First and foremost, written terms are critical. Whether electronically or with old-fashioned pen and paper, any employee eligible to participate in a bonus plan should be required to acknowledge the terms and conditions of the plan as a condition of

participation. Ideally this is done before the start of the relevant bonus period when objectives are being set and communicated. That said, it’s never too late. Even if the bonus period is underway, employers should consult with experienced employment counsel to identify an effective way to implement bonus terms that will meet the organization’s objectives.

Second, if your organization has an annual bonus program, it is prudent to review the bonus language yearly to ensure it is current with the law and consistent with actual practice. A written plan does not have to be lengthy or full of onerous legalese. Key terms of eligibility and objectives, as well as reliable protections, can be implemented through clear and concise language in a short and effective document.

Finally, if your organization is considering the implementation of a new or amended bonus plan, its design and the language used to describe it to employees ought not to be taken lightly. As the courts have now made clear, there is a right way and a wrong way to address these important issues.

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to stop it completely, we’re just trying to get a gradual change, to get people to think about what they are doing and alternatives that could be available which are much more healthy.”

People can get scared when they feel like they’re messing with a learned tradition like bringing in fruit instead of cake for a birthday, said Merner.

“Sometimes, it’s just opening up that channel of communication,” she said. “(It’s about) ‘We’re going to put healthier choices as the more available option because we know that’s what keeps us happy and healthy and focused at work and happier with ourselves,’ as opposed to focusing on ‘We’re taking away the cake because it’s not good for you.’”

A lot of the time, there’s very little thought about food choices and people just get into bad routines, said Holwegner.

“It’s ‘Well, we’ve always done it that way, this is our vendor, our supplier, and we didn’t see those options on the menu.’”

It’s about upper leadership team taking the lead by choosing healthier options, such as no longer supplying pop, she said. “I would divert junk food budgets and vending machine budgets.”

Providing fridges and food preparation stations can also help, said Merner.

“If we can foster that environment, then it makes it easier to do it, and I think healthy is often the harder choice, so if we can make it easier, then that will help our employees go that route,” she said.

“Overall, I would find that most workplaces are getting healthier, but it comes back a lot to the convenience piece and what’s available.”

One Halifax call centre, for example, provides workers with fruit each day, said Merner.

“It’s visible, it’s easy, it’s already prewashed, you grab it and go back to your cubicle.... So it’s a nice bonus.”

Fresh fruit platters or bowls of nuts are good alternatives, said Hunt, who cited the example of Google when it concealed sweets in opaque containers to make them less visible and harder to reach, while healthy alternatives were more prominent. New York employees ate 3.1 million fewer calories over the course of seven weeks.

“If you just take them out of eyesight, then people are far less likely to keep dipping into the tin of chocolates or whatever it may be that’s on the desk,” he said.

Happily, the culture is changing — gradually, said Hunt.

“It isn’t something that we expect to happen overnight — look how long it took for smoking to have a cultural change — but it’s the same principle and I think we’ve just got to keep on drip feeding into this.”

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