

## **DEFINITION OF REMUNERATION PERPLEXES EMPLOYERS**

Regulation 691, which determines the definition and meaning of “remuneration” for the purposes of calculating the remuneration of employees under certain circumstances was published on 23 May 2003. Its provisions became effective on 1 July 2003. These provisions created several questions and uncertainties for employers.

Even before the implementation of these provisions, uncertainty often existed about the definition of remuneration for the purposes of payment of for example leave credit upon termination of service, the payment of severance pay when personnel cuts are made and payment during annual leave. Employers followed various approaches, often resulting in a lack of consistency and unnecessary risks.

The regulation attempts to address this situation by specifically referring to elements of payment that are included and excluded in the definition of remuneration, for purposes of the calculation of severance pay when personnel cuts are made, pay-out of leave credit, payment of employees during leave and payment of employees who are requested in their notice period to no longer offer their services.

The regulation inter alia provides that a housing subsidy or allowance, car allowance or the provision of a vehicle (unless it is merely provided to enable the employee to perform his work), any cash payments (unless expressly excluded by the regulation), employees' contributions to medical, provident and pension or similar funds and employers' contributions to death benefits, are included in the definition of “remuneration”.

Excluded from the definition are any cash payment that enables the employee to perform his work (for example an equipment or tool allowance or the provision of transport or the payment of a transport allowance in order to enable the employee to get to work), a relocation allowance, gifts or gratuities, payments in respect of profit-sharing schemes, discretionary payments not related to the employee's work hours or performance, entertainment allowances and education or schooling allowances.

The value of payment in kind is determined by either the employment contract or a collective agreement, provided that the value is not less than the cost thereof to the employer.

The relevant provisions of Regulation 691 further apply only to annual leave accrued since 1 July 2003.

Where payment fluctuates, for example in the case where an employee earns a commission, remuneration must be calculated over a period of 13 weeks, or if the employee has been in employment for shorter than that, for such shorter period.

The regulation holds the following implications for employers: when severance pay is calculated when personnel cuts are made, or when someone is remunerated while he is on leave or when someone is dismissed or resigns, any pay must be calculated with reference to the above inclusions and exclusions. In other words, leave credit cannot be calculated with reference to “basic” salary only.

Similarly, in the case of the payment of the minimum statutory severance pay when personnel cuts are made, namely one week's pay, the amount paid cannot be calculated on basic salary only, but must be calculated on the inclusive definition of remuneration as indicated above. What needs to be kept in mind however, is that, should an employer pay two weeks' severance pay based on basic salary and the sum total thereof is equal to or more than one week's remuneration, statutory requirements are still being met.

Many employers are already applying the broader definition of remuneration. Others will probably find that larger amounts need to be paid out in the above cases than before.

Employers need to keep the following in mind:

- The term “remuneration” as defined applies only in respect of the statutory minimum payments under the Basic Conditions of Employment Act, namely 1 week's severance pay in the case of personnel cuts and payment for 21 successive days' annual leave.
- Remuneration as defined above therefore does not include severance pay that exceeds the statutory minimum.
- Where an employer grants more than the statutory minimum of 21 calendar days' annual leave, the additional leave can be calculated or paid on the cash portion of the employee's remuneration, unless the employment contract states otherwise.
- When the employee takes annual leave, he is remunerated as usual (benefits and salary). The principle is that the employee who is on leave should be in the same position as he would have been, had he worked during the leave period.
- If the employee gives notice of termination of service and the employer requests him not to offer his services during the notice period, the employer must still receive the same remuneration that he would have received had he worked during the notice period.

As regards payment for annual leave, the matter is complicated by the Regulation's stipulation that it applies only to leave accrued since 1 July 2003. It thus seems that for the calculation of payment, specifically for leave in respect of someone who takes his annual leave after 1 July 2003 or who resigns after 1 July 2003, leave accrued after 1 July specifically would have to be calculated according to the definition of remuneration above.