



Bonuses

1. What is a bonus?

A bonus may be defined as *'something given or paid in addition to what is usual or expected'*, or *'payment over and above salary given to an employee as an incentive or reward.'* Employees are not entitled as of right to a bonus, unless this has been agreed to in a contract of employment or collective agreement. In some cases non-payment of a bonus may constitute an unfair labour practice.

2. The most common types of bonuses

- **Discretionary bonus:**
Payment of a bonus is left entirely to the discretion of the employer and is not guaranteed. It is usually linked to individual, team or company performance.
- **Performance bonus:**
Payment of a bonus is dependant on individual or company performance, or both. It only becomes payable if and when individual, team or company performance targets are met.
- **Guaranteed bonus:**
The so-called thirteenth cheque is an example of a guaranteed bonus: it is paid irrespective of individual or company performance. Typically, the thirteenth cheque is contractually guaranteed and therefore becomes a payment that the employee is entitled to, as of right.

3. Why employers pay bonuses

The key reasons are to –

- motivate employees;
- make the company attractive to potential employees;
- retain the services of valuable employees;
- be competitive in terms of remuneration and benefits when compared to other employers; and to
- obtain better results from employees by linking pay with performance.

4. Legal implications

- Bonus payments attract income tax.
- Section 29(1)(h) of the *Basic Conditions of Employment Act, Act 75 of 1997* dealing with particulars of employment, stipulates that employers must include details of 'any other cash payments that the employee is entitled to' (apart from wages / remuneration). Therefore if an employee is entitled to any type of bonus, the details thereof must be specified. Details should include the type of bonus and when it is payable (which should be clearly defined).
- *Although* employment contracts need not be in writing (only particulars of employment as provided for in s 29 of the BCEA are required to be kept) it is always advisable to record the details of the employment contract in writing. This applies equally to bonus arrangements. If, for example, a bonus is provided on a discretionary basis, this should be stipulated in the employment contract. The exact circumstances under which the bonus will be paid should be spelt out, as well as whether the bonus is payable *pro rata* and whether the employee must still be in employment on the date that the bonus becomes payable. If a bonus is forfeited in certain circumstances (e.g. due to excessive absenteeism or dismissal for misconduct), this should also be made clear. Finally, the contract should indicate that no right to payment of a bonus exists and that payment remains at management's discretion and that past practice does not constitute a right to future bonus payments.
- If a bonus is guaranteed, the employer cannot unilaterally remove it and replace it with, e.g. a discretionary bonus, as this amounts to a breach of contract. The employee's agreement needs to be obtained to effect such a change.
- Even if a bonus is not guaranteed, non-payment may amount to an unfair labour practice. This will be the case, for example, if an employee meets all the requirements for a discretionary bonus but the employer, without a valid reason, refuses to pay or only pays in part. The employee who relies on this ground, would need to prove
 - he/she has some entitlement to receiving this benefit; and
 - that the employer acted unfairly in not paying or not fully paying the relevant benefit.

- Employers who pay discretionary bonuses but who intend not making any payment because of an employee's or the company's alleged non-performance, should alert employees in good time of this fact and provide information to substantiate the decision.
- If lack of financial resources is the reason for not paying, employers should consult with affected staff to explain their predicament and attempt to find an agreed solution before unilaterally withholding a bonus. We would recommend the following process:
 - give sufficient advance notice in writing to affected employees, stating that the company is considering not paying bonuses and the reasons for it;
 - the notice should invite the employees to provide their input and any proposals they might have, either verbally or in writing;
 - they should be allowed enough time to comment and formulate their own proposals;
 - the employer should give careful consideration to the employees' proposals and comments as they may contain some merit;
 - if the employer disagrees with the employees' proposals and comments, this should be conveyed to the employees as well as the reasons for it
- **These steps are important not only to avoid a possible unfair labour practice award, but to keep staff motivated and informed.**
- If an employer treats employees who are in similar positions differently, i.e. by paying bonuses to some and not to others, and this distinction happens to coincide with differences in race, gender, or any other discriminatory ground, the employer may be guilty of unfair discrimination under *the Employment Equity Act, Act 55 of 1998*. The questions an employer should ask itself to avoid liability are:
 - Did some employees receive bonuses while others did not?
 - If so, what is the reason for it?
 - Is the reason justifiable, i.e. is it (a) unconnected to race, gender, or some other discriminatory ground; and (b) based on an objective, justifiable grounds e.g. non-performance?

Consider the following before deciding whether or not to award bonuses

The way in which the performance of an employee is evaluated and the awards associated with good performance, could contribute significantly to improve employee performance. In order to link pay with performance, the following should be done:

- ensure that every employee has an up-to-date and comprehensive job description;
- set clear performance objectives;
- involve employees in the goal setting exercise in order to improve the employee's understanding of the performance requirements, to make sure that these are realistic and to secure their buy-in;
- monitor performance on an ongoing basis;
- conduct regular (e.g. weekly or monthly) informal performance feedback discussions with all employees to motivate the stars but also to allow for early intervention with less stellar performers;
- encourage employees to participate and give their inputs in any performance feedback discussions and formal evaluation processes;
- make sure that qualification criteria and bonus payment terms and conditions are clearly spelt out in the employment contract (see standard clauses below);
- if the company is unable to pay a bonus in any year, staff should be informed of this well in advance so that they are able to arrange their financial commitments. Many employees are dependent on a bonus, especially where a practice has been established that bonuses are indeed paid each year.

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