

## Members Quarterly

Winter 2015 Edition

## Feature

# Designing Your Bonus Programs

*Be careful of legal ramifications*

Employers often implement bonus programs (short term, long term and other) as part of their compensation plans. Such programs allow you to incent different behaviours and are necessary to provide compensation that is market competitive. A recent decision highlights the importance of crafting these bonus programs carefully in order to avoid unnecessary liabilities.

In *Symcor Inc. vs Russell*, the employer, a financial processing services company, had short-term and long-term incentive plans. These plans were viewed as being integral parts of an employee's total compensation. It was a term of the plan that "To receive an award, you must be employed with Symcor on the actual date of payout."

The employee in this case resigned after the fiscal year end and before the anticipated short-term incentive plan payout a couple months later. The employee was notionally entitled to a bonus payment of \$66,000 which the employer was able to calculate based on the terms of its plan. The employer denied payment on the basis that termination occurred before payment had been made, though long-term incentive payments were made to the employee.

## Does a bonus constitute wages?

Rather than file a lawsuit, the employee filed a claim under the *Canada Labour Code* (equivalent to the *Alberta Employment Standards Code*). Regardless of the terms of the plan, an Inspector and Referee under the *Canada Labour Code* held that the bonus monies had been earned and were payable as "wages" under the *Canada Labour Code*. The appeal decision took a broad interpretation of "wages" and included the following points:

"Wages" under the *Canada Labour Code* includes "every form of remuneration for work performed", but does not include "tips and other gratuities." [In Alberta, "wages" excludes "a payment made as a gift or bonus that is dependent on the discretion of an employer and that is not related to hours of work, production or efficiency."]

The bonus pay was an important part of the total compensation package and a large part of the employee's remuneration. There was no distinction between salary and bonus in whether they constitute "wages."

Tips and gratuities are an unexpected extra. In this case, the bonus was not unexpected because it was based on individual and company performance.

Once a bonus is held to be "wages," there is still a second step required to assess whether the employee is entitled to the bonus under the terms of the plan.

Paying a bonus that has been earned will not be avoided just because there are general statements in a bonus plan that its purpose is to help retain employees.

If an employer wishes to enforce a condition that a bonus is only payable if the person remains an employee at the time of payment, the employer must make the condition known to the employee as a specific term of employment.



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Discretion must be exercised consistently with objective measures set by the company. A discretion cannot be applied solely on the basis that we will pay your entitlements "only if we feel like it."

The employer was not allowed to exercise its discretion so as to undermine the intent of the total compensation package. Otherwise, the employer would be able to abuse its discretion and obtain a windfall.

#### Tips for employers

It is important to remember the following when implementing bonus programs:

Formulaic or objective bonus programs are harder to deny an employee once the fiscal period in question has concluded. If the bonus has been earned under its terms, payment will be required.

A contractual requirement of continued employment to earn a bonus may protect your interests under a lawsuit, but does not necessarily prevent a negative employment standards outcome because parties cannot contract out of employment standards obligations. The Alberta definition of "wages" gives more latitude for the exclusion of incentive programs provided they are structured to be dependent on the discretion of an employer and not related to hours of work, production, or efficiency.

If you want to delay bonus payments and ensure a retention element to the program, it is important to clearly document the retention requirement and ensure that the retention element is an explicit criterion to "earn" the bonus.

Where suitable, the retention related conditions of a bonus should be set out as a specific term of employment. Careful wording is required. Unclear language will be interpreted against employers.

It is worthwhile to clearly identify bonus plans as discretionary, but that discretion will still have to be exercised reasonably. Pure discretion is often inconsistent with formulaic bonus programs and employers have to make policy choices about what kind of bonus program they want.

Some employers fail to recognize that if bonuses constitute "wages," vacation pay accrues on bonus payments. It is important to account for or take steps to prevent this added cost to your program. In addition, wages must be paid within a stipulated time of being earned (subject to different employment standards obligations).

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