



MEMENTO

OF THE EMPLOYER 9



TOPIC

End-of-year bonus



END-OF-YEAR BONUS

As the end of the year approaches, the usual questions arise regarding the payment of end-of-year bonuses.

Are you obliged to pay an end-of-year bonus to your workers? What are the conditions dictating payment of this bonus? How much should be paid? What are the tax and social security implications? What about the other bonuses and gifts often awarded at the end of the year? These are just some of the questions that we address in this Guide.

01

THE END-OF-YEAR BONUS: OPTIONAL OR MANDATORY?

Are you obliged to pay an end-of-year bonus to your workers? This depends on the actual situation at hand. There is no legal provision providing for the introduction of a general entitlement to an end-of-year bonus for private sector workers.

That being so, an obligation to pay such a bonus may nevertheless result from:

- a sectoral or company collective labour agreement (CLA);
- a provision in an individual employment contract;
- a provision in the employment regulations;
- customs and practices within the company.

A. OBLIGATION ARISING FROM A SECTORAL CLA

You are obliged, in principle, to pay an end-of-year bonus to your workers when you fall under a joint committee or sub joint committee where payment of such a bonus is provided for in a CLA. Is there any exemption from this obligation?

If the sectoral CLA has been made binding by royal decree, its provisions will apply to all employers and workers in the sector, even where a provision in the individual employment contract, the employment regulations or a company CLA stipulate that the granting of the said bonus constitutes a gift, with the payment and terms under which it is granted being determined unilaterally by the employer

EXAMPLE

Under an employment contract, a worker is entitled to an end-of-year bonus equal to half of the salary for the month of December. However, the sectoral CLA (made binding by royal decree) provides for the mandatory payment of a thirteenth month and the worker satisfies the requisite criteria (length of service and actual presence) to receive the full end-of-year bonus. The employer will therefore be required to pay the worker not half of the usual monthly salary, but a full thirteenth month, calculated in accordance with the provisions of the sectoral CLA.



However, if the CLA has not or not yet been made binding by royal decree, you will still be required to comply with it if you are a member of an employers' organisation that has signed the CLA. If you are not a member of an employers' organisation you can provide for exempting provisions, provided that the exemption is express and in written form.

A sectoral CLA generally determines the amount and terms under which the end-of-year bonus that it establishes is granted. Payment of the bonus is, in principle, the responsibility of the employer. However, in a certain number of sectors this obligation has been transferred to a Social Security or Welfare Fund created within the joint committee and financed by employer contributions. This serves, among other things, as a guarantee for workers that the end-of-year bonus will be paid, even in the event of the employer going bankrupt.

B. DOES THE SECTORAL CLA OFFER FREEDOM OF CHOICE? JOINT COMMITTEE NO. 200 AS AN EXAMPLE.

Within Joint Committee no. 200, each worker is entitled to an end-of-year bonus equal to one month's salary, paid in December. The end-of-year bonus is not payable where "the company has established at its level by agreement the remuneration and other working conditions of workers, provided that the benefits granted by this agreement are at least on the whole equivalent to the benefits provided by the collective labour agreement". The text of the sectoral CLA is subject to debate.

Instead of paying an end-of-year bonus you can award an alternative benefit, even where you have previously paid an end-of-year bonus in accordance with the sectoral CLA. What is an example of such an alternative benefit? A budget for the cafeteria plan within your company (see the April issue of the guide). How exactly you should award this alternative benefit is less clear. Does the alternative benefit have to be defined in a company CLA or will an amendment to each participating worker's individual employment contract suffice? It is possible to conclude a company CLA within a company without a trade union delegation, but this is not so easy in actual practice.

C. OBLIGATION ARISING FROM A COMPANY CLA, THE EMPLOYMENT CONTRACT OR THE EMPLOYMENT REGULATIONS

The granting of an end-of-year bonus is also

mandatory where you have committed in writing (company CLA, individual employment contract or work regulations) to pay an end-of-year bonus. Carefully determine the eligibility criteria for the end-of-year bonus. You may, for example, limit the bonus to certain categories of workers, impose a requirement for a minimum length of service or expressly provide that any worker who leaves the company before the end of the calendar year will not be entitled to an end-of-year bonus.

Notwithstanding this, the rules determined at company level may never be less favourable than what may be provided at sectoral level. If they are, the contractual provision will have to be set aside in favour of the more favourable sectoral rules. It goes without saying that there is nothing preventing you from granting an end-of-year bonus for an amount greater than that set out in the sectoral CLA. You may pay a larger amount or set less restrictive eligibility criteria (e.g. removal of the length of service condition required at sectoral level).

ADVICE/TIP

Let's suppose that you want to give your workers a little something extra. Does a supplement to the end-of-year bonus set by a sectoral CLA seem like a good idea? If it does, consider paying the supplement as a separate end-of-year bonus. This will enable you to determine your own eligibility criteria with ease: you will not therefore have to comply with the criteria set out in the sectoral CLA.

D. OBLIGATION ARISING FROM CUSTOMS AND PRACTICES

The absence of any provisions in a sectoral or company CLA, in an employment contract or in the employment regulations does not always mean that you are free of any obligation to pay an end-of-year bonus. Specifically, workers may be able to claim an entitlement to an end-of-year bonus based on established customs and practices within the company.

However, in order for customs and practices to create an entitlement to an end-of-year bonus, they must satisfy all three of the following criteria at the same time:

1) **Continuous nature**

The end-of-year bonus must have been granted regularly and on a continuous basis over time. The granting of a bonus for one year is not



sufficient to give rise to a genuine entitlement. The benefit must have been granted over a sufficiently long period for it to be regarded as continuous. This boils down to a question of a de-facto benefit that varies depending on the situation.

2) Generally applicable

The end-of-year bonus must be granted generally, i.e. to all workers or to a specific, objective category of worker (a division of the company, workers with a certain number of years of service with the company, etc.) without excluding any worker. The granting of an end-of-year bonus to individual workers can never give rise to customs and practices.

3) Fixed calculation and awarding parameters

The amount and terms for calculating and granting the end-of-year bonus must be determined in an objective manner and be known by workers. While it is permitted for the amount of the bonus to vary, the method used to calculate it must remain the same. The basis on which the bonus is calculated must, in other words, remain constant.

EXAMPLE

The bonus is calculated in proportion to growth in the company's turnover or corresponds to a set percentage of the worker's monthly or yearly salary. However, the granting of a bonus where the amount is at the discretion of the employer or where the method used to calculate and grant the bonus is not known by workers does not satisfy the constancy requirement.

What about where a worker believes that he or she is entitled to an end-of-year bonus based on customs and practices? In this case, it is up to the worker to prove the existence of the customs and practices in question.

E. GRANTING AN END-OF-YEAR BONUS ON AN OPTIONAL BASIS

What if you wish to grant an end-of-year bonus without any sectoral CLA obliging you to do so? We would advise you to check that there is no company CLA. Also consult the employment regulations and find out whether any individual agreements have been concluded with your workers. If there is nothing else to indicate that you should already be awarding an end-of-year bonus, you can establish that the end-of-year bonus is optional in nature. In this scenario, the granting of the bonus is viewed purely as a gift.

To maintain the gift-like character of the end-of-year bonus and prevent the payment giving rise to an obligation on the part of the employer to pay it in the future (by establishing customs and practices giving rise to an entitlement), it is important that, whenever the bonus is granted, it is clearly reiterated in writing that the said bonus is being paid outside of any sectoral obligation, that it is revocable and is entirely at the employer's discretion. This will establish that the granting of the bonus does not constitute an entitlement on the part of the worker, even where the 3 criteria required to give rise to customs and practices (see above) are present.

EXAMPLE OF A GIFT CLAUSE

This end-of-year bonus is granted outside of any obligation imposed by a company or sectoral agreement. Its nature is that of a pure gift, it is fully revocable and does not entail any obligation on the part of the employer for the future, irrespective of the frequency at which it is awarded.



02

AMOUNT OF THE END-OF-YEAR BONUS

In principle, the sectoral or company CLA, the employment contract or the employment regulations determine the amount of the end-of-year bonus and the terms under which it is calculated and awarded.

In general, the end-of-year bonus consists of a flat-rate amount equal to all or part of the worker's monthly salary. Nevertheless, in certain cases provision is made for a minimum or maximum amount

EXAMPLE

Sales representatives - Joint Committee no. 200:

If the remuneration of a sales representative is partially variable, the end-of-year bonus is calculated based on the average monthly remuneration over the previous twelve months. However, this amount is limited to the highest level on the category 4 wage scale in the professional classification applicable in the sector.

It may also consist of a specific percentage to be calculated on all fixed and/or variable remuneration received by the worker or based on an amount that, for workers that are paid by the hour (e.g. blue collar workers), is obtained by multiplying the hourly salary by a set ratio.

03

ELIGIBILITY CRITERIA

A. PRESENCE AND LENGTH OF SERVICE

The CLA, employment contract or employment regulations usually specify the different conditions that need to be satisfied in order to receive the end-of-year bonus.

The eligibility criteria generally include a requirement to be present in the company on the date of payment of the bonus as well as an effective length of service (e.g. 6 months of service). An effective length of service is generally understood to mean an uninterrupted period worked by the worker with the same employer pursuant to one or more employment contracts.

Given that the end-of-year bonus is, in principle, compensation for work carried out, any periods of inactivity resulting from a suspension of performance of the employment contract (e.g.

periods of incapacity for work, parental leave, time credit, temporary unemployment, strike, etc.) must not be taken into account when calculating the bonus, except where such periods are treated as effective service based on the provisions of a CLA, the employment contract, the employment regulations or customs and practices within the company.

Notwithstanding the above, many sectoral CLAs provide for certain absences to be treated as effective service (e.g. incapacity for work, maternity leave and emergency leave). Such CLAs not only specify the periods of suspension of the employment contract (statutory and contractual) that may be treated as effective service, but also the maximum length of time during which such inactivity will be treated as such (e.g. non-work-related incapacity for work treated as effective service for a maximum of 6 months).



A worker present in the company throughout the year might therefore only be entitled to a partial end-of-year bonus if, over the course of the year, performance of the worker's employment contract was suspended for a period not treated or only partially treated as effective service by the CLA.

EXAMPLE

A worker working in a company falling under Joint Committee no. 200 who was ill for 4 months during the year will only be entitled to a partial end-of-year bonus given that periods of illness lasting longer than 60 days are not treated as effective service in this sector.

B. POINTS OF CAUTION

1. GRANTING OF THE BONUS IN PROPORTION TO HOURS WORKED

If a worker starts to work for or leaves the company (e.g. dismissal) during the year, is he or she entitled to the end-of-year bonus? In other words, is the employer required to pay the end-of-year bonus in proportion to the time worked?

Payment of the end-of-year bonus in proportion to the length of employment, at the rate of e.g. 1/12 per month worked, may be mandatory where such proration is provided for in the CLA, the employment contract or the employment regulations or arises from customs and practices within the company.

Most joint committees provide for the bonus to be paid on a proportional basis by linking its granting to a length of service requirement.

EXAMPLE

In Joint Committee no. 116 for chemical industry workers, a worker who started work for or left the company during the year is entitled to the end-of-year bonus at a rate of 1/12 per month worked provided he or she can demonstrate at least 3 months' length of service with the company

Where not specified in the CLA, the individual employment contract or the employment regulations, the end-of-year bonus is to be seen as compensation for the work provided pursuant to the employment contract (principle of divisibility).¹

2. AWARDING OF END-OF-YEAR BONUS TO PART-TIME WORKERS

Part-time workers cannot be treated less favourably than full-time workers insofar as pay and working conditions are concerned. However, the working conditions can be adapted in proportion to working hours.² This rule also applies to payment of the end-of-year bonus. This means that a part-time worker is, in principle, entitled to the end-of-year bonus under the same conditions as a full-time worker, but in proportion to his or her working hours. It should be noted in this regard that many sectoral CLAs explicitly specify that part-time workers benefit from an end-of-year bonus in proportion to their working hours.

3. AWARDING OF THE BONUS IN CASE OF TERMINATION OF THE EMPLOYMENT CONTRACT

Are workers entitled to the end-of-year bonus where the employment contract is terminated? Where the employment contract comes to an end before the end of the year, the end-of-year bonus will be due in proportion to the period worked during the year (principle of divisibility).³

However, an exemption from this basic rule is possible via a CLA, or even via a clause in the employment contract or a provision in the employment regulations. In this way, the prorated payment of the end-of-year bonus in case of departure during the year may be subject to certain conditions relating to the worker having completed a certain length of service, the reason for the termination, the party responsible for the termination, etc. Sectoral CLAs generally stipulate that an end-of-year bonus is never due in case of dismissal for gross misconduct.

As to whether the bonus must be paid (in proportion to the time worked) in case of dismissal, resignation, force majeure or termination by mutual agreement, reference must be made on each occasion to the provisions of the sectoral CLA, which may rule out payment of the bonus in one or more such scenarios or require certain conditions to be satisfied, such as the requirement for a certain length of service by the worker, before payment is made.

If the CLA, employment contract or employment regulations provide an exhaustive list of the scenarios in which an end-of-year bonus is due (in proportion to the time worked), only the scenarios specified in the text concerned will give rise to an entitlement to the annual bonus.



However, where nothing is specified in the CLA, employment contract or employment regulations, the bonus must be paid to a worker who has been dismissed (including for gross misconduct) or who has resigned, in proportion to the length of employment.

An employer can only refuse to pay the bonus where it can demonstrate that the bonus paid to its workers is indivisible or that pursuant to customs

and practices within the company it is never granted to workers dismissed for gross misconduct or that resign.

The same reasoning also applies in the event of termination of the contract for force majeure or in the event of termination by mutual agreement.

04

WHEN AND BY WHOM MUST THE BONUS BE PAID?

Payment is to be made at the end of the year or on the date set down in the CLA, individual employment contract or employment regulations. In principle, you are responsible for paying the end-of-year bonus.

However, in a certain number of sectors (e.g. Joint Committees 12, 124, 145, 149.1, 302), payment is the responsibility of the Welfare Fund or Social Security Fund established within the joint committee and financed by monthly employer contributions.

05

END-OF-YEAR BONUS AND SEVERANCE PAY

When you dismiss a worker and provide payment in lieu of notice, this payment must be calculated while taking account of all benefits acquired under the employment contract.

Therefore, provided that the worker is entitled to an end-of-year bonus (pursuant to a sectoral or company CLA, a contractual provision, the employment regulations or customs and practices within the company), you will have to include the amount of the end-of-year bonus when calculating

the payment in lieu of notice.

It will have to be taken into account, even where any length of service requirement has not yet been satisfied and/or even where the terms for awarding the end-of-year bonus do not provide for it to be prorated!

The amount to be used when calculating the payment in lieu of notice must itself be calculated in proportion to the number of months covered by this payment.



The amount paid for the previous financial year or the amount set for the current financial year will be used if, at the time of the worker's departure, such amount has already been determined in the CLA, employment contract or employment regulations.

However, where payment of the end-of-year bonus is optional and therefore does not yet constitute an entitlement on the part of the worker, it is permitted to exclude the bonus when calculating the payment in lieu of notice, unless otherwise agreed between the parties.

06

END-OF-YEAR BONUS AND HOLIDAY PAY

The end-of-year bonus is not taken into consideration when calculating single and double holiday pay.⁴ However, insofar as the holiday pay to which a worker is entitled upon termination of his or her contract (due to resignation, dismissal, termination by mutual agreement or due to force majeure or dis-

missal for gross misconduct) is concerned, you will have to include the end-of-year bonus when calculating this holiday pay entitlement on termination.^{5,6}

07

END-OF-YEAR BONUS AND SOCIAL SECURITY AND TAX

The end-of-year bonus is considered part of remuneration for the purposes of both social security contributions and taxation. The end-of-year bonus will therefore be included when calculating both worker and employer social security contributions.

In terms of taxation, the end-of-year bonus is subject to the rate of income withholding tax applicable to exceptional bonuses and benefits. This rate is calculated based on the worker's standard annual remuneration that is subject to tax. However, withholding tax deductions are possible based on the number of dependent children.



GIFTS AND GIFT VOUCHERS

The end of the year is also a time when employers offer their workers various gifts, whether in cash, in kind or in the form of vouchers.

Gifts and gift vouchers that you offer at the end of the year are, subject to certain conditions, treated favourably from a tax and social security perspective.

They will not be considered remuneration and will not therefore be subject to social security contributions if they satisfy the following conditions:

- 1) The gifts and gift vouchers must be given for Saint-Nicolas/Sinterklaas, Christmas or New Year.
- 2) The value of such gifts may not exceed €35 per worker, increased by €35 for each dependent child. This is an annual limit.
- 3) The gift vouchers may only be exchanged at businesses with which the issuer of the vouchers has concluded an agreement in advance.

- 4) The gift vouchers must have an expiry date.
- 5) The gift vouchers may not, under any circumstances, be paid in cash to the beneficiaries.

If the value of the gifts exceeds the aforementioned amounts or if they are given for other occasions, the social security contributions will be calculated based on their total value and not on the difference between the permitted amount and the amount actually given!

Workers are exempt from paying tax on any gifts and gift vouchers which satisfy the aforementioned conditions.

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¹ Belgian Court of Cassation, 9 September 1985, JTT 1986, 162; Belgian Court of Cassation, 24 April 2006, JTT 2007, 6.

² Article 4 of the Law of 5 March 2002 on the principle of non-discrimination towards part-time workers.

³ Belgian Court of Cassation, 3 April 1978, JTT 1977, 2441; Belgian Court of Cassation, 16 June 1980, JTT 1981, 48.

⁴ Belgian Court of Cassation, 9 October 1989, JTT 1989, 433; Belgian Court of Cassation, 22 September 1980, JTT 1981, 10.

⁵ Belgian Court of Cassation, 28 October 1985, JTT 1986, 27.

⁶ By way of reminder, the holiday pay entitlement on termination corresponds to 15.34% of the gross remuneration received by the worker during the current holiday year from the employer with which he or she was employed.



COLOFON

Partena – Non-profit-making association – accredited Payroll Office for Employers by ministerial decree of 3 March 1949 under no. 300
Registered office: 45, Rue des Chartreux, Brussels, 1000 | VAT BE 0409.536.968

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39th year – Monthly review