Ius Laboris BELGIUM
CLAEYS & ENGELS

The system of collective bonus linked to results: 2011 version

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CONTENT:

After two years of real success in companies, the system of collective bonuses linked to results has been revised with a view to clarifying and improving its functioning.

In this newsletter, we take stock of the system and update you on the recent changes that take effect on 1 April.

We hope you enjoy the read!

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What's in a name?

In the framework of the interprofessional agreement 2007-2008 and under pressure from the Federation of Enterprises in Belgium, employers and unions agreed on a new bonus system, called "non-recurrent advantages linked to results" (called hereinafter "bonus linked to results").

This system enables employers to provide to all their workers or to just one category of them[1] advantages linked to the company's results or the realization of collective objectives fixed in advance. These advantages are not a part of the workers' remuneration. The aim pursued is to motivate the workers by involving them in a common company project. It is not about rewarding individual performance.

Originally, the Collective Labour Agreement n°90 (CLA no. 90) of the National Labour Council[2] and the Act of 21 December 2007[3] put in concrete form the agreement of the social partners.

After two years during which time the difficulties linked to applying the new system had become clear and following the advice of the National Labour Council, the social partners amended the original rules by adopting Collective Labour Agreement n° 90*bis* on 21 December 2010. Furthermore, the Act of 21 December 2007 has also been amended by the Act of 29 December 2010 (title 12).

The main purpose of the amendments is to make the rules easier to read and to improve the system as a whole.

An advantageous tax and parafiscal treatment

With regard to social security, the rules provide that the collective bonus linked to results is excluded from the notion of remuneration. Thus, the ordinary employer and employee contributions are not due. This exemption is limited to a ceiling of 2,358 EUR (amount applicable in 2011) by calendar year, by employee, and for each employer for which the employee is in service.

However, a special social security contribution of 33% is due on the amount of the collective bonus linked to results which is granted. The bonus must be notified to the National Office for Social Security (NOSS) in the declaration filed for the quarter during which it has been paid.

As regards tax, the collective bonus linked to results, granted in accordance with the legal provisions, is exempted from any tax. This exemption is limited to a ceiling of 2,358 EUR (amount applicable in 2011).

The employer does not have to retain withholding taxes and the employees thus receive a net income. The collective bonus linked to results and the special employer's contribution of 33% are, moreover, deductible from tax as professional charges for the employer.

If the amount of the bonus granted exceeds the ceiling of 2,538 EUR (amount applicable in 2011), only the surplus is subjected to the ordinary social security contributions and to tax (with the obligation for the employer to withhold taxes).

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[1] With respect to anti-discrimination rules.

[2] As regards the non-recurrent advantages linked to results of 20 December 2007.

[3] Relating to the execution of the 2007-2008 interprofessionnal agreement (*Belgian Gazette* of 31 December 2007).

Example:

	'normal' bonus	Collective bonus linked to results
Cost	6,658.20	3,136.14
NOSS employer (± 35% / 33 %)	+ 1,726.20	+ 778.14
Gross	4,932.00	2,358,00.
NOSS employee (13,07)	- 644.61	0
Professional deduction (± 45 %)	- 1,929.32	0
Net	2,358.00	2,358.00

The cost of granting the same net bonus is thus reduced by more than half in the framework of this regulation. In our example, we have moreover not taken into account the fact that a normal bonus must also to be taken into account for calculating the vacation pay, contrary to the collective bonus linked to results.

Special treatment in employment law

Employees cannot derive any rights from results-linked bonuses (save to the extent that more favourable provisions are provided for by CBA), except for the right to payment of the bonus itself.

More specifically, as to employment legislation[4], this means that the collective results-linked bonus:

- should not be taken into account for the calculation of the vacation pay, the holiday pay, the guaranteed remuneration, a bridging pension allowance, group insurance contributions, etc.;
- should not be taken into account in the computation basis when calculating the notice period and the indemnities due in case of termination of the employment agreement (severance indemnity, compensation for loss of clientele, compensation for so-called protected status, etc.);
- should not be taken into account for the verification of certain thresholds, like for example, for the application of a non-compete clause.

Nonetheless, we wish to draw your attention to the fact that the Act of 12 April 1965 concerning the protection of the remuneration does apply to the collective results-linked bonus. This means, inter alia, that the advantage must be paid out in cash and that this advantage produces interest from the moment the bonus is due.

[4] Likewise, the collective result-linked bonus is not taken into account for the calculation of the benefits concerning social security, or concerning work-accidents or professional diseases.

The characteristics of the collective results-linked bonus

The collective results-linked bonus must comply with certain conditions. The elements listed hereafter are essential:

- the bonus must be linked to the collective results of the undertaking, a group of undertakings or a clearly defined group of employees, on the basis of objective criteria. Hence, the bonus cannot be dependent on achieving individual targets or the performance of the employees concerned;
- the bonus plan must apply to all the employees of the undertaking, or to a clearly defined group among them. The definition of this group cannot be discriminatory. A personnel category (blue-collar employees, white-collar employees, sales representative, etc.), and also a certain division of the undertaking, a service, a team, etc. can be qualified as such a clearly defined group;
- the bonus must be dependent on the achievement of transparent, definable, measurable and verifiable targets. Furthermore, the employer has a large measure of flexibility to define these targets and the results.[5] The targets can have a financial nature, like for instance a cost decrease or an increase in the turnover by 10% before a certain date. However, the targets can also have a totally different nature, like the improvement of the environmental policy of the company or the achievement of an ISO norm;
- on the other hand, the bonus cannot depend on targets the realization of which is manifestly certain at the moment the system is introduced. The reason behind this prohibition is to prevent the bonus being formally linked to certain targets only to guarantee the payment of guaranteed remuneration.

Furthermore, the bonus cannot be introduced with a view to converting existing elements of the remuneration, premiums, benefits in kind or other advantages, provided for in CBAs and/or individual agreements, whether or not they are subject to social security (for example, the 13th month premium, individual bonus, etc.). Under certain conditions, however, the collective bonus system can replace an existing system of results-linked advantages, which has a similar content (this can also be based upon individual targets) as the provisions of the regulations on the collective results-linked bonus. Of course, the collective results-linked bonus scheme can be in force in a company alongside other bonus schemes.

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[5] Targets linked to the value of the shares of the company are, however, excluded. Targets with regard to a decrease in work accidents or in rates of absenteeism should comply with certain conditions.

Introducing a system of collective results-linked bonuses

By CBA or by act of accession?

Every employer can take the initiative, without being obliged to do so, to introduce a system of collective results-linked bonuses. In principle, the bonus plan is introduced by a collective bargaining agreement (CBA). However, for these employees not represented by a Trade Union delegation, the plan can be introduced either by a CBA or by an 'act of accession'. Therefore, it is possible that an employer must conclude a CBA for his blue-collar employees, whilst an act of accession suffices for his white-collar workers (if they are not represented by a Trade Union delegation).

Both the CBA and the act of accession must be drafted in conformity with the models as provided for by new rules.

The procedure for introducing a collective results-linked scheme on the basis of an act of accession can, to a certain extent, be compared to the procedure that is applicable when a company's Work Rules are changed. The draft of such act, also containing the granting plan, is first presented to the employees for their consideration and they have a term of 15 days to notify their possible remarks (with such remarks being included in an ad-hoc register or sent directly to the Labour Inspectorate).

When this term ends, the register is submitted to the Labour Inspectorate, which, in the event there are employee remarks, will try to reconcile both parties. Should such reconciliation fail, the Inspectorate must seek the assistance of the President of the competent Joint Committee, who will try for the last time to reconcile the parties. If this attempt also fails, the Joint Committee will settle the dispute. After this procedure, or from the moment that the text of the act of accession is no longer subject to any remarks, the act is to be deposited with the Registry of the General Direction collective employment relations of the FPS Employment, Labour and Social Dialogue. The registry will then send the act of accession to the Joint Committee, which will check the act on its formalities and evaluate the granting plan in the light of the principles of non-discrimination.

In the event a CBA is concluded (for a defined or undefined period of time), it must be deposited with the Registry of the General Direction collective employment relations of the FPS Employment, Labour and Social Dialogue.

The granting plan – mandatory content

The models CBA and act of accession, provide for certain clauses that form the "granting plan" of the bonus scheme. Thus, clauses must be included to specify:

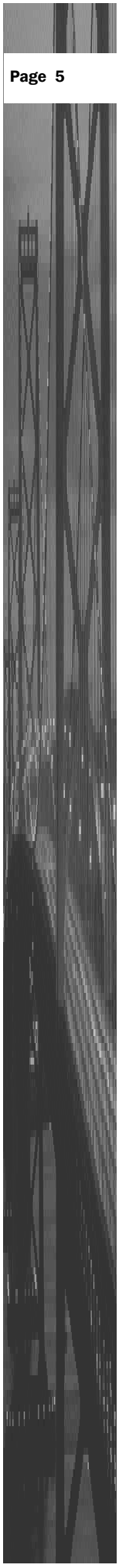
1 The Company, the group of companies or the clearly determined group of employees for which the advantage is established on the basis of objective criteria.

2 The objectively measurable and verifiable goals, excluding any individual goals, to which the advantages are linked.

3 The number of employees concerned by the bonus plan at the moment of drafting.

4 The reference period to which the collective goals refer.
The granting plan must enable the mo ment when the collective goals have to be reached to be determined. This period is minimum three months.
The reference period can coincide with the calendar year, the financial year, or can be shorter or longer (the end date can also coincide with the introduction of an ISO-standard in the company).

5 A method of follow-up and control to determine whether or not the results are achieved.



6 An operational procedure that is applicable in case of discussion on the evaluation of the results.

The granting plan should mention the possibility for appeal for the employee-beneficiaries who wish to contest the assessment of the results. This is not prejudicial to the application of the rules with regard to the employee representatives and/or the sector arrangements that might exist on that point.

7 The advantages and the calculation method.

The plan must contain all the calculation elements which enable the share of every employee in the collective advantages to be calculated. This share should be calculated separately from the individual assessments, performance and results.

The granting plan must also determine how the advantages are to be calculated in the event the collective goals are only partially achieved. In addition, in case of multiple collective goals the weight of every goal has to be determined. If the advantages are granted to different groups of employees, the rules for distributing the eventual advantages amongst the groups have to be determined.

Regardless of the employee being in service during the entire reference period, the calculation has to be made at least *pro rata temporis* of the effective performance during this period in the company or the clearly determined group of concerned employees. The periods of maternity leave, as well as annual vacation and official holidays are considered as worked times for the purposes of the scheme and employee entitlement to the collective advantages.

Moreover, it is possible to include a seniority condition, which cannot be more than half the reference period. The seniority condition is to be checked at the end of the reference period and takes all successive employment agreements in the company into account.

It is also possible to exclude the right to the collective bonus for employees who are dismissed during the reference period for serious cause or who resign (except if they resigned for a serious cause on the part of the employer).

8 The moment and mode of payment (in cash) of the advantages.

9 The period of validity (for an indefinite or a definite period of time) of the plan.

The texts (CBA and act of accession) must also mention:

1 The existence of a prevention plan in the company if the objectives are linked to reducing work accidents.

2 A possible conversion of an existing bonus plan, of which the text that defines the granting modalities has to be annexed.

The granting plan – optional elements

The plan may also contain certain optional information, like:

- the way the employees concerned will be informed on a regular basis about the development of the results;
- a modification procedure for the target-levels that have to be achieved for every goal;
- in order to prevent that the individual employment agreement – that has been changed tacitly by the CBA – continues to exist when the CBA ceases to have effect, the CBA can provide for particular provisions.

Changes to the granting plan

Changes to the granting plan can only be made if the CBA (or the act of accession) provides for a particular modification procedure and on condition that the signatory parties (in the case of a CBA) or the employees (in the case of an act of accession) are kept informed about the intervening modifications. If no particular procedure is provided for, the complete procedure for establishing

such plan (by CBA or by act of accession) should be followed again.
The employer should inform the Registry of the General Direction Collective Employment Relationships of the FPS Employment of the changed goals or levels that have to be achieved. The Registry will subsequently notify the competent Joint Committee.

Information to be provided to the employees

Besides this special information provided upon establishing the granting plan (in particular in the case of an act of accession), the employer is obliged to hand over an information sheet to every employee individually upon payment of the collective bonus linked to the results. Even if no bonus is paid, an information sheet should be handed over anyway.
This individual information sheet (which is a so-called "social document") must mention at least:

- the identity of the employee concerned by the advantage;
- the concerned granting plan or, in case of establishing the granting plan by a CBA, the place where it can be consulted;
- the concerned reference period;
- for every goal, the expected results, their level of realization and the method used to verify the level of realization;
- the mode of calculating and weighing the advantage and the amount granted to the concerned employee or the statement that no advantage is granted;
- the date of payment of the advantage when it is due;
- a statement that the advantage is exempt from social security contributions for the employee and is not subject to personal income tax up to the ceiling of 2.358 EUR (amount for 2011).

Timing for 2011

Companies that want to establish a collective bonus plan linked to the results of the complete year 2011, can still do this. Indeed, the effective entry into force of a collective plan can at the most be retroactive for one third of the reference period, as determined by the granting plan. In practice, this means that if the objectives are determined on the basis of the entire year 2011, the plan should be deposited at the Collective Employment Relationships of the FPS Employment on Friday 29 April 2011 at the latest.

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