

EMPLOYMENT

RETENTION BONUSES –
FOR EMPLOYEES ONLY

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Awarding bonuses to employees reminds deserving individuals of their value to the employer and strengthens the trust and loyalty in an employment relationship. As the name suggests, the intention of retention bonuses is also to retain employees in the services of the employer. It follows then that such a gratuity should in principle not be afforded to employees who, by their own choice or otherwise, no longer intend on working for the employer.

The Labour Appeal Court in the case of *Apollo Tyres SA (Pty) Ltd v CCMA & Others* [2013] 34 ILJ 1120 (LAC), defined benefits as "existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion." The decision gave employees the opportunity to refer unfair labour practices to the CCMA where the employer failed to award such bonuses, even on the basis of predetermined performance management systems, exposing employers to a potential spike in unfair labour practice disputes.

Are employees entitled to retention bonuses after they tender their resignation?

Resignation is a unilateral act by an employee which only needs to be communicated in a clear and unambiguous manner. In *Uthingo Management (Pty) Ltd v Shear NO & Others* (2009) 30 ILJ 2152 (LC) the Labour Court made it clear that an employer need not accept the resignation for it to become effective. In addition, whilst an employer may hold the employee to the notice period, it is acceptable for the employer to terminate the employment immediately and make a payment *in lieu* of the notice period.

The Labour Appeal Court also had opportunity to consider contractual terms relating to termination of employment in the recent case of *Bonfiglioli South Africa (Pty) Limited v Panaino* [2014] JOL 32441 (LAC). In this matter the employee had signed an extension to a retention and restraint agreement. In this extension the employer inserted a clause which expressly made the bonus payable subject to the employee remaining in the employ of the company until a specified date. The parties agreed that, for the purpose of the contract, termination included the employee tendering his resignation (as opposed to remaining in the employ of the employer until the end of the notice period, the normal position). The Labour Appeal Court agreed that the employee's

contract terminated when the employee tendered his resignation, as agreed in the contract. The court held further that an employer could make a retention bond payable at the end of a specified period with the intention of incentivising employees to stay in its employ for a period and that those who resigned before such period would not be entitled to it.

In a scenario where a company bonus is payable at the end of December provided that an employee is still employed at such date, and the employee tenders his resignation at the end of November, ordinarily the employee should serve the notice period and continue to work until the end of December, and thus be entitled to the benefit. The parties could, however, agree to a different dispensation whereby the employee is no longer entitled to certain rights (such as a retention bonus) whenever the employee tenders her resignation.

Employers may consider inserting a clause in all of their employment contracts making payment of retention bonuses subject to employment at the time that the bonus is due in order to safeguard themselves against unnecessary payment of bonuses to people who are no longer in their employ. Incorporating a clause that disqualifies employees from such a payment upon tendering resignation could assist employers to reward those employees who are in active employ at the cut-off date.

Hugo Pienaar and Sihle Tshetlo



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THE XXI WORLD CONGRESS OF THE INTERNATIONAL SOCIETY FOR LABOUR AND SOCIAL SECURITY LAW IS TAKING PLACE IN CAPE TOWN FROM 15 TO 18 SEPTEMBER 2015, HOSTED BY THE SOUTH AFRICAN SOCIETY FOR LABOUR LAW (SASLAW) AND PROUDLY SPONSORED BY CLIFFE DEKKER HOFMEYR AND DLA PIPER AFRICA.

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CONTACT US

For more information about our Employment practice and services, please contact:



Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@dlacdh.com



Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@dlacdh.com



Johan Botes
Director
T +27 (0)11 562 1124
E johan.botes@dlacdh.com



Mohsina Chenia
Director
T +27 (0)11 562 1299
E mohsina.chenia@dlacdh.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@dlacdh.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@dlacdh.com



Gavin Stansfield
Director
T +27 (0)21 481 6314
E gavin.stansfield@dlacdh.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@dlacdh.com



Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@dlacdh.com

Kirsten Caddy
Senior Associate
T +27 (0)11 562 1412
E kirsten.caddy@dlacdh.com

Nicholas Preston
Senior Associate
T +27 (0)11 562 1788
E nicholas.preston@dlacdh.com

Lauren Salt
Senior Associate
T +27 (0)11 562 1378
E lauren.salt@dlacdh.com

Ndumiso Zwane
Senior Associate
T +27 (0)11 562 1231
E ndumiso.zwane@dlacdh.com

Anli Bezuidenhout
Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@dlacdh.com

Katlego Letlonkane
Associate
T +27 (0)21 481 6319
E katlego.letlonkane@dlacdh.com

Inez Moosa
Associate
T +27 (0)11 562 1420
E inez.moosa@dlacdh.com

Thandeka Nhleko
Associate
T +27 (0)11 562 1280
E thandeka.nhleko@dlacdh.com

Sihle Tshetlo
Associate
T +27 (0)11 562 1196
E sihle.tshetlo@dlacdh.com

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@dlacdh.com

cliffedekkerhofmeyr.com

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