

Is an employer obliged to pay bonuses?



Are employers obliged to pay out bonuses?

The quick answer to this question is easy. No, as a rule there is no obligation on an employer to pay out any bonuses or 13th cheques to employees, apart from the exceptions discussed below. Bonuses are discretionary in nature.

Bonus and 13th cheques

A **13th cheque** merely serves as a gratuity payment and is awarded to the employee irrespective of performance of either the employee or the company. Many employers have done away with a 13th cheque by distributing such payment over 12 months as part of the normal wages.

A **bonus**, on the other hand, is awarded to an employee based on either the employee's performance, such as an incentive or performance bonus, or the performance of the company, as in the case of a production bonus.

Although bonuses and 13th cheques are not the same, for the purpose of this discussion reference to a bonus also applies to a 13th cheque.

There are some exceptions to the above-mentioned rule:

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Bargaining councils' collective agreements may make provision for the payment of bonuses

Where a specific industry has a collective agreement that contains provisions regarding the payment of bonuses, an employer who is a party to the collective agreement cannot avoid payment of bonuses as he would be bound by the provisions of such an agreement.

If an employer is unable to pay any bonuses due to financial constraints or for any other valid reason, it would be advisable to approach the Bargaining Council to establish whether he may apply for exemption in this regard.

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The employer may be contractually liable to pay bonuses

Where an employer and employee had entered into a contract of employment that contains any provision regarding the compulsory payment of bonuses, an employer would need to adhere to the terms of such contract. If an employer does not pay the bonus, it may be seen as a unilateral change to the provisions of the employment contract, in which case the employee may take legal action against the employer for breach of contract.

The employer is advised to negotiate with the employees once it becomes evident that no bonuses would be paid.

Expectations regarding the payment of a bonuses due to company policies, custom or practices

If an employer has consistently awarded bonuses in the past, he may have created an expectation in this regard. Where employees have been receiving a December bonus for the past five years and then two weeks before close of business in December hear that they will not be receiving a bonus that year, it may be seen as an unfair labour practice as the expectation had been created over a number of years. Failure to give sufficient notice of such non-payment and to consult with the employees in this regard may also be seen as unfair labour practice. When an expectation has been created regarding the payment of bonuses, it doesn't automatically entitle employees to such payment, but at the very least affords them the right to be heard before a decision in this regard.

In order to avoid claims for unfair labour practices pertaining to non-payment of bonuses, an employer must be **fair, reasonable** and **transparent**. As soon as it becomes apparent that bonuses will not be paid, the employer should consult with the employees and the representative trade union, if applicable. If the employees refuse to see reason, the employer may still proceed to implement his plan, although it must be clear that he had good and fair business reasons or commercial rationale to proceed with it and that he had made the effort to consult with employees.

Briefly, an employer who does not pay bonuses may continue not to do so. Those who have been paying bonuses are advised to stipulate the terms of the bonuses in the contract of employment, perhaps specifically indicating that bonuses will be awarded in accordance with a certain set rules or principles which may change from year to year.

About the author: Audrey Cloete obtained her LLB degree from the North-West University Potchefstroom in 2003. She completed her articles with the main focus on Criminal Law, however broadened her horizons after being admitted as attorney to take on other legal disciplines. She is also an admitted Conveyancer. Audrey joined SERR Synergy in 2015 where she currently works as a Legal Compliance Advisor.