

Employment in Financial Services

Contributing Editor

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07. Are there any specific rules relating to compensation payable to financial services employees in your jurisdiction, including, for example, limits on variable compensation, or provisions for deferral, malus and/or clawback of monies paid to employees?

Belgium

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Specific rules apply to personnel whose professional activities have a significant impact on the company's risk profile (article 92, 2. Directive 2013/36/EU; article 67, Act of 25 April 2014), including:

- all members of the legal administrative body and senior management;
- staff members with supervisory responsibility for control functions or business units;
- employees who received significant remuneration during the previous year (ie, 500,000 EUR or more and equal to or greater than the average remuneration of members of the legal administrative body and senior management) and the employee performs the professional activity in a critical business unit and the nature of the activity is such that it has a significant impact on the risk profile of the business unit concerned.

Variable remuneration is capped at 50% of the fixed remuneration or 50,000 EUR, without exceeding the fixed remuneration, whichever is higher (article 1, Annex II, Act of 25 April 2014). Moreover, it is forbidden to have a guaranteed variable remuneration (article 5). 40% of variable remuneration is delayed for four to five years, with a minimum of five years for members of the legal administrative body and senior management. When the variable remuneration is very high, the percentage of the delayed variable remuneration is 60% (article 7).

The total variable remuneration will be significantly reduced if the company generates a reduced or negative financial return. This applies to variable remuneration not yet earned, variable remuneration earned but not yet paid, and variable remuneration that has already been paid. It occurs through malus or clawback schemes, in particular when the person has participated in practices that have resulted in significant losses, has not respected the “fit and proper” duties or has set up a specific mechanism for tax fraud (article 8).

A termination indemnity is considered a variable remuneration, except for a legal indemnity in lieu of notice or a non-compete indemnity (based on the calculation provided by the Employment Contracts Act). Furthermore, a termination indemnity higher than 12 months, or 18 months for a motivated decision from the remuneration committee, can only be granted subject to the approval of the first ordinary general meeting following the termination (articles 12 and 12/1).

For companies that benefit from government intervention, there is in principle no variable remuneration, except for the person recruited after the public intervention to carry on the restructuring. Moreover, the termination indemnity is capped at nine months, unless the legal indemnity in lieu of notice (based on seniority) is higher (articles 16 and 17).

Last updated on 16/04/2024



Brazil

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The Collective Labour Agreement establishes several rules for employees in the sector.

There is a determination, through collective negotiation, of:

- percentage of salary increase;
- minimum wage for employees who begin their activities in the sector;
- minimum wage for employees after 90 days' tenure;
- additional pay for length of service;
- additional overtime;
- night additional pay;
- additional pay for unhealthy or dangerous work;
- function bonus;
- cash bonus;
- gratuity for check clearing;
- meal assistance;
- food assistance;
- daycare and nanny assistance;
- funeral assistance;
- transportation vouchers; and
- assistance with night-time travel.

Last updated on 16/04/2024



France

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Under French law, several mechanisms regulate the compensation of employees in the financial services sector to limit risk-taking.

Concerning guaranteed variable remuneration (welcome bonus, recruitment bonus, etc) for new staff, establishments are not allowed to guarantee this beyond the first year of employment; it is said to be "exceptional" and can only be granted if the financial base is sufficiently sound and solid.

In addition, European Directive 2013/36 EU, UCITS V, of 26 June 2013 introduced a "clawback" mechanism that the legislature has transposed into French law. Thus, article L.511-84 of the Monetary and Financial Code provides that "the total amount of variable remuneration may, in whole or in part, be reduced or give

rise to restitution when the person concerned has failed to comply with the rules laid down by the institution with regard to risk-taking, in particular because of his responsibility for actions that have led to significant losses for the institution or in the event of failure to comply with the obligations of good repute and competence".

In addition and following the above-mentioned Directive 2013/36/EU (article 94) concerning the deferral of remuneration, the payment of variable remuneration should be made in part immediately and in part on a deferred basis.

Institutions are encouraged to implement a deferral schedule, that properly aligns staff compensation with the institution's business, economic cycle, and risk profile, so that a sufficient portion of variable compensation can be adjusted to results through ex-post risk adjustments.

This schedule consists of the portion of variable compensation deferred, the length of the deferral period and the speed of vesting of the deferred compensation.

In the event of poor or negative performance by the institutions, leading to a reduction in the total amount of variable compensation, the payment of variable compensation may be subject to specific arrangements implemented by the institutions, as referred to in Directive 2013/36/EU.

In addition, article L.511-84-1 of the French Monetary and Financial Code specifies that the variable portion that may be reduced or even recovered as a penalty is excluded from the calculation of several indemnities in the event of dismissal, including the legal indemnity for dismissal.

Finally, following Law No. 2013-672 of 26 July 2013 on the separation and regulation of banking activities, the variable remuneration of managers and traders is capped, and cannot exceed the fixed part. In addition, a "say on pay" mechanism has been implemented (ie, the general meeting of shareholders must be consulted on the remuneration paid to executives and traders).

Last updated on 16/04/2024



Germany

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Yes, there are specific sets of rules on remuneration in the financial services sector, varying in detail per sub-sector. Rules are particularly strict for material risk-takers of significant institutions in light of the increased risk profile of their activities for the entire organisation.

Variable and fixed remuneration must have an appropriate ratio to each other. For financial institutions, the ratio is appropriate if the variable remuneration both complies with an upper limit of 100% of the fixed remuneration (up to 200% maximum based on a shareholders' resolution) and provides an effective behavioural incentive. Further, variable remuneration may need to be spread over deferral periods. Depending on the sector, remuneration may have to be made subject to malus, holdback or clawback provisions in case specific risks materialise or the employee is found guilty of misconduct. Further, certain remuneration elements must be granted in instruments instead of cash payments, with restrictions around this element again varying by sub-sector.

Last updated on 16/04/2024



Hong Kong

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There are no specific mandatory rules relating to compensation payable to financial services employees in

Hong Kong.

The HKMA has issued a Supervisory Policy Manual CG-5 “Guideline on a Sound Remuneration System”. This focuses on providing a broad idea and introducing basic principles of how remuneration policies should be designed and implemented in the authorised institution, to encourage employee behaviour that supports the risk management framework, corporate values and long-term financial soundness of the authorised institution.

Under the Guideline, the elements of a sound remuneration system are as follows:

Governance

- Remuneration policy should be in line with objectives, business strategies and the long-term goals of the authorised institution.
- The remuneration arrangement for employees whose activities could have a material impact on the authorised institution’s risk profile and financial soundness should support, but not undermine, the overall risk management approach.
- The Board of an authorised institution is ultimately responsible for overseeing the formulation and implementation of the remuneration policy.
- The establishment of a Board remuneration committee would assist the Board in discharging its responsibility for the design and operation of the authorised institution’s remuneration system.
- Risk control personnel should have appropriate authority and involvement in the process of design and implementation of the authorised institution’s remuneration policy.

Structure of remuneration

- Balance of fixed and variable remuneration should be determined with regard to the seniority, role, responsibilities and activities of their employees and the need to promote behaviour among employees that support the authorised institution’s risk-management framework and long-term financial soundness.
- Variable remuneration should be paid in such a manner as to align an employee’s incentive awards with long-term value creation and the time horizons of risk.
- Guaranteed minimum bonus to senior management or key personnel should be subject to the approval of the Board (or the Board’s remuneration committee with the necessary delegated authority).

Measurement of performance for variable remuneration

- The award of variable remuneration should depend on the fulfilment of certain pre-determined and assessable performance criteria, which include both financial and non-financial factors.
- Size and allocation of variable remuneration should take into account the current and potential risks associated with the activities of employees, as well as the performance (overall performance of the relevant business units and the authorised institution as a whole as well as the contribution of individual employees to such performance).
- Judgement and common sense may be required during the process to arrive at a fair and appropriate remuneration decision. The rationale for the exercise of judgment and the outcomes should be recorded in writing.

Alignment of remuneration pay-outs to the time horizon of risks

- Deferment of variable remuneration is appropriate when the risks taken by the employee in question are harder to measure or will be realised over a longer timeframe.
- The award of deferred remuneration should be subject to a minimum vesting period and pre-defined vesting conditions in respect of future performance.
- Authorised institutions should seek undertakings from employees not to engage in personal hedging strategies or remuneration and liability-related insurance to hedge their exposures in respect of the unvested portion of their deferred remuneration.

Remuneration disclosure

- Authorised institutions should make remuneration disclosures at least annually. The disclosure should

include the qualitative and quantitative information that the HKMA has set out in its annual remuneration disclosure.

Last updated on 22/01/2023



India

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There are certain rules relating to compensation payable to financial services employees, such as those in the banking, mutual fund or asset management, and insurance industries.

The central bank of India, the RBI, deals with the compensation policy for all private-sector banks and foreign banks operating in India by requiring them to formulate their own compensation policy and annually reviewing it. Banks are not allowed to employ or continue the employment of any person whose remuneration is excessive in the RBI's opinion. For instance, the RBI lays down guidelines on the compensation of "Whole Time Directors ("WTD") / Chief Executive Officers / Material Risk Takers and Control Function Staff"[\[1\]](#), elaborate guidelines encompassing the governance of compensation and its alignment with prudent risk-taking, policies for risk control and compliance staff, the identification of "material risk takers", and disclosure and engagement by stakeholders. It even envisages deferred payments being subjected to malus or clawback arrangements if there was negative performance. For variable pay, it mandates banks to incorporate malus or clawback mechanisms and suggests they specify periods of malus or clawback application to cover at least deferral and retention periods.[\[2\]](#) It is pertinent to highlight that private sector and foreign banks in India must obtain regulatory approval[\[3\]](#) for the grant of remuneration to WTDs or CEOs.

The RBI also prescribes guidelines around compensation for key managerial personnel (KMP) and senior management in non-banking financial companies (NBFCs)[\[4\]](#):

- NBFCs are mandated to form "Nomination and Remuneration Committees" (NRCs) as per Section 178 of the Companies Act, 2013, which will then be entrusted with framing, reviewing and implementing the compensation policy to be approved by the board of the company.
- The compensation must align with the risk related to the decision-making process. The compensation package can comprise both fixed and variable pay and may also be a mix of cash, equity or other forms, in line with projected risk factors.
- A bonus has no bearing on the performance of the individual. The bonus is guaranteed based on the fulfilment of certain criteria as may be specified in the compensation policy. A guaranteed bonus should neither be considered part of fixed pay nor variable pay and the same is not payable to KMP and senior management. However, a guaranteed bonus can be paid to new employees as part of a sign-on bonus whereby potential employees can be incentivised to join NBFCs.
- "Deferred compensation may be subject to malus/clawback arrangements." The compensation policy concerning malus or clawback must mandatorily apply for the period equal to at least the deferred retention period.

Despite the aforementioned guidelines being applicable from 1 April 2023, NBFCs must immediately begin aligning their internal procedures to comply with the mandatory guidelines above to assist the transition. Existing remuneration policies being followed by the NBFCs should be reviewed to make the necessary changes to be compliant with the above-mentioned policies.

When it comes to regulations on an "employee stock option plan" (ESOP) for financial services employees, regulators may impose industry-specific guidelines. For instance, as per the SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021[\[5\]](#), the employee stock option scheme should be drafted in a manner that no such employee violates SEBI (Insider Trading) Regulations, 1992 and SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to the Securities Market) Regulations, 1995. ESOPs issued to managerial staff and for non-cash consideration shall be treated as part of managerial remuneration. In another development, the RBI has directed that ESOPs should be at a fair value, shooting up costs and

creating the cascading effect of replacing ESOPs with deferred bonus payments for senior managerial personnel.

[1] Guidelines on Compensation of Whole Time Directors/Chief Executive Officers/Material Risk Takers and Control Function staff, November 4, 2019, available at <<https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI898C120D41D0E3465B8552E5467EDD7A56.PDF>>

[2] Guidelines on Compensation of Whole Time Directors/Chief Executive Officers/Material Risk Takers and Control Function staff, November 4, 2019, available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI898C120D41D0E3465B8552E5467EDD7A56.PDF>

[3] Section 35B, Banking Regulation Act 1949.

[4] Guidelines on Compensation for Key Managerial Personnel (KMP) and Senior Management in non-banking financial companies (NBFCs), April 29, 2022, available at <<https://rbidocs.rbi.org.in/rdocs/notification/PDFs/KMPNBFCs962EC76438C845A6846A5BD59BC7513D.PDF>>

[5] Securities and Exchange Board of India (Share Based Employee Benefits and Sweat Equity) Regulations 2021, August 13, 2021, available at <https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-share-based-employee-benefits-and-sweat-equity-regulations-2021_51889.html>

Last updated on 16/04/2024

Ireland

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There are prescriptive, sector-specific requirements, which apply to the remuneration of specified categories of employees or directors, and which apply in the asset management, investment services, banking, and insurance sectors.

Employers in these sectors are tasked with ensuring that the remuneration paid to material risk takers (individuals whose professional activities have a material impact on an RFSP's risk profile) or identified staff align with the RFSP risk profile.

There are detailed rules with technical guidance (emanating from EU law) specific to each sector, but at a high level they (to differing degrees) set out rules on; variable remuneration composition, ratios or other metrics to compare variable to fixed remuneration to ensure it is appropriate; malus requirements, which would allow the RFSP to cancel or reduce the employee's variable remuneration before it is paid out; and clawback provisions which allow RFSPs to recover variable remuneration after it has been awarded. It is important to ensure that employees' contracts of employment acknowledge that any variable remuneration will be subject to all regulatory restrictions and rules and may be clawed back in certain circumstances.

The CBI's 2014 Guidelines on Variable Remuneration Arrangements for Sales Staff also emphasise the importance of remuneration structures to have sufficient deterrents built into them (such as malus and clawback mechanisms) to avoid incentivising undesirable/risky behaviours from sales staff in the banking, insurance and investment services sectors.

Last updated on 24/04/2024

Isle of Man

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There are no prescribed rules relating to compensation payable to financial services employees and any

remuneration, bonuses or clawback will be a matter of contract between the financial services employee and the financial institution. Inevitably, this will reflect what is typical in the market for experienced, qualified, financial services personnel performing the role for which they are applying or are currently carrying out.

Last updated on 17/04/2024



Mexico

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Brokerage houses must implement a compensation system under the general provisions set forth by the CNBV. This system must include all compensation provided and must contain the responsibilities of the boards that implement the compensation schemes, ordinary and extraordinary compensation policies, and periodic reviews of payment policies. The board of directors must incorporate a special committee for compensation.

Under article 9 of the general provisions applicable to brokerage houses, account management fees may be paid to stock proxies provided that they comply entirely with the applicable laws in the exercise of their duties. Stock operators must not execute operations with the public or receive any remuneration or account management fees, except if, with the proxy's authorisation, they execute orders of institutional investors in the brokerage house's reception and allocation system.

Brokerage houses must not pay fees, commissions, and other remuneration of third parties that act as promoters, sellers, associates, independent commissioners, investment advisors or any similar roles. This also applies to proxies of the investor client without being proxies of the brokerage house, or those who have a conflict of interest to receive fees, commissions, or any other remuneration from the investor client.

If there is a critical event, such as a control measure, the CNBV may order the brokerage house to suspend the payment of extraordinary compensation and bonuses to the general manager and senior officers. This includes preventing the granting of new compensation until the matter is properly resolved. This should be included in employment contracts, to avoid labour-related disputes should the extraordinary measure of the CNBV be enacted.

Last updated on 14/03/2023



Netherlands

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Remuneration policy

Under Dutch law, financial services companies must implement an internal remuneration policy. Financial services companies must explain in the management report the relationship between the remuneration policy and the social function of the company.

Variable remuneration

The variable remuneration that a financial services company awards to an employee amounts to a maximum of 20% of that person's fixed annual remuneration. There are a (very) limited number of exceptions to this maximum.

Five-year statutory retention period for shares and other financial instruments

Financial services employees whose fixed remuneration consists of shares or related instruments may only

sell them after five years.

Adjustment or recovery of bonuses (claw-back)

Adjustment or recovery of bonuses is mandatory if a financial services employee has failed to meet appropriate standards of competence and proper conduct or has been responsible for conduct that led to a significant deterioration in the company's position.

Severance payments

Paying out severance payments by financial services companies is not allowed if the employee leaves voluntarily or if there are seriously culpable acts or omissions in the performance of the function. Severance payments for directors (or other policymakers) may not exceed more than 100 per cent of their fixed annual salary.

Last updated on 16/04/2024



Singapore

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Disclosure requirements may apply depending on the employee's role. For example, with some exemptions, financial advisors are required to disclose to the client the remuneration that they receive or will receive for making any recommendations in respect of a particular investment product, or executing a purchase or sale contract relating to a designated investment product on their clients' behalf.

MAS' Guidelines on Corporate Governance (applicable to designated financial holding companies, banks, and some insurers) also requires the FI's board of directors to have a formal and transparent procedure for developing policies on and fixing the remuneration of directors, executives, and key management personnel. A separate remuneration committee made up of non-executive directors must be established to make the relevant recommendations. MAS expects compliance with these guidelines in a manner commensurate with the size, nature of activities and risk profile of the FI. Diverging from the guidelines is acceptable to the extent that FIs explicitly state and explain how their practices are consistent with the policy intent of the relevant principle.

Companies listed on the Singapore stock exchange have similar requirements under MAS' Code of Corporate Governance, and these also exist in subsidiary legislation applicable to the FI. As for all other non-exempt companies, director and employee remuneration will ordinarily have to be disclosed through publicly available financial statements, under applicable accounting standards.

Apart from the above, there are no strict limits on compensation or requirements to impose deferral, malus or clawback provisions. Employers may include such provisions in their contracts, but should be aware that the enforcement of such provisions may be subject to challenge.

Last updated on 16/04/2024



Switzerland

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Swiss civil law provides for special rules that govern the compensation of current and former members of inter alia the board and executive committee (Ordinance against Excessive Compensation) of Swiss companies limited by shares that are listed on a Swiss or foreign stock exchange. In addition, there are disclosure provisions listed companies need to follow concerning remuneration under stock exchange regulations.

In addition to the above, FINMA has formulated ten principles regarding remuneration that banks, securities firms, financial groups and conglomerates, insurance companies, insurance groups and conglomerates are required to implement. The principles serve as minimum standards for the design, implementation and disclosure of remuneration schemes.

These schemes should not incentivise to take inappropriate risks and thereby potentially damage the stability of financial institutions.

One of the focal points of the principles is variable remuneration that depends on business performance and risk. In particular, all variable remuneration must have been earned by the company over the long term. Consequently, remuneration is dependent on performance, taking into account the sustainability of such performance as well as the risks. That said, FINMA's principles do not limit the amount of variable remuneration. However, FINMA aims to prevent the granting of high remuneration based on large risks and the generation of short-term, unsustainable earnings. Furthermore, persons who have significant responsibility relating to the risk or receive a high total remuneration, must receive a significant part of the variable remuneration on a deferred basis and consequently, in a way that is linked to the current risk. Under the FINMA principles, "clawback" and "malus" arrangements are permitted.

Last updated on 16/04/2024



UAE

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Both the DFSA General Rulebook and FSRA General Rulebook contain Best Practice Guidance for remuneration structure and strategies of authorised entities. In particular, the guidance identifies that the governing body of an authorised entity ought to consider the risk to which the firm could be exposed to as a result of the conduct or behaviour of its employees, and to consider the ratio and balance between fixed and variable remuneration components, the nature of the duties and functions performed by the relevant employees, the assessment criteria against which performance based components of remuneration are to be awarded, and the integrity and objectivity of any performance assessment against that criteria.

Last updated on 24/04/2024



United Kingdom

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The remuneration of financial services employees working at certain firms (such as banks, building societies, asset managers and investment firms) is heavily regulated. The relevant rules can be found in various FCA "Remuneration Codes" (each Code tailored to different firms) and also (for dual-regulated firms) in specific remuneration parts of the PRA Rulebook and directly applicable retained EU law.

The remuneration rules are complex and their application is dependent on each firm. The key principle of the rules, however, is that firms subject to them must ensure that their remuneration policies and practices are consistent with and promote sound and effective risk management.

Some elements of the rules apply to all staff, whereas others apply only to material risk-takers within a particular firm.

By way of a snapshot, the rules generally cover such matters as:

- the appropriate ratio between fixed pay and variable pay, to ensure that fixed pay is a sufficiently

high proportion of total remuneration to allow for the possibility of paying no variable pay;

- the amount of any discretionary bonus pool, which should be based on profit, adjusted for current and future risks, and take into account the cost and quantity of the capital and liquidity required;
- performance-related bonuses, which should be assessed based on a variety of factors, including the performance of the individual, the relevant business unit and the overall results of the firm;
- restrictions on guaranteed variable pay and payments on termination of employment; and
- malus and clawback requirements.

Last updated on 22/01/2023



United States

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Overtime

Financial services employees in the United States are commonly classified as administrative employees exempt from both minimum wage and overtime laws. To qualify for this administrative exception under the Fair Labor Standard Acts (FLSA) and often, applicable state law, an employee must:

- be compensated on a salary or fee basis at a rate at least equal to the minimum required threshold (at the time of writing set at \$684 a week or \$35,568 annually); and
- have a primary duty:
 - that is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
 - includes the exercise of discretion and independent judgment on significant matters.

Examples of employees qualifying for the administrative exemption are those whose duties include:

- collecting and analysing information regarding the customer's income, assets, investments or debts;
- determining which financial products best meet a customer's needs;
- advising customers regarding the pros and cons of various financial products; and
- marketing, servicing, or promoting financial products.

An employee whose sole duty is selling financial products does not qualify for the administrative exemption. United States courts are split on whether financial advisors are exempt.

Many states have a higher minimum annual salary threshold for the administrative exemption, including California (\$1,240 a week, as of 1 January 2023) and New York (\$1,125 a week for New York City and Nassau, Suffolk, and Westchester counties and \$990 a week for the remainder of the state. The remainder of the State increased to \$1,064.25 a week on 31 December 2022).

California has an administrative exemption test, which also requires the employee to customarily and regularly exercise discretion and independent judgement, in addition to being primarily engaged in administrative duties. Employees that do not qualify as non-exempt under one of the exemptions must receive overtime pay under California law.

FLSA also exempts "highly compensated" employees. To qualify for this exemption, an employee must earn at least \$107,432 in total annual compensation (not including discretionary bonuses), must perform office or non-manual work as part of their primary duty, and must customarily perform one or more exempt duties of an administrative, executive, or professional employee.

Bonuses

Discretionary bonuses can be for any amount and can be determined on quantitative factors (eg, employer profits) or subjective factors (eg, known performance indicators, performance, merit) and employers may condition an employee's eligibility to receive a bonus on their active employment at the time when bonuses are paid.

Guaranteed bonuses are typically non-discretionary and set at a fixed number or percentage (eg, a percentage of the employee's annual base salary or the employer's profits). A guaranteed bonus (unlike a discretionary one) creates a contractual obligation and will be considered wages. Once a payment is considered a "wage," employers generally cannot withhold, recover or claw back the bonus from an employee.

California requires non-discretionary bonuses to be included in a non-exempt employee's regular rate for overtime calculation.

Certain compensation plans include "forgivable loans," conditioning an employee's obligation to repay on their continued employment with the new employer for a time. If the employee leaves or is fired for certain reasons before the full loan amount is forgiven, the unforgiven share, with interest, can become due and payable.

California generally prohibits employers from deducting any outstanding loan balances from an employee's final paycheck without express permission in contemporaneous writing signed by the employee, both at the time the loan or advance was given and at separation.

Similarly, New York has extremely nuanced rules related to permissible deductions for employee benefits, which are limited (eg, authorised deductions and deductions for the benefit of the employee).

Last updated on 22/01/2023

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