



PRC Labor and Employment Law Newsflash

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Brief Introduction about Year-end Bonus in the Turn of the Year

The year-end bonus becomes a hot topic within offices around China at the end of the year. Due to the lack of relevant laws and regulations, there is a great deal of misunderstanding relating to the bonus. This newsflash combines present laws and regulations with human resource practices to discuss these front-burner issues for the reference of the enterprises that face similar scenarios.

1. What is a ‘year-end bonus’?

In a broad sense, a year-end bonus refers to the annual bonus or remuneration paid by employers in addition to the basic salary. It commonly arrives in the following three forms: the first is to pay an extra month’s salary (i.e. the thirteenth salary or double salary at the year-end); the second is to give a one-time annual bonus after considering the operation income of the enterprise, departmental performance and personal performance; the third is the presentation of red envelopes filled with money, given at random by the boss.

The first form, where there is a fixed thirteenth salary or double salary, requires the employer to pay the bonus as either a part of the employment contract agreement or as stipulated in the internal rules and regulations. Although some employees may resign in the middle of the year, the employer may still be required to pay the bonus in proportion to the actual amount of time worked under the relevant employment contract. As for the last two forms, the employers have greater discretionary power over the factors to be considered and whether a year-end bonus will even be paid.

In a narrow sense, the year-end bonus is interpreted using the definition provided by the tax regulation¹. That is, although still a form of remuneration², the year-end bonus is similar to the traditional understanding of a ‘bonus’. For example, employers give out a one-time bonus that is calculated according to the whole year’s economic benefits and the annual evaluation of employees.

2. How is the year-end bonus paid?

- Standard of Year-end Bonus

The standard of year-end bonus is formulated by enterprises according to their operational conditions. The standard is a matter that has a direct bearing on the immediate interests of the

¹ See Article 1 of *Notice of the State Administration of Taxation on Issues Concerning the Adjustment of Methods for Calculating and Imposing Personal Income Tax on Lump-sum Annual Bonuses and Other Bonuses Obtained by Individuals*, promulgated by State Administration of Taxation on January 21st, 2005.

² See Article 2 of *Interpretation of the National Bureau of Statistics on the Specific Scope of the Provisions on the Composition of Total Wages*, promulgated by National Bureau of Statistics on January 1st, 1990.

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employees and is pursuant to the regulation of Article Four of *the Employment Contract Law*. That is, the employers must form written rules and regulations and go through a democratic procedure when determining the standard of the bonus in order to avoid potential legal risks.

Two commonly raised questions regarding the standard of the year-end bonus include: ‘can employees who resign before the end of year get the bonus?’ and ‘can employees who do not get the year-end bonus claim the bonus if it is enjoyed by other employees of the same post, in accordance with the principle of Equal Pay for Equal work?’ In response to these questions, there are two conflicting opinions in judicial practice.

Some are of the opinion that the year-end bonus is a form of remuneration. That is, employees have paid out their work, so they should be offered consideration and remuneration. Therefore, although an employee resigns in the middle of the year, he or she is entitled to a year-end bonus in proportion to his or her service time. Additionally, employees of the same post pay out equivalent work value, so employees of the same post should enjoy the same bonus treatment in accordance with the principle of ‘Equal Pay for Equal work’.

Another view holds that the year-end bonus is an incentive treatment paid by employers in addition to the basic remuneration. When considering this payment, employers naturally favor loyal, long-term service employees or recognize the personal or future value of the employee. Hence, regulations such as “resigned employees before the payment of the year-end bonus do not have the right to the year-end bonus” or “different year-end bonus treatment of the employees of the same post” reflect the freedom of the employer’s discretion or autonomy, which should be protected. Therefore, the judiciary should not have excessive interference with this process.

As a result of the conflicting judicial opinion, enterprises should ensure that there is a clear policy regarding the year-end bonus. Specifically, the policy should be written out in a reasonable and effective manner. This ensures the continuance to the year-end bonus as an incentive to employees while maintaining the enterprise’s autonomy.

- Forms of Year-end Bonus

In practice, it is common for employers to use shopping cards or gifts as the agreed year-end bonus. Is this practice legal? By law, the year-end bonus is proportional to the total amount of the salary³. As such, employers can only use lawful currency to pay the bonus and cannot use shopping cards or gifts.⁴

3. How to treat the year-end bonus when calculating different kinds of base figures?

- Base Figure of Monetary Compensation.

The base figure of monetary compensation is the worker’s average monthly wage for the 12 months prior to the termination of his or her employment contract. This average monthly wage includes the hourly wages, piecework wages and other sources such as bonuses, allowances and subsidies. As the year-end bonus is a type of bonus, it should be included into the base figure of monetary compensation.

- Base Figure of Unused Annual Leave

³ See Article 4 of *Interpretation of the National Bureau of Statistics on the Specific Scope of the Provisions on the Composition of Total Wages*, promulgated by National Bureau of Statistics on January 1st, 1990.

⁴ See Article 5 of *Interim Provisions on Wage Payment*, promulgated by Ministry of Labor on December 6th, 1994.

The base figure of unused annual leave is the worker's average monthly wage for the last 12 months' excluding overtime payment.⁵ However, the year-end bonus should be included into the base figure.

- Base Figure of Notice Payment

Generally, the base figure of notice payment is the previous month's salary⁶, so the year-end bonus can be ignored. However, in Shanghai's local practice, if the last month's salary does not reflect the normal salary level, the base figure could instead be calculated using the worker's average monthly wage for the 12 months prior to the termination of his employment contract.⁷ If this is the case, then the year-end bonus should be taken into account.

4. How to tax the year-end bonus?

Pursuant to *Notice of the State Administration of Taxation on Issues Concerning the Adjustment of Methods for Calculating and Imposing Personal Income Tax on Lump-sum Annual Bonuses and Other Bonuses Obtained by Individuals*: lump-sum annual bonuses obtained by taxpayers are deemed as monthly salaries and wages for calculating and imposing taxes. First divide the lump-sum annual bonuses obtained by employees in the current month by 12 months, and determine the applicable tax rate and quick calculation deduction according to the quotient.

- (a) Where the salaries and wages of employees in the same month are higher than (or equal to) the deduction amount set forth in taxation laws, the applicable formula shall be: tax payable = lump-sum annual bonuses obtained by employees in the same month × applicable tax rate - quick calculation deduction.
- (b) Where the salaries and wages of employees in the same month are lower than the deduction amount set forth in taxation laws, the applicable formula shall be: tax payable = (lump-sum annual bonuses obtained by employees in the same month - balance of income from salaries and wages of employees in the same month and deduction amount) × applicable tax rate - quick calculation deduction.

If employers pay double salaries at the year-end, the extra one month salary shall be combined into the current month salary to calculate tax and will not be taxed independently.

⁵ See Article 11 of *Measures for the Implementation of Paid Annual Leave for Enterprise Employees* promulgated by Ministry of Human Resources and Social Security on July 17th, 2008.

⁶ See Article 20 of *Regulation on the Implementation of the Employment Contract Law* promulgated by the State Council on September 3rd, 2008.

⁷ See Article 5 of *Opinions of Shanghai's High Court on Certain Issues Concerning the Application of the Employment Contract Law* issued on March 3rd, 2009.

Case Study: Year-end Bonus Dispute after Resignation

When Mr. Li entered into a foreign company working as a salesman, the company agreed with him that the annual year-end bonus would be RMB 100,000 to RMB 400,000 according to his annual sales performance. The specific amount was to be determined in March next year after the annual performance evaluation was completed. Mr. Li resigned in January the next year, and the company refused to pay out the year-end bonus. Mr. Li was unsatisfied and applied for arbitration at the Labor Dispute Arbitration Commission. The Commission held that Mr. Li's annual sales performance was better than others. Additionally, the company had mentioned that the sales performance was only one factor in determining the year-end bonus agreement. The other factors were not mentioned. . Hence, it was unreasonable for the company not to pay any year-end bonus. The award of the Commission was to pay year-end bonus of RMB 160,000 to Mr. Li by the company.

Our team is of the opinion that enterprises should place great importance on policy making and agreements relevant to the year-end bonus. This may be through comprehensively considering factors such as profit margins, personal contribution and future predictions, in addition to generating lawful, reasonable and relevant policies. As a result of sound year-end bonus policies, enterprises may avoid potential labor dispute risks.

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中国劳动法资讯速递
二零一四年一月刊

岁末年初话“年终奖”

每到岁末年初，“年终奖”话题就会成为关注热点。由于我国相关法律法规未能对“年终奖”相关内容做出清晰厘定，导致对“年终奖”的疑问与误区也普遍存在。本文结合相关法规及实际人事操作，探讨相关热点问题，以资企业遇到类似情形时参考。

一、何谓“年终奖”？

广义的“年终奖”一般指用人单位于基本薪资之外，年度性发放的奖金或劳动报酬。主要有三种形式：一是年底多发一个月工资（即“十三薪”或“年底双薪”）；二是综合考虑企业经营收益、部门绩效及个人绩效后发放的全年一次性奖金；三是老板随机派给的“利是”或“红包”。而狭义的“年终奖”仅指后两种形式，系税务法规界定的属于用人单位根据其全年经济效益和雇员的全年综合考核，向雇员发放的一次性奖金¹，属于相关法律法规规定的奖金性质的劳动报酬²。而于第一种形式，即每年年底或春节前后固定发放的“十三薪”或“年底双薪”在实际操作中，一旦劳动合同或规章制度中有约定/规定，用人单位可能被要求如约发放，即使有员工提前于年中离职，也可能须按照员工已履行劳动合同时间之比例按比例发放“十三薪”或“年底双薪”。而对于后两种形式的狭义年终奖的发放标准及是否发放等，用人单位拥有较大的自主决定权。

二、“年终奖”如何发放？

• “年终奖”发放标准

狭义上的年终奖金的分配方案一般由企业根据生产经营状况和特点自主制订。考虑到奖金的发放标准属于涉及员工重大利益的事项之一，根据《劳动合同法》第四条之规定，对于年终奖是否发放及如何发放，应形成书面规章制度并通过法律规定之民主程序使之生效，以避免潜在法律风险。

现实操作中围绕年终奖发放标准常遇到俩个问题：提前离职员工是否可以获得年终奖？没有得到年终奖的员工是否可以依据“同工同酬”原则主张应享有与其同岗位其他员工一样的年终奖？

对于这两个问题，司法实践中两种相左意见一直并存。其一认为，年终奖也是劳动报酬的一种表现形式，既然员工已经付出了劳动，就应获得对价报酬。故此，即使员工年中离职，也有资格按照在职时间按比例享有年终奖金。同样，既然相同岗位付出的劳动价值

¹ 参见 2005 年 1 月 21 日国家税务总局发布《关于调整个人取得全年一次性奖金等计算征收个人所得税方法问题的通知》第一条。

² 参见 1990 年 1 月 1 日国家统计局发布《〈关于工资总额组成的规定〉若干具体范围的解释》第二条。

相当，应根据同工同酬原则，与他人享有一样的奖金报酬。另一种观点认为，年终奖系基本劳动报酬之外，用人单位额外发给员工的激励性待遇。在考量发放这笔待遇时，用人单位理所当然包含了对员工忠诚性的期许，即为雇主长期服务的期望；也包括了对员工个人价值的肯定和未来的预期。所以，用人单位制定的诸如“年终奖发放之前离职的员工无资格获得年终奖金”或同岗位员工年终奖金的差别对待系企业用工自主权的体现，应予保护，司法审判不应予以过多干涉。

针对以上两种司法审判意见并存的情况，我们建议在实际操作中，用人单位应特别注意年终奖制度与相关绩效考核制度的建立，注意年终奖发放标准的合理化、有效化和书面化的合规工作，在保证企业拥有自主决定权的同时，实现年终奖的激励作用。

• “年终奖”发放形式

实践中，常见有些用人单位以购物卡或实物的方式兑现事先约定的年终奖，这样的操作方式是否合法呢？由于年终奖作为奖金，属于相关法律规定的工资总额组成一部分³，用人单位只能以法定货币形式发放，不得以购物卡或者实物形式发放⁴。

三、 各类计算基数中如何对待“年终奖”？

• 经济补偿金基数

应为劳动者在劳动合同解除或者终止前十二个月的平均工资，该平均工资按劳动者应得工资计算，包括计时工资或计件工资以及奖金、津贴和补贴等货币性收入。年终奖作为奖金，属于劳动者的货币性收入，应计入经济补偿计算基数内。

• 应休未休年休假补偿金的计算基数

应为前十二个月全部货币性收入扣除加班工资之后计算所得的平均月工资收入⁵，年终奖金也应计入计算基数。

• 代通金基数

一般应为员工的上个月工资标准⁶，无需考虑年终奖。但上海地方实践中，如其上月工资不能反映正常工资水平的，可按解除劳动合同之前劳动者十二个月的平均工资确认⁷，此时需将年终奖计入计算基数内。

四、 “年终奖”如何计税？

根据《国家税务总局关于调整个人取得全年一次性奖金等计算征收个人所得税方法问题的通知》规定，纳税人取得全年一次性奖金，单独作为一个月工资、薪金所得计算纳税，可以先将其当月内取得的全年一次性奖金，除以 12 个月，按其商数确定适用税率和速算扣除数。如果雇员当月工资薪金所得高于（或等于）税法规定的费用扣除额的，适用公式

3 参见 1990 年 1 月 1 日国家统计局发布的《关于工资总额组成的规定》第四条。

4 参见 1994 年 12 月 6 日劳动部发布的《工资支付暂行规定》第五条。

5 参见 2008 年 7 月 17 日人力资源和社会保障部颁布《企业职工带薪年休假实施办法》第十一条。

6 参见 2008 年 9 月 3 日国务院公布《劳动合同法实施条例》第二十条。

7 参见上海市高级人民法院 2009 年 3 月 3 日发布《关于适用劳动合同法若干问题的意见》第五条。

为：应纳税额=雇员当月取得全年一次性奖金×适用税率-速算扣除数；如果雇员当月工资薪金所得低于税法规定的费用扣除额的，适用公式为：应纳税额=（雇员当月取得全年一次性奖金-雇员当月工资薪金所得与费用扣除额的差额）×适用税率-速算扣除数。

而如果企业发放年终双薪，年终双薪部分应当并入当月工资薪金合并计税，不再独立计税。

案例分析：离职后关于“年终奖”的纠纷

某外企销售员工李某入职时，公司曾与其约定年终奖奖金将根据其年度销售业绩发放十万到四十万不等，具体发放数额待公司次年 3 月年度绩效考核完成后予以确定。李某于次年 1 月辞职去了新单位，公司因此拒绝支付任何年终奖金。李某不服，遂诉至劳动仲裁委员会。劳动仲裁委员会认为，李某年度销售业绩比其他同事突出，公司在约定年终奖金发放因素时，仅提及销售业绩，并未约定其他影响年终奖发放的因素，因此公司一分钱年终奖都不发放的行为是不合理的，故此酌情裁决公司支付年终奖十六万元。

本团队律师认为：企业应慎重对待年终奖相关约定及制度安排，综合考虑企业盈利状况、个人贡献以及未来预期等各种因素，合法、合理地安排相关制度内容，并按照已有约定或规定如实履行，这样才能避免潜在的劳动争议风险。

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