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Legal Interpretation and Application of Year-End Bonus

Year-end bonus generally refers to the material incentive given by an enterprise to its employees to reward their good performance and contribution to its development. With the continuous economic growth, more and more employers and employees pay attention to the issues on payment of year-end bonus, and it brings along various legal disputes. Now let's know something about the "year-end bonus" loved while hated, from the perspective of law.

I. Legal Nature of Year-End Bonus

Year-end bonus is usually the bonus paid by an employer, as specified by its rules and regulations, or otherwise agreed, to its employees at the end of year or any agreed date. Year-end bonus may be paid in the form of: (1) fixed amount, such as the 13th month's salary or the 13th and 14th months' salary widely adopted by foreign enterprises, to which all employees are entitled, as long as the employees are on board at the bonus payment, regardless of individual performance or company profits, which is similar to welfare in nature; (2) floating bonus, which is the performance bonus paid on the basis of annual individual performance appraisal results and company profits; or (3) "red packet", generally determined by the boss, without a fixed rule, which might be related to the individual employee's contribution, qualifications, relation with the boss, or other factors.

No matter which form is chosen, year-end bonus is a material incentive to employees. Then, what is year-end bonus essentially?

According to Article 4 and 7 of the *Provisions on the Composition of Total Salary* promulgated by the National Bureau of Statistics[1], firstly, year-end bonus is a type of "bonus", falling in the category of "other bonuses"; secondly, bonus is a constituent component of salary and a part of labor remuneration.

Once the legal attribute of end-year bonus is clear, we have the answers to many questions. For example, disputes on year-end bonus are typical labor remuneration disputes, therefore they fall into the scope of acceptance of labor dispute cases; year-end bonus is in the category of salary, so it should be included in the salary counting; and year-end bonus is taxable same as normal wage income.

II. Agreed Forms of Year-End Bonus

[1] Provisions on the Composition of Total Salary, Article 4: Total Salary consists of the following six parts: (1) hourly wage; (2) piecework wage; (3) bonus; (4) allowance and subsidies; (5) overtime pay; and (6) salary paid under special circumstances. Article 7: Bonus refers to the labor remuneration paid to employees for their additional efforts and their work to increase revenue and reduce expenditure, including: (1) production bonus; (2) bonus for practicing thrift; (3) labor competition bonus; (4) incentive salary of government organizations and public institutions; and (5) other bonuses.

Since year-end bonus is a part of salary, the forms in which year-end bonus is agreed are similar to those of salary. Year-end bonus should be agreed between the employer and the employee at the time of entry or during the employment. The difference between year-end bonus and salary lies in that salary is the labor remuneration payable by the employer while year-end bonus should be agreed/ stipulated.

Year-end bonus is commonly:

1. Agreed individually. Same as individual salary, year-end bonus is usually specially agreed between the employer and the employee in an employment contract or other agreement;

2. Stipulated by rules and regulations. During the employment, the employer pays year-end bonus to certain or even all employees in the form stipulated by its rules and regulations to stimulate the employees' enthusiasm for work, in the nature of collective motivation, much easier to mobilize the initiative of most employees; or

3. Agreed in the collective contract. Like the form under rules and regulations, year-end bonus provisions in the collective contract also apply to certain group of and even all employees.

Provided that year-end bonus is agreed/stipulated as above, where an employee meets agreed conditions, he/she will be entitled to year-end bonus. But when is year-end bonus paid, and is it necessary to pay before the end of year?

Firstly, from the word "year-end", we may learn that appraisal period is from the beginning of a year to the end of the year. For this purpose, "year-end" emphasizes appraisal period instead of the time of payment of bonus.

Secondly, "year" does not necessarily mean calendar year and is likely to be a company's fiscal year. If a date of year-end is expressly agreed by the parties, it should apply.

Thirdly, the time of payment of year-end bonus should also be subject to the agreement between the parties.

Therefore, year-end bonus is not required to pay at the end of a calendar year. Certainly, if the employer promises or agrees with employees to the time of payment of year-end bonus, it shall be strictly followed.

III. Legal Questions about Year-End Bonus

1. Should year-end bonus be included in the calculation of economic compensation?

Year-end bonus is a part of salary so it should be included in the calculation of economic compensation[2].

[2] Employment Contract Law, Article 47, paragraph 3: Monthly salary refers to the average monthly salary of the employee in the 12 months prior to termination or end of the employment contract.

2. Should year-end bonus be included in the calculation of double pay due to failure to sign a written employment contract?

In accordance with the *Employment Contract Law* and the *Regulation on the Implementation of the Employment Contract Law*, an employer who fails to enter into a written employment contract with an employee more than one month and less than one year from the date of employment shall pay double salary to the employee every month.

However, no national law or regulation sets the standard for calculation of double salary due to failure to sign a written employment contract or specifies whether year-end bonus is included in double salary. These are controversial in judicial practice and different precedents appeared, some ordering to pay full salary, some ordering to pay base salary, and some ordering to pay the salary after deduction of risk and welfare allowances.

3. Is an employee on board for less than one year entitled to year-end bonus?

Conditions for payment of year-end bonus should firstly be subject to the agreement between the parties. If whether the employee on board for less than one year is entitled to year-end bonus is expressly agreed by the parties or provided for in the employer's rules and regulations, as long as the content is reasonable, the parties shall perform and observe such agreement or provision in good faith.

In practice, it is expressly agreed or specified by most enterprises. For example, some enterprises stipulate that the employee on board for less than one year is not entitled to the current year's year-end bonus, some stipulate that the employee on board for less than one year is entitled to the year-end bonus on a pro rata basis in proportion to dates of on-board, and some stipulate that the employee on board for less than one year is also entitled to the full year-end bonus.

4. Is an employee leaving before expiration of his employment entitled to year-end bonus?

As similar to the case described in above Q3, conditions for payment of year-end bonus should firstly be subject to the agreement between the parties. If it is expressly agreed by the parties or provided for in the employer's rules and regulations, as long as the content is reasonable, the parties shall perform and observe such agreement or provision in good faith.

It is still controversial in judicial practice, particularly for 13th month's salary. For example, it is specified in some companies' rules and regulations that "13th month's salary" is similar to fixed salary. In this regard, some local arbitration commissions and courts believe that such year-end bonus as 13th month's salary is nothing less than a reward for the employee's work in the past year, is not used to retain the employee and has no connection to the employment status of the employee, therefore, even if the employee leaves the company before the date of payment, the company is still ordered to pay the 13th month's salary.

5. Is an employee taking the maternity, sick or other leave entitled to year-end bonus?

Things could be different from one to another type of year-end bonus. It is specified by prevailing employment laws and regulations that maternity leave shall be deemed as normal attendance, therefore, such bonus based on the appraisal of attendance as full attendance bonus and year-end 13th month's salary should be fully paid.

For performance year-end bonus, firstly, the company cannot assert that an employee has poor performance because he/she has maternity leave or sick leave; secondly, whether an employee taking the maternity or sick leave is entitled to performance bonus is subject to its rules or agreement and is controversial in judicial practice particularly when it is not expressly specified by rules and regulations or agreed by the parties.

IV. Period of Action Limitation and Burden of Proof for Labor Disputes arising out of Year-End Bonus

Since year-end bonus is a part of salary and in the nature of labor remuneration, it applies the special action limitation of labor arbitration: an in-service employee is not subject to the one-year action limitation for arbitration application, while an employee whose employment expires or is terminated should make arbitration application within one year from the date of expiration or termination of employment. That is to say, the employee should claim year-end bonus no later than one year after his/her separation, or he/she will lose the right of winning the lawsuit.

If any dispute arises between the employer and the employee in connection with the payment of year-end bonus, which party bears the burden of proof is a concern. Same as most civil cases, labor dispute cases apply the general evidence rule of "who claims, who presents evidence".

The burden of proof for year-end bonus should be understood in two sections:

First, if there is an agreement on year-end bonus or the primary fact that the employee is entitled to year-end bonus, the party who disputes should bear the preliminary burden of proof; and

Second, for the dispute on reduction or non-payment of bonus, the employer shall bear the burden of proof.

Case Study:

In December 2009, Mr. Zhang signed an employment contract with a trading company with a term of three years, serving as sales manager. On May 25th, 2011, Zhang submitted the resignation and a month later terminated employment with the company.

In February 2012, Zhang got to know the company paid 2011 year-end bonus and required the company to pay the year-end bonus calculated from January to June 2011. The company rejected his request. Zhang submitted the dispute to the arbitration

commission and then the people's court, claiming against the company for year-end bonus RMB 10,000.

The court found that Zhang was entitled to annual bonus, i.e., 0.3% of the department's total annual receivables, under the employment contract between the company and Zhang. The company had paid 2010 year-end bonus to Zhang, so the court ascertained that the company has the year-end bonus system. The company has not submitted any evidence proving that Zhang should not receive 2011 year-end bonus. Therefore, the first instance court ruled that the company should pay the year-end bonus RMB 10,000 to Zhang.

An employer has the option to decide whether to pay year-end bonus. However, if year-end bonus or its formula is specified in the employment contract or the company's rules and regulations, the employee having been worked for the company should receive appropriate year-end bonus. In practice, if an employee intends to acquire his/her year-end bonus, he/she should enter into an employment contract in detail with the employer, making concrete agreement on year-end bonus. Thus, once any dispute arises out of year-end bonus, such agreement will be the "effective weapon" of the employee to win the case.

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年终奖的法律理解与适用

年终奖，一般是企业为奖励员工绩效优良、为企业的发展做出贡献而给予员工的物质奖励。随着经济的不断发展，越来越多的企业及员工重视年终奖发放问题，由此也不断滋生相关的法律纠纷，现在我们就从法律的角度认识这让人又爱又恨的“年终奖”。

一、年终奖的法律属性

年终奖，一般是按照规章制度的规定或其他约定，用人单位在年末或约定的时间，向员工发放的奖金。年终奖通常有三种发放形式，第一种为数额固定的奖金，如外企普遍采用的 13 薪或 14 薪，只要员工在发放年终奖时在岗，无论个人的表现如何，无论公司的业绩如何，全员享受，类似于福利性质；第二种为浮动的奖金，根据个人年度绩效评估结果和公司业绩结果，所发放的绩效奖金；第三种为“红包”性质的奖金，通常由老板自己决定的，没有固定的规则，可能与员工的贡献、资历或与老板的关系等因素有关。

无论上述三种的哪一种，都是公司奖励员工的物质奖励，那么年终奖的实质是什么？

根据国家统计局《关于工资总额组成的规定》第四条和第七条[1]，年终奖首先是 “奖金”的一种，属于“其他奖金”的类别；其次，奖金是工资的组成部分，是劳动报酬的一部分。

明确了年终奖的法律属性后，很多问题便有了答案。例如，年终奖的争议是典型的劳动报酬争议，应当属于劳动争议案件的受理范围；年终奖属于工资范畴，在统计各项涉及工资的数据时，均应当被纳入；年终奖应当按照正常的工资性收入计税等。

二、年终奖的约定形式

年终奖既是工资的组成部分。那么，年终奖的约定形式，与工资有着很大的相似之处，年终奖需在入职或在岗期间由企业与员工约定。年终奖与工资也有不同之处，工资是企业必须支付的劳动报酬，而年终奖却是需要约定的。

年终奖通常有以下三种约定方式：

[1]《关于工资总额组成的规定》 第四条规定，工资总额由下列六个部分组成：（一）计时工资；（二）计件工资；（三）奖金；（四）津贴和补贴；（五）加班加点工资；（六）特殊情况下支付的工资。第七条规定，奖金是指支付给职工的超额劳动报酬和增收节支的劳动报酬。包括： （一）生产奖；（二）节约奖；（三）劳动竞赛奖；（四）机关、事业单位的奖励工资； （五）其他奖金。

1、个别约定。与个人的工资约定相同，通常是用人单位与劳动者，通过劳动合同或其他协议进行的特别约定。

2、规章制度规定。实际用工过程中，用人单位为了增加激励性，激发员工工作的热情，会采用规章制度规定的方式，对某类员工，甚至全部职工发放年终奖，具有集体激励的性质，更容易调动大多数员工的积极性。

3、集体合同约定。与规章制度的方式类似，集体合同中的年终奖条款，也适用于某类员工群体，甚至全体员工。

在上述三种方式的约定下，员工达到约定的条件下即享有享受年终奖的待遇，那么年终奖在何时发放，是否必须在年前发放？

首先，年终奖金中的“年终”，应当理解为考核终期是自一年的开始至一年的结束。此处的“年终”强调的是考核周期，而非发放奖金的时间。

其次，年终奖金的“年”，并不一定是指日历年度，也很有可能是公司的财务年度。如果双方明确约定了年终的时间点，则应当从其约定。

第三,年终奖的发放时间，同样应当尊重双方的约定。

所以，年终奖金并非必须在年前发放。当然，如果用人单位承诺或与劳动者约定了年终奖金的发放时间，则应当严格遵照执行。

三、涉及年终奖的法律疑问

1、计算经济补偿的基数是否应当包含年终奖金

年终奖金属于工资的一部分，在计算经济补偿金的基数时，应当将年终奖金计算在内[2]。

2、计算未签订书面劳动合同的双倍工资时，是否应当包含年终奖金

根据《劳动合同法》以及《劳动合同法实施条例》的规定，用人单位自用工之日起超过一个月不满一年未与劳动者订立书面劳动合同的，应当向劳动者每月支付二倍的工资。

但是，就全国性的法律法规而言，并未明确计算未签订书面劳动合同的双倍工资的标准，更未明确双倍工资中是否包括年终奖金。对此，司法实践中存在较大争议，也出现了各类判例，有的判令支付全额工资，有的判令支付基本工资，有的判令支付扣除风险性、福利性福利后的工资，口径各有所不同。

3、劳动者入职未满一年是否享受年终奖

[2]《劳动合同法》第四十七条第三款规定，月工资是指劳动者在劳动合同解除或者终止前十二个月的平均工资。

对于年终奖的发放条件，首先应当尊重双方的约定。如果双方对入职未满一年能否享受年终奖进行了明确约定，或用人单位规章制度中明确规定了相关条款，只要内容合理，则双方均应当诚信履行和遵守。

实践中，大部分企业对此进行了明确约定或规定。例如部分企业规定入职未满一年的，不享受当年度年终奖金；而部分企业则规定，入职未满一年的，依据入职时间按比例享受当年度年终奖金。也有部分企业规定，入职未满一年的，同样可以享受全额年终奖金。

4、劳动者提前离职能否享受年终奖

与劳动者入职未满一年的情况略同，对于年终奖金的发放条件，首先应当尊重双方的约定。如果双方对此进行了明确约定，或用人单位规章制度中明确规定了相关条款，只要内容合理，则双方均应当诚信履行和遵守。

司法实践中，对此仍然存在一定争议，特别是当涉及十三薪这一类型的年终奖金时。例如，部分公司的规章制度中明确“十三薪”类似于固定薪资，此时，部分地区仲裁院和法院认为，十三薪这类年终奖完全是为了奖励劳动者过去一年的工作，不具有挽留劳动者的作用，与劳动者是否在职没有任何联系，因此，即使员工在发放日前已经离职，仍然判令公司应当支付十三薪。

5、劳动者在产假或者病假等假期期间，用人单位是否需要支付年终奖

不同类型的年终奖金可能会有所不同。目前劳动法律法规规定，女职工产假期间视同正常出勤，因此，如果该等奖金考核的依据仅是出勤情况，比如全勤年奖、年终十三薪等，则应当全额支付。

如果是绩效类的年终奖金，则：首先，公司不能以员工享受产假或病假，而认定员工工作绩效差；其次，对于享受产假、病假的员工，是否能够享受绩效奖金，视规章或约定而有所不同，并且司法实践中存在一定的争论，尤其是规章制度或约定不明时更易产生争议。

四、因年终奖引发的劳动争议的时效及举证责任

就年终奖金而言，其属于工资的组成部分，即劳动报酬的性质，因此，适用劳动仲裁特殊时效制度，在职期间，劳动者申请仲裁不受一年仲裁时效的限制。但是，劳动关系解除或终止的，应当自劳动关系解除或终止之日起一年内提出。也就是说，劳动者主张年终奖，最迟应当在离职后一年内主张，否则会丧失胜诉权。

用人单位与劳动者就年终奖金的发放发生争议，应当由谁承担举证责任也是劳资双方关心的问题。与大多数民事案件相同，劳动争议案件适用“谁主张、谁举证”的一般证据规则。

对于年终奖金的举证责任，应当分为两个层次理解：

首先，对存在年终奖的约定，或者员工有权利获得年终奖金的基本事实，应当由提出争议的一方承担初步的举证责任；

其次，对于减少或不发奖金的争议，由企业承担举证责任。

案例分析：

2009 年 12 月，张先生在一家贸易公司当上了销售经理，并和公司签订了一份为期 3 年的劳动合同。2011 年 5 月 25 日，张先生提出辞职，并在一个月后和公司解除了劳动关系。

2012 年 2 月，张先生得知公司发放了 2011 年的年终奖，便找到公司，要求领取 2011 年 1 月至 6 月的年终奖，公司予以拒绝。张先生先后向仲裁院和法院提起诉讼，要求公司支付年终奖共计 10,000 元。

法院查明，根据该公司和张先生签订的劳动合同，张先生年度奖金为部门年度回款总额的 0.3%。且该公司已向张先生发放 2010 年度年终奖金，法院确认了该公司存在年终奖金制度。公司未提交可以证明张先生不应获得 2011 年年终奖金的证据。法院一审判决公司支付张先生年终奖 10,000 元。

是否发放年终奖，属于用人单位的工资自主权，但是如果劳动合同或者公司规章制度里规定了年终奖或者计算方式，且劳动者付出了劳动，就应该得到相应的年终奖金。在实践中，如果劳动者想保护自己的“年终奖”，就应该和用人单位签订周密的劳动合同，并对年终奖进行细致约定。此后，一旦与用人单位因年终奖发生争议，约定将是劳动者胜诉的“法宝”。

期待我们的资讯速递能对您有所裨益。若您有任何问题，请通过电邮 hrlaw@dachenglaw.com 联系我们。

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