

Global HR Hot Topic

Tackling challenges in global human resources administration and compliance

Global Compensation/Bonus Plan Checklist

Challenge:

Global compensation and bonus plans can be powerful tools for motivating and rewarding global teams. But paying employees across borders implicates a range of legal problems.

Since global rewards strategies are an excellent way to motivate international workforces and align strategy, multinationals increasingly launch compensation, benefits and bonus programs such as regional sales commission plans, international incentives and global executive retention bonuses. However, whenever a pay plan crosses borders, it spawns legal issues. Here is a checklist of what to account for:

☑ **Payor:** Will corporate headquarters fund the plan? Headquarters funding opens a host of issues, especially as to tax, withholdings, “permanent establishment” (doing business abroad) and national currency regulations such as foreign exchange and reporting rules. A headquarters entity that pays money directly to overseas employees can become a “dual employer” jointly liable for employment claims along with the local entity—a particular problem in Latin America. One solution is to have local entities pay their employees directly, with headquarters reimbursing. However, complicating this, countries like India and Singapore actually favor an overseas headquarters paying local employees, at least in respect to compensation and bonus plans with claw-back provisions.

☑ **Ripple effects:** Outside the US, bonus pay often gets rolled into “total compensation” for purposes of calculating legally-mandated payments such as vacation, pension, Sunday/holiday premiums, severance pay and “thirteenth-month” bonus. A plan clause saying payments are excluded from these calculations can be enforceable in some places, but in certain countries (such as Venezuela), enforceability may be difficult.

☑ **Definitions:** Be sure global compensation plans define all material terms, even those whose meaning in a single-country plan would be obvious. For example, plan eligibility may depend on “full time” status, being a “salaried” employee, or not “retiring” or being terminated for “good cause” during a plan year. These words mean different things in different locales. Define them in a way that works across borders, perhaps by incorporating local definitions.

☑ **Eligibility selection:** Be sure the plan selects participants in a way that is legal everywhere. For example, equal protection laws in Germany and South Africa effectively require employers to select participants based on objective reasons.

Pointer:

As possible, design regional and global compensation and benefits plans to sidestep potential problems. Use a checklist.



Each monthly issue of *Global HR Hot Topic* focuses on a specific challenge to globalizing HR, and offers state-of-the-art ideas for ensuring best practices in international HR management and compliance. White & Case LLP’s Global Human Resources Practice helps multinationals globalize business operations, monitor employment law compliance across borders and resolve international labor and employment issues.

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The European Union prohibits discriminating against temporary and part-time workers, making illegal those plans that reach only regular full-timers. Laws in the Middle East prohibit paying foreigners more than locals.

✔ **Consultation:** In some countries the roll-out of a new bonus plan will be a mandatory subject of consultation or bargaining with local works councils or trade union committees (although when a plan offers new benefits, worker representatives are quick to get on board).

✔ **Vested/acquired rights:** In many countries, employees who customarily receive a payment a few times in a row acquire a vested right to receive it forever. Plan language saying “*this does not give rise to any vested right to future payments*” is a good idea, but will not always be enforceable. A one-time-only plan or one with an end date should state that feature clearly.

✔ **Consents:** Many plans include acknowledgments for employees to sign consenting to plan terms. But employee acknowledgements can be difficult to enforce in Continental Europe, Argentina and other jurisdictions that see employer-requested consents as inherently coercive. Those bonus plans that offer extra money over and above employer pay obligations can sometimes sidestep this problem if the only consequence of a refusal to consent is non-participation in the plan.

✔ **Rescission of prior plan:** If a new compensation plan replaces an earlier arrangement (often the case with commission plans), be certain to rescind the old plan properly. Getting an employee consent here is a best practice (if enforceable—see above). However, the vested/acquired rights doctrine (discussed above) can make rescission a problem if the old plan was more lucrative than the new one.

✔ **Claw-backs:** Retention bonuses sometimes have claw-back provisions requiring that employees whose employment terminates early pay back part of the bonus. Sales commission plans sometimes have claw-back provisions for recouping paid but unearned commissions. Recovering money from employees, though, is particularly difficult outside the US—especially in Denmark, France, Japan, Korea, Sweden and much of Latin America.

✔ **Local pay laws:** Plans that pay a significant percentage of employee compensation are likely to trigger local pay laws. Argentine regulations on “traveling salesmen,” for example, impact sales commission plans. Be sure to check.

✔ **Choice-of-law/dispute resolution:** A best practice is to include a clause in the plan invoking headquarters’ country law as governing law of the plan worldwide. These choice-of-law clauses should be enforceable at least as to those aspects of a plan not affecting fundamental employment rights (such as minimum wage). But a few countries, such as Argentina and Chile, may hold the clauses void. Dispute resolution provisions (mediation/arbitration/choice-of-forum) will likely be void wherever local labor courts enjoy mandatory jurisdiction over employment disputes.

✔ **Language:** Laws in Chile, Belgium, France, Quebec, Poland and Portugal require that plans communicated locally be in the local language. One US company that overlooked this in France paid a \$689,920 penalty.

✔ **Cross-border data transfers:** Administering a global compensation plan usually requires transmitting participant data back to headquarters. But in Europe these data transfers require legal tools, such as participant consents, model contractual clauses, safe harbor or binding corporate rules.

In addition, any global equity or restricted stock plan raises many separate issues, such as securities, tax and currency laws.

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