

Employment opinion piece

The hysteria of bonuses

Briefing note

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In this new monthly series Head of Charles Russell's Employment and Pensions Group, David Green, will be discussing topical employment issues and encouraging your feedback on the matter. At the bottom of this article is a short questionnaire for you to email back to us with your views; the results will be analysed and reported back in next month's email.

There has been a great deal of hysteria created by the media claiming that the bonus culture of financial institutions has led to the current recession. Governments desperate to blame others have helped create the current pandemonium. Does this all mean that the bonus culture will disappear or are we simply looking at a realigning of policy? If this actually leads to a bonus scheme in which employees share in the risk as well as the reward then will not business decisions in the future be more rational or will the adoption of such policies lead to the loss of entrepreneurial flare?

There is a need to reign back on the hype and reflect briefly on the current legal position. Bonus schemes that are described as discretionary but are paid year in, year out, are, in reality, likely to be contractual. If therefore bonuses are not paid then a court will consider whether an employer has been arbitrary and capricious in making the decision not to pay a bonus. Because of this case law many employers have adopted wording in their bonus schemes which makes clear that if an employee is not employed, for any reason, at the time of payment then they simply do not get the bonus. Such schemes have been challenged unsuccessfully in the courts. Employees negotiating bonuses will seek to agree wording which means that if they are a good leaver they get paid the bonus but if they are a bad leaver they do not. Examples of a bad leaver would be leaving to join a competitor or being dismissed for gross misconduct. What bonus schemes have failed to address is whether there should be risk as well as reward.

The Government have tasked the FSA with preparing a Code of Practice on remuneration policies and a draft Code has been published. The key points are that Boards and relevant Remuneration Committees should exercise independent Judgment and have on those Boards and Remuneration Committees, people who actually have skills and experience in the area of remuneration. Bonus pools should be based on profit and take account of current and future risks but how are those risks going to be measured. Bonus payments should be deferred and the deferred payments should also be subject to the financial position of the employer at the time of payment, not at the time the bonus was earned. The FSA do not seem to be going as far as saying that if losses are suffered as a result of the employees actions then bonuses can be clawed back.

If these measures or more radical claw backs are adopted, employers will be concerned about recruitment but if all employers take a similar approach then the culture of greed could be avoided.

So what do employers think? This is your chance to give us feedback by answering the simple 'yes/no' questions set out below in an email. [Click Here](#) to respond or email Christopher.wilsher@charlesrussell.co.uk.

1. Are bonuses an important motivational tool for your employees?
2. Should all bonus payments be deferred and the deferred payment also linked to the financial position of the employer at the time of payment?
3. Would you as an employer consider adopting a bonus policy that allowed a claw back of bonuses where the business decision on which the original bonus was based led to the employer suffering loss?
4. Do you think the Government should introduce legislation in respect of bonus schemes?

More information

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