Wage & Hour Insights
Guidance & Solutions for Employers

Am I Obligated to Pay a Pro Rata Bonus to Employees No Longer With The Company?

By Staci Ketay Rotman on November 28, 2011

As the end of the year rolls around, we inevitably are asked questions related to the payment of bonuses, particularly for those employees who are terminated before annual bonuses are paid out. Of particular interest is whether an employee who has been terminated – voluntarily or involuntarily – is entitled to a pro rata share of the bonus as of the date of termination. The payment of bonuses is generally governed by applicable state law.

Status of the Law in Illinois

Here in Illinois, the Illinois Wage Payment and Collection Act does not define the term "earned bonus," however, there is a regulation that attempts to address earned bonuses:

Section 300.500 Earned Bonuses

a) A claim for an earned bonus arises when an employee performs the requirements for a bonus set forth in a contract or an agreement between the parties.

b) A former employee shall be entitled to a proportionate share of a bonus earned by length of service, regardless of any provision in the contract or agreement conditioning payment of the bonus upon employment on a particular date, when the employment relationship was terminated by mutual consent of the parties or by an act of the employer through no fault of the former employee.

(Source: Added at 16 Ill. Reg. 13828, effective September 1, 1992)

Unfortunately, part (b) of this regulation addressing pro rata payments only specifically relates to a length of service bonus (e.g., longevity) - not a general performance based bonus. So there is some ambiguity as to whether an employee would be entitled to a pro rata share of a performance bonus. While Section 300.500(b) has not been heavily litigated, the few cases that have addressed this regulation have looked at two key factors when reviewing a bonus situation - whether the language of the plan provides an unequivocal promise to pay the bonus and whether the employer made it impossible for the employee to fulfill a condition precedent. *See McLaughlin v. Sternberg Lanterns*, 917 N.E.2d 1065 (2d Dist. 2009) and *In re Handy Andy Home Improvement Centers, Inc.*, 1997 WL 401583 (Bkrtcy N.D. Ill. July 9, 1997).

McLaughlin is the most recent Illinois case and contains some helpful analysis of how bonuses/incentive plans have been treated by Illinois state and federal courts. There, the court reasoned that Section 300.500(a) indicates that the right to a bonus must be unequivocal as the employee does not have a right to the payment until he or she has performed the requirements in the agreement, whereas Section 300.500(b) refers to a length of service bonus, which is a type of unequivocal bonus to which an employee has a right to unless his or

her performance is terminated due to his or her own fault. The bonus at issue in *McLaughlin* was more like a production bonus - contingent on sales increases over the previous year and was not guaranteed or paid unless such increases occurred. Because the bonus was determined not yet "earned" at the time of his termination, the plaintiff was not entitled to a pro rata share of that bonus. *See also In re Comdisco, Inc.*, 2003 US DIST LEXIS 2982 (Feb. 27, 2003)(Where employees were terminated by the successor employer before the incentive plan bonus was paid, the plan contained a disclaimer that no rights vested prior to payment and should not be construed as a contract, there was no unequivocal statement that employees will be paid the bonus, and the successor employer - not Comdisco - was involved in the employees' inability to meet the employment requirement, the employees were not entitled to any share of the bonus).

The Second District in *McLaughlin* distinguished its reasoning from an earlier Fifth District Appellate Court opinion in *Camillo v. Wal-Mart Stores*, 221 Ill.App.3d 614 (5th Dist. 1991). *Camillo* was the first time the definition of "earned bonus" was addressed by an Illinois Court, before Section 300.500 was added in 1992. In *Camillo*, assistant managers were promised a bonus each year based on length of service and corporate net profit, however, they were required to be on the payroll on January 31 or forfeit the bonus. The plaintiff had received a bonus every year until his termination on December 31. The court viewed this length of service bonus similarly to earned vacation and held that the plaintiff was entitled to his pro rata share because the employer made it impossible for the employee to fulfill the condition precedent (that he be employed). The court considered this to be an unequivocal promised bonus. The same result occurred in *In re Handy Andy Home Improvement Centers, Inc., supra*. Citing *Camillo*, there, the court determined that the plaintiff was promised a bonus based upon the number of days he was employed in 1995 and, therefore, was entitled to a pro rata share of that bonus.

Insight for Employers

While these cases do not provide a definitive answer to this issue, they do provide some guidance for Illinois employers. A good rule of thumb for employers to follow is that if no unequivocal promise of a bonus is made or the employee left voluntarily before the date stated in the bonus plan, then the employee would not likely be entitled to any part of the bonus. If an unequivocal promise was made and the employee was no longer employed on the required date only because of the employer's action (through no fault of the employee), the employee is likely entitled to a pro rata share of the bonus.