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LEGAL WISE BY MDME | BONUS OR NO BONUS: THAT IS THE QUESTION!

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The modern employment relationship is, more often than not, haunted by the ghost of the past and present bonuses. Among other entitlements, it is usually the "cherry on the top of the cake" which employers use to entice new employees to join their ranks or, as frequently occurs, to continue their service for as long as possible.

As simple as it might seem, however, bonus entitlements are not as straightforward as they look at first sight.

For starters, not every bonus is actually a bonus. According to Macau law, bonuses are considered variable remuneration, i.e., non-regular payments made on a case-by-case basis by the employer to the employee. Moreover, the bonus is, by nature and generically, an unexpected contribution paid on top of the normal salary that aims to reward the performance of employees. As such, bonuses are not part of the employees' base remuneration. In order to truly fit the variable remuneration definition, they should not be linked to predetermined conditions/criteria that, if met, enable the employees to receive them on a recurrent and expected basis.

So, it is not the case that should the employer call a certain benefit granted to employees a discretionary bonus that such payment automatically becomes either discretionary or a bonus.

In fact, Macau's Labour Law regards the 13th month, or other periodic benefits of similar nature, to be payments that are part of the basic remuneration. In practical terms, this means, for example, that the very popular Chinese New Year Bonus of one month's salary paid every year by some employers should not, actually, be considered or treated as a bonus, but as a part of the base remuneration of employees.

For a bonus to be a true bonus its characteristics and eligibility requirements should be linked to and/or dependent on factors that vary in accordance with the circumstances. At the same time, those characteristics and eligibility requirements should give no grounds for employees' to claim having any kind of expectations about receiving them. Generally speaking, a bonus that is, for example, dependent on the employee's and the company's performance would, in principle, have the characteristics of a true bonus if the criteria for eligibility are rightly tailored.

Another aspect to consider when it comes to the bonus is, naturally, whether it is payable or not upon termination of the work relationship. As we all know, it is a common practice among Macau employers to deny the payment of a bonus when employees leave the company. This causes most employees seeking new job opportunities to tender their resignations immediately or shortly after they have received their bonus. As the saying goes, better safe than sorry, which would be a valid position for employees working for companies with true discretionary bonus schemes that, among other factors, link the attribution of the bonus to the actual and future employment of the employees with the companies.

However, for employees working for companies that have bonus schemes that are not really bonuses, but actually part of the employees' remuneration, then the fact that the employees submitted their resignation should not create an impediment to pay said bonus upon termination. In fact, if the bonus is not really a bonus, but a periodic payment similar to the 13th month, then upon termination employees are entitled to claim the payment of those benefits in proportion to the time they have worked, according to the law.

That being the case, to pay or not to pay a bonus seems to be a question much less rhetorical than it has become in the employment market!



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