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# The Legal 500 Country Comparative Guides

## Argentina

# EMPLOYEE INCENTIVES

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This country-specific Q&A provides an overview of employee incentives laws and regulations applicable in Argentina.

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# ARGENTINA

## EMPLOYEE INCENTIVES



### 1. What kinds of incentive plan are most commonly offered and to whom?

The most commonly incentive plans offered are the following:

- Fixed payments received by the employee (daily travelling expenses, mobile phone, car expenses, car parking, health care insurance, housing expenses, etc.) with no documental support.
- Commissions: They are generally granted on accomplishment of objectives and performance, including both individual and corporate ones. Usually, they are a percentage established on the sales made by the employee, regardless whether the employer effectively collects the money from such sale or not.
- Bonuses: Some bonuses are customarily granted to certain employees, usually employees in higher positions. Companies often have their own specific annual or quarterly bonus plans or hiring bonus policies subject to their own criterion since there is not a statutory regulation on this issue.
- Stock option plans (hereinafter "SOP"): They are generally granted to top and key executives. They create incentives for executives in strategic areas. In general, their aim is to retain employees so that they stay in the company long enough to be able to exercise the option and to align interests of the company on the interests of the executives. Special attention needs to be given when putting in place these plans to avoid exposure to labour, social security and tax risks.

Each company may implement the structure of incentive plan it deems more convenient to their business needs as long it respects the minimum requirements establish by Argentine labour law.

Please bear in mind that some benefits granted by the company may be considered as salary in kind and, consequently subject to tax and social security obligations. Also, salary in kind, as part of employee's salary cannot be modified in detriment for the employee, or taken away in any way that it may consider an acquired right.

Some examples of salary in kind are: i) working tools: mobile phone and corporate automobile when used for personal purposes, ii) housing when money is granted to the employee, iii) parking space paid by the employer, etc.

The main aspects about the salary in kind are:

- It is any benefit different from money received by the worker by reason of his or her services (usually goods or services granted to the employee);
- It complements the monetary salary, but it may not replace it;
- Its impact must be reflected in employee's pay slips;
- Its impact must be considered for purposes of calculating social security contributions, income tax, severance calculation base, vacations and semi-annual bonus;
- It must not replace more than the 20% of the monthly salary.

### 2. What kinds of share option plan can be offered?

Companies tend to grant participation in different kinds of SOP, to key employees or to all their employees depending on the particular circumstances of their business and compensation schemes. The plan can be granted by local or parent companies.

Employer can offer share plans, restricted shares, phantom shares, stock grants, and less commonly, employee stock Owner Plans (ESOPP) or employee stock purchase plans ESOP.

Since in Argentina there is not a specific law governing stock related plans, all kind of plans are legally treated in the same way as SOP. The main aspects related SOPs are:

- In the majority of cases, SOP represents a benefit to employees because they are granted at a discount exercise price ('Benefit').
- As a consequence, employers 'grant of the options under a SOP are commonly tied up to the frequency of their grant and to whether its grant represents a benefit to the employee ('Beneficiary') or not.
- In the case that options are granted at a discount exercise price, the benefit for beneficiaries participating in the SOP is given by the difference between the exercise and the market price at the moment the options are exercised.
- Under local labour regulations, restricted shares and phantom shares are considered similar to a 'gratification/bonus', which are considered also as salary. Such gratification/bonus may be deemed to be: i) extraordinary, if the benefit is granted on a one-time basis, or ii) regular, if such benefit is granted on a frequent basis.
- This implies that every time the Benefit under the SOP is vested or exercised, it will have to be registered in the payment slip and any other labour document, and the appropriate social security and income tax, if applicable, must be made.
- In addition, companies which belong to the same economic group may be jointly and severally liable in case of misdeed from one of the companies or commission of fraud. Such case will be if the beneficiaries argue that the parent company granted the SOP at the discount price in order to avoid local labour registration of their correct salary by local company (employer). Thus, such a conduct could be considered a fraud under local labour laws and claim the extension of responsibility to the economic group.
- If the benefit under the SOP is considered to be extraordinary, there will be no labour or social security contingencies related with acquired rights.

### 3. What kinds of share acquisition/share purchase plan can be offered?

Employers can offer any kind of plans that involves the

granting of options of shares, such as SOP (explained in question No. 2) or:

Restricted Stock Units (RSU) and Phantom shares, which main aspects are the following:

- RSUs are generally granted to top and key executives. They create incentives for executives in strategic areas. · In case the RSUs are granted at a preferential price (lower than the market price), they represent a benefit.
- RSU´s preferential price and the market price at the time when the options are exercised.
- The benefit represented by the RSUs may be considered a frequent bonus if it is periodically obtained and as such, of a compensation nature.
- It will be subject to social security withholdings and contribution and, also have an impact on vacation pay, mandatory semi-annual bonus and calculation base for accrued salaries and severance compensation, in the event of termination of the employment relationship. The portion of the benefit considered as of compensation nature must be registered in the labour documentation.
- In order to comply with the constitutional principle of equal pay for equal tasks, RSUs must be granted according objective criteria and to similarly-situated employees (employees performing the same tasks).
- Regarding Phantom shares, it is treated as a cash nous scheme subject to same considerations to bonus explained in RSU plans.
- ESOP, which is not frequently used and it apply as retirement plan.
- ESPPP, employees can purchase company stock at a discount price and employees contribute through payroll deduction (observing certain requirements).

### 4. What other forms of long-term incentives (including cash plans) can be offered?

Regarding long-term incentives, employers may offer pension/retirement plans:

According to the Retirement and Pension Law No. 24,241 amended by Law No 26,425 and by Law No. 27,426, employers must comply with pension benefits, which in Argentina are granted by the State.

In order to apply for the retirement, employees must: i)

have 30 years of pension contributions; ii) have reached the legally determined age: 65 for men; and 60 for women. (Women have the option to continue working until age 65.).

There are several withholding regimes that are different from the one described above because of dangerous work activities or work activities that produce physical disabilities. Accordingly, these job activities provide different retirement ages, and also gather a minor amount of year's contributions.

However, other incentives may be offered usually to executives as a supplemental retirement benefit. Those benefits are related to private pension's plans.

There are 2 main types of retirement plans granted by companies:

- Defined contribution (DC): also referred to locally as a 'share effort': this kind of plan determines that the employer contributes a certain percentage of the employee's monthly salary (usually between 10 and 20 per cent) and the employee contributes some other percentage (usually no more than 10 per cent) of his or her salary and the amount is deposited with a trust or with the execution of a retirement insurance policy. In most cases, the percentage contributed by the employee is withheld from his or her monthly salary. Prior authorization from the Ministry of Labour is advisable before withholding an amount from an employee's salary. Once requirements defined in the plan are met (age and seniority in employment), the beneficiary's accumulated amount is vested and granted.
- Defined benefit (DB): this plan determines that, upon retirement of the employee, the employer continues to pay him or her certain percentage of his or her salary either on a monthly basis or as a lump amount. The percentage considered is usually between 40 and 60 per cent.
- Golden and Silver parachutes are not generally granted and are extremely rare.

## 5. Are there any limits on who can participate in an incentive plan and the extent to which they can participate?

No, there are no limits on who can participate in an incentive plan. In this sense, discretionary incentive plans may be customarily granted to certain employees, usually employees in higher positions. Companies often

have their own specific bonus plans, regarding to those incentive compensations, since there is not a statutory regulation on this issue.

## 6. Can awards be made subject to performance criteria, vesting schedules and forfeiture?

Yes, it is advisable to subject awards to performance criteria, and bonus plan establishes in detail the goals to be achieved by the employee so that it is clear when the employee has the right to its granting. Also it is advisable that employees are informed by a written note the bonus plan and its performance result.

Regarding vesting periods, statutorily, there are no limits on the length or type of vesting or deferral provisions. Therefore, awards may be also subject to vesting schedules, it depends on the practice and policy of each company or employer.

With regards to "forfeiture", it is not possible within Argentinean legislation, due to its protective nature. According to Section 12 of the National Employment Law ("NEL"), agreements between the parties diminishing acquired rights of employees, such as compensation and benefits (i.e. awards, SOP), shall be considered null and void. The employer has the right to modify labour conditions provided that certain limits are respected: i) It does not involve a modification that will affect essential labour conditions, such as compensation (awards), place of work, working schedule or tasks; ii) it must be reasonable; and iii) It does not cause any material or moral damage to the employee.

## 7. Can awards be made subject to post-vesting and/or post-employment holding periods. If so, how prevalent are these provisions both generally and by reference to specific sectors?

Certain Tech companies implemented ESPP program for key employees as retirement benefit or to use in case of termination of labor contact for dismissal, disability or death. However, these kind of awards are uncommon in the market.

## 8. How prevalent malus and clawback provisions are and both generally and by reference to specific sectors?

Malus and clawback provisions are not included in SPO or any other plan for employees, since the collected

amount is treated as salary.

Once the amount is paid and collected by the employee, salary is not subject to reimbursement for error in performance calculations or assessment in risk management. To recover the money, in case of serious misconduct that implies a criminal action, employers must file civil and criminal cases against the employee for fraud and damages. We usually do not recommend to pursue such actions because if they are dismissed the employee may sue for damages.

### 9. What are the tax and social security consequences for participants in an incentive plan?

- i. on grant, there are no consequences;
- ii. on vesting, there are no consequences;
- iii. on exercise. When option is exercised, the participant will be taxed on the obtained benefit (for instance, if the incentive plan consists of a stock option plan, benefit will be equal to the spread between stock value minus exercise price paid by the participant). Taxation implies payment of income tax and social security contributions on the above-mentioned benefit;
- iv. on the acquisition, holding and/or disposal of any underlying shares or securities. If any of these acts (especially disposal) derive a benefit for the participant employee granted by the employer company, such benefit should be reflected in the payroll slip of the employee and it is subject to income tax and social security contributions. Otherwise, if benefit is not granted by the employer company but by a third party, then the participant must include the benefit in its annual income tax return and pay the corresponding tax; and
- v. in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan. There are no consequences.

### 10. What are the tax and social security consequences for companies operating an incentive plan?

- i. on grant, there are no consequences;
- ii. on vesting, there are no consequences;
- iii. on exercise, the benefit obtained by the employee should be reflected in the payroll

- slip and employer must withhold income tax (due by the participant employee) and pay social security contributions on it;
- iv. on the acquisition, holding and/or disposal of any underlying shares or securities. If any of these acts derive a benefit for the participant employee granted by the employer company, such benefit should be reflected in the payroll slip of the employee and employer must withhold income tax (due by the participant employee) and pay social security contributions on it;
- v. in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan. Interest of loans granted by local company (employer) to participant employees at lower rate or longer terms than market loans is exempt from VAT and, according to certain case law, not subject to income tax.

### 11. What are the reporting/notification/filing requirements applicable to an incentive plan?

As such aspects are not statutorily established, it is recommended that the Company sets an incentive plan's policy, including the requirements for its granting, dates, employees who may receive such plans, and all related information. Such policy must be notified to employees in writing.

Based on the protective nature of labour regulations, all documents should be in Spanish, in addition to any other language that the employer wishes to use.

In addition, in case the company decides to grant an incentive bonus related to shares, it must register shares in a special book with the formalities established for the books of commerce, which must be freely-available for shareholders (Section 213 Law No. 19.550). This book must contain:

- Shares' classes, rights and obligations;
- Integration status, with indication of the name of the subscriber;
- If they are the bearer, the numbers; if they are nominative, the successive transfers with details of dates and individualization of the purchasers;
- Any other mention that derives from the legal status of the shares and their modifications.

## 12. Do participants in incentive plans have a right to compensation for loss of their awards when their employment terminates? Does the reason for the termination matter?

This matter will depend on what does the policy that grants the incentive bonus establishes. As mentioned before, companies often have their own specific bonus plans, regarding to those incentive compensations, since there is not a statutory regulation on this issue. It is important to note that, in case of shares, if they were vested, they may be exercised by the employee in case of termination of the employment relationship without fair cause. On the other hand, if the employment relationship is terminated with cause, the employee may lose his/her award, even though it was vested.

In addition, the bonus plan must include in detail the goals to be achieved by the employee so that it is clear when the employee has the right to its payment. Otherwise, the repetition of payment over time may be deemed an acquired right and as part of the employee's compensation, which means that it may become a mandatory contractual entitlement.

In case of M&A transactions, in case plans cannot be longer granted for the buyer, POA, RSU and other plan may be terminated upon payment of pending vesting periods or an amount that mitigate any damages.

## 13. Do any data protection requirements apply to the operation of an incentive plan?

All employees are protected by the Habeas Data Law (Law No. 25,323), so the processing of their information and data operated in incentive plans must comply with the provisions of such Law. The purpose of this law is the complete protection of personal data.

Please find below the main provisions that employers must comply with:

- a) The employee's information must be used only for the reason for which the data was obtained.
- b) Employees have the right to access and modify any incorrect or false information.
- c) The information collected may not be used for discriminatory purposes.
- d) The employee's data must be used only for the reason for which the data was obtained and with the employee's

consent.

e) However, consent is not required if the data:

- i. has been obtained from a source of unrestricted public access;
- ii. has been collected for the performance of the State's duties;
- iii. consists of lists limited to name, ID number, tax or social security identification, occupation, date of birth, domicile, and telephone number; or
- iv. arises from a contractual, scientific, or professional relationship and the data is necessary for the development or fulfillment of such relationship.

f) When processing the information, the employer must notify in advance and in an express and clear manner about: i) The purpose for which the information is to be processed, and who the users of such data or type of user may be; ii) The existence of the relevant data file, register or bank, whether electronic or otherwise, and the identity and domicile of the person responsible for it; iii) The compulsory or discretionary character of the answers to the questionnaire the individual is presented with; iv) The consequences of providing the data, of refusing to provide such data or of their inaccuracy; v) The possibility the data subject has to exercise the right of data access, rectification and suppression.

g) Employers may not disclose that personal data to any third party, even for storage purposes. h) Employers have the duty of confidentiality.

## 14. Are there any corporate governance guidelines that apply to the operation of incentive plans?

N/A

## 15. Are there any prospectus or securities law requirements that apply to the operation of incentive plans?

N/A

## 16. Do any specialist regulatory regimes apply to incentive plans?

N/A

### 17. Are there any exchange control restrictions that affect the operation of incentive plans?

From December 2015, the Government implemented several amendments to the foreign exchange regulations to reduce the control over the foreign exchange market.

However, since September 2019, new regulations have been enacted in order to impose new controls on foreign exchange market. In this regard, all Argentine residents are obligated to transfer to Argentina the proceeds of any sale of shares collected in foreign currency and convert them into local currency within 5 business days as from its collection.

Both the compensation arising from the vesting, and the gains resulting from the sale of shares (i.e., equal to the difference between the sale value and acquisition value) are considered income from a foreign exchange perspective.

### 18. What is the formal process for granting awards under an incentive plan?

In Argentina share options plan are operated according to market value. So employers offer to employees, usually key employees, shares at a discount subject to a time vesting period. The discount is considered by case law as a benefit linked to employees work and therefore, treated as salary. The payment must be reflected in payslips and it is subject to social security and income tax.

Same procedure with RSU and Phantom, once the amount is cashed is treated as a bonus, so it is part of employees' salary.

### 19. Can an overseas corporation operate an incentive plan?

Yes, it is possible that an overseas corporation operate an incentive plan, but it exists the risk that the employee understands that the company belongs to the same economic group.

Companies which belong to the same economic group may be jointly and severally liable in case of misdeed from one of the companies or commission of fraud. Such

case will be if the Beneficiaries argue that the parent company granted the incentive plan (i.e. SOP) at the discount price in order to avoid local labour registration of their correct salary by local company (employer). Thus, such a conduct could be considered a fraud under local labour laws and claim the extension of responsibility to the economic group.

### 20. Can an overseas employee participate in an incentive plan?

An overseas employee it may participate in an incentive plan depending on the company policies. However, in Argentina, based on the territorial principle, the law of where services are rendered applies, disregarding any agreement about jurisdiction made by the parties.

### 21. How are share options or awards held by an internationally mobile employee taxed?

Internationally mobile employees are taxed only on Argentine source income during their first 5 years of stay in Argentina. If they receive any share options or awards from the local entity / employer, such benefit is taxed as explained in answer 9 above.

### 22. How are cash-based incentives held by an internationally mobile employee taxed?

Please see answer 21 above.

### 23. What trends in incentive plan design have you observed over the last 12 months?

There are no we trends in incentive plans. The market is quite conservative due to employees' protective legislation. Additionally, Argentina stock market is still limited.

### 24. What are the current developments and proposals for reform that will affect the operation of incentive plans over the next 12 months?

There are not current development or proposals.

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