



The Legal 500 Country Comparative Guides

Brazil

EMPLOYEE INCENTIVES

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

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BRAZIL

EMPLOYEE INCENTIVES



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

There are several types of incentive plans normally offered by Brazilian employers, and most common are:

- Profit Sharing Plan: is a type of incentive implemented by most companies in Brazil due to its cost-effectiveness. This is because payments made under a profit sharing plan are excluded from the employees' base pay for purposes of calculating their labor rights and payroll taxes – what causes an economy of approximately 60% to the employer when compared to incentives that are taxed as compensation. To benefit from labor and social security charges' exemption, some requirements need to be met, including the negotiation of the plan with the employees and their labor union. Profit sharing plans are typically extended to all employees of a company.

- Commission Plan: more commonly offered to sales employees, it is also specifically regulated. Payments must be made at least every 3 months, are statutorily considered part of overall compensation (as taxable as such).

- Bonus Plans: these more general bonus plans are quite flexible in terms of what metrics, goals and targets can be included. The employer is allowed to set different triggers to different groups of employees (discriminatory criteria is not allowed). The bonus amounts may or may not be taxed as compensation, depending on their metrics and goals (if performance-based, the amounts are likely viewed as regular remuneration).

- Awards: as a general rule, regular payments made to employees, e.g. bonuses, awards and gratifications previously agreed and promised, should be taxed as compensation for payroll purposes. In 2017, the Labor Reform set forth the possibility of employers to pay awards (*prêmios*, in Portuguese) that are not taxable as compensation, provided that: (a) are paid due to an exceptional performance; (b) are not a promise, but granted as a liberality (and for this there should be no documents formalizing or promising such payment); and

(c) the company is able to ensure that the performance achieved was exceptional and not expected.

- Equity incentive plans: these (stock options, RSUs, ESPPs) are more commonly granted to Brazil employees directly by the parent, foreign entity. It is key to note that equity awards are not specifically regulated in Brazil. Regardless of the inexistence of specific legislation on this matter, the legal concept and doctrine about the rights over shares, corroborated by decisions of the Brazilian labor courts, acknowledges that, as a general rule, the options granted to the employees, with the disbursement of money by them (thus, not cashless), shall not be considered as compensation but a mere business transaction (i.e.; purchase and sale of shares on the stock market in the future) within the limits of its provisions, in compliance with the principles established in the Brazilian law.

In addition, the payment (which depends on the type of the plan), its frequency, the freedom of the participant to join or not the program and the mere expectation of a right as result of risk involved in the business – trading on the stock market – are elements that give arguments to defend that such payment should not be considered remuneration.

Thus, for the purposes of levy of social security contributions and payment of labor rights, it is important to evaluate whether the payment is being made as a retribution/compensation or not for the work performed by the individual.

That said, companies who offer equity awards to Brazilian employees through their parent company (mainly those who do not process the payment through local payroll and do not charge back the local employing entity) need to carefully review their plans in order to make an educated decision on how to treat their equity awards – if subject to taxes and social security contributions or not.

2. What kinds of share option plan can be

offered?

As there are no specific regulations on share options in Brazil, there are no specific restrictions on what kinds of plans can be offered. Most common kinds of share option plans are stock options and restricted stock units ("RSUs").

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

Most common is ESPPs (Employee Share Purchase Plan).

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

Please refer to our response to Question #1.

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

Profit sharing, commissions and bonus plans may only be offered to employees, under the penalty of increased risk of employment misclassification in case they are offered to non-employees (outsourced workers and independent contractors, for instance).

Likewise, and although technically feasible to have non-employees participating in equity plans, this is not advisable due to the mentioned misclassification risk.

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

Generally, yes, but such provisions should be carefully reviewed from a local legal perspective to mitigate any unenforceability risks.

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?

Yes, this is possible and common across several sectors, mainly Tech and Financial sectors.

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

Malus provisions are likely enforceable in Brazil if clearly drafted to regulate what impacts the deferred awards, including to state that any payment made before the vesting period does not mean that the employee has acquired any right to receive the award.

Clawback provisions are as common as malus clauses in Brazil, but are more challenging to enforce, as the award would be considered vested (i.e., an acquired right). In addition, there are practical issues to be considered, such as limitations to what may be deducted from compensation and/or severance pay (for instance, deductions from severance would be limited to one employee's monthly compensation). For this reason, the employer may need to come to an agreement with the employee for him/her to return any due amount.

In any case, such provisions are commonly included in incentive plans, even if only for a deterrent effect.

9. What are the tax and social security consequences for participants in an incentive plan including: (i) on grant; (ii) on vesting; (iii) on exercise; (iv) on the acquisition, holding and/or disposal of any underlying shares or securities; 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.

The answer will depend on whether the company has taken the position to treat the equity awards as part of the employees' compensation (taxable as such) or not. If the awards are not taxed as compensation (this is normally the case with equity granted directly by the parent, foreign entity), then no social security contributions apply.

From a tax perspective, in case of shares issued abroad, there is no income tax at the grant, but only after the issuance of the shares (exercise/acquisition). The tax authorities understand that the shares issued for free or the discounts applied should be considered as income earned by the individuals and should be taxed at the progressive income tax rates of up to 27.5%, by means of the *carên-leão* system, applicable to the awards when the employee exercises. Subsequent sales of shares would also be subject to capital gains taxation in the

event of further appreciation of the shares. There are arguments to defend that there will be income tax only at the sale, depending on the details of each equity plan.

If the company has decided to treat the equity awards as part of the employees' compensation, then the 27.5% income tax (uncapped) plus 11.69% social security contribution (cap possibly already reached by the base salary) are withheld directly from payroll by the company.

10. What are the tax and social security consequences for companies operating an incentive plan? (i) on grant; (ii) on vesting; (iii) on exercise; (iv) on the acquisition, holding and/or disposal of any underlying shares or securities; (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.

As above, the answer again depends on whether the company has taken the position to treat the equity awards as part of the employees' compensation (taxable as such) or not. If the awards are not taxed as compensation (this is normally the case of equity granted directly by the parent, foreign entity), then no social security contributions or neither withholding pf taxes apply to the company.

If the company has decided to treat the equity awards as part of the employees' compensation, then the awards are subject to a social security contribution of approximately 28%. In addition, the amounts become part of the basis for calculation of other local labor rights due by employers in Brazil, such as Severance Fund (8%), Christmas bonus and vacation pay. It may also impact severance pay.

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

There are no statutory requirements on these aspects. It is highly advisable that any incentive program (except for the Awards - *prêmios*) is properly formalized in a specific policy. The document should provide for eligibility, payment schedule, calculation of the awards, etc. It is also important to have the policy in place (and have shared it with the eligible employees) ideally before its effectiveness term.

To avoid any misunderstanding, a best practice is to have the relevant documents in Portuguese.

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?

Based on case law, requiring employees to be actively employed at the date the incentive amount is paid may be deemed lawful. Terminated employees are generally entitled to a prorated amount, which can be paid by the company based on the regular payment calendar.

If case of a termination for cause, if the employee's wrongdoing negatively affected the company's results, there are arguments (not risk-free, though) to avoid the prorated payment altogether.

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

Yes: the operation of an incentive plan will require compliance with Law No. 13,709/18 (Brazilian Data Protection Law), which became effective on September 18, 2020, if it involves processing employees' personal data.

The mentioned legislation stipulates rights, obligations, and good practices related to the processing of personal data (i.e., information related to an identified or identifiable individual), and creates a national data protection authority, among other topics.

The Law will apply to individuals and the private and public sectors provided that the processing occurs in Brazil or the personal data is obtained from data subjects located in Brazil, despite the location of the controller's headquarters or where the data is stored. If data is processed in a foreign jurisdiction, the Law will apply when the processing activities relate to the offering of goods and services to data subjects in Brazil.

The Law also provides for the legal basis for processing personal data. To this effect, among other legal basis established in the Law, processing shall be lawful: (i) if it is required for compliance with the data controller's legal or regulatory obligations, (ii) if it arises from legitimate interest, or (iii) when the data subject has given consent to the processing of his or her personal data for specific purposes.

One of the key aspects of the Law is that it creates the National Data Protection Authority ("NDPA"), which is linked to the Ministry of Justice. The NDPA's authority includes issuing data protection regulations and proceedings, and imposing administrative sanctions in the event of non-compliance. Sanctions for non-compliance include warnings, one-time fine (of up to 2% of the group's gross revenues in Brazil in the last fiscal year excluding taxes, with a cap of R\$ 50 million which is approximately USD 9 million), and daily fines (subject to the same cap aforesaid). Sanctions also include blocking or eliminating personal data, partial or full suspension of the data base, and suspension or prohibition to process personal data.

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

Not specifically. However, it is worth noting that the inclusion of environmental, social, and governance (ESG) metrics in corporate incentive plans is becoming more common in Brazil.

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

No securities laws apply if the awards are offered to the local entity's workers only (employees or self-employers workers).

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

No, provided that the plan offered to workers of the Brazilian company only.

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

No, provided that the plan is offered only to workers of the Brazilian company. The international remittance of amounts, if any, is subject to *IOF* – tax upon financial operations in Brazil.

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

There is no statutory formal process. But, from an

employment law perspective, having the relevant policy properly and thoroughly drafted is highly recommended – please refer to our comments to Question #11.

19. Can an overseas corporation operate an incentive plan?

Yes, as there are no local statutes preventing an overseas corporation operate an incentive plan.

It is important to note that, in Brazil, all companies that belong to the same economic group (whether located in Brazil or abroad) are viewed as one sole employer for labor purposes. For this reason, an incentive plan operated by an overseas corporation will likely not exempt the local employer from any open taxes or labor rights.

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

Yes. Since the employee, although working from abroad, would be still under a Brazilian employment agreement, there would be no specific legal roadblocks.

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

When an employee, under a Brazilian employment agreement, works from abroad, all local regulations continue to apply. Please refer to our comments to Questions #9 and #10, which apply also to the scenario where an employee works from abroad.

The company should also review the tax and labor regulations of the host country for additional obligations.

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

When an employee, under a Brazilian employment agreement, works from abroad, all local regulations continue to apply. As a consequence, the same requirements that apply to Brazil-based employees apply: any taxes, social security contributions and labor rights must, as a general rule, be paid though the local Brazilian payroll.

The company should also review the tax and labor regulations of the host country for additional obligations.

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

Aside from an increasing inclusion of ESG metrics, we have been seeing US-based Tech companies deciding to consider RSUs as part of the employees' compensation in Brazil. This would be reportedly in view of the tax, social security and labor risks involved, and also to make the income tax issuance easier to employees, as the income tax is withheld directly from payroll in this case.

As explained earlier in this Q&A, by considering the RSU as compensation, the company has to (i) pay social security contributions; (ii) pay labor rights and (iii) withhold income tax. In this scenario, it might be preferable to transfer the RSUs costs to Brazil, in order to deduct the amount from the corporate income tax basis.

A possible new regulation on stocks (Question #24 below) has also been giving rise to increased interest on the subject and encouraging employers to roll out equity plans.

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

Bill of Law 2724/2022, also known as the "Stock Options Legal Framework," gained approval from the Federal Senate's Economic Affairs Committee (CAE) on August 22, 2023. Notably, the bill will bypass the plenary stage and be directly forwarded to the Chamber of Deputies, as it originated in the Senate itself.

The bill introduces significant improvements to mitigate tax risks and enhance legal certainty. It clearly defines the commercial nature of stock option plans, explicitly excluding their integration into employment contracts and exempting them from labour and social security charges.

In summary, the bill provides a commercial framework for stock option (or quota) plans, contingent upon specific conditions. These include onerousness in option exercise, a minimum 12-month vesting period, and a mandatory 12-month lock-up period for share trading post-acquisition, unless otherwise specified by the company.

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