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Denmark

EMPLOYEE INCENTIVES

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

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

• Cash based bonus schemes – typically a right to variable remuneration based on the achievement of one or more KPI's. May also be based on the company's general performance.

• Equity based bonus schemes – bonus schemes based on remuneration offered through grants of warrants or share options as described below in 2.

Cash based bonus schemes are often offered to a selected group of employees and very often for retention, incentive or transition purposes. It may also be a general profit-sharing pool. Bonus schemes are more common for white collar than blue collar workers.

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

Basically, it is possible to offer all sorts of share option plans. However, which legal regime applies the mechanisms of the share plan is decisive for its legal regulation.

If shares are used as compensation, and nothing is paid for the shares, but for instance they vest over time contingent on employment only then they would be assessed as part of the cash remuneration, however, in shares instead of cash.

If shares can be purchased at a later time, they are stock options. If it is discounted shares e.g. ESPP, the discount is part of the remuneration.

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

There are no restrictions. What is decisive for the legal submission of share plans is its elements and technicalities surrounding the share plan. Analysis must be made on an individual basis.

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

Phantom share plans, direct employee share-based plans, exit award plans, warrant plans, employee share purchase plans etc.

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

No, however, in the tax regulation there are certain limits if tax preferential treatment is to be an option.

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

Yes, however, there are different consequences depending on which legal regime such award is subject to.

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, that can be agreed. It is not prevalent to a wide extent, however, due to the special rules governing the financial sector, such arrangements are mandatory, however, the employer is subject to the obligation of holding back part of the award etc.

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

This has not been prevalent, but awareness and use of such clauses are becoming more widespread, due to both internationalization and due to an increased focus on good governance also when using incentives. It is mandatory within the financial sector.

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.

There are no direct social security consequences for participating in an incentive plan. Cash incentives and incentives similar to cash – e.g. shares vesting free of charge thus considered part of the remuneration – are taxed as ordinary income.

Sections 28 and 7 P of the Tax Assessment Act allow favourable and deferred taxation for employees participating in warrant and stock option programmes provided that specific requirements are met. Section 28 basically allows the employee to postpone taxation until the time of exercise.

Section 7 P allows for a further postponement from the time of the acquisition of the shares and until the time when the employee sells the shares acquired. Any capital gain at the time of sale will be taxed as capital gains with a marginal tax rate of 42%. It is important that all requirements of section 7 P are met which must be analysed and documented on an individual basis.

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.

(i) on grant: None, however, there is a reporting obligation.

(ii) on vesting: None.

(iii) on exercise: Taxation according to section 28 of the Tax Assessment Act

(iv) on the acquisition, holding and/or disposal of any underlying shares or securities: Taxation according to section 7 P – provided that the conditions have been met.

(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: None

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

Cash-based incentive plans (and plans similar to cash) are taxed at payment by the employer while gains and losses in connection with shares must be reported by the employee through the Danish Tax Authority’s website. Special schemes, including the schemes mentioned in 9 and 10 must be reported by the employer.

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?

Employees employed under the Salaried Employees Act are entitled to a pro rata share of their cash-based incentive which they would have received if being employed at the time of payment.

Employees subject to a warrant or option programme covered by the Stock Option Act of 2018 cannot be forced to sell back their shares to a price less than the market value. An obligation to sell back acquired shares usually follows from a shareholders’ agreement. For other loss of rewards, there is no mandatory entitlement to compensation as forfeiture either as a good or bad leaver is up to the regulation in the contract and award agreement, thus subject to censorship and amendment of unreasonable terms by the courts.

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

No. It is considered part of the data processing during the employment relationship.

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

Yes, listed companies must provide an overview over their executive remuneration programmes, including any offered incentive plans and, generally, these are subject to special regulation set out in the Companies Act including shareholder approval. Privately held companies are free to choose whether to adhere to corporate governance guidelines.

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

No, there are no direct prospectus or securities law requirements for non-listed companies. For regulated companies within the financial sector, special rules apply.

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

Yes, the Salaried Employees Act – albeit not to share or warrant programmes and the Stock Options Act. Further, the act on Financial Services and special regulation for other financial companies than banks and insurance service providers holds legal regulation for incentive schemes covering the financial sector.

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

Yes, mostly depending on the company and incentive plan and if the company is listed on a regulated market. Granting, postponing usually due to insider regulation and exercise of share-based remuneration is subject to disclosure requirements.

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

Depending on the incentive plan, the formal requirements vary. The grant of cash-based incentive plans will typically be a decision for the company's CEO or line managers while most equity-based incentive plans will require a decision by the board of directors and in many cases an adjustment of the company's articles of association thus becoming a shareholder topic to be decided at a general assembly. Typically, the articles of association will allow the board to grant options or warrants in a specific time window.

Grants are usually given as part of an ordinary HR procedure and in writing.

19. Can an overseas corporation operate an incentive plan?

Yes.

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

Yes.

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

Upon permanent departure from Denmark with shares valued with a market value of DKK 100,000 or more, any gains or losses will be treated as having been realised by the Danish tax authorities.

Whether share options or awards are taxable in Denmark depends on a variety of factors including whether the employee is subject to taxation in Denmark or whether the specific income is.

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

Based on the assumption that the internationally mobile employee does not have unlimited tax liability, limited tax liability will apply. There are different schemes which could be applicable for internationally mobile employees, and which would also apply to cash-based incentives.

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

The 7 P – plans continue to be a favoured option. There is a special scheme to be used by start-ups to enable granting e.g. warrants of a value of up to 50% of the annual salary whereas the ordinary threshold is 10 or 20% of the value of the annual salary. We see a trend that many newly established companies use warrants to attract and retain qualified employees.

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 no key focal points from the Government.

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