



# **The Legal 500 Country Comparative Guides**

## **Norway**

### **EMPLOYEE INCENTIVES**

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

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# NORWAY

## EMPLOYEE INCENTIVES



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

It is normal to differentiate between incentive programs for management and other employees. It is also normal to differentiate between large companies, and companies in the start-up and growth phase, both due to different commercial aspects but also as Norway has a beneficial framework for companies in the start-up and growth phase.

For management and employees, the most common incentive programs are cash bonus plans, share purchase plans, share options, and RSU plans. For share purchase programs, gearing is often offered. The gearing can consist of loans to finance the share purchase or a combination between preference and ordinary shares.

For qualifying companies in the start-up and growth phase (primarily businesses with less than 50 employees, less than MNOK 80 in revenue, less than MNOK 80 in balance sheet total, and younger than 10 years), it would be normal to offer share options because of the beneficial tax treatment, see item 2 below.

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

#### Standard options

There is freedom of contract related to how to design the terms of the options. Under private law, there is thus great flexibility. However, there are some restrictions associated with gearing, and the tax treatment will vary. For public companies, further considerations will also apply. Income earned upon exercise of options is taxed as salary.

#### Share option tax scheme for companies in the start-up and growth phase

From 1 January 2022, a new share option tax scheme for companies in the start-up and growth phase was implemented.

Taxation of income on such share options is not triggered upon exercise of the share options (as is the case for share options that do not qualify), but upon the time when the shares received under the share options are realized for tax purposes. Furthermore, taxation of the taxable income was changed from salary taxation (with a total tax burden for the employee and employer of 53.9%) to capital gains taxation (with a tax rate of 37.84%).

There are certain requirements that must be met for the scheme to apply:

- The scheme applies to companies with up to (i) 50 employees, (ii) NOK 80 million in operating revenues/balance sheet total, (iii) maximum 10-year-old companies. Certain other requirements must also be met.
- Furthermore to qualify under the scheme, the employee granted share options must work an average of at least 25 hours per week in the company from grant to exercise of the option, and the employee, alone or with related parties, cannot control more than 5% of the capital or voting shares in the grant year or the two previous years. One or more public bodies alone or in total cannot control more than 25% of the capital or voting shares in the company.
- The option cannot be granted or transferred to other persons or companies, and must be exercised by the employee so that he or she becomes the owner of the shares under the share options. This means that it is not possible to combine the share option tax scheme for companies in the start-up and growth phase with the beneficial participation exemption applicable for companies. The share option can also not be transferred by inheritance or gift.
- The strike price on the share options must be set at the fair market value of the underlying shares at the date of grant.
- The option cannot be exercised before three

years after the grant date, and no later than ten years after the date of grant. The company cannot be listed on the stock exchange at the time of allotment.

- The company can issue options with a total market value of underlying shares of maximum NOK 60 million and a maximum NOK 3 million per employee. This means that the shares must be valued at the market value at the time of allotment.

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

There are several types of share purchase plans that can be offered. Generally, any purchase of shares below market value is considered as income for the employee, where the discounted value is to be taxed as salary. Furthermore, if the employee does not have a sufficient economic risk on its investment, income on the investment can be considered salary. The tax rate on salary income is higher than on capital gains derived from shares, and will also trigger payroll tax for the employer (Nw: *arbeidsgiveravgift*)

#### Share purchase with share restrictions

The company can impose restrictions on the shares that are offered to the employees, such as lock-up restrictions. Such restrictions will normally reduce the fair market value of the shares, and an acquisition at such reduced value is not considered as a capital gain for the employees.

#### Preference/ordinary shares

The company can structure the share capital with ordinary shares and preference shares. The preference shares will receive a preference return, and the ordinary shares will receive a return in excess of the preference return. Management may be offered to buy preference shares or ordinary shares, but will have to pay the assumed fair market value of the shares to avoid triggering salary taxes upon acquisition.

#### Share purchase with gearing – the Kruse Smith model

On 1 January 2022 the Directorate of Taxes issued a statement that the Kruse Smith model could no longer be used as a basis for the taxation as previously assumed. On 28 March 2022, the Directorate of Taxes reversed its position in a new statement. Thus, the model based on the Kruse Smith case from the Supreme Court reappeared as an incentive model.

In the Kruse Smith judgment (Rt. 2000 p. 758), the

Supreme Court considered whether the acquisition of shares at nominal value (7% of the shares' fair value) should be taxed as a benefit gained from earned income. The shares were purchased on the condition that the discount at the time of acquisition had to be repaid upon later realization of the shares. If the consideration for the shares did not cover the discount at the time of acquisition, the discount at the time of acquisition only had to be repaid as far as the consideration extended. The Supreme Court concluded that no lower price had been paid at the purchase of the shares and that a sufficient financial risk had been taken for the return on the shares to be regarded as capital income (and not earned income). The Supreme Court commented that the discount at the time of acquisition had to be regarded as a loan on which interest had to be calculated, to avoid taxation on the benefit of a tax-free loan.

Hence, the Kruse Smith model entail that:

- The employee can purchase shares at a discount (maximum 93% discount), provided that the discount must be repaid upon later realization of the shares.
- If the employee acquires shares at a discount, where the discount must be repaid upon realization (according to the same model as in the Kruse Smith judgment), the discount at the time of acquisition shall be considered a loan for tax purposes. Hence, the acquisition of shares will not trigger taxation.
- Since the discount at the time of acquisition is considered as a loan, interest must be calculated on the loan to avoid taxation on the benefit of a tax-free loan. The loan will often be regarded as granted in an employment relationship. Hence, an interest rate below the standard interest rate stipulated in the regulations to the Tax Act will constitute a taxable benefit for the employee. If the loan is not granted in an employment relationship, the interest rate must be set at the market interest rate to avoid taxation.
- Dividends or gains on the sale of the shares shall in principle be taxed as income from capital, provided that the employee has taken a sufficient financial risk when purchasing the shares (which shall be the case when at least 7% of the acquisition was funded with equity).
- If the discount at the time of acquisition is forgiven, the employee will be taxed for the benefit associated with remission.
- If the employee purchases the shares through a limited liability company, dividends or gains on the shares shall in principle be allocated to

the limited liability company and taxed under participation exemption. Benefits in the event of a too low interest rate on the discount at the time of acquisition, or benefit in the event of any remission of the discount at the time of acquisition, shall be allocated to and becomes taxable for the employee.

- The tax treatment for the employee will be the same regardless of whether the employer sells its shares to the employee, or whether the employee purchases shares from another shareholder. It does not matter whether the shares are in the employer company or another company in the group. However, some company law barriers become important when structuring the scheme, which the Directorate of Taxes does not address in the new statement.

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

In practice, besides the plans mentioned above, the following long-term incentives are common:

- Cash bonus,
- Synthetic share and synthetic option plans, and
- Company pension schemes.

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

Eligible employees are determined by the company and agreed with the relevant employees.

Please refer to item 2 regarding share option schemes for companies in the start-up and growth phase for limits on who that may participate under such scheme.

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

Awards can be made subject to performance criteria, vesting schedules, and forfeiture. These aspects may have an impact on taxation. Awards can also be subject to a lock-up period.

#### **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?**

Awards can be made subject to post-vesting and/or post-employment holding periods. However, we generally don't see such provisions.

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

Malus and clawback provisions are generally not common in Norway.

#### **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.**

##### Standard options

(i) on grant;

No tax is triggered on grant.

(ii) on vesting;

No tax is triggered on vesting.

(iii) on exercise;

The participant is taxed as salary on exercise, with a tax rate of 47.4%.

(iv) on the acquisition, holding and/or disposal of any underlying shares or securities; and

If the shares are acquired by a private limited liability company owned by the participant, the private limited liability company is tax exempt upon sale of the underlying shares or securities (please note that distributions from the private limited liability company owned by the participant results in a taxation of the participation with 37.84%).

If the shares or securities are held by the participant personally, the participant is taxed with an effective tax rate of 37.84% on gains when selling the shares (and can deduct losses).

#### Option in qualifying start-up and growth companies

(i) on grant;

No tax is triggered on grant.

(ii) on vesting;

No tax is triggered on vesting.

(iii) on exercise;

No tax is triggered on exercise.

(iv) on the acquisition, holding and/or disposal of any underlying shares or securities; and

The participant is taxed with an effective tax rate of 37.84% when selling the shares.

#### Share purchase programs

(i) on grant;

No tax is triggered on grant.

(ii) on vesting;

No tax is triggered on vesting.

(iii) on the acquisition, holding and/or disposal of any underlying shares or securities; and

The participant is not taxed upon acquisition, provided the employee has paid fair market value for the shares, and any financing is on arms' length terms.

If the shares are held by the participant through a private limited liability company, the private limited liability company is tax exempt upon sale of the underlying shares or securities (please note that distributions from the private limited liability company owned by the participant results in a taxation of the participation with 37.84%).

If the shares are held by the participant personally, the participant is taxed with an effective tax rate of 37.84% when selling the shares.

(iv) 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.

If the employer or another entity acting on behalf of the employer offers credit to the participant as part of the incentive plan, the participant will not be taxed provided the financing is on arms' length terms.

Loans offered to participants by third parties in relation to incentive programs is normally concluded on market terms. Hence, no tax is normally triggered.

### **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;

No tax is triggered on grant.

(ii) on vesting;

No tax is triggered on vesting.

(iii) on exercise;

When options are exercised under standard share option programs, the employer must pay employer's social contribution at a tax rate of 14.1%, on the calculated income earned by the participant upon exercise. The Government has for 2023 introduced a temporary additional bracket to the employer's social contribution of 5% for income above NOK 750,000, resulting in a total rate of 19.1%. However, we note that the amendment to the National Insurance Act does not include any time limit. Hence, we believe Friedman's quote "nothing is so permanent as a temporary government program" might also apply to temporary additional bracket to the employer's social contribution.

Options that qualify for the option tax scheme for companies in the start-up and growth phase will not trigger employer's social contribution upon exercise.

(iv) on the acquisition, holding and/or disposal of any underlying shares or securities;

If shares are acquired against a consideration below fair market value, the income earned by the participant (being the difference between the fair market value and

the consideration actually paid) shall be reported as income, and employer's social contribution is payable with 14.1% (19.1% above NOK 750,000 for 2023) on the income.

Provided the participant has paid fair market value for the shares, no tax is triggered on the acquisition.

Holding and disposal of underlying shares or securities are taxable as income on capital, subject to 37.84% taxation if held privately, or subject to participation exemption if held through a private limited liability company.

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

The employer is required to report grants of share options.

There are no specific requirements regarding reporting of other incentive plans. Awards from incentive programs that for tax purposes are classified as salary, have to be reported as salary 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 are generally not entitled to compensation for loss of awards if the employment relationship ends, unless compensation for such an event has been contractually agreed upon. It is normal to include "good leaver / bad leaver" terms that regulate how to calculate the compensation to the employee at the end of their employment.

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

Yes, the processing of the employee data for an incentive plan is considered a processing activity that is governed by the General Data Protection Regulation (GDPR).

Hence, the processing must be based on legal grounds, be done for specific purposes and the personal data may not be retained longer than necessary. Additional requirements apply for the processing of sensitive data.

Furthermore, a company is under the obligation to inform the employees about the processing of their personal data in the context of the incentive plan in accordance with the information obligation. In case personal data is collected or processed by companies located outside of the European Economic Area, additional measures must be implemented and complied with to ensure adequate level protection.

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

Incentive plans for listed companies must comply with the corporate guidelines in the Norwegian Public Limited Liability Companies Act. This entails that the incentive plan must be in accordance with the guidelines for determining the salary and other remuneration of the general manager, other senior executives, and employees who are members of the board and the corporate assembly. The guidelines must be clear and comprehensible and contribute to the company's business strategy, long-term interests, and financial sustainability. The Board may, in special circumstances, temporarily deviate from the guidelines, provided that the guidelines state the procedural conditions for deviating from the guidelines and which parts of the guidelines may be deviated from.

For non-listed companies, no such guidelines apply.

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

Generally, incentive programs will not trigger an obligation to create a prospectus.

Listed companies must comply with the Market Abuse Regulation.

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

Yes, the EU Capital Requirements Directive (CRD IV) applies to the following undertakings:

- Holding companies in financial groups.
- Banks.
- Mortgage companies.
- Finance companies.
- Investment firms.
- Insurance companies.
- Pension companies.



Section 15-4 of the Financial Undertakings Regulations contains special requirements for the remuneration of senior executives in credit institutions and investment firms. The requirements apply correspondingly to employees with tasks of significant importance to the company's risk exposure, employees with control tasks, and employee representatives.

The composition of fixed and variable remuneration must be balanced, but still so that there are certain limits to how large the variable part can be. Furthermore, the fixed part of the remuneration must be sufficiently high for the enterprise to omit to pay the variable part of the remuneration. The company must specifically assess what constitutes a sufficiently high fixed remuneration.

Variable remuneration shall not amount to more than 100 percent of the fixed remuneration. The general meeting, or a similar body, may, however, decide that the limit may be increased to 200 percent if the requirements for consideration in the company's governing bodies, etc., in the Financial Undertakings Regulations § 15-4 second paragraph is fulfilled.

For the general manager and the members of the management team in a bank, variable remuneration may not amount to more than half of the fixed remuneration.

Pursuant to the Financial Undertakings Regulations § 15-4 fifth paragraph, variable remuneration shall be based on a combination of assessment of the employee's performance and results, the business unit's result, and the enterprise's result.

At least half of the annual variable remuneration – or at least 60 percent when the variable remuneration constitutes a very large amount in light of, among other things, the company's activities and the salary level in the company – must be given in the form of shares or other equity instruments issued by the company or another company in the group, or in the form of contingent capital that reflects the company's value development.

Variable remuneration that is not paid immediately shall be reduced if the profit development in the enterprise or subsequent results indicate this, cf. the Financial Undertakings Regulations § 15-4 sixth paragraph. Variable remuneration shall only be paid if it is justifiable based on the enterprise's overall financial position.

### **17. Are there any exchange control restrictions that affect the operation of**

### **incentive plans?**

No.

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

Formal requirements regarding the process of granting awards exist depending on the incentive plan itself and whether they are equity or non-equity based.

- Non-equity-based incentive plans (i.e., cash bonuses) are not subject to any formal process requirements. Requirements are limited to precise contractual regulation.
- The formal process for granting awards and delivery of shares under an equity-based incentive plan is subject to corporate resolutions and potentially registration in the Companies Register (registration needed if new shares are to be issued).

### **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?**

If the employee is tax resident in Norway, the share options or awards will generally be subject to ordinary taxation in Norway.

Employees that are not tax residents of Norway, will generally be taxable to Norway only on income earned from labour performed in Norway, including income from share options or award incentive schemes.

Double tax treaties and an exception in the Norwegian Tax Act for employees working outside of Norway for more than 12 months, may reduce Norway's right to tax income from share options or awards held by an internationally mobile employee.

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

If the employee is tax resident in Norway, the cash-based incentive will generally be subject to ordinary taxation in Norway.

Employees that are not tax residents of Norway, will generally be taxable to Norway only on income earned from labour performed in Norway, including income from cash-based incentive schemes.

Double tax treaties and an exception in the Norwegian Tax Act for employees working outside of Norway for more than 12 months, may reduce Norway's right to tax income from cash-based incentives earned by an internationally mobile employee.

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

For the income year 2023, the Government introduced a temporary additional bracket to the employer's social contribution of 5% for income above NOK 750,000, resulting in a total rate of 19.1%. This generally made it more beneficial to establish incentive programs that didn't trigger the employer's social. For the income year 2024, the Government has decided to keep the temporary additional bracket to the employer's social

contribution of 5%, but has increased the entry point to NOK 850,000. Hence, we continue to see an increased popularity for incentive programs such as the Kruse Smith model and the option tax scheme for companies in the start-up and growth phase.

In an advance tax ruling published on 15 November 2023, the Norwegian Directorate of Taxes concluded on the tax treatment of synthetic shares acquired by employees. Firstly, the Directorate concluded that synthetic shares acquired by an employee's holding company would qualify for participation exemption. Secondly, the Directorate concluded that gains or losses on personally held synthetic shares would not be subject to a gross-up of 1,72, as is the case for actual shares. Gains or losses on personally held synthetic shares will thus be subject to a flat tax rate of 22% instead of the effective taxation of gains and losses on actual shares of 37.84%. Following the ruling, we are starting to see an increased popularity for incentive programs involving the use of synthetic shares.

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

As of now, we have not seen any current developments or proposals for reform which will affect the operation of incentive plans over the next 12 months.

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