



The Legal 500 Country Comparative Guides

Ukraine

EMPLOYEE INCENTIVES

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

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EMPLOYEE INCENTIVES



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

Ukrainian labour legislation doesn't envisage any mandatory rules on incentives. A general incentive plan is usually offered to all employees of the same company pursuant to collective bargaining agreements and the employer's internal incentive policies. At that, individual employment agreements may envisage detailed bonus conditions.

The bonuses of different nature are possible (there are no limits under the laws): general or personal performance bonus, bonus related to a specific event (e.g., professional holiday bonus), interest-free loans etc.

In contrast, executives of the companies are usually granted with a broader range of additional incentives, e.g., performance bonuses, kick-off bonuses, participation in private pensions funds, company vehicle or car leasing with the subsequent sale to the employee, apartment rent reimbursement (usually for foreign employees), medical insurance, etc. At that, some companies also offer D&O insurance as part of the incentive plan.

In general terms, bonuses are subject to a PIT at a rate of 18% and a military levy at a rate of 1,5%. If bonuses are paid by a Ukrainian company, the latter shall also accrue and pay a social security contribution at a rate of 22%. Social security contributions are capped, and the maximum monthly social security contribution is UAH 21,450 (circa USD 740) per employee.

Premiums paid by Ukrainian employers under voluntary health insurance programs in respect of employees and family members thereof are not subject to social security contributions.

Accommodation, corporate cars, and certain other benefits that are either made available to employees or compensated thereto by a Ukrainian employer, are exempt from personal taxation if certain requirements are met.

Alongside the bonuses, popularity of share options and restricted stock units as incentive tools has been increasing. The labour legislation does not address these tools, and this helps crafting the terms and conditions of incentive programs as employers wish to see them.

A high discretionary level of the recently enacted limited liability company law and certain other recent legislative developments have also contributed to the popularity of such instruments and to the prospects of addressing stock (share) options in the shareholder/stock option agreements.

Still, one of the key features of the limited liability companies in Ukraine is its private nature and specific corporate governance, allowing blocking certain decisions by minority shareholders (under the Ukrainian corporate legislation, there is a number of issues to be adopted by the shareholders unanimously).

Thus, in some cases, share options at the Ukrainian level are not beneficial from the governance standpoint. Hence, international employers often choose to structure the incentive plans via overseas group companies to keep the ownership structure as efficient as possible.

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

The Ukrainian legislation does not specify any special rules regarding share option plans - at that, preferable terms of implementation may be agreed upon by the parties either at Ukrainian or foreign level. As a rule, the Ukrainian employers tend to align their local incentive plans with the policies and guidelines approved at the group level.

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

As indicated above, the Ukrainian legislation does not specify any special rules and all provisions are to be specified by the employee and employer in the

respective documents (employment agreements/contracts, collective bargaining agreements and internal policies)

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

Please refer to our answer to question 1 regarding other incentives examples.

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

As the Ukrainian legislation is silent regarding this matter, all limits regarding scope of participants of the incentive programmes along with other restrictions are to be specified in the documents (employment agreements/contracts, collective bargaining agreements and internal policies).

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

Yes, performance criteria as point of reference are possible. The company may include rules and criteria regarding general labour incentives (e.g., bonuses), including performance criteria, into internal labour policies, collective bargaining agreement, employment agreements/contracts with employees.

As to share options, such rules are usually included into separate agreements with the employees.

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?

As a general rule, the law requires to conduct final settlement (including all sums due to the employee's employment) on the day of employment termination. Thus, it is recommended to avoid any post-employment awards (e.g., bonuses).

However, such post-employment incentives can be granted by the documents of a non-labour nature (e.g., under civil law or share options agreements).

Nevertheless, the Ukrainian company, when paying awards to an individual, remains the tax agent of this individual (on the basis of an employment or civil law contract). The level of taxation depends on the type of award.

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

Malus and clawback provisions are not specifically regulated by law. However, recently they have become more popular and applied to top managers following group guidelines of multinational companies. At that they must be adjusted to be compliant with the provisions of the Ukrainian law and envisaged in documents on the local level (employment agreements/contracts, collective bargaining agreements and internal policies), to be enforceable in Ukraine.

Though it is generally possible to envisage reduction or cancellation of bonus due to misconduct (if not already paid), unfortunately it is not possible to return remuneration (monetary incentives are generally considered as such) that has already been paid to the employee, unless such return is voluntary or there has been a calculation mistake.

To solve this problem, in practice, companies either conclude civil law agreements between a foreign parent company and an employee (if allowed under the foreign laws) or provide for more complicated schemes of deduction of the relevant sums from future bonuses to have additional protection.

This, however, is not applicable for the separate option agreements that can regulate the malus and clawback provisions at the parties' discretion.

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

Both overseas and Ukrainian companies can operate incentive (stock option) plans. But in practice, all or almost all such plans for Ukrainian employees are operated by foreign parent (holding) or sub-holding companies even if the employees are formally employed by Ukrainian subsidiaries of multinational groups. The employees of Ukrainian subsidiaries can participate in incentive (stock option) plans operated by foreign companies either directly or indirectly through Ukrainian subsidiaries (employers).

In this section we summarise the Ukrainian tax and

social security implications for Ukrainian participants (employees) of such incentive plans operated by foreign companies.

i. on grant;

Granted stock options and RSUs should not give rise to Ukrainian tax and social security liabilities and/or reporting obligations for the Ukrainian recipients (employees).

ii. on vesting;

Vested stock options should not give rise to Ukrainian tax and social security liabilities and/or reporting obligations for their Ukrainian recipients (employees).

In contrast to stock options, RSUs do not have an exercise (strike) price. Hence, upon their vesting, employees with RSUs receive shares at a defined value without paying any consideration to exercise the RSUs.

Vesting of RSUs gives rise to a receipt by a Ukrainian recipient (employee) of shares or a cash payment. The received share value or payment is subject to a PIT at a rate of 18% and a military levy at a rate of 1,5%.

Should a Ukrainian recipient (employee) receive shares on vesting of RSUs, there are also special gross-up rules to come up with a taxable income amount.

If vesting of RSUs is not structured through a Ukrainian employer, a Ukrainian recipient (employee) shall report the relevant taxable income in an annual tax return and pay taxes.

Unfortunately, the taxed income does not add to a tax cost base of the received shares. Such situation can give rise to double taxation of the same economic income.

iii. on exercise;

In general terms, exercised stock options should not give rise to Ukrainian tax and social security liabilities and/or reporting obligations for their Ukrainian recipients (employees).

Theoretically, if such exercise gives rise to a receipt by a Ukrainian recipient of already issued shares for consideration that is less than the fair market value of the shares, the difference between the market value and exercise (strike) price can be an additional (taxable) benefit that is subject to a PIT at a rate of 18% and a military levy at a rate of 1,5%. There are also special gross-up rules to come up with a taxable benefit amount.

Unless an exercise of a stock option is structured

through a Ukrainian employer, a Ukrainian recipient may need to report an additional (taxable) benefit in an annual tax return and pay taxes on such benefit.

Unfortunately, a taxed benefit is not included in a tax cost base of the received shares. Such situation can give rise to double taxation of the same economic income.

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

The Ukrainian tax implications of acquisitions (receipts) of shares are discussed in the previous sub-section. Similar tax rules should apply to acquisitions of securities other than shares.

Holding of shares or other securities is not a taxable event in Ukraine.

A gain realized by a Ukrainian resident individual on a disposal of shares or other securities is a taxable (investment) profit that is subject to a PIT at a rate of 18% and a military levy at a rate of 1,5%.

If a Ukrainian resident individual receives dividends from an overseas company, such dividends are subject to a PIT at a rate of 9% and a military levy at a rate of 1,5%. The Ukrainian resident individual shall include such dividends in his/her annual tax return and pay the relevant taxes.

If a Ukrainian resident individual receives dividends from a Ukrainian company, such dividends are subject to a PIT at a rate of 5%, and a military levy at a rate of 1,5%. In this case the Ukrainian company will be a tax agent that shall deduct and remit the indicated Ukrainian taxes and file the relevant tax reporting.

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.

A loan is not a taxable income of a Ukrainian resident individual and is not subject to taxation unless this loan is forgiven or otherwise is not repaid by the individual.

If a loan is non-interest bearing, it can give rise to negative accounting and corporate income tax implications for the Ukrainian company.

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

As discussed above, both overseas and Ukrainian companies can operate incentive (stock option) plans. But in practice, all or almost all such plans for Ukrainian employees are operated by foreign parent (holding) or sub-holding companies even if the employees are formally employed by Ukrainian subsidiaries of multinationals. The employees of Ukrainian subsidiaries can participate in incentive (stock option) plans operated by foreign companies either directly or indirectly through Ukrainian subsidiaries (employers).

Please note that if social security contributions apply to remuneration paid by Ukrainian employers, the latter are responsible for accruing and paying all such social security contributions. In other words, social security contributions are the costs of Ukrainian employers rather than employees.

In this section we summarise the Ukrainian tax and social security implications for Ukrainian companies (employers) that operate incentive plans or through which foreign companies operate their incentive plans.

i. on grant;

Granted stock options and RSUs should not give rise to Ukrainian tax and social security liabilities and/or reporting obligations for the Ukrainian companies (employers).

ii. on vesting;

Vested stock options should not give rise to Ukrainian tax and social security liabilities and/or reporting obligations for the Ukrainian companies (employers).

In contrast to stock options, RSUs do not have an exercise (strike) price. Hence, upon their vesting, employees with RSUs receive shares at a defined value without paying any consideration to exercise the RSUs.

Vesting of RSUs gives rise to a receipt by a Ukrainian recipient (employee) of shares or a cash payment.

The received share value or payment is subject to a PIT at a rate of 18% and a military levy at a rate of 1,5%.

The Ukrainian company shall deduct and remit a PIT at a rate of 18% and a military levy at a rate of 1,5% from such share value or payment.

Should a Ukrainian recipient (employee) receive shares rather than monies, the Ukrainian company shall also apply special gross-up rules to determine a taxable share value.

The Ukrainian company may also be required to accrue and pay a social security contribution at a rate of 22%

provided that the underlying shares or monies paid are on account of employment or service-fee remuneration.

Social security contributions are capped, and the maximum monthly social security contribution is UAH21,450 (circa USD740) per employee.

iii. on exercise;

The Ukrainian company shall deduct and remit a PIT at a rate of 18% and a military levy at a rate of 1,5% from such provision of shares.

The Ukrainian company shall apply the special gross-up rules to determine a taxable share value.

The Ukrainian company may also be required to accrue and pay a social security contribution at a rate of 22% provided that the underlying shares or monies paid are on account of employment or service-fee remuneration.

Social security contributions are capped, and the maximum monthly social security contribution is UAH21,450 (circa USD740) per employee.

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

Referring to Section 10 (iii), disposal of shares on a free-of-charge basis triggers the obligation for Ukrainian company to perform the function of a tax agent (that is, deduct taxes from the employee's taxable income).

The obligation to accrue and pay social security contribution may arise if certain conditions are 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.

Tax consequences may arise only for the Ukrainian company (lender).

A zero-interest loan is a tax-neutral transaction for the Ukrainian lender, while interest is treated as income taxable at 18%.

Ukrainian lender may be required to recognise income in the amount of loan which is taxable at 18% only if the borrower does not return the loan and some other conditions are met.

Starting from 2022, the qualified Ukrainian IT company may apply for special IT box regime ("Diia City") and pay distributed profit tax at 9% instead of traditional corporate income tax at 18%. In this regard, the loan

may be subject to distributed profit tax at 9% only if the Ukrainian lender opted for the respective IT box regime and some other conditions are met.

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

In general terms, the Ukrainian companies are tax agents of employees and/or certain contractors whom they pay remuneration and shall report all payments made and taxes deducted from such payments in Form 4DF.

If Ukrainian resident individuals receive income from foreign companies or realize gains on sales of shares, they shall declare such income or gains in annual PIT returns and pay the relevant taxes.

Starting from 1st January 2022, Ukrainian controlled foreign company (CFC) rules became effective. Ukrainian resident individuals and companies are now required to:

- a. notify the Ukrainian tax authorities within 60 calendar days on their acquisition or termination of de jure or de facto control over an overseas company, and
- b. file an annual CFC report.

But in practice, it is unlikely that a Ukrainian resident individual or company will acquire a 25% (or a 10%) "controlling" shareholding in a CFC, as the case may be, as a result of an operation of an incentive plan.

From a corporate law standpoint, special reporting rules apply to Ukrainian joint-stock companies that are vested with the annual obligation to submit information on the method of determination of the remuneration of the supervisory board members (including, using shares options) and compensations to the official in the case of their dismissal.

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?

In practice, the employees are rarely entitled to compensation for loss of his or her awards in case of employment termination. However, the parties are free to agree on a right to compensation for loss of their awards, including in case of (early) termination of the employment. Usually such right is dependent on the

specific ground for dismissal.

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

The data related to the incentive plan may contain personal data (i.e., any data related to identified or identifiable natural person). In view of this it's important to remember basic rules on personal data processing in Ukraine:

- purpose limitation (data shall be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes);
- lawfulness (each data processing operation shall have a legal basis);
- data minimization (adequate, relevant, and limited collection of data to what is necessary in relation to the purposes of processing),
- the employer is obliged to notify the Ukrainian data protection authority of any processing of sensitive personal data. At the same time, if data processing is necessary pursuant to the rights and obligations of the employer as controller of personal data under the law, there is no need for notification,
- specific rules on cross-border data transfers applies in Ukraine. In case of transmission of personal data abroad or to any third parties the employer is obliged to notify its employees thereof,
- personal data shall be timely deleted as soon as the purpose of its collection and processing ceases to exist.

Also Ukrainian law contains a list of data categories which are out of protection as trade secret. It means that if the data in the incentive plan (1) is included to any form of state reporting, (2) is necessary for check of calculation and payment of taxes and other mandatory payments as well as certifies such payments the employer cannot absolutely restrict access to them.

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

For the corporate governance purposes, the incentives may be treated as part of the employee's remuneration. Thus, this triggers the necessity to comply with the governance rules specified for the remuneration approval (e.g., obtaining the consent of the responsible

management body – shareholders’ meeting/supervisory board/board of directors). The charter/internal provisions may also contain provisions regarding specifics of the incentive plans approval.

Moreover, given the primarily foreign nexus of the incentive plans offered to employees in Ukraine, the group governance guidelines and guidelines of the companies involved in such programs are to be considered.

Specific requirements to the incentives of the supervisory board members are indicated in the newly adopted Ukrainian Corporate Governance Code. To ensure transparency, it is recommended that the remuneration of members of the supervisory board should consist exclusively of fees for participation in the meetings/annual fees and should not include any significant options regarding the company’s shares. At that, these provisions are not mandatory and reflect best practices (rules of the soft law).

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

Information on the officials’ remuneration (including also in-kind bonuses) is to be submitted in prospectus in the course of the public offering of the securities.

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

Ukrainian legislation does not specify any specific rules regarding this matter.

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

Ukrainian foreign exchange legislation restricts amounts that can be invested from Ukraine abroad by Ukrainian individuals. There are no other restrictions that affect the operation of incentive plans.

Specifically, Ukrainian individuals may invest abroad only in the amount not exceeding EUR 200,000 per year (the limit may be amended from time to time). This limit does not apply to gift of shares or transfer of funds from Ukrainian individual’s bank account outside Ukraine. In this regard, Ukrainian employees will be able to exercise their stock options and acquire the shares of the overseas company via payments from the Ukrainian bank account only within that limit.

Moreover, there are no statutory requirement for Ukrainian individuals either to inform the Ukrainian authorities on opening securities account abroad or acquiring foreign shares.

However, they will need to provide the Ukrainian bank with documents confirming the reason of investment abroad (e.g. the approved incentive plan and a formal agreement between the overseas company and the Ukrainian employee).

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

The formal process for granting awards under an incentive plan is to be established by the respective document providing for such plan (e.g., collective bargaining agreement, incentive plan, share option agreement, employer’s internal policy, employment agreement/contract). Usually internal labour-related orders issued by the management of the local company are required to pay monetary incentives (bonuses) to employees.

As regards formal approvals of the governing bodies, please refer to the question 14.

19. Can an overseas corporation operate an incentive plan?

Yes, in practice, the overseas corporations operate the relevant incentive plans. This is a usual practice for multinational groups.

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

Yes, overseas (foreign) employees employed by the Ukrainian entity have the same rights to participate in incentive plans as Ukrainian citizens.

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

In general terms, taxation of an internationally mobile employee depends on whether such employee is a resident or a non-resident of Ukraine when the relevant taxable event arises.

Share options, RSUs and other awards held or received by internationally mobile employees who are resident in Ukraine are subject to the same Ukrainian tax treatment

that is outlined in Sections 9 and 10.

If an internationally mobile employee ceases employment in Ukraine, he/she shall usually receive all employment remuneration due on or before the last working day, and such remuneration shall be taxed in Ukraine.

An internationally mobile employee shall file a final Ukrainian tax return at least 60 calendar days before a projected departure date, and to pay all Ukrainian taxes before the departure date.

Having said that, there is no exit tax in Ukraine. This means that if an internationally mobile employee departs from Ukraine and ceases to be a tax resident of Ukraine, there are no Ukrainian taxes on unvested RSUs and/or unexercised stock options held by the employee on the departure date.

As a matter of practice, should RSUs be vested or stock options exercised by an internationally mobile employee when he/she is no longer a tax resident of Ukraine, any received income or gain is not taxed in Ukraine unless the RSUs and stock options are granted by Ukrainian companies.

Naturally, if an internationally mobile employee is a non-resident of Ukraine and receives RSUs, stock options or other awards from an overseas (not Ukrainian) entity, he/she should not be subject to tax in Ukraine in respect of such receipts.

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

Taxation of cash-based incentives held by an internationally mobile employee depends on whether such employee is a resident or a non-resident of Ukraine when the relevant taxable event arises, and how a payment of a cash-based incentive is structured.

If an internationally mobile employee is a tax resident of Ukraine and receives a payment (a cash-based incentive) from a Ukrainian or an overseas company, such received incentive should be subject to an 18% PIT and a 1,5% military levy. The cash-based incentive will additionally be subject to a 22% social security contribution provided that it is paid by a Ukrainian company.

If an internationally mobile employee is a tax non-resident of Ukraine and receives a cash-based incentive

from an overseas company, the receipt of such incentive should usually not be subject to Ukrainian tax or social security contributions.

Should an internationally mobile employee be a tax non-resident of Ukraine and receive a cash-based incentive from a Ukrainian company, the receipt of such incentive should usually be subject to an 18% PIT and a 1,5% military levy unless such incentive is exempt from Ukrainian tax or is subject to a reduced Ukrainian tax rate under the relevant double tax treaty. Also, such cash-based incentive can be subject to a social security contribution at a rate of 22%, which is paid by and is a cost of a Ukrainian company.

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

We have seen that the interest of both employees and employers in using the incentive plans has been substantially increased. Especially, it is relevant for the IT sector and multinational companies operating worldwide.

Additionally, the shift to remote work during Covid-19 pandemic resulted in companies starting to consider the implementation of new incentive mechanisms for performance and goals achievement in order to have a better control of remote work.

Certain companies started introducing additional incentive packages to motivate employees to get vaccinated against COVID-19, however there is a risk of recognition of such schemes as discriminatory against non-vaccinated employees.

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

The Ukrainian MPs will continue reforming personal taxation next year.

It is possible that in 2022 they will consider:

- a. introducing indirect methods of taxation;
- b. increasing penalties for tax underpayments (tax evasion);
- c. aligning taxation of Ukrainian source income and foreign source income;
- d. introducing a joint tax return for spouses.

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