

# Bonus payments for Swiss employees

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Each year many Swiss corporate clients ask the same question: are bonus payments under an employment contract at the full discretion of employers and therefore voluntary or do employers have an enforceable financial obligation in this regard?

This article addresses the factual and legal considerations which usually play a role when HR departments prepare for the yearly bonus season.

## Discretion

In Switzerland, 'gratification' is a special remuneration that employers pay in addition to fixed basic salaries at the end of the financial year. In general, bonuses exist to reward employees for the work performed each year and incentivise them to perform equally well for the employer in future.

Swiss case law distinguishes between the following three basic forms of gratification:

- Genuine gratification – the bonus and its amount are at the employer's discretion. According to the Code of Obligations, there is no legal entitlement to a bonus. Accordingly, the basic form of gratification, so-called 'genuine gratification', is characterised by the fact that both the principal bonus and its amount constitute a voluntary benefit at the full discretion of the employer. For instance, if a bonus agreement states that substantial contributions to efficient teamwork could trigger a bonus, then both the bonus as such and its amount are discretionary.
- Untypical gratification – only the bonus amount is at the employer's discretion. If a bonus payment is agreed in principle and therefore owed as such, but its amount is left up to the employer's discretion, this is called 'false gratification' and is granted either explicitly or by silent agreement.
- Classical wage component gratification – if a bonus is agreed in principle and its amount is contractually determined or can be determined objectively, it is considered a wage component. In other words, the characteristic feature of such a bonus is that the employer has no discretion in granting the bonus in principle, though the specific amount can be objectively determined or is at least determinable. This rule applies, for example, to bonus clauses where an employee is entitled to receive a wage payment "based on a percentage of the net sales he or she realized through [their] work".

## Business practice

The Federal Supreme Court adopts a broad definition when it comes to defining an agreement, in particular if it is concluded tacitly. In other words, enforceable wage claims can also arise from business practices. For example, an initially voluntary gratification can lead to a claim for gratification benefits after three uninterrupted and unconditional payments. 'Unconditional' means that no reservation of voluntariness was issued when granting the voluntary bonus. However, in numerous cases the Federal Supreme Court has disregarded the fact that:

- a reservation of voluntariness was made;
- over time the business figures were different; and
- no differentiation was made to that end.

Therefore, claims can arise despite the so-called 'voluntary clause'.

## AUTHOR

**Dominique  
Berther**



Notably, a part of the doctrine rejects this case law, as no obligation should arise from mere voluntary action on an employer's side. In other words, generous employers that want to reward their employees in good financial years are punished when the business goes south in subsequent years, while less generous employers never pay any bonuses.

### **Striking a balance**

Where a bonus exceeds an employee's regular fixed wage, the Federal Supreme Court assumes that it is no longer a mere accessory to the regular fixed salary and therefore becomes a regular fixed salary itself. Thus, if an employee is paid Sfr50,000 but receives a bonus of Sfr100,000, the allegedly voluntary bonus of Sfr100,000 is requalified as a regular wage, at least to some degree.

The regularity of excessive bonuses is also considered when requalifying whether an employee receives a bonus more than once.

As previous case law applied only to employees earning relatively high incomes, over time the Federal Supreme Court has refined its practice. In 2013 it ruled that the requirement of accessoriness did not apply to very high incomes. A 'very high income' is where an employee's total income exceeds five times the median wage in Switzerland, which was Sfr354,000 for private sector employees in 2009. In this case, genuine gratification is always a bonus that depends on the will of the employer.

If an employee with a medium to high total income receives a variable bonus declared voluntarily for several years, this must be at least as high as the basic wage paid in the same year in order to qualify as a wage component in the absence of accessoriness. Otherwise, the employee is unentitled to the bonus. Income between one and five times the median wage in Switzerland (eg, between Sfr70,800 and Sfr354,000 in 2009) is regarded as medium to high.

There is still no established case law on gratifications for low incomes. In principle, it can be assumed that a bonus on low incomes has a more controlling effect on the lives of employees than a bonus on high incomes. Here, no accessoriness is in most cases given anymore when a bonus equals one to three times the monthly wage.

*For further information on this topic please contact [Dominique Berther](mailto:dominique.berther@rihm-law.ch) at [Rihm Rechtsanwälte](http://www.rihm-law.ch) by telephone (+41 44 377 77 20) or email ([dominique.berther@rihm-law.ch](mailto:dominique.berther@rihm-law.ch)). The [Rihm Rechtsanwälte](http://www.rihm-law.ch) website can be accessed at [www.rihm-law.ch](http://www.rihm-law.ch).*

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