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Negotiating Tips: The Art Of The Ratification Bonus

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Every negotiation, especially complex negotiations, requires careful planning and, once things get underway, creative ideas and tools to bring the deal to completion. In the collective bargaining context, one often overlooked tool available to companies that can help "grease the skids" is the ratification bonus (aka "signing bonus"). There are two critical components to an effective ratification bonus: 1) structuring it in a way that truly incentivizes a union to accept the deal you want but also complies with requirements under the National Labor Relations Act (NLRA); and 2) structuring it in a way that potentially allows for the bonus to be exempted from inclusion in employees' regular rates under the Fair Labor Standards Act (FLSA) for overtime purposes. **Structure the Bonus to Incentivize Acceptance of Your Proposal** From the outset, the primary reason, in my view, to offer a ratification bonus is to increase the chances your final, desired offer will be accepted by union membership. For example, you may need significant healthcare concessions to avoid the Affordable Care Act's impending "Cadillac Tax" or something else that may be hard for the rank-and-file to swallow. By offering a bonus **expressly conditioned on** acceptance of your proposed offer, it makes it more difficult for a union to turn it down (and if you sweeten the bonus enough, potentially almost impossible). Some may be fearful that explicitly stating in a proposal that a ratification bonus will be removed from an offer if the deal is not ratified could constitute evidence of regressive bargaining and/or bad faith. Good news: the National Labor Relations Board ("NLRB") has held over the years that, when appropriately structured, ratification bonuses can be expressly contingent on acceptance of an offer without running afoul of an employer's good faith bargaining obligations. For instance, in *White Cap, Inc.*, 325 NLRB 1166 (1998), an employer set a one-week deadline for ratification of its proposals, which included certain "incentive proposals" (*e.g.*, wage increases) that would be withdrawn permanently if the contract was not ratified by the specified date. The union requested an additional ten (10) days beyond the seven-day deadline because it did not believe sufficient time existed to hold a vote, but the company only granted an additional five (5) days and held firm that the incentive proposals would come off the table if the offer was not ratified. The union failed to hold a timely vote and the proposals were withdrawn. The Board held the employer had "good cause" to withdraw the proposals, including permanently withdrawing the wage proposals, when the Union failed to ratify the contract by the company-imposed date because, among other things, the employer had stressed that the "incentive wage increases" were offered in exchange for prompt ratification of its proposed offer. Of course, you want to ensure your bargaining record establishes a good faith reason for

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incentivizing the deal you want and ensure you provide the union with enough time to consider and vote on your final offer (sufficient time will vary under the circumstances). Thus, when done the right way, the ratification bonus can be the "sweetener" you need to bring home the best deal for your organization.

Structure the Bonus in a Way that May Allow You to Exempt It From Employees' Regular Rates of Pay Usually, ratification bonuses are paid out in a lump sum. The bonus is **not** tied to hours worked by employees, which begs the question: do such bonuses have to be re-calculated into an employee's regular rate for overtime purposes under the Fair Labor Standards Act (FLSA)? Based on at least one federal court case, the answer may be "no." Under FLSA Section 7(e)(2), signing bonuses generally are required to be included in employees' regular rate notwithstanding any "agreements" to the contrary. However, the case *Minizza v. Stone Container Corporation*, 842 F.2d 1456 (3d Cir.) offers a potential roadmap to follow in the labor contract context. In that case, the U.S. Court of Appeals for the Third Circuit ruled that union contract ratification bonuses could be excluded under FLSA Section 7(e)(2) from employee regular rates because the payments were an inducement for ratification of the collective bargaining agreement, negotiated as a trade-off for wage increases, and unrelated to hours of employment or service. The court further observed the bonuses at issues were the result of the "give-and-take" of negotiations. Of course, the *Minizza* case only technically is controlling with respect to the FLSA in the states that court oversees (Delaware, New Jersey, and Pennsylvania), so you need to vet any legal authority (including potential state laws) within the jurisdiction you are bargaining before you make a final decision on this issue; but *Minizza* provides a potential road map of the way you could structure the bonus in the event you are interested in pursuing this strategy. To the extent you are able to lawfully exclude such a bonus from the regular rates and not have overtime compound the economic cost associated with it, it can potentially save your organization money over the life of a deal. Good luck out there. Here's hoping you get the deal you need – with or without a crafty ratification bonus.