



**Addressing Recent Litigation Issues in Your Award Agreements**

A Multijurisdictional Panel Discussion

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**Addressing Recent Litigation Issues in Your Award Agreements**

Why is there an increase in litigation with respect to equity awards?

- Increase in sophistication of the workforce (society becoming more litigious)
- Cultural differences
  - At-will employment and ability to contractually eliminate vested benefit upon termination of employment

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- Expectations of continued benefits based on common labour practices of the applicable jurisdiction

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**AGENDA:**  
**Significant Litigation Areas Which We Will Cover**


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Who is the ultimate obligor of the equity plan?

- Does the parent company or local subsidiary bear the ultimate legal obligation of the equity awards? Or both?

Are equity awards “salary?”

- Actual and potential conflicts arising therefrom
  - Inclusion in severance payments (how is the value computed and at what time)
  - Inclusion in holiday allowance (how is the value computed and at what time)
  - Mid-year terminations of employment (proportional allocation)



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**AGENDA:**  
**Significant Litigation Areas Which We Will Cover**

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Should there be a continuation of entitlement to an equity award upon termination of employment?

- Should the type of termination affect the entitlement (e.g., retirement, death, disability, voluntary resignation, involuntary resignation without cause, unfair or wrongful termination)
  - Mid-year terminations of employment and proration
- Can this be contracted away?
- Does “notice” of termination of employment in certain countries affect the entitlement? If so, when does entitlement end?



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**AGENDA:**  
**Significant Litigation Areas Which We Will Cover**

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How to avoid the following discrimination claims:

- Part-time vs. full-time
- Fixed- term vs. permanent employees
- Temporary vs. staff employees
- Common law employees vs. independent contractors



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**AGENDA:**  
**Significant Litigation Areas Which We Will Cover**

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Can a company fully reserve the right to unilaterally amend and terminate an equity plan? Can this be preserved?

- Vested rights of employees and consent issue
- Subsequent re-approval of shareholders
- Consultation of works council or similar organization

**NOTE:** When dealing with a multijurisdictional equity plan, legal issues vary by jurisdiction and plan language is typically not a “one size fits all.”




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**Who is the Ultimate Obligor of the Equity Plan?**

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Why is this a central issue?

- Enforceability from employee’s perspective

Is there a way to preserve for the parent company (whose stock is at issue) the right to define the playing field?

- Governing law / Jurisdiction
- Text of the equity plan vs. terms of employment contract

Which entities should execute the equity documents (e.g., parent, subsidiary, holding company)?




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**Who is the Ultimate Obligor of the Equity Plan?**  
**Typical and Suggested Plan Language**

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**NOTE:** Suggested plan/award language is intended to work in as many countries as possible but inherently will not work in ALL countries. It is intended to achieve a goal, but may not be fully enforceable everywhere.

Typical plan language

- In general, there is no “typical” language that covers this.

Suggested plan language:

- Add only if necessary for a particular country
- Choice of law / jurisdiction provisions should always be used




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### Are equity awards “salary”?

Severance and redundancy payments as well as holiday allowances

- Can award agreement contractually draft around such inclusion?
  - Can something be contractually defined as “not salary?”
- If not, how do you handle valuation (and timing of valuation)?




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### Are equity awards “salary”?

Mid-year terminations of employment

- Is prorata piece of award legally required?

**NOTE:** How “salary” is defined may be different for tax and social insurance purposes versus the common definition for labour purposes. This is critical in determining whether a certain body of law applies or not.




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### Are equity awards “salary”? Example of Awards and Severance Payments

Annual Salary: US\$ 70,000                      Length Service: 5 years  
Daily Salary: US\$ 194.44                      Severance Payment: US\$ 43,750

SOPs Grant	SOPs Granted	Exercise Price	SOPs Vested	SOPs Exercised	FMV	Benefit (US\$)	Pro-rata (US\$)
2004	1000	US\$ 40	0	0	US\$ 50	0	0
2003	1000	US\$ 35	250	250	US\$ 50	3,750	3,750
2002	1000	US\$ 45	500	500	US\$ 50	2,500	1,250
2001	1000	US\$ 25	750	750	US\$ 50	18,750	6,250
2000	1000	US\$ 20	1000	1000	US\$ 50	30,000	7,500

Total: 18,750

Annual Salary: US\$ 88,750                      Length of Service: 5 years  
Daily Salary: US\$ 246.52                      Severance Payment: US\$ 55,467  
Difference: US\$ 11,717 (26 %)




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**Are equity awards “salary”?**  
**Typical Plan Language**

**NOTE:** Suggested plan/award language is intended to work in as many countries as possible but typically will not work in ALL countries. It is intended to achieve a goal, but may not be fully enforceable everywhere.

Typical plan language

- “Nothing in the Plan or this Agreement shall be construed as creating any right in the Participant to continued employment or as altering or amending the existing terms and conditions of employment of the Participant.”



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**Are equity awards “salary”?**  
**Suggested Plan Language**

Suggested add-on to plan language:

- “The Participant’s rights in respect of or in connection with any Award grant are separate from any rights in respect of or in connection with his or her employment with the Company. The Award grant represented by this agreement is in the nature of an incentive bonus provided to the Participant in recognition of outstanding performance but is not intended to be compensation of a continuing or recurring nature and further does not represent any portion of the Participant’s salary for a given Plan Year.”



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**Are equity awards “salary”?**  
**Suggested Plan Language**

How (or should) the suggested add-on language deviate by jurisdiction?

- **Denmark:** Any award is granted discretionarily and the award is not part of the Participant’s salary (however, this sentence may be set aside by the Danish courts)
- **Germany:** Any Award is granted voluntarily and does not create a Participant’s right to receive the Award in the future even if Awards are granted repeatedly.



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**Are equity awards “salary”?**  
**Suggested Plan Language**

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How (or should) the suggested add-on language deviate by jurisdiction?

- **Portugal:** The Award grant represented by this agreement does not constitute any payment or benefit granted by the Company in consideration for the rendering of the Participant’s services as employee and is merely in the nature of an incentive bonus provided to the Participant as an employee of the Company / Group and in recognition of his performance and professional merit, but is not intended to be compensation of a regular, continuing or recurring nature and further does not represent any portion of the Participant’s salary for a given Plan Year. Further, the possible benefits that may derive to the Participant in connection with the Plan are in no way secured, guaranteed or warranted by the Company in anticipation to participation in the Plan or otherwise by sole virtue of said participation. The Participant’s rights in respect or in connection with any Award grant is derived solely from the free and discretionary decision of the Company to permit the employee to participate in the Plan and have the opportunity to benefit from an Award grant. The Participant expressly acknowledges that there is no obligation on the part of the Company to implement the Plan and grant any Award in subsequent years.




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**Are equity awards “salary”?**  
**Suggested Plan Language**

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How (or should) the suggested add-on language deviate by jurisdiction?

- **Spain:** Even though the suggested add-on language may have problems of enforceability, due to the broad definition of “salary,” it is still advisable due to arguments or international jurisdiction.




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**Should there be a continuing entitlement to an equity award upon termination of employment?**

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This is the most frequently litigated issue (outside of taxation results)

- Does the type of termination affect the entitlement (e.g., retirement, death, disability, resignation, unfair termination)
  - What are the courts holding?
- Can the entitlement be contracted away in exchange for participation in the plan?
- Notice periods in various countries: How does this impact entitlement?




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**Should there be a continuing entitlement to an equity award upon termination of employment?**  
**Typical Plan Language**

**NOTE:** Suggested plan/award language is intended to work in as many countries as possible but typically will not work in ALL countries. It is intended to achieve a goal, but may not be fully enforceable everywhere.

Typical plan language (same as "salary" language)

- "Nothing in the Plan or this Agreement shall be construed as creating any right in the Participant to continued employment or as altering or amending the existing terms and conditions of employment of the Participant."



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**Should there be a continuing entitlement to an equity award upon termination of employment?**  
**Suggested Plan Language**

Suggested Add-on plan language:

- "If the Participant ceases to have the status or relationship of an employee or officer of the Company for any reason as a result of or in connection with termination of his or her office or employment for any reason and however that termination occurs (lawfully or otherwise), the Participant will not have, and shall be deemed irrevocably to have waived, any entitlement by way of damages or compensation in respect of dismissal, breach or termination of contract or otherwise, to any sum, damages, shares, or other benefits to compensate the Participant for the loss, diminution or alteration of any shares, future rights, benefits or expectations under these terms and conditions or any instrument executed, document created or entered into, or arrangement pursuant to them (including but not limited to any employee share options trust, scheme or plan of the Company)."



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**Should there be a continuing entitlement to an equity award upon termination of employment?**  
**Suggested Plan Language**

How (or should) the suggested add-on language deviate by jurisdiction?

- **Denmark:** Regulated by the new Stock Option Act. The wording could be as follows: *"An employee who resigns without having exercised his stock options, will lose the right to his/her options. An employee who is dismissed will regardless of the provisions of the stock option scheme be entitled to keep all his/her stock options as though he/she was still employed with the company, except where the employee is in breach of his/her employment contract."* Please notice that only in case of termination by the death of the employee, the stock options can be cancelled, otherwise it is not possible.



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**Should there be a continuing entitlement to an equity award upon termination of employment?  
Suggested Plan Language**

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How (or should) the suggested add-on language deviate by jurisdiction?

- **Germany:** No suggested language if unvested awards. Please note that the circumstances of the termination of employment may affect the validity of the suggested clause.




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**Should there be a continuing entitlement to an equity award upon termination of employment?  
Suggested Plan Language**

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How (or should) the suggested add-on language deviate by jurisdiction?

- **Portugal:** If the Participant ceases to have the status or relationship of an employee or officer of the Company for any reason as a result of or in connection with termination of his or her office or employment for any reason and however that termination occurs (lawfully or otherwise), the Participant will not have any entitlement by way of damages, compensation in respect of dismissal, loss of salary, breach or termination of contract or otherwise, to any sum, damages, shares, or other benefits to compensate the Participant for the loss, diminution or alteration of any shares, possible future rights, benefits or expectations under these terms and conditions or any instrument executed, document created or entered into, or arrangement pursuant to them (including but not limited to any employee share options trust, scheme or plan of the Company).




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**Should there be a continuing entitlement to an equity award upon termination of employment?  
Suggested Plan Language**

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How (or should) the suggested add-on language deviate by jurisdiction?

- **Spain:** Suggested add-on language must
  - Define voluntary and involuntary termination (including unfair termination)
  - Provide for different consequences for voluntary and involuntary termination
  - Allow a period (*i.e.*, 3 months) to exercise outstanding options after the termination date in the event of an involuntary termination




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**How to avoid discrimination claims**

In general, this should only be an issue for broad based equity grants. If grant is restricted to top executives or a small group, unlikely to have such a claim arise.

Have to understand the demographics of the population to which equity grants are being made (before they are made) and whether current composition is discriminatory.



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**How to avoid discrimination claims**

The key appears to be documentation

- Part-time vs. full-time
  - Support with a justification (business reason) of the difference in treatment
- Fixed- term vs. permanent employees
  - Never give equity grants to new hires or support with a justification (business reason) of the difference in treatment
- Temporary vs. staff employees
  - Never give equity grants to new hires or support with a justification (business reason) of the difference in treatment
- Common law employees vs. independent contractors
  - Support with a justification (business reason) of the difference in treatment



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**How to avoid discrimination claims  
Typical Plan Language**

**NOTE:** Suggested plan/award language is intended to work in as many countries as possible but typically will not work in ALL countries. It is a intended to achieve a goal, but may not be fully enforceable everywhere.

Typical plan language

- Facts and circumstances so typically not addressed



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**How to avoid discrimination claims**  
**Suggested Plan Language**

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Suggested Add-on plan language:

- “If a person who is classified by an Employer as an independent contractor, consultant or self-employed individual is reclassified as a common law employee by a governmental agency, court, or any other entity or law for any purposes, such individual shall be an employee and shall be eligible to participate in the Plan as of the date of his or her reclassification (but not retroactively), provided he or she is eligible to participate in the Plan.”
  - Generally this is referred to a “Microsoft” language

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**How to avoid discrimination claims**  
**Special Notes**

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- **Denmark:** No suggested language. No new hire or fixed term employees should be given options at the date of grant.
- **Germany:** No suggested language. Please note that employees would be reclassified retroactively by law in Germany.

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**How to avoid discrimination claims**  
**Special Notes**

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- **Portugal:** The eligibility criteria to participate in the Plan has been decided by the Company based on objective, uniform and non-discriminatory reasons. All addressees of the Plan who meet the referred criteria are eligible to Participate in the Plan independently of their sex, sexual orientation, age, ascendance, marital status, familiar situation, genetics, reduced labour capacity, impairment, disability, chronic disease, nationality, ethnic origin, religion, political or ideological convictions or union affiliation. No employee who meets the eligibility criteria and has the same seniority in the Company or job category as another employee who is eligible may be prevented from participating in the Plan.
- **Spain:** No suggested language.

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**Can the right to amend and terminate a plan be fully reserved by the company?**

Vested rights of employees and participant consent issues

Subsequent re-approval of shareholders

Consultation of works council or similar organization

- Does consultation mean the employer has immediately characterized the issue as a labour issue?



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**Can the right to amend and terminate a plan be fully reserved by the company?**  
**Typical Plan Language**

**NOTE:** Suggested plan/award language is intended to work in as many countries as possible but typically will not work in ALL countries. It is intended to achieve a goal, but may not be fully enforceable everywhere.

Typical plan language

- "The Board may at any time and from time to time, alter, amend, suspend or terminate the Plan in whole or in part. No termination, amendment, or modification of the Plan shall adversely affect in any material way any Award previously granted under the Plan, without the written consent of the Participant holding such Award."



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**Can the right to amend and terminate a plan be fully reserved by the company?**  
**Suggested Plan Language**

Suggested add-on plan language:

- "Participant acknowledges and agrees (by executing this Award Agreement) that the granting of Awards under this Award Agreement are made on a fully discretionary basis by the Company and that this Award Agreement does not lead to a vested right to further Awards in the future. Further, the Awards set forth in this Award Agreement constitute a non-recurrent benefit and the terms of Award Agreement are only applicable to the Awards distributed pursuant to this Award Agreement. Additionally, unless the Board specifically provides otherwise, any revision or amendment that would cause the Plan to fail to comply with any requirement of applicable law, regulation, or rule if such amendment were not approved by stockholders, shall not be effective unless and until such approval of stockholders of the Company is obtained."



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**Can the right to amend and terminate a plan be fully reserved by the company?  
Suggested Plan Language**

How (or should) the suggested add-on language deviate by jurisdiction?

- **Denmark:** Cannot be used. Contractual notice period must be observed.
- **Germany:** Suggested language is not very common. However, it would be valid from a legal perspective.



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**Can the right to amend and terminate a plan be fully reserved by the company?  
Suggested Plan Language**

How (or should) the suggested add-on language deviate by jurisdiction?

- **Portugal:** The Board may at any time and from time to time, alter, amend, suspend or terminate the Plan in whole or in part. No termination, amendment, or modification of the Plan shall adversely affect in any material way any rights already vested in the participants under an Award previously granted under the Plan, without the written consent of the Participant holding such Award. Participant acknowledges and agrees (by executing this Award Agreement) that the granting of Awards under this Award Agreement are made on a fully discretionary basis by the Company and that this Award Agreement does not lead to a vested right to further Awards in the future. Further, the Awards set forth in this Award Agreement constitute a non-regular and non-recurrent rights benefit and the terms of Award Agreement are only applicable to the Awards distributed pursuant to this Award Agreement. Additionally, unless the Board specifically provides otherwise, any revision or amendment that would cause the Plan to fail to comply with any requirement of applicable law, regulation, or rule if such amendment were not approved by stockholders, shall not be effective unless and until such approval of stockholders of the Company.



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**Can the right to amend and terminate a plan be fully reserved by the company?  
Suggested Plan Language**

How (or should) the suggested add-on language deviate by jurisdiction?

- **Spain:** The suggested add-on language must set out a term for the Plan, which would facilitate amendments or even termination of the Plan at the expiration of the term (reducing the life cycle of the Plan).



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**Recommendations**

- Decide which awards, when there is a variety of alternatives, is more suitable from a legal standpoint for a particular country
- Decide whether the general governing equity plan should be accompanied by a local document (addendum per country)
- Decide whether local documents should be drafted in local language

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**Recommendations**

- Even if there is no ability to draft language which circumvents a litigious issues, we recommend adding language because
  - It can act as a psychological deterrent to employees with respect to bringing claims.
  - It occasionally adds weight to an employer's argument when the issue is brought before a judge that the employee was fully apprised of the conditions.
- Carefully compare your customary practices with what is required under the equity plan language. If customary practices do not mirror what is required by the plan, it erodes the employer's ability to argue the plan governs.

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**Questions?**

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Thank you for your participation




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