Printed from
THE TIMES OF INDIA

Cos ensure payback if execs flout norms

TNN | Feb 7, 2019, 04.00 AM IST

Mumbai: Clawback clauses in employment contracts are in the spotlight following the sacking of Chanda Kochhar as ICICI Bank CEO, and the lender's decision to get her to repay bonuses since 2009 and even revoke ESOPs.
According to executive search firms, there is a growing trend of firms putting several such clawback clauses while hiring senior executives. "When you have a potent combination of various levers to drive performance and delivery — including performance-led incentivesand benefits and perks — it is bound to introduce enhanced complexities in the total annual payout design," said Hunt Partners managing partner Suresh Raina.

"At the time of departure, all the annual, term-bound payouts come into consideration and need a deft and creative handling. The sums involved are large (some are upwards of $75,000) and become a retention tool. Yet the talent hunt leaves few options for the hiring company to find a way to compensate the candidate and, by the time you are done, it looks like a financial contract and less of an employment contract," added Raina.

ICICI Bank's compensation policy and contracts, which govern its whole-time directors and senior employees, has a provision of clawback of certain compensation benefits, said an ICICI Bank spokesperson.

Clawback clauses are entered in contracts for a service or benefit provided to an employee, for which the employee has to ensure reciprocity for a certain period, said Mahindra & Mahindra EVP (group human capital & leadership development) Prince Augustin.

Executive Access MD Ronesh Puri said some companies even peg the amount to be clawed back at double of what they would spend on learning and development (L&D) of a senior executive. This comes even as more companies send their senior executives abroad for L&D programmes. “Since such programmes are expensive, companies do not want to lose the trained talent to competition. A clause to claw back the amount if the executive leaves soon after a stipulated period serves as a retention tool,” said Puri.

At junior levels, employers try to achieve a clawback by way of a training bond. Here, the employee is asked to reimburse the expenses incurred by the employer for imparting training if he does not successfully complete a service commitment.

For managerial level positions, the clawback mechanism is structured on the basis of additional payouts (such as bonus or ex gratia) being made to the employee, especially in cases of breach of the code of conduct or employment terms.

“In the practical sense and in a country like India, it remains a challenge for the employer to recover such amounts at the time of the employee’s exit, especially if the amounts are higher than the full and final settlement. Unlike the US where the law (section 304 of the Sarbanes-Oxley Act) allows for clawback for financial misstatements, some of the similar mechanisms adopted by employers are likely to be tested in courts, especially if found to be punitive or unreasonable in nature,” said Nishith Desai Associates leader (HR law) Vikram Shroff.