Dear clients and business friends,

In response to changing needs in the economic and political environment, the State Secretariat for Economic Affairs (SECO) has issued a directive on the obligation to record working hours that came into effect on 1 January 2014. Under the terms of this directive, employees will no longer all be subject to the same comprehensive requirements on the recording of working hours but will be divided into three separate categories. Providing certain requirements are met, executives authorised to issue directives as well as full-time project managers and senior company officers are to benefit from a significant relaxation of the rules on recording rest periods.

The cantonal authorities are required to comply with the new directive immediately, while monitored companies have been granted a transition period to the end of April 2014.

The current issue of Legal News is intended to provide you an overview – from the employer’s perspective – of the key changes and any action you may need to take with regard to recording working hours.

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1. Background

Under Switzerland’s current labour law, the majority of employers in the private sector are required to keep very detailed records of employees’ working hours and rest periods. In accordance with Art. 46 of the Swiss Federal Employment Act (ArG) and Art. 73 of Ordinance 1 on the Employment Act (ArGV 1), employers have to keep a complete and verifiable record not only of the duration and concrete circumstances of the daily and weekly hours worked, but also of rest periods of more than half an hour. In particular, the requirement to record rest periods has led to major practical problems in the case of employees who can manage and organise their work largely at their own discretion.

The current controversial but slow-moving efforts to amend these (overly) general and broad burden-of-proof provisions prompted SECO to take the pragmatic step of issuing a directive (ref. 2013-10-23/381) to create a simplified work-time recording option for this defined employee group.

2. Employee categories and time recording

2.1 Category A - Top managers

In line with previous practice, members of top management do not fall under the Employment Act and so are not subject to the work-time recording provisions contained in it. In keeping with prevailing case law, which is both stringent and restrictive (cf. Federal Supreme Court Decision 126 III 340), the SECO directive stipulates that only senior executives with wide-reaching decision-making powers fall under this first employee category, i.e. CEOs, top management and directors.

2.2 Category B - Executives

2.2.1 Definition

The directive states that all employees enjoying a considerable degree of discretion as to how they plan and organise their work fall under this second and – in this context – most important category B. This relatively broadly defined category mainly includes executives authorised to issue directives, full-time project managers and other company officers who are accountable for results. It by no means includes employees required to regularly work nights or Sundays. The decisive criterion appears to be that the employee is given a certain amount of autonomy in structuring his or her work. This may, for example, apply in the case of company officers and project managers in the services and consultancy industries who have a large degree of autonomy and less for a group head in the retail segment who has to keep to strictly defined working (and opening) hours. As there...
2.2.2 Time recording

A system of simplified time recording comes into play for employees in category B. Only the daily (and thus also the weekly) hours worked need to be documented, and not the rest periods. Nevertheless, this relaxation of the rules is only permissible if the relevant employees agree in writing to waive the requirement of seamless work-time record keeping. The respective agreement must also outline the key employment law provisions on working hours and rest periods as well as state the company’s policy on implementing them. Although any such agreement should, in principle, be signed by each individual employee concerned, for reasons of practicability it may be admissible – at least for larger companies – to agree a waiver under a generally valid set of rules. It is mandatory, though, for these rules to be declared an integral part of the employment contract. The SECO directive also stipulates that a documented discussion to record the workload situation must take place at the end of each year.

2.3 Category C - Other employees (comprehensive work-time recording)

By reverse logic, all other employees, i.e., those not falling under the two categories defined above, belong in the third category C insofar as they are subject to the Employment Act. The obligation to keep comprehensive records of hours worked still applies to them. In addition to fulfilling the requirements of simplified time recording, they also have to list breaks of more than half an hour along with the circumstances (when exactly the break was taken).

Work times may be entered by hand or electronically in a table, or manually or fully automatically using a time logging system or time clock, as long as a seamless verifiable record of working hours and rest periods is produced for monitoring officials to inspect.

3. Sanctions in the case of failure to keep records

Infringements of Art. 46 ArG do not directly lead to sanctions. However, where violations of work-time recording provisions are established, labour inspectors can specifically issue a warning and demand or direct that the situation be remedied, under threat of a penalty for failure to obey a lawful order in accordance with Art. 292 of the Swiss Penal Code. Employers face a fine of up to 180 times the daily rate if they fail to observe, or they wilfully contravene, legislation governing working hours and rest periods (cf. Art. 59 in conjunction with Art. 61 ArG).

4. Recommendation

In order both to comply with and facilitate the legal obligation to record hours worked and rest periods, the following procedure is recommended:

1. Issue working hours regulations, which can also be integrated into existing employment regulations. The different employee categories must be defined in these regulations. They may stipulate the express exemption of top management from the obligation to keep comprehensive working hours records and also incorporate the necessary waiver for all employees in category B. The rules must also state the data on working hours and rest periods as stipulated in the directive.

2. Conduct an information campaign to obtain the (tacit or implied) consent of all employees affected so that the work-time regulations can be amended or introduced with immediate effect. If an employee refuses to accept the new rules, the only option open is to serve notice of termination pending a change of employment contract.

3. Annual documentation of the workload discussion with employees in category B (incl. confirmation of the waiver).

4. Continuation or introduction of comprehensive work-time recording for all employees in category C. Complete and verifiable documentation must be kept of the exact times of arrival at and departure from the workplace and the relevant breaks (in particular the lunch break).