

# Legal News

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## New rules for the intragroup deployment of employees

In 2003, the State Secretariat for Economic Affairs (SECO) issued a directive exempting intragroup secondments from most of the rather restrictive provisions of the Recruitment and Loan Staffing Act (RLSA); in particular, secondments among affiliates were not subject to the permit requirement of the RLSA, and secondments from abroad (which are generally prohibited by the RLSA) were allowed within a group. However, already over the last few years the SECO in practice interpreted its own directive more and more restrictively. This practice has now been formalized in a written directive dated 20 June, 2017, with the clear intention to make intragroup secondments generally subject to an RLSA permit. Further, cross-border secondments into Switzerland are only allowed in specific cases.

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### 1. Distinction between assignment of employees and secondments (loan staffing)

The RLSA's main intention is the protection of employees. When issuing its 2003 directive the SECO took the position that the perceived risks of loan staffing were not present, or at least not as imminent, when people were seconded within the same group. However, over time the SECO has apparently grown more concerned in that regard, driven by the widespread occurrence of intragroup secondments and in particular the establishment of "staffing companies" in some groups which hire employees for the sole purpose of loaning them to affiliates. As a result, the SECO in recent years has developed a more restrictive practice (as now formalized in the new directive) under which the distinction between assignments and secondments becomes very important: While the mere assignment of employees within Switzerland or across the border (in- and outbound) remains admissible without a permit in all cases, domestic and outbound cross-border secondments generally require a permit (subject to certain rather narrow exceptions), and inbound secondments are generally prohibited, unless one of the exceptions defined in the directive applies.

In practice, the distinction between assignments and secondments is difficult because in both cases the role of the formal employer and thus, in particular, the duty to pay salaries and at least a part of the

authority to give instructions (e.g. the right to give notice) remain with the deploying company. The primary criterion for the qualification as an assignment is the authority to give instructions, which remains completely with the formal employer (i.e. the deploying company) in the case of an assignment. Further, in the case of an assignment the deploying employer fully retains the liability for the work activities of the deployed employee, and the employee remains integrated into the formal employer's organization. In the review of all of these criteria the determining factor is not the wording of the relevant deployment contract and policies, but rather the actual working conditions implemented in practice.

The deployment of a foreign employee to a Swiss group company is often classified as a secondment because usually, the employee (i) is subject to the instructions of a superior in Switzerland, and (ii) becomes integrated into the Swiss company (e.g. access badge, assigned work-place, provision of a computer, telephone and work materials, Swiss e-mail address and business cards, application of the local employment regulations) and thus acts (at least *de facto*) as an employee of the Swiss company. In contrast, the deployment can only be qualified as a conventional intragroup assignment in specific cases, for instance in the case of clearly defined project deployments which are limited in time from the outset, when the relevant specialists continue to be subject to the instructions of their superiors in their home country and remain integrated in the organization of the deploying company.

## 2. Permit requirement

Under the previous SECO directive intragroup secondments were fully permitted, even in cross-border contexts, without the need to obtain a permit. However, under the more recent practice of the SECO (as now formalized in the new directive) intragroup secondments without a permit are only allowed as an exception, provided that:

- ▶ it is a singular case,
- ▶ it is limited in time, and
- ▶ it exclusively promotes the acquisition of experience in a technical, linguistic or other respects or is conducive to the transfer of know-how within the group.

Further, both for intragroup secondments and for loan staffing among independent parties the following two general statutory exceptions from the permit requirement continue to apply:

- ▶ The employer second employees merely on an occasional basis. Based on the strict practice applied by the authorities so far, this exception applies extremely rarely at the intragroup level, because the deployment of employees to other subsidiaries is often standard practice within a group and is not made merely short-term, but rather occurs for extended periods. This exception is mainly tailored to employers who loan out staff in times of low business activities (e.g. construction companies) or in other comparable exceptional situations (e.g. cross-border restructurings).
- ▶ The secondments are not made on a commercial basis. Secondment activities are considered "commercial" if the deployments (i) exceed the threshold of ten deployments (of individuals or of groups of employees) within a 12-month period and are made with the intention to realize a profit, or (ii) generate a revenue in excess of CHF 100,000. Since intragroup deployments are generally provided at cost or, in order to comply with the arm's length principle, at cost plus a certain surcharge, this exception will rarely be available, either.

In any case, the "on-seconding" of employees (i.e. the seconding of a person who has already been seconded to the now deploying company) remains absolutely prohibited.

## 3. Prohibited loan staffing from abroad

The language of the RLSA prohibits loan staffing from abroad,

but under the previous SECO directive a general exemption was made for secondments among affiliates. The new directive, however, abolishes this general exemption; rather, inbound intragroup secondments will only be allowed if one of the specific exceptions set out above applies. Moreover, there is no possibility of obtaining a permit for secondments into Switzerland from abroad. Therefore, if the deployment cannot be qualified as a mere assignment, either the deployment will have to be designed so that one of the specific exceptions applies, or the foreign employee has to be hired locally in the Swiss affiliate.

## 4. Hiring locally as an alternative

As stated above, hiring locally with a local employment contract at a Swiss (affiliated) company may be a solution if the deployment from abroad cannot be qualified as an assignment and no exception to the permit requirement applies. In this alternative, additional administrative expense (e.g. duplicated entry and exit procedures in both of the companies involved) will apply, and challenges related to immigration law often arise at the outset, at least if the local labor authority does not apply the facilitated immigration process which many cantons provide for intragroup transfers of executives and specialists.

In addition, it is always important to consider the consequences under social security regulations (e.g., transfer of the duty to pay social security contributions to Switzerland) and tax law both for the companies and the employees (e.g. personal tax liability in Switzerland, transfer prices between the affiliates involved).

## 5. Conclusion

The SECO's new directive goes much farther than it appears at first glance. It will remain to be seen in practice how strictly the few exceptions must actually be interpreted and handled. At any rate, intragroup secondments are subject to new rules, and companies regularly deploying employees to affiliates will have to review their current activities for compliance with the practice of the SECO. In many cases, a permit will have to be obtained for domestic or outbound deployments (in particular in the case of Swiss-based group staffing companies), or the applicable contracts and policies will have to be revised so that the deployments qualify as assignments. In the case of inbound cross-border deployments, either an assignment or a local employment will have to be implemented, unless one of the exceptions provided by the SECO directive or the law is available.

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