

Legal News

November 2017

Seven issues to take into consideration in Swiss labour law

Chloé Tavernier, Attorney-at-law, Senior Consultant, Legal Services, chloe.tavernier@ch.ey.com
Manuel Moor, Attorney-at-law, Senior Manager, Legal Services, manuel.moor@ch.ey.com

1. Salary vs. Bonus

A decisive and recurrent question in Switzerland is to determine if an agreed bonus constitutes owed salary or a voluntary extra allowance.

Various criteria have been set forth by the Swiss Federal court in this respect such as reservation of discretion and voluntariness, regularity of payment and accessoriness.

The risk here is for an employer to have a bonus requalified by a court as owed salary to an employee.

Avoiding requalification of a bonus into owed salary requires preliminary verification as to whether the content and modalities of the bonus comply with the principles set forth by Swiss Federal court and to adopt a clear contractual wording.

2. Compensation of top management in Swiss publicly listed companies

In 2013, Swiss people voted in favour of a legislation on the moderation of indemnities, deemed excessive, granted to the top management of Swiss companies publicly listed in Switzerland or abroad (the "Minder Initiative").

Specific restrictions now apply on the remuneration of the top management. The global remuneration of the board of directors, the management and the consultative committee shall now be annually subject to the vote of shareholders. Governance principles have also been strengthened for these companies.

In case of breach of these provisions, the risk is for these companies to face civil and criminal consequences.

Mitigating this risk could be achieved by ensuring that the corporate governance practices of the company are in line with the new legislation.

3. Mandatory social plan

Employers employing usually at least 250 employees are obliged to offer a social plan for collective dismissal, if they intend to dismiss at least 30 employees within 30 days for reasons unrelated to the person of the employee.

As proceeding to the termination of the employment contracts requires the approval of the labor authority, breaching this obligation may delay the termination dates and engender further costs for the employer.

Employers contemplating collective dismissal should hence bear in mind this obligation.

4. Minimum salary

The general principle of a minimum salary does not exist under Swiss federal law.

On 4 August 2017, a general minimum salary of CHF 20/hour (subject to exceptions) was however introduced in the canton of Neuchâtel, becoming the first Swiss canton to implement such measure. Other cantons (such as Tessin or Jura) could follow.

Minimum salaries may also be contained in collective bargaining contracts in specific work branches and regions.

On top of minimum salaries, cantons have also developed customary salaries in specific branches used as minimum referential in fields such as work permits and public contracts.

In case of noncompliance with the above, the employer may face claims from employees and have to retroactively pay them a higher salary.

In case of secondment of employees or prior to entering into a contractual relationship, it is recommended to determine whether minimum salaries, collective bargaining contract or customs apply.

5. Termination of an indefinite duration employment contract

Whilst in Switzerland it is not required to give a cause for termination, two main issues may arise in case of termination of an indefinite duration employment contract:

- ▶ the employee may be under mandatory protection periods (e.g., due to pregnancy or illness) during which no termination shall occur; or
- ▶ the termination may be qualified as abusive.

Termination under a mandatory protection period would be considered as void

whereas abusive termination could lead to claims from the employee and payment of an indemnity.

Anticipating the time of the termination as well as providing with detailed grounds of termination to the employee would help easing those risks.

6. Overtime and additional work

A distinction is made between:

- ▶ overtime which compensation in time or in cash may in principle be contractually excluded (working hours exceeding the working hours set forth contractually); and
- ▶ additional work for which such a compensation cannot be excluded (working hours exceeding the maximum legal working hours, in principle of 45 hours weekly).

Additional work, leading to specific compensation rules and restrictions, shall have to be diligently monitored as it is being verified by the authorities through controls performed in relation to work-time recording.

Noncompliance may result in sanctions from the authorities and claims from the employee.

7. Seconded employees

Various risks may arise in relation to seconded employees:

- ▶ possibility to have a secondment being qualified as loan staffing (cf. our August 2017 EY newsletter);
- ▶ mandatory application of minimum work conditions to the posted employees;
- ▶ qualification of the host company as *de facto* employer.

A careful review of the effective situation and the contractual structure should therefore be conducted before posting an employee.

About the global EY organization

The global EY organization is a leader in assurance, tax, transaction and advisory services. We leverage our experience, knowledge and services to help build trust and confidence in the capital markets and in economies all over the world. We are ideally equipped for this task - with well trained employees, strong teams, excellent services and outstanding client relations. Our global purpose is to drive progress and make a difference by building a better working world - for our people, for our clients and for our communities.

The global EY organization refers to all member firms of Ernst & Young Global Limited (EYG). Each EYG member firm is a separate legal entity and has no liability for another such entity's acts or omissions. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information, please visit www.ey.com.

EY's organization is represented in Switzerland by Ernst & Young Ltd, Basel, with 10 offices across Switzerland, and in Liechtenstein by Ernst & Young AG, Vaduz. In this publication, "EY" and "we" refer to Ernst & Young Ltd, Basel, a member firm of Ernst & Young Global Limited.

Legal News: Publication in German, French and English

Registration/address changes
www.ey.com/ch/newsletter
www.ey.com/ch/legal

© 2017
Ernst & Young Ltd

All Rights Reserved.

This publication contains information in summary form and is therefore intended for general guidance only. Although prepared with utmost care this publication is not intended to be a substitute for detailed research or professional advice. Therefore, by reading this publication, you agree that no liability for correctness, completeness and/or currentness will be assumed. It is solely the responsibility of the readers to decide whether and in what form the information made available is relevant for their purposes. Neither Ernst & Young Ltd nor any other member of the global EY organization accepts any responsibility. On any specific matter, reference should be made to the appropriate advisor.

www.ey.com/ch

Contacts Legal

Basel: Maja Krapf
maja.krapf@ch.ey.com

Bern: Jürg Strebelt
juerg.strebelt@ch.ey.com

Geneva: Aurélien Muller
aurelien.muller@ch.ey.com

Zurich: Oliver Blum
Oliver.Blum@ch.ey.com