

## Briefing August 2017

# Lease of Personnel and Outsourcing within a Group of Companies

The Swiss Federal State Secretariat for Economic Affairs (SECO) has specified the conditions for the assignment of employees between group companies in a published internal directive dated 20 June 2017.

In future, the lease of personnel between companies of a group requires a licence. Exempt from the licence requirement is a lease of personnel (i) for the purpose of enabling the employee to acquire experience in the profession, language or otherwise, (ii) for the purpose of know-how transfer between group companies, and (iii) on an occasional basis as set out in the Federal Recruitment Act (RecA). Within the limits of those exceptions, cross-border lease of personnel from foreign group companies to Swiss companies is also permitted.

This largely unknown specification or clarification in the Internal Directive is, in essence, in line with the more recent view of SECO and with the practice of the competent authority of the cantons (AWA; e.g. AWA of the Canton of Zurich). However, these specifications *de facto* amend the SECO guidelines (SECO Guidelines) as the wording of the SECO Guidelines, in principle, entirely exempts intragroup leasing of personnel from licence requirements.

## Background

To respond to the challenges and developments in the business and industry and to increase the efficiency of resources, companies need flexibility in the assignment of their personnel between group companies, particularly in connection with the transfer of know-how. Such allocation of personnel resources may be achieved by various means such as leasing of personnel or outsourcing.

This briefing aims to provide a brief overview of the regulations on lease of personnel and the current

practice of the competent authorities. The topic of work and resident permit requirements for non-Swiss employees is not discussed here.

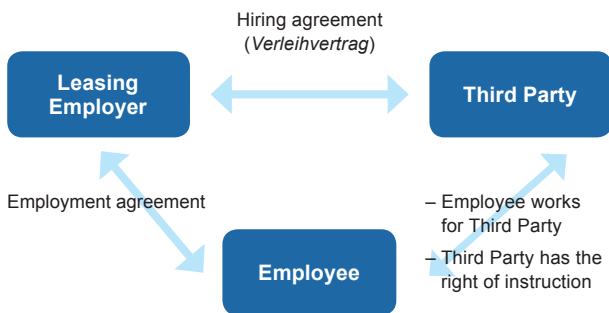
## Lease of Personnel and Outsourcing of Employees

### Definition of Lease of Personnel

Under the RecA, a lease of personnel is defined as the leasing out by a Swiss employer (the Leasing Employer) of an employee to a third party (the Third Party) for the Third Party's business. The formal legal

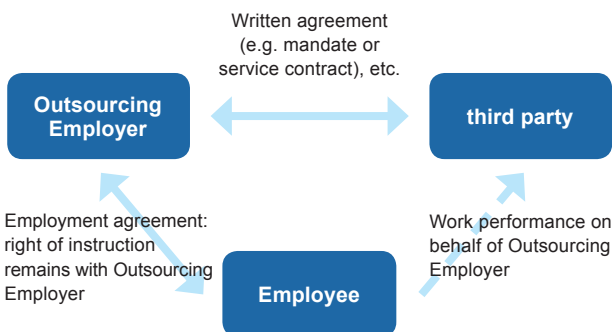
**Lease of Personnel and Outsourcing within a Group of Companies**

employment relationship remains between the Leasing Employer and the employee. However, the employer's right to direct and instruct the employee as well as to receive his/her workforce is assigned to the Third Party.



**Distinction between Leased Employees and Outsourcing**

Given the statutory law restrictions on the lease of personnel, the distinction between lease of personnel (*Personalverleih*) and outsourcing (*Auslagerung*) is important. Employees in an outsourcing set-up carry out work on behalf of their actual employer (Outsourcing Employer) for the benefit of a third party, but without being integrated in the organizational structures or directly subject to the instructions in a functional, personal, organizational way of such a third party.



In such set-ups, the employer retains the right to direct and instruct its employees. Sometimes, the distinction between lease of personnel and outsourcing might be difficult in practice. It may require a careful analysis in each individual case, e.g. of the agreement between the employer and the third party,

the agreement between the employer and the employee, and how and by whom the right to instruct the employee is in fact exercised in practice.

In contrast, an employee is qualified as a leased employee – who is subject to the regulations on the lease of personnel – if the following criteria as set forth in the Recruitment Ordinance (RecO) have been met:

- the employee is subject to the instructions and supervision of the Third Party;
- the employee is integrated in the Third Party's organizational structures/reporting lines;
- the Third Party bears the economic risk associated with an employee's activity; and/or
- the Third Party provides the employee with tools and materials.

The commercial business of the lease of personnel is restricted by law and requires a licence. Such a licence is issued by the relevant cantonal authorities (generally the AWA).

Lease of personnel is deemed commercial by its nature, if it exceeds an occasional and unplanned leasing of employees for short periods of time. In any event, lease of personnel is deemed to qualify as commercial if: (i) employees are leased out on a regular basis (i.e. more than ten leasing agreements per employer within a period of twelve months) with the intent to generate revenue, or (ii) if an annual revenue of CHF 100,000 or more is generated through the lease of personnel.

**Intragroup Leasing of Personnel**

**Intragroup Leasing**

The SECO Guidelines define intragroup leasing of personnel (*Konzerninterner Personalverleih*) as a lease of personnel between a parent entity and its subsidiaries, or between subsidiaries, or between branches (Intragroup Leasing).

**Licence Requirements for Intragroup Leasing in the Past**

In 2003, SECO issued the SECO Guidelines setting

## Lease of Personnel and Outsourcing within a Group of Companies

out its general policy relating to the lease of personnel and its understanding of the licence requirements as set forth in the RecA. In the SECO Guidelines, Intragroup Leasing has, in principle, been entirely excluded from a licence requirement.

The SECO states in the Internal Directive that its initial position on Intragroup Leasing had been adopted in order to facilitate either the gain or the transfer of know-how, or professional skills in other group companies. In support of this, SECO listed examples of training on new machines, or IT technicians who implement new technology platforms in all group companies.

According to SECO, the exemption led to a more liberal interpretation of Intragroup Leasing by group companies. However, in SECO's view the exemption policy eventually exceeded its original intent. This prompted SECO to issue the Internal Directive to clarify its position on the exemption from licence requirements for Intragroup Leasing. As a result, it has now tightened the scope of the exemption from the licence requirement in practice significantly.

SECO considers that this limitation of the Intragroup Leasing exemption is required to protect the interests of employees.

We expect that a number of groups of companies, including e.g. those that have established service companies, do not yet hold a licence for the lease of personnel, but will now be required to apply for such a licence.

A further impact will be that Intragroup Leasing from abroad to Switzerland will no longer be possible as such lease of personnel is now prohibited (with very few exceptions).

### Potential Exemptions for Lease of Personnel in the Future

Intragroup Leasing is exempt from the licence requirement if personnel are leased (i) for promoting the acquisition of experience in the profession, language or otherwise, or (ii) for know-how transfer within a group of companies, or if (iii) the lease of personnel takes place on an occasional basis within the meaning of RecA. However, each case of lease of personnel has to be evaluated in the individual case.

The Internal Directive includes a list of indicators for Intragroup Leasing activities that are not subject to licence requirements, referring in particular to the following:

- The employee is mainly assigned to work in one single group company. There are no plans for a lease of personnel to another group company and, if it nevertheless takes place, this would be for an individual case.
- The lease of personnel is not the main purpose of the employer.
- The lease of personnel is limited in time (e.g. 90 days; in contrast e.g. a period of four years would probably not qualify as a limitation in time).
- The lease of personnel only takes place occasionally, e.g. in order to bridge shortfalls or excess capacities, or to cover the need of the receiving group entity for additional personnel, e.g. for the implementation of a new IT system within the group or if employees require training to use a new machine.
- The lease of personnel has the main objective of enabling the employee to acquire and/or transfer professional experience, specific skills and know-how.

### Cross-Border Intragroup Leasing and Outsourcing

Within the limits of the exemption, Intragroup Leasing is also permitted in cross-border situations, i.e. if personnel are leased from Switzerland to abroad or from abroad to Switzerland (Cross-Border Leasing) – even though Cross-Border Leasing from a foreign entity to a Swiss entity, is otherwise generally prohibited (see below under 'Special Requirements for Cross-Border Leasing').

The SECO points out that the prohibition of Cross-Border Leasing from abroad to Switzerland (see below 'Special Requirements for Cross-Border Leasing') under the RecA must not be circumvented by labelling the cross-border Intragroup Leasing as a posting of employees (under the Swiss Posted Workers Act, PWA). According to SECO, in cases of posting, the right of instruction remains with the posting employer and the posted employee remains

## Lease of Personnel and Outsourcing within a Group of Companies

directly subject to the instruction right of the posting employer.

Therefore, when assessing whether an assignment of an employee qualifies as a lease of personnel in cross-border situations, the decisive criteria here is also the question of who exercises the right of instruction (see above 'Distinction between Leased Employees and Outsourcing').

As a result, cross-border assignments do not qualify as lease of personnel if the assigning employer keeps the right of instruction as referred to by SECO in the context of posting of employees under the PWA. In contrast, if the right of instruction transfers from the assigning employer to the receiving legal entity, this qualifies as Cross-Border Leasing and is prohibited unless the exemption referred to above applies (see above 'Potential Exemptions for Lease of Personnel in the Future').

### Licence Requirements for Lease of Personnel

#### Requirements for Obtaining a Licence

The requirements for obtaining a licence for the lease of personnel include, in particular, the following: (i) organizational requirements in respect of the Leasing Employer's business (Organizational Requirements), (ii) requirements in respect of the person who manages the lease of personnel activity within the Leasing Employer's business (Personal Requirements), and (iii) the payment of a deposit of at least CHF 50,000.

Organizational requirements include, e.g. registration with the Swiss commercial register, suitable business premises, and the presence of a manager, who fulfills the Personal Requirements. The Personal Requirements relate to the experience and training of such manager, who must be either a Swiss citizen or a foreign national with a C-Permit (*Niederlassungsbewilligung*), and who has a suitable professional background as well as clean criminal and debt enforcement records.

#### Special Requirements for Cross-Border Leasing

Further restrictions apply to Cross-Border Leasing:

The Leasing Employer must be a Swiss entity. Lease of personnel from abroad into Switzerland by a foreign domiciled person or entity is prohibited except in very limited situations (see above 'Intra-group Leasing of Personnel').

Cross-Border Leasing by Swiss Leasing Employers requires, besides the licence of a cantonal AWA, an additional Federal licence from SECO. Such a licence is subject, among other requirements, to an additional deposit of CHF 50,000 (leading to an aggregate minimum deposit of CHF 100,000, taking into account the cantonal deposit).

#### Continuing Obligations upon Obtaining the Licence

Upon the granting of the licence, the Leasing Employer must promptly inform the authorities of any change of the facts and circumstances stated/disclosed in the licence application. In particular, the Leasing Employer must immediately notify the competent AWA of any change of the manager responsible for the Leasing Employer's Compliance with the Personal Requirements. In addition, each year it must inform the AWA in more general terms in respect of the conduct of the lease of personnel business.

#### Sanctions

The conduct of a lease of personnel business in violation of the legal requirement (i.e. RecA, RecO, etc.) may entail consequences from a civil law perspective and potentially criminal sanctions. In particular, performing lease of personnel services on a commercial basis without the mandatory licence as set forth above (see above 'Requirements for Obtaining a Licence') may prompt criminal prosecution and fines of up to CHF 100,000.

From a civil law perspective, both the hiring agreements (*Verleihverträge*) between the Leasing Employer and the Third Party as well as the employment agreement between the Leasing Employer and the leased employees may be qualified as null and void. However, in latter case, both Leasing Employer and leased employee must fulfill their obligations under the employment relationship as if the contract had been valid until such time as one party terminates the relationship due to the invalidity of the employment agreement.

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