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New Regulations for the Recording of Working Time

On 4 November 2015, the Swiss Federal Council announced to amend the working time record keeping requirements to reflect new working time models of employees granted high working time autonomy, such as employees performing work outside the premises of their employers or employees not required to perform work during specific hours.

The new rules allow, under specific circumstances, to deviate from the general obligations of detailed working time recording. They intend to set clear rules on how to record working time, to reduce the employers' administrative burden and to strengthen the implementation of the Swiss Labour Law Act.

The revised regulation on working time record keeping introduces articles 73a and 73b in the Ordinance 1 to the Swiss Labour Law Act. The new provisions will enter into force on 1 January 2016.

Background

The current working time recording obligations contained in the Swiss Labour Act (ArG) and the Ordinance No. 1 to the Swiss Labour Act (ArGV 1) require employers to ensure that all their employees that are subject to the time-keeping regulations (i.e. all employees except those in very senior and executive positions) maintain a detailed recording of their working time.

To be recorded are the daily and weekly working hours, including compensation time and overtime as well as their location, the permitted weekly time off or compensation time, and the location and duration of breaks half an hour or longer in length (article 73 para. 1 lit. c – e ArGV 1).

The rapid development of communication technology has changed the way of work: Many employees also work from remote and outside regular office hours. As a consequence, the strict time keeping obligations have been criticized as unrealistic and impractical.

On 1 January 2014, a directive by the State Secretariat for Economic Affairs (SECO) entered into force. It gave certain members of staff the option to forego minutely detailed timekeeping and to only record their daily working hours instead, while the political discussions on simplifying the work tracking obligations continued.

Applicability and Entry into Force of the New Provisions

As of 1 January 2016, the new provisions on recording of working time will enter into force.

Whereas article 73a ArGV 1 concerns the waiving of the working time recording, article 73b ArGV 1 deals with simplified working time recording:

Art. 73a ArGV 1: Waiver of Working Time Recording

Under the revised regulations, employees with a work and working time autonomy of at least 50% and an annual gross salary exceeding CHF 120,000 (including a potential bonus) may agree to waive the working time record keeping obligation provided that both a collective bargaining agreement between the employer and a representative number of workers' organizations from a branch or company as well as a written confirmation by the employee exist.

The collective bargaining agreement must contain specific provisions with regard to health and recovery time and must entail regulations on the waiving of working time record keeping as well as an obligation to provide an internal contact for questions related to the working time. For part-time workers, the salary requirement applies on a *pro rata* basis.

Either party may withdraw the agreement each year (article 73a para. 3 ArGV).

Art. 73b ArGV 1: Simplified Working Time Recording

Employers and employees with a degree of working time autonomy of at least 25% may choose to limit working time recording obligations to the number of hours worked each day (with the exception of work performed at night or on Sundays, where the beginning and end of the actual work performance still must be recorded in addition to the actual total daily working hours), provided the employer and the employees' representation conclude a respective written agreement. If no employee representation exists, the employer may enter into individual agreements with the majority of the employees.

A written agreement between the employees' representation or the majority of employees and the employer must include the following:

- definition of the categories of employees of a company with the necessary amount of working time autonomy for which the recording of working time shall be simplified;
- specification of the measures taken to ensure compliance with work and recovery time regulations;
- procedure for a periodical information exchange between the parties and the verification of compliance with the provisions of the agreement.

For companies with less than 50 employees, the employer may conclude written agreements with individual employees.

Any individual agreement on the alleviation of working time record keeping must contain information with regard to the applicable work and recovery time regulations. Furthermore, it must be complemented with a documented end year consultation between the employer and the affected employee to analyze and discuss the annual workload.

Existing Provisions Remain in Force for Employees with Less Autonomy

For employees covered by the time-keeping regulations but not falling under the two categories mentioned above, the existing, rather detailed time record keeping obligations (see above) remain in place.

Existing Agreements under the Interim SECO Guideline Remain Valid Until 31 December 2016

As mentioned above, the new provisions will enter into force on 1 January 2016.

However, where employers and employees had concluded agreements under the interim SECO

guideline, such agreements will remain in force until 31 December 2016 except if the parties agree otherwise.

Employers to Evaluate on Case-by-Case Basis

Employers should evaluate on a case-by-case basis whether alleviations of working time record keeping are possible and, if so, whether to opt for waived or for simplified record keeping. Both options have their advantages, but neither option changes the limits on maximum weekly and daily working time. If employees do not comply with these limits employers may be sanctioned. Furthermore, with either option employees still have the right to track their working time in detail.

Sanctions in Case of Breach

If employers fail to comply with their obligations with regard to working time recording, they might receive a warning by the authorities. In case of continuous violation, employers risk an administrative order combined with a penalty threat as regulated in article 292 of the Swiss Penal Code or administrative constraints.

Further, a breach of the obligations set out in a collective bargaining agreement might be subject to sanctions as defined in such agreement.

Remaining Uncertainties

Uncertainties remain in particular with regard to the determination of work and working time autonomy as well as to the financial threshold required for the waiver of working time recording. This applies in particular to employees with highly variable bonuses and to employees that have started working for an employer and did not receive a bonus in the preceding year.

Employees meeting the requirements of article 73a ArGV 1 – i.e. employees with a work and working time autonomy of at least 50% and an annual gross salary exceeding CHF 120,000 – are usually not the employees to which a collective bargaining agreement applies and employers may want to avoid concluding a collective bargaining agreement only to waive the working time recording obligations.

Furthermore, the requirement to enter into coalitions to conclude collective bargaining agreements may run contrary to the freedom of coalition. Without a clear definition of the term "representative number" it remains unclear when the requirement to conclude an agreement with a representative number of workers' organizations from a branch or company is met.

Since the revision will continue on a statutory level employers may soon have to deal with new working time recording obligations again. We will gladly keep you informed about new developments.

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