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Newsletter

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EMPLOLYMENT LAW

Intragroup staff transfers and staff leasing regulations

The State Secretariat for Economic Affairs SECO detailed intragroup staff leasing conditions in an internal guideline dated 20th June 2017. Opportune clarification or drawback to employees' mobility?

1 CONTEXT

Employees' mobility often is the **corner stone of the running of groups of companies**. This mobility can cover several aspects depending on the organization of the group, its business model and the affected employees. First of all, one thinks of **expatriation**, the classic case where an employee is sent to live and work abroad for another company of the group. Then, **certain departments**, such as human resources, marketing, IT or financial services, can be **centralized** within one company of the group. Employees of these departments undertake their tasks for the benefit of all group entities, which do not themselves have internal resources in the corresponding field, or only a small team. Sometimes, it is only the head of a service, a department or an operational unit which is centralized. The hierarchical superior manages a team whose members are attached to other companies of the group than the one where he/she is him/herself employed. Another case is the one of employees having special skills who are occasionally in charge of **realizing a project or undertaking a mission** within other companies of the group than the one which employs them. On occasion, it is only about temporarily replacing an employee of another company who is unfit to work or whose position must be filled. This list of examples is far from being exhaustive. In numerous cases, affected employees are led to **work within a company which is not the one which formally employs them and/or according to instructions given by third parties** being neither a body nor an employee of their own employer. Thus, the question of the compliance with the Federal Act on Employment Services and the Hiring of Services (LSE) arises.

2 STAFF LEASING

2.1 DEFINITION

The definition of **staff leasing** is set out in the Ordinance on Employment Services and the Hiring of Services (OSE).

There is staff leasing when **the employer (the leasing employer) leases out the services of an employee to a third party (hiring company) transferring to the third party the substance of its directing and instructing rights towards employees**. The main distinction criteria leading to conclude to the existence of staff leasing are:

> **The subordination link**. The hiring company has the right to instruct the employee about the tasks that he/she must fulfill, the manner he/she must work and the means he/she has to use.

> **The integration of the employee in the hiring company**. The employee is integrated in the organization of the work in the hiring company on a personal, organizational, material and time level. He/she works with the materials and/or within the premises of the hiring company and he/she is subject to the work schedule and internal directives of the latter.

Other criteria can also be taken into account, notably those related to the invoicing mode of the employee's services to the hiring company, to the commercial risk of the work (bad execution of the work) and to the liability in case of damage caused by the employee.

"Only employers who lease out the services of some employees as an exception and without it being their normal and regular offer are released from the obligation to obtain an authorization."

2.2 ACTIVITES SUBJECT TO AUTHORIZATION

The LSE imposes on the employers (leasing employers) who make a business of leasing out the services of their employees to **hold an authorization** granted by the competent authority. Only **occasional staff leasing** is exempt from authorization. There is occasional staff leasing when the following cumulative conditions are fulfilled:

> the aim of the employment agreement entered into between employer and employee mainly consists in placing the employee under the orders of the employer;

> the services of the employee are only exceptionally leased out to a hiring company and

> the duration of the employment agreement is independent from potential missions undertaken in hiring companies.

If the leasing out of employees' services does not fulfill the above-mentioned criteria to be qualified as occasional staff leasing, the employer is only exempt from an authorization if he does not do a business of leasing out employees' services. **The concept of doing business** is however **very broadly** defined by the OSE. Thus, any company which has an annual turnover of CHF 100,000.- due to its staff leasing business is deemed to be doing business in that field. Any employer who enters into more than ten staff leasing agreements within a twelve-month period and intends to profit from this activity is also deemed to be doing business. In short, practically, only employers who exceptionally lease out the services of certain employees without it entering into their normal and regular offer are released from their obligation to obtain an authorization.

2.3 STAFF LEASING TO/FROM ABROAD

The authorization to undertake in Switzerland the leasing out of employees' services is granted by the cantonal employment office where the company is located. If the Swiss employer intends to lease out the services of its employees to a hiring company located abroad, or to hire to a company based in Switzerland the services of foreign employees recruited abroad, an authorization of the State Secretariat for Economic Affairs (**SECO**) is necessary, in addition of the cantonal authorization.

Independently from any authorization, **the leasing out of services of personnel in Switzerland by an employer (leasing employer) domiciled abroad is strictly forbidden by the LSE**.

Neither the LSE nor the OSE contain any specific provision on the leasing out of services between companies of the same group.

3 SECO GUIDELINES

3.1 2003 GUIDELINES

In 2003, the SECO published **Directives and comments** of the Federal Act on Employment Services and the Hiring of Services (LSE), of the Ordinance on Employment Services and the Hiring of Services (OSE) and of the Ordinance on the LSE-fees (OEmol-LSE) (**2003 Directives**). In this document, the SECO indicates that the leasing out of services between companies of the same group is not subject to an authorization. According to SECO's remarks, the cross-border intragroup leasing out of services is lawful despite Art. 12 para. 2 LSE, which states that the leasing out of services from abroad to Switzerland is not authorized.

3.2 2017 GUIDELINES

On 20th June 2017, the SECO published a new directive entitled "Intragroup staff leasing – Evaluation of the authorization obligation / 2017 Directive: precision of the LSE Directives and Comments" (**June 2017 Directive**).

In this document, the SECO indicates that its remarks in the 2003 Directives **do not mean that intragroup staff leasing is generally exempt** from the obligation to hold an authorization. An exception to this authorization obligation is only justified in **exceptional situations**. Intragroup staff leasing must only be permitted without authorization when it is a single case, when it is only aimed at favoring the acquisition of professional, linguistic or other experiences, or at a transfer of knowledge within a group or eventually when it occurs on an occasional basis.

The **main clues** permitting to determine whether intragroup staff leasing is exempt from any authorization are the following ones:

> The employee is mainly hired to work with the employer and on his behalf;

> Staff leasing to other companies of the group does not constitute one of the primary objectives of the employer;

> Staff leasing only occasionally occurs and is limited in time;

> Staff leasing's primary objective is to acquire experiences and knowledge and to transmit these ones.

If intragroup staff leasing fulfills the conditions to be exempt from an authorization, the prohibition to lease employees from a foreign employer is not applicable. A Swiss company belonging to an international group of companies will be allowed to use the services of an employee employed by another company of the group set abroad.

"If intragroup staff leasing fulfills the conditions to be exempt from an authorization, the prohibition to lease employees from a foreign employer is not applicable."

The SECO indicates in addition in its 2017 Directive that the Federal Act on accompanying measures applicable to posted workers and to the control of minimum salaries set forth by framework employment agreements (Posted Workers Act, **PWA**) only excludes the application of the LSE in case of **true postings**. According to the SECO, posting differs from staff leasing in that the entirety, or at least a substantial part, of the right to direct and instruct remains with the employer. The SECO estimates that, if there is a delegation of the right to direct and instruct the employee to a third party, there is staff leasing. The provisions of the LSE are applicable, whether the third party (hiring company) belongs to the employer's group or not.

4 SANCTIONS

The default of authorization to undertake staff leasing is sanctioned by a **fine worth up to CHF 100,000** imposed on the leasing company. The hiring company, which resorts to the services of the leasing company not holding the necessary authorization, is punished by a fine of maximum CHF 40,000. From a civil law perspective, if the leasing company does not hold the necessary authorization, both the staff leasing contract with the hiring company and the employment contract concluded with the employee are null and void. However, the employment agreement must be fulfilled by both parties, as if it were a valid employment contract, until one of the parties terminates it on the basis of the invalidity of the contract.

5 ANALYSIS AND PRACTICAL CASES

5.1 IMPACT OF THE SECO DIRECTIVES

The SECO directives constitute **administrative ordinances** addressed to bodies in charge of the application of the law in order to ensure an unequivocal practice. They indicate the interpretation generally given to certain legal provisions. They do not have the force of law and bind neither the citizens nor the courts but, as long as they strive to achieve an unequivocal and equal application of the law, the latter only diverge when they do not reproduce the exact meaning of the law.

As already mentioned, neither the LSE nor the OSE specifically address intragroup staff leasing and the PWA does not explicitly exclude the application of the provisions of the LSE in that matter. The competent cantonal authorities regarding staff leasing matters must establish a practice in accordance with the SECO 2017 Directive. The affected companies, leasing or hiring companies, can only argue and demonstrate that the SECO criteria to admit the existence of intragroup staff leasing exempt from authorization are met.

5.2 CONSEQUENCES ON THE PRACTICE OF GROUPS

Some groups use one or several **affiliated companies as group-wide personnel recruitment centers**. The company at stake employs employees based on personnel needs within the group. The company concludes employment agreements as an employer and manages salaries and other human resources issues. The employees are sent to work for other companies of the group depending on the positions to be filled in these companies. The primary objective of the SECO 2017 Directive is to **fight against this practice**.

Such a company located **in Switzerland** must be considered as a **leasing company undertaking commercial staff leasing subject to an authorization**, even if the company only leases out its employees' services to companies belonging to the same group. If the leasing company is located abroad, the Swiss companies of the group can absolutely not use the services of the employees in virtue of the **prohibition** of staff leasing in Switzerland **from a leasing company located abroad**.

The posting of an employee in order to replace the holder of a position **temporarily absent or to undertake a specific project** within a company of the group **is in principle still possible without authorization**. Within that frame, the leasing out of an employee whose employer is located abroad is admissible. The occasional character of the posting of employees must however be guaranteed, which may raise interpretation issues under certain circumstances.

6 CONCLUSIONS

The 20 June 2017 Directive formalizes an interpretation which was already recommended by SECO when it was asked about practical cases and that was often applied by competent cantonal offices. The circulation of this Directive **however clearly decreases the room for manœuvre and the flexibility of interpretation** which some authorities could make use of under specific circumstances. Every time a company sends one of its employees to work in another entity of the group or welcomes an employee of another entity, in Switzerland or abroad, the question of the necessity to obtain an authorization, respectively the lawfulness of the posting, must be carefully examined.

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The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or any of the following persons:

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