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Update

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New Rules on the Recording of Working Time

Following-up on our Newsflash of March 2015, in which we reported on the new draft rules on the recording of working hours, on November 4, 2015 the Federal Council has enacted the amendments to the Ordinance 1 to the Labor Act. Two new modalities for the recording of working hours are introduced: (1.) the requirement to record working hours may be waived altogether for certain categories of employees, provided such waiver is covered by a collective labor agreement, and (2.) the recording of the working hours may be limited to the recording of the total hours per day without specifying within the day when such hours were worked, including breaks. The relevant rules will become effective on January 1, 2016.

Exemption to timekeeping requirement

Pursuant to the provisions of the new Article 73a Labor Ordinance 1, certain categories of employees may be exempt from the requirement to record their working hours. The exemption applies only to companies that are parties to a collective labor agreement which specifically provides for such exemption and, in addition, subject to the consent of each individual employee.

According to the wording of the relevant provision in the ordinance, an existing or new collective labor agreement must be signed *"by a majority of labor unions that represent the relevant sector or company"*. In its report accompanying the introduction of the new rules, the State Secretariat for Economic Affairs SECO states that the labor organization which signs the relevant collective labor agreement must be independent of the company that wishes to introduce the exemption to the timekeeping requirement. If an existing collective labor agreement is amended by introducing the relevant exemption, SECO writes in its report that the employees are considered to be properly represented if all the parties to the existing agreement are in favor thereof. As far as the representation of employers is concerned, it is sufficient that at least one employer signs the relevant collective labor agreement.

In addition to providing for an exemption to the timekeeping requirement, the relevant collective labor agreement needs to provide for specific measures to protect the health of employees and to comply with the statutory resting hours. Furthermore, the employer needs to designate an internal contact person to deal with issues regarding working hours.

The agreement between the employer and the individual employee to waive the requirement to record working hours may be revoked by each party each year. While the law is silent on the date for such revocation, the SECO report refers to year end as a possible date for the revocation. As a result, it may be advisable for companies that apply the exemption to certain employees to put the renewal of the waiver on the agenda for the meeting that is to be scheduled at year end between the employee who is exempt from the timekeeping requirement and his/her supervisor.

The relevant meeting should be minuted and the minutes should be signed by both parties.

Eligible to be exempt from the timekeeping requirement are employees who *"have a high degree of discretion to manage their own working hours"*. According to the SECO report, this will apply mainly to higher management functions and employees on special assignments, for example project managers. The employee, according to SECO, needs to have discretion to determine at least 50% of its own working time. Each individual case needs to be considered separately. According to SECO, flex-hours do not *per se* bring prove that the employee has the necessary degree of autonomy to manage its own time schedule. Indications in favor of a high degree of autonomy are the absence of any mandatory office presence or remote office without fixed time schedule. By contrast, always according to SECO, the relevant degree of autonomy may not be reached if there are many mandatory meeting dates and mandatory hours for office presence. SECO recommends in its report that the employer and employee organizations specify in the relevant collective labor agreement what categories of employees are eligible to be exempt from the requirement to record their working hours.

It is a condition for the exemption of the recording requirement that the employee has an annual gross salary of at least CHF 120'000, inclusive of bonus. For part-time employees the relevant amount is reduced pro rata. According to the SECO report, it is the salary that is reported for purposes of social contributions in the previous year that will form the basis for the exemption. For a new hire it is the gross salary agreed in the employment contract. The amount of CHF 120'000 is linked to the maximum insured salary under the Federal Law on Insurance against Accidents (as of January 1, 2016 CHF 148'200) and may be adapted by the Federal Council subject to its future development.

In the event of an audit by the labor inspector, the employer needs to have available the relevant collective labor agreement and the individual waiver of each employee. As a rule, the individual waiver has to be made in writing. The employer also needs to keep a list of employees that are exempt from the timekeeping requirement, indicating that their gross annual salary exceeds the applicable threshold. The labor inspector may randomly verify the information on the basis of the salary certificates.

Simplified timekeeping

The new rules allow for the possibility to simplify the recording of the working hours for employees *"who have significant discretion in managing their own working hours"* (Art. 73b Labor Ordinance 1). As a result, the employee only needs to record the total hours worked per day without specifying when such hours were worked. If work is performed on Sundays or at night, the time entries have to specify beginning and end.

According to the SECO report, employees are eligible for the simplified recording of their working time if they can freely dispose of at least 25% of their working time. As a rule, this will apply to middle management and to positions that are not directly involved in the production / performance of services in an enterprise.

In businesses with 50 employees and more the introduction of the simplified timekeeping requires an agreement between the employer and the labor representatives of the relevant sector or company. According to the SECO report, the relevant agreement may be concluded between the employer and any labor union that already represents the relevant employees or any other internal employee representation. If the employees are not represented, the majority of the employees have to approve the introduction of the simplified timekeeping.

The agreement that introduces the simplified timekeeping has to specify the categories of employees who are eligible for the simplified recording of working hours and has to specify measures that are designed to make sure that the statutory provisions regarding maximum working hours and resting hours are complied with. In addition, the compliance of the agreement has to be supervised by a body that is made up equally of representatives of the employer and the employees. This supervision entails a periodic exchange between employer and employees on matters regarding working hours and their recording.

In any business that employs less than 50 employees the simplified recording of working hours may be agreed individually between the employer and the employee. As a rule, the relevant agreement needs to be in writing. In the individual agreement, reference must be made to the applicable statutory provisions regarding maximum working hours and resting hours. In

addition, at year end the employer has to meet with the relevant employees in order to discuss matters around the workload and working hours; such meeting needs to be documented. It is advisable to keep minutes of such a meeting which are signed by the employer and the relevant employee.

Stricter controls and sanctions

It is to be expected that the cantonal labor inspectors will closely monitor compliance with the new rules. If the labor inspector finds an employer to be in breach of the rules regarding recording of working hours, it will issue an informal non-compliance warning and, in a second step, will issue an administrative decree which is sanctioned by a fine of up to CHF 10'000. Since the statutory provisions of the Labor Act regarding maximum working hours and resting hours apply irrespective of the timekeeping requirement, in case of willful violation of such rules a fine may be issued up to 180 daily penalty units.

Conclusions and outlook

The exemption from the requirement to record working hours will only be a feasible solution once collective labor agreements in important sectors provide for it. This is likely to take some time still. By contrast, the simplified recording of working hours does constitute a viable solution especially for small enterprises which may implement the new rules quickly and without much effort.

The amended Labor Ordinance 1 has a number of flaws and ultimately falls short of the expectations for a modern legal framework to record time in today's working environment with educated and responsible employees. Especially the requirement to provide for the exemption for the recording of working hours in a collective labor agreement will not be acceptable for many companies. Against this background the intention to generally revise the Labor Act to reflect the modern working environment, in particular with respect to maximum working hours, resting hours and work on Sunday, is a move in the right direction. A parliamentary motion of 2013, which pursues that objective, is currently before the Commission for Economic Affairs of the Swiss Senate.

For further questions please contact us.

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