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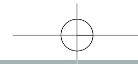

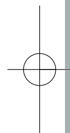

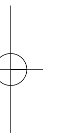

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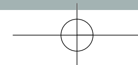
LABOUR LAW IN PRACTICE



40787al_Focus_Arbeitsr_UG_e 25.9.2008 15:26 Uhr Seite 2

TABLE OF CONTENTS

General Employment Conditions, Business Regulations and Instructions

1. Introduction 1
2. Contract and Instructions 1
3. Creation and Subject Matter 1
4. Contents 3
5. Modifications 3
6. Recommendations 4

Information and Consultation Obligations of the Employer for Business Transfers / Mass Dismissals

1. Presentation of the Problem 5
2. Information and Consultation Obligations for Business Transfers 5
3. Information and Consultation Obligations for Mass Dismissals 6
4. Conclusion and Recommendation 8

Employment in a Group – Nothing but trouble?

1. The "Problem" with the Group 9
2. Who is the Employer? 9
3. Loyalty Obligation for Executives in Groups 9
4. Result 11

Time Limitations on Work – Overtime, Extra Work Hours and Sunday Work

1. Introduction 12
2. Working Hours 12
3. Overtime 13
4. Extra Work Time exceeding Statutory Hours 14
5. Sunday Work 1

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40787al_Focus_Arbeitsr_IH_e 25.9.2008 15:21 Uhr Seite 1

GENERAL EMPLOYMENT CONDITIONS, BUSINESS REGULATIONS AND INSTRUCTIONS

Dr. Markus Metz, Attorney-at-Law

1. Introduction

Employers sometimes assume that they can extensively save the time and expense of a detailed individual employment contract when they issue general terms and conditions all around the individual employment contract, refer to them in the individual employment contract and possibly also waive them. There are numerous forms and designs of such general terms and conditions to individual employment contracts, including general labour or employment terms and conditions, instructions, general company regulations, regulations regarding working hours, vacations and holidays, those regarding participation/co-determination and participation programs, expenses and expenditures, IT-guidelines, use of infrastructures of the Employer, management regulations, regulations regarding social security but also work regulations and forms. The fantasy of the Employer has practically no limits. More difficult, however, is the legal classification of all of these decrees which hereafter should be described and summarized in short – and somewhat simplified – under the title General Employment Terms and Conditions (GETC), work rules and business regulations.

2. Contract and Instructions

The individual employment contract distinguishes itself in that the Employee carries out work "in the service of" the Employer and receives a salary for this. The Swiss federal court talks in this connection continually of a "subordination relationship" between the contractual parties. This relationship results in the fact that the Employer can issue to the Employee general and special instructions regarding his work and behaviour in the business. The scope of the instruction right is materially influenced by the design of the employment contract; what the parties regulate – in any case on a voluntary basis – in the employment contract, can no longer be the subject matter of an instruction. The Employer, however, will also have to differentiate what belongs to the agreed upon contents of the agreement and which provisions by virtue of its competence to issue work-regulations and by virtue of its instruction right can and should be unilaterally ordered and regulated in business regulations, forms, etc. All this does not belong in the individual employment contract and not in the GETC. Certainly any statutory or, in particular, collective labour contractual participation and co-determination rights must be observed through which decision-making rights exceeding the minimal statutory regulations can be created by issuing business regulations.
It is indispensable, however, for all parties to be absolutely clear whether a certain regulation is combined with the agreed upon agreement contents or in unilateral instructions of the Employer.

3. Creation and Subject Matter

3.1 General Employment Terms and Conditions

The GETC supplement the individual employment contract in the sense that due to their contractual contents, they are completely a part of this agreement. That then means, however, also that they are only valid when the parties – at least tacitly – are in agreement that these GETC are to be part of the contents of the agreement. It is therefore not sufficient that these GETC are given to the Employee; rather he must take notice of and at least implicitly approve of them. The mere reference in the employment agreement to the GETC is not sufficient.
An individual employment contract can in principle be executed without any special form (Art. 320

40787al_Focus_Arbeitsr_IH_e 25.9.2008 15:21 Uhr Seite 2

par. 1 Swiss Code of Obligations "CO"). There are, however, numerous provisions which are only valid between the parties when are agreed upon in writing[1]. In the event the contract must be in writing, it must "bear" the signatures of all parties who are bound by it (Art. 13 par. 1 CO). That means that the obligating paper must bear the signature of the obligating persons. Should the GETC for which the law prescribes the written form be included, these GETC must therefore at least be signed by that party who enters into obligations due to them. It cannot be therefore sufficient when such provisions are referred to in the signed individual agreement. By this means, they do not yet "bear" the signature of the obligated person.

Should the parties subject themselves voluntarily to the written form for all contractual agreements (Art. 16 CO), they must logistically likewise mutually sign all GETC.

The practice is somewhat less strict and treats the GETC the same as the acceptance of unread signed documents because the business intention can also only exist to approve an unknown contractual content which is shaped by another. This must be ejected for those provisions which according to statutory regulations must be agreed upon in writing or when the parties agree on the written form.

3.2 Work Rules

Work rules are a legal institution of collective labour law. They are based on public labour law and may be either issued unilaterally by the Employer or be agreed upon by it with Employee representatives. Included in the work rules are provisions regarding prevention of sickness and accidents and to the extent necessary, regarding the rules of operation and the conduct of the Employees. Included in addition in the agreed upon work rules may be provisions which concern the relationship between the Employer and Employee. They may, however, not compete with a collective labour agreement or other collective agreements. In particular, the unilaterally issued work rules may include nothing which must be "agreed to" in writing between the contractual parties according to statutory provisions.

3.3 Business Regulations

As subject matter of business regulations the Employer eventually includes all provisions which it by virtue of its unilateral instruction right (possibly after consultation with the Employees) can unilaterally issue and which do not belong in the work rules. The regulations are therefore indeed attached as an appendix to the individual employment contract; the Employee must take notice of and observe them, however does not have to sign to approve. Decisive is however that such regulation does not establish or take away any contractual claims by their contents and subject matter. So, for example, compensation for overtime or remuneration for inventions cannot be regulated by unilateral business regulations.

[1] This applies in particular to special compensation for overtime (Art. 321c par. 3 CO), agreements regarding commission rights (Art. 322b par. 2 and 323 par. 2 CO), special compensation in the event of the employee's inability to perform (Art. 324a par. 4 CO), expense reimbursement (Art. 327a par. 2 CO), return of deposit (Art. 330 par. 2 CO), stipulation concerning inventions (Art. 332 par. 2 CO), changes in probation period (Art. 335b par. 2 CO), changes in termination periods (Art. 335c par. 2 CO), agreements concerning the due date of certain claims in the event of termination of the employment relationship (Art. 339 par. 2 CO), the amount of severance pay (Art. 339c par. 1 CO), competition prohibition after termination (Art. 340 par. 1 CO).

4. Contents

4.1 General Employment Terms and Conditions

Included in the GETC are all provisions of a contractual nature – and therefore generally outlined – commencement, contents and termination of the individual employment contracts are defined. They are the contractual agreements which supplement the completely specific parts of the individual employment contracts with special agreements by means of additional contractual agreements and which also ensure the equal treatment of all Employees. They are in any event the provisions which must be "agreed to" in writing based on statutory provisions.

4.2 Work Rules

The contents of the (unilaterally issued) work rules are specified by public labour law; they are the provisions regarding prevention of sickness, accident protection, rules of operation and the conduct of the Employee in the business. The work rules are to be submitted to the Cantonal authorities for control as to conformity with the law. The Employer is therefore no longer completely free as to the contents of these work rules as it would most often wish. The Employer can also issue in the work rules provisions concerning disciplinary measures (fines, reprimands, etc., however no salary reductions).
In the work rules agreed upon with the Employee representatives can be included additional provisions regarding the relationship between the Employer and Employee; they may not, however, compete with a collective labour agreement or other collective agreements. It would therefore be difficult to stipulate the contents of these agreed upon work rules. The unilaterally issued work rules often better meet the requirements of the Employer.
Work rules must be posted in a well readable location in the business.

4.3 Business Regulations

It must be eventually regulated in the business regulations what the Employer likewise unilaterally can issue (in this respect the business regulations are similar to the work regulations), however are not subject to Cantonal control. Specific definition difficulties can arise between a contract with GETC and the business regulations including the instructions. More detailed organisation in the business regulations – with due regard to statu-tory, contractual and collective labour agreement general conditions – can be found for example in the following areas: expenses and disbursements, working hours, vacations, holidays and leisure time, promotions, arrangement of work place, child care, parking spaces, severance pay.

5. Modifications

5.1 General Employment Terms and Conditions

The GETC form a part of the contents of the Agreement and can therefore only be modified or revoked under the conditions and forms of modification or revocation of the individual employment contract; in any case, the statutory or contractual termination periods must be complied with. In regard to the GETC, in probably every case the provisions regarding notice of large-scale changes and any freeze periods must also be observed, whereby the effective date of the (modified) GETC must be staggered which, on the other hand, is not conducive to legal stability. This leads to the fact that modification of the GETC is cumbersome. It would be rather better for the Employer to consider not unnecessarily expanding the applicability of the GETC.

40787al_Focus_Arbeitsr_IH_e 25.9.2008 15:21 Uhr Seite 4

5.2. Work Rules

As an instrument of the collective labour law, changes to the work rules are subject also to the corresponding provisions. In the event the voluntarily agreed upon work rules are not issued for a specific time period (which should seldom however be the case), they may be terminated after expiry of a year at any time by giving six months notice. The same provisions apply regarding control by the Cantonal authorities for modification of both the obligatory and unilaterally issued work rules. Work rules issued by the Employer may therefore be modified at any time after inspection by the Cantonal authorities.

5.3 Business Regulations

Inasmuch as the business regulations do not create individual claims, the Employer at any time and in safeguarding legal stability and equality (for the future) may adjust, modify or revoke them. The employer must though comply with statutory and collective labour contractual participation rights.

6. Recommendations

- The Employer must differentiate between contractual agreements and unilaterally issued rules. Contractual agreements, including the GETC, include only what must be regulated between the parties by means of rights and obligations. On their basis, contractual claims and contractual obligations are founded; they must be signed when the written form has been either reserved by the parties or has been prescribed by law. For modifications or revocations, the provisions regarding the termination of a contract apply.
- The Employer may unilaterally issue, modify or revoke business regulations to the extent that they have no contents which compulsorily (by virtue of law or a collective labour agreement) must be contractually regulated. What must be, however, born in mind are already existing legal claims at the time of the modification or revocation (a change may therefore only occur in the future) and the equal treatment of Employees.
- The contents of work regulations are described in the labour law. The voluntarily issued work rules may at any time be modified or revoked, the agreed upon work rules according to the collective labour agreement. The control rights of Cantonal authorities must be complied with in regard to the work rules.

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40787al_Focus_Arbeitsr_IH_e 25.9.2008 15:21 Uhr Seite 5

INFORMATION AND CONSULTATION OBLIGATIONS OF THE EMPLOYER FOR BUSINESS TRANSFERS / MASS DISMISSALS

Dr. Dominique Portmann, Attorney-at-Law

1. Presentation of the Problem

Within the scope of restructurings and reorganizations, the business is often completely or partially transferred to a third party, possibly along with a personnel reduction. The former Employer and under certain circumstances also the third party is subject in this connection to certain information and consultation obligations. Such result first from the labour law provisions of the Swiss Code of Obligations (Art. 333a CO, resp. Art. 335f CO), from the right of participation and in connection with a merger, splitting or asset transfer, in particular also from the Merger Act in effect as per July 1, 2004 (MerA) which will be gone into in detail hereafter. In addition, the co-determination provisions are often also found in collective labour agreements and company agreements between management and Employee representatives. Business transfers, resp. mass dismissals within the scope of a bankruptcy procedure will not be discussed below.

2. Information and Consultation Obligations for Business Transfers

2.1 Information Duty

The Employer must inform the Employee representatives or – in the event there are none – the Employees regarding, on the one hand, the reason for the business transfer as well as, on the other hand, the legal, economic and social consequences of the business transfer for the Employees (for example the legal transfer of the employment relationship, the objection right of the workers, the binding nature of a collective labour agreement, the joint and several liability as well as the economic, operational and social situation of the third party, etc.) (Art. 333a par. 1 CO).

The information duty affects in principle the Employer which transfers its business or a part of the business to a third party. In the event of a merger, splitting or asset transfer according to the Merger Act, the third party moreover also has an information duty (Art. 28, 50 and 77 MerA).
Should the business involved have at least 50 workers, they are entitled pursuant to the right of participation to appoint from among themselves one or more representatives (Art. 3 Right of Participation Law). Should such Employee representatives be present in a business, the Employee representatives are entitled to the above-mentioned right to information. Otherwise, the Employees must be directly informed.
In terms of time, the information must be timely given before completion of the business transfer. In contrast, it is not required that the information be given before the decision is made to transfer the business, resp. a part of the business, to a third party, resp. the corresponding legal transaction with the third party is executed. Information is given therefore as a rule between the signing and the closing.

2.2 Consultation Duty

If due to the business transfer, measures are planned which concern the Employees (e.g. terminations, internal transfers, salary reductions, etc.), there is in addition a consultation duty (Art. 333a par. 2 CO). The consultation duty includes undisputedly a right to a hearing; in contrast it is disputed whether also a right to debate and statement of reasons exists inasmuch as the Employer rejects the suggestions of the Employees.
The former Employer or the acquiring third party is subject to the consultation duty depending on who plans the corresponding measures; mostly it involves the first. Within the scope of a merger, splitting or asset transfer, the consultation duty involves in addition not only the former Employer

40787al_Focus_Arbeitsr_IH_e 25.9.2008 15:21 Uhr Seite 6

but also the acquiring third party (Art. 28, 50 and 77 MerA).
As with the right to information, the Employee representatives, for the case there are ones, otherwise directly the Employees involved, are also entitled to the consultation right. Depending on who is affected by the planned measures, either the Employees of the transferring or those of the acquiring business are entitled to be consulted.
In terms of time, consultation must be timely done before the decision regarding these measures is taken. Timely means that consultation is done early enough so that the suggestions of Employees can also actually be taken into consideration in coming to the decision. This has the consequence that consultation must occur before execution of the contract, therefore before the signing. Should the Merger Act be applicable in a particular case, consultation must occur certainly before the merger resolution but not already before the execution of the merger agreement.
Consultation may be done orally or in writing. It is recommended that a time limit for written comments be fixed for the Employee representatives or – in their absence – the Employees. In regard to the duration of this period, reference is made to the legal jurisprudence in connection with mass dismissals (cp. sec. 3.2 below).

2.3 Sanctions for Breach of the Information or Consultation Obligations

Breach of the information or consultation duties for business transfers do not result in any sanctions pursuant to Art. 333a CO. The same applies in principle also for the Right of Participation Law, however based on it, the breach of the above-mentioned provision can be judicially determined (Art. 15 par. 2 Right of Participation Law). The legal situation for applicability of the Merger Act is otherwise modelled; in these cases, the representatives of the Employees can demand that the court prohibits the registration of the merger, splitting or asset transfer in the Commercial Register (so-called Commercial Register injunction, Art. 28 par. 3, 50 and 77 par. 2 MerA).

3. Information and Consultation Obligations for Mass Dismissals

A mass dismissal is presented when the Employer announces a certain number of dismissals within 30 days which has no connection to the person of the Employee affected. If a business employs more than 20 but less than 100 persons, at least ten Employees must be affected. When between 100 and 300 persons are employed, at least 10% of the Employees must be affected. Should the company employ as a rule more than 300 workers, a minimum of only 30 of them must be affected (Art. 335d CO).

3.1 Information Duty

The information duty includes all relevant information. Which information is relevant is determined according to the actual circumstances. In any case, it must include the reasons for the mass dismissals, the number of Employees who should be dismissed and the number of workers who as a rule are employed as well as the time period in which the dismissals will be announced (Art. 335f par. 3 CO). In the event that the number of dismissals to be announced is not yet definitely determined, an estimate must be made and the maximum and minimum numbers are to be stated. By law, the information must be given in writing.
Moreover, a general information right of the employee representatives exists based on the Right of Participation Law (Art.9 Right of Participation Law). According to this, the Employee representatives have the right to timely and comprehensive information regarding all matters, the knowledge

40787al_Focus_Arbeitsr_IH_e 25.9.2008 15:21 Uhr Seite 7

of which is required for the proper fulfilment of their duties. They are to be informed in this connection at least once a year about the effects of the course of business on employment and the Employees. The time to perform this information duty is not regulated by law. The information duty pursuant to the Right of Participation Law does not go further, however, than that pursuant to Art. 333a par. 1, resp. Art. 335f CO.

The information duty concerns the Employer.

The information must be given to the Employee representatives or – in the event there are none – directly to the Employees.

Because the information duty is a prerequisite for the subsequent consultation of the Employees affected, it must correspondingly be fulfilled before the consultation proceedings.

3.2 Consultation Duty

In addition to information, the Employer which plans a mass dismissal must give the Employees the possibility to submit suggestions of how the dismissals can be avoided or limited in their number or whose consequences can be reduced (Art. 335f par. 2 CO). Consultation includes therefore in any case a right to a hearing. In contrast, it is disputed whether in addition a right to debate and statement of reasons exists.

The Employer is subject to the consultation duty. Consultation is done with the Employee representatives or – in the event there are none – directly with the Employees.

In terms of time, consultation must take place before the Employer formulates the definitive resolution for the mass dismissals. It is recommended that the Employee representatives or – in their absence – the Employees be given a time period in which to submit written comments. The duration of this period is dependent on the actual circumstances, in particular on the complexity of the material and the urgency of the planned mass dismissals. Theory and jurisprudence consider usually about ten days as sufficient although in simple circumstances a minimum of three to five work days, in complex circumstances in contrast about 14 work days are presumed; a concrete minimum period is not specified by legal jurisprudence[2]. The consultation period should be immediately fixed after the decision to effect mass dismissals. Urgency is not able to justify the shortening of the consultation period when it has arisen because the Employer has begun the consultation proceedings too late. In any case, consultation must be completed before the dismissals are announced.

3.3 Sanctions for Breach of the Information or Consultation Duty

Breach of the information and consultation duty has the consequence that the dismissals announced within the scope of the mass dismissals can be objected to on the basis of abuse and compensation for a maximum of two months salary may be demanded (Art. 336 par. 2 lit. c CO in connection with Art. 336a par. 3 CO). In addition, based on the Right of Participation Law, judicial determination of a breach of Art. 335f CO may be requested (Art. 15 par. 2 Right of Participation Law).

3.4 Additional Obligations vis-à-vis the Cantonal Labour Office

In addition to the above presented information and consultation obligations, the Employer is subject to certain duties vis-à-vis the Cantonal Labour Office. The Labour Office must be informed in writing about every planned mass dismissal and a copy of this notice sent to the Employee representatives, resp. the Employees. The notice must contain the results of the consultation proceedings and all relevant information about the planned

2 BGE 130 III 102 et seq.; BGE 123 III 176 et seq.; ZR 103 [2004], No. 5; plädoyer 5/04, p. 70 et seq.

40787al_Focus_Arbeitsr_IH_e 25.9.2008 15:21 Uhr Seite 8

mass dismissals (Art. 335g par. 1 and 2 CO).
In addition, the Employer must send the Labour Office a copy of the written information given (Art. 335f par. 4 CO).
The employment relationships terminated within the scope of a mass dismissal are ended 30 days after notice to the Labour Office provided the termination would not first be effective at a later date according to contractual or statutory provisions (Art. 335g par. 4 CO). This has the result that the stopped notices to the Labour Office allow the continued existence of the employment relationships involved.

4. Conclusion and Recommendation

Since the providing of information and the consultation of the Employees must in principle be done before execution of a take-over agreement, under certain circumstances confidentiality interests of the Employer are concerned. The Employer has an interest for various reasons that news of the restructuring or also the reorganisation of businesses does not reach the public too early. In the view of the legislature, the information and participation rights of the Employees involved take precedence, however, over such a confidentiality interest of the Employer. It is therefore to be well recommended to the Employer to impose on the Employee representatives – provided they exist – a confidentiality obligation vis-à-vis the Employees. In addition, it may also demand a general secrecy towards third parties. In this case, neither those Employees not belonging among the Employee representatives nor persons outside the company who are entrusted with safeguarding the interests of the Employees may be informed (Art. 14 par. 2 lit. a Right of Participation Law). Notwithstanding this, a general secrecy obligation exists which involves both the Employee representatives and the Employees (Art. 14 par. 1, 3 and 4 Right of Participation Law). Finally, such also arises from the general labour law loyalty duty (Art. 321a par. 4 CO) and the criminal law confidentiality duty (Art. 162 Swiss Criminal Code).
Should a business have no Employee representatives, the Employees are directly entitled to the information and consultation rights. Under certain circumstances, it is recommended that a personnel speaker or an ad hoc delegation be appointed by mutual agreement.
There is no duty to issue a social plan for restructurings.

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40787al_Focus_Arbeitsr_IH_e 25.9.2008 15:21 Uhr Seite 9

EMPLOYMENT IN A GROUP – NOTHING BUT TROUBLE?

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1. The "Problem" with the Group

Large businesses are often organised in a complex group structure. The intertwining of the individual group companies is varied. The individual companies are either connected by voting majorities, contractually, statutorily or due to personnel integrated and are commercially under one management. Economically, the group companies are therefore considered consolidated and "the Group" perceived as a unity. The economic perception can thereby under certain circumstances collide with the legal: "The Group" is not a legal entity. According to civil law, the Group companies remain independent legal entities. Contractual partner (e.g. Employer) is always one or more Group companies, "the Group" as such can never be a contractual partner (e.g. Employer or contractor).
Nevertheless the linking of companies in a Group structure has consequences for the approach according to (labour) law. Precisely executive staff is often employed in various Group companies in various functions. Hereafter, it will be shown which problems executives in a Group can have under labour law, in particular in regard to their loyalty duties and how such problems can be avoided.

2. Who is the Employer?

Often problems already arise in a Group as to the Employer. This question first suggests itself when the assertion of claims arising from the employment relationship is involved: Against which company must I claim? For international Groups: Which law is applicable? The answer to the question regarding the Employer is primarily important, however, where the fixing of mutual rights and obligations is involved.
Who the Employer is, is determined in the first place according to the intentions of the parties. The Employment Agreement can of course give hints thereto. The description of the parties to a contract is, however, not decisive. Likewise it is only an indication, in any case however not alone decisive, who pays the salary. Also as little compelling is the argument that the Employer is that company which does the social security accounting or appears before the tax authorities.
Also when the Employer is determined, there can be – precisely for executives with corporate body functions – an additional problem which is described below:

3. Loyalty Obligation for Executives in Groups

By way of introduction, an example for illustration purposes: Mr. B. has been a member of management for five years of Mu-Ltd. and as such successful. Ten months ago, he was in addition appointed as delegate of the Board of Directors of To-Ltd., a 100 percent subsidiary of Mu-Ltd. Mr. B. was pleased about the new challenge. After a short time, however, Mr. B. had a problem: The Board of Directors of Mu-Ltd. demanded that B. have compensation paid to S-Ltd. (an associated company of To-Ltd.) which was having financial difficulties. B. asked himself whether he – because he is a member of the Board of Directors of To-Ltd. – should or had to do this.
Employees are obligated to be loyal to their Employer pursuant to Art. 321a par. 1 CO, meaning the justified interests of the Employer must be protected, their concerns and targets promoted and to not do anything which could cause damage to the Employer. To the duty of loyalty also belongs the prohibition of accepting bribe money

40787al_Focus_Arbeitsr_IH_e 25.9.2008 15:21 Uhr Seite 10

and the prohibition of competing outside jobs. Within the Group, the question is constantly posed in the practice of which company can plead the duty of loyalty, resp. (from the view of the Employees) which company is owed loyalty. For executives who – like Mr. B. in our example – simultaneously perform functions in governing bodies, also involved is whether they are actually ”Employees” or whether or not they have a special management duty of good faith according to Art. 717 CO, which as a rule goes further than the duty of loyalty according to labour law[3].

In the view of the Swiss federal court, the legal relationship between the company and the governing body is most of the time not a pure employment agreement but instead a so-called innominate contract, therefore a type of contract not legally regulated for which both labour law and corporate law provisions apply[4]. In assessing the legal relationship, the specific characteristics of the concrete case must always be considered. In the first place, it is decisive whether a dependent relationship exists, meaning the person involved receives instructions. Should this be the case then in addition to a corporate duty of good faith also a duty according to labour law exists[5].

Coming back to our example: Mr. B. is managing director of Mu-Ltd., and as such is bound by the instructions of its Board of Directors. For the relationship between Mu-Ltd. and Mr. B., the provisions of labour law are primarily applicable. He is therefore obligated to be loyal towards Mu-Ltd. pursuant to Art. 321a par. 1 CO. At the same time Mr. B. is the delegate of the Board of Directors of To-Ltd. He performs as such both management functions as well as operational functions. As a member of the Board of Directors of To-Ltd., he has simultaneously special management duties of good faith towards To-Ltd. Because he is also operationally employed, he must however possibly also fulfil loyalty obligations pursuant to labour law vis-à-vis To-Ltd. Whether that is so is dependent on the answer to the question of whether an employment relationship exists with the subsidiary or whether in accordance with the intentions of the parties, the parent should remain the Employer.

Does Mr. B. breach his special management obligations of good faith towards To-Ltd. when he acts pursuant to the instructions of his Employer, Mu-Ltd.? Mr. B. finds himself in a classical conflict of interests. This is particularly accentuated in Group relationships. Therefore Mr. B. asks himself whether it should not be his duty as Employee of Mu-Ltd. to also protect the Group interests, therefore also the interests of S-Ltd. Does he not act also in the interests of To-Ltd. when he protects the Group interests and therefore also the interests of S-Ltd.?

As mentioned above, Swiss corporate law starts from an ”individual company” perception. Protection of ”Group interests” must be therefore separated from the protection of the interests of the individual companies. This view was also reflected in an earlier decision of the Swiss federal court[6]. Indeed the federal court recognizes that the loyalty duty according to labour law could include the protection of interests of other Group companies. However in respect to the special management duty of good faith, the federal court retained the ”individual company” approach. The federal court opposed a superior Group interest, meaning protection of the interests of other Group companies is in principle the protection of the interests of third parties. These should be therefore kept in mind only to the extent that they are in conformity with the interests of the ”own” company.

3 BGE 130 III 217 E. 2.1.

4 Unpublished Swiss Federal Court Decision 4C.402/1998 dated December 14, 1999; BGE 130 III 217, E. 2.1 with additional references.

5 BGE 130 III 217 E. 2.1.

6 Cp. BGE 130 III 213.

4. Result

In the opinion of the Swiss federal court jurisprudence it is to be presumed that executives with management functions will always have a ”double job description” and therefore the risk of conflict of interests of such activities is inherent. In the final analysis, there are however possibilities to keep this risk as small as possible:

- Regardless of the transfer of management functions, first uncertainties regarding the contractual parties are to be avoided. This means that it must be made clear what the intentions of the parties are in utilising executives in other Group companies (e.g. in whose interest is this employment). It is important to specify who is authorised to give instructions to whom. The modalities of this assignment[7] are to be so chosen that uncertainties regarding the contractual parties cannot even arise.
- A clear job description must be prepared which states the promotion of Group interests.
- The procedures in the event of conflict of interests is to be exactly specified e.g. in By-Laws. When there is a conflict of interest, the person who the conflict affects must excuse himself. The modalities of the regulations for excusing oneself are to be specified.
- Protection by means of agreement with the parent company: Indemnification of the Employee by the parent company for protecting the interests of the Group.
- Caution is recommended for the transferring of new or additional duties (in particular in other Group companies). These should be put into writing. The corresponding supplementation of the job description and the regulation of conflicts of interest must be timely tackled.
- In view of the federal court jurisprudence, the rule of thumb applies: ”In case of doubt, you better decide against the interests of the Group”.

[7] Work place, salary bookkeeping, tax and social security organisation, etc.

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40787al_Focus_Arbeitsr_IH_e 25.9.2008 15:21 Uhr Seite 12

TIME LIMITATIONS ON WORK – OVERTIME, EXTRA WORK HOURS AND SUNDAY WORK

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1. Introduction

Working hours are determined by collective, standardised or individual contracts or by operational practice. However, the Labour Law (LL) contains compulsory minimum regulations regarding working and break times in order to protect the Employee for health reasons from too long and other arduous working times. In view of the variety of needs of the modern working world, the legislature has not been able, however, to issue uniform regulations. Therefore, the Labour Law recognizes principles, exceptions, special permit possibilities and special regulations for certain businesses and Employees. In order not to create unjustified competition benefits for individual businesses, the legislature could not leave the regulations to the collective employment agreements. In addition to the Labour Law, also the Cantonal police provisions for Sunday quiet time and closing time of stores must be taken into consideration in connection with the time limitations on work.

2. Working Hours

Working hours is the time during which the Employee must make himself directly available to the Employer. Belonging to working hours are also business trips, emergency service, professional training ordered by the Employer and as a rule also stand-by duty. In contrast, the way to work does not in principle count as working hours. For emergency duty, the Employee must remain prepared for any assignments in the event of disruptions or control procedures in addition to normal working hours (Art. 14 par. 1 LL). For stand-by duty, the entire service time is considered working hours (Art. 15 par. 1 LL). For on-call duty in contrast, only those service hours are considered as working hours during which the Employee actually performs work. Here, however, the time used for the way to work is considered to be working time.
In regulating working hours, the Labour Law fixes maximum weekly working hours. For Employees in industrial businesses as well as for office personnel, technical and other Employees including sales personnel in large operations of retain businesses, they are 45 hours; for all other Employees 50 hours (Art. 9 par. 1 LL). These maximum working hours may be exceeded by four hours at the most (Art. 9 par. 3 and 4 LL).
The weekly working hours may be fixed differently for individual days. The daily working time is limited, however, to the time between 6:00 am and 8:00 pm; evening work to the time between 8:00 pm to 11:00 pm (Art. 10 LL). The performance of evening work requires the prior hearing of the Employee representatives, resp. the Employee involved (Art. 10 Abs. 1 LL). The day and evening work of an Employee including breaks and overtime may be a maximum of 14 hours (Art. 10 par. 3 LL).
The employment of Employees outside of this operational day and evening work is considered night work. This is in principle prohibited (Art. 16 LL), may however be as an exception temporarily permitted by the responsible Cantonal authorities when the Employer shows an urgent need (Art. 17 par. 3 LL). Continual and regularly recurring night work may be though only permitted by the State Secretariat for the Economy, Department of Labour, Section Work Conditions when it is indispensable for technical or economic reasons (Art. 17 par. 2 LL). The performance of night work also requires the agreement of the Employee. The Employer must pay the Employee working at night at least 25% of his salary as a surcharge. In the event the Employee works at night for a longer time period, he also therefore has the right to medical examinations and consultations (Art. 17c LL).

3. Overtime

3.1 Obligation to Perform Overtime

Overtime is every work which exceeds the normal working time. Whether overtime is involved is decided according to the normal working hours which are agreed upon in the collective labour agreement or the individual employment contract. Should there be no agreement, the customary working hours are decisive. Should overtime be necessary, the Employee is in principle obligated to perform it (Art. 321c par. 1 CO). The Employee must perform overtime when he can recognize that it is required to protect the justified interests of the Employer. Overtime must not be therefore expressly ordered or demanded by the Employer. The burden of proof that overtime has been performed to complete work arising in the interest of the Employer lies with the Employee. In the event that the exact number of extra hours cannot be any longer proven, they must be estimated. Should the Employer refrain from the stipulated registration of extra hours, the burden of proof is reversed. After working overtime, the Employee must notify the Employer within a useful period. In the event that the Employee does not claim overtime, he forfeits his rights. The time period in which the notice must be given is determined by the circumstances of the specific case[8].

The obligation to work overtime is, on the one side, limited by the ability of the Employee to perform it and, on the other side, by Labour Law provisions regarding working hours (cp. sec. 2 above). The Employee can therefore refuse overtime work when he is not in the position to perform it due to health or family reasons. He is also not required to work overtime when in good faith it cannot be expected of him. That is for instance the case when the Employer could have avoided the overtime work by means of a better allocation of work.

[8] Cp. BGE 129 II 171 et seq., 174 et seq., E. 2.2 - 2.4.

3.2 Compensation of Overtime Worked

In the event that it is agreed that the overtime will be compensated by time off and the parties do not agree otherwise, the time off must equal at least the period worked as overtime and compensation must be effected within an appropriate period of time (Art. 321c par. 2 CO). Should the overtime not be compensated by time off and the parties have not agreed otherwise in writing or in the standardised or collective employment contract, the Employee has the right to special compensation for the overtime worked. This right includes the normal salary together with a surcharge of at least 25% (Art. 321c par. 3 CO). For periodically performed overtime, the overtime may be compensated for practical reasons with the monthly salary. In these cases, special compensation for overtime to be performed in the future can be precluded by collective employment contract, standardised employment contract or written individual employment contract. A differing agreement for overtime does not apply, however, for extra work time exceeding statutory hours.

3.3 In Principle No Compensation for Executives

Overtime for executives[9] is often not specified in detail in contracts. The Employer expects his executives to work more than the normal working hours and compensates this above-average commitment with a higher salary. Since the working hours in this employment relationship are usually not specified in a contract, also no overtime can accrue. Therefore in this kind of employment relationship, no right to overtime compensation arises. Such exists only when either additional duties exceeding the contractually agreed upon obligations are transferred to the executive or the entire staff must work overtime to a substantial extent during a longer period. In the event that the time

[9] Cp. BGE 126 III 337 et seq., 340, E. 5.

scope of working hours is, however, expressly agreed by contract, the statutory regulations of Art. 321c CO also applies for the executives.

4. Extra Work Time exceeding Statutory Hours

4.1 Exceptional Allowance of Extra Work Time

Extra work time is work which exceeds the statutorily prescribed maximum weekly working hours (Art. 12 par. 1 LL). Due to urgency or priority of the work, it is exceptionally allowed. The Employee may not, however, work more than two hours extra daily and for a maximum weekly working time of 45 hours, not more than 170 hours extra per year (Art. 12 par. 2 LL).

4.2 Compensation for Extra Work Time

For extra work time, the Employer owes the Employee a salary surcharge of a minimum of 25% when the extra work is not compensated with the agreement of the Employee by time off within an appropriate time period (Art. 13 LL). A deviating agreement between the parties is not allowable; the surcharge is binding for both sides, meaning the Employer and Employee. Office personnel and technical and other employees including sales personnel in large operations of retail businesses are only though owed the surcharge when the extra work time exceeds 60 hours in the calendar year. For certain groups of businesses or Employees, the surcharge is totally not applicable (Art. 27 par. 1 LL).

4.3 No Compensation for Executives

Executives do not fall under the regulations of the Labour Law and are therefore precluded from the surcharge obligation for extra work time. The term executive is though narrowly interpreted. Not every employee who exercises a responsible function is considered an executive. Executive within the meaning of the Labour Law are only those Employees who due to their position and responsibility as well as dependent on the size of the business have far-reaching decision authority or can decisively influence decisions of large significance and by means of this, lastingly mould the structure, course of business and development of the business or part of the business (Art. 9 LL). Executives are obligated to perform additional work. This obligation is limited by the capability of the Employee taking in consideration the protection of the Employee’s individuality (Art. 328 CO).

5. Sunday Work

5.1 Permit Obligation for Sunday Work and Agreement of the Employee

As for evening work, the Labour Law in principle prohibits also work on Sunday (Art. 18 LL). Sunday is considered the time span between Saturdays at 11:00 pm to Sunday at 11:00 pm. In addition, the Cantons can treat a maximum of eight holidays equal with Sundays (Art. 20a par. 1 LL). Temporary Sunday work may be exceptionally allowed by the responsible Cantonal authorities when the Employer shows an urgent need (Art. 19 par. 2 LL). Continual or regularly recurring Sunday work may be permitted by the State Secretariat for Economy, Department of Labour, Section Work Conditions, when this is indispensable for technical or economic reasons (Art. 19 par. 2 LL). In addition to the permit obligation, Sunday work requires, however, that the Employee states his agreement to work then (Art. 19 par. 5 LL). Finally, the Employer must give the Employee at least once every two weeks an entire Sunday off as the weekly day off directly before or after the usual day off (Art. 20 LL).

40787al_Focus_Arbeitsr_IH_e 25.9.2008 15:21 Uhr Seite 15

5.2 Compensation for Sunday Work

For temporary Sunday work, the Employer must pay the Employee a salary surcharge of 50% (Art. 19 par. 3 LL). In addition, the Employee has the right to replacement free time (Art. 20 par. 2 LL). To the extent which the Labour Law prescribes free time, this may not be compensated by money or other allowances, except at the termination of the employment relationship (Art. 22 LL).

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