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Swiss employment law

New Obligation to Conclude a Social Plan

Initial Situation

On 1 January 2014, the new Swiss Restructuring Law will enter into force. In addition to various changes in the Swiss Debt Enforcement and Bankruptcy Law (SchKG), the amendment to the legislation also includes in particular one change regarding substantive employment law that is of major importance.

As of 1 January 2014, (larger) employers are obliged to negotiate a social plan in certain cases of collective redundancies. According to this far reaching revision of the law, an arbitral tribunal will establish a social plan by way of an arbitral award if such negotiations fail.

Obligation to Conclude a Social Plan

The employer is obliged to enter into social plan negotiations if it (i) usually employs at least 250 employees and (ii) intends to terminate at least 30 employees within 30 days for reasons that are unrelated to the individual employee. Terminations that are issued over time (i.e. within more than 30 days) but based on the same operational decision have to be taken into account and added together. Hence, the employer may not avoid the duty to conclude a social plan by staggering the notices of termination.

Accordingly, the new legislative provision concerns in particular restructurings of larger companies. Pursuant to the Federal Department of Justice, more than one third of all employees in Switzerland work in companies that could be affected by the new obligation to conclude a social plan. Collective redundancies in insolvency situations are exempt from the obligation to conclude a social plan.

The employer negotiates a social plan with the employees' representative body (i.e. an employees' organization, depending on the collective labour agreement); when there is no employees' representative body, the employer will negotiate directly with the employees. According to the text of the law, employees may enlist the services of "experts". Such experts will most likely be trade union representatives; trade unions had also been the driving force behind the present legislation amendment. The object of these negotiations is the preparation of a social plan.

Pursuant to the legal definition, a social plan is "an agreement, in which the employer and the employees determine the measures aimed at preventing or limiting terminations and mitigating their consequences." The definition is unclear with respect to the phrase "measures aimed at preventing […] terminations"; this wording goes beyond the usual content of a normal social plan. In our opinion it is clear that this passage is not supposed to mean that an arbitral tribunal, when determining the content of the social plan, may prohibit an employer from issuing terminations. Both the relevant message of the Swiss Federal Council as well as the parliamentary consultations do not give any indication that this revision of the law would allow for such a massive intrusion of the arbitral tribunal into the decision-making sovereignty of employers.

If the parties are unable to agree on a social plan, then an arbitral tribunal must be appointed. The law does not define, however, when negotiations have failed. Thus, the employer must always expect that the negotiations on the social plan will be conducted under the permanent "threat" of arbitral proceedings being initiated, if the employer fails to meet the demands of the employees. This is particularly the case if trade unions are involved on the employees' side.

The arbitral tribunal will establish a social plan by way of an arbitral award. In general, the arbitral tribunal will require the employer to make severance payments to the terminated employees and to for e.g. assist them with their job search efforts. As a result, in cases of collective redundancies that are

subject to a social plan, there is a considerable uncertainty for the employer with respect to the respective financial consequences until the arbitral tribunal makes a decision. And it is of little help that the law's sole principle for the content of a social plan merely states that such social plan must not jeopardize the continued existence of the company.

Conclusion and Recommendations

The new obligation to conclude a social plan will have a considerable impact on planned restructuring programs of larger employers (with more than 250 employees), whereby a multitude of practical ramifications of this revision of the law are difficult to estimate today.

It is evident, that the relevant collective redundancy procedure will become considerably more complicated and markedly prolonged. Also, the mandatory negotiations on a social plan will have to be conducted under the permanent "threat" of arbitral proceedings being initiated, if the employer fails to meet the demands of the employees. If such arbitral tribunal is eventually appointed, it will determine by arbitral award the benefits to be paid by the employer within the framework of the social plan. Hence, there will be considerable uncertainty for the employer in terms of the financial consequences of a restructuring until the arbitral tribunal makes a decision.

Pursuant to the relevant statutory provision, the mandatory negotiations on a social plan must be conducted with "the employees" if there is no employees' representative body. The obligation to conclude a social plan applies only for companies with more than 250 employees and it is clear that negotiations on a social plan cannot be conducted effectively with such a large number of employees. We, therefore, recommend that companies with more than 250 employees give serious consideration to introducing an employees' representative body (irrespective of a specific case of collective redundancy that is subject to a social plan).

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