

Executive Compensation & Employee Benefits 2020

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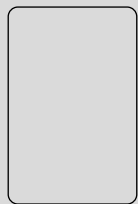
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Executive Compensation & Employee Benefits 2020

Contributing editors

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Mayer Brown LLP

Lexology Getting The Deal Through is delighted to publish the sixth edition of *Executive Compensation & Employee Benefits*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on China, Hong Kong and Nigeria.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Maureen J Gorman and Debra B Hoffman of Mayer Brown LLP, for their continued assistance with this volume.



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SOURCES OF RULES AND PRACTICE

Overview

- 1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

Executive compensation arrangements are primarily governed by the federal statutory provisions contained in the Swiss Code of Obligations (CO), specified to a certain extent by cantonal or federal case law. The CO does not distinguish between executive and non-executive employees. The provisions set out in the CO regarding (executive) compensation include regulations on salary, commissions, bonuses, payment terms and periods, and participation in the success of the business.

With regard to listed Swiss companies, the federal Ordinance against Excessive Compensation in Listed Companies (CompO) is applicable. The CompO sets out, inter alia, the permissible types of compensation for executive management, board members and the advisory council (if any), and states' obligations relating to the disclosure of such compensation as well as the shareholders' 'say-on-pay' rights.

Specifically, regarding the banking industry, the Swiss Financial Market Supervisory Authority has issued Circular No. 2010/1 'Minimum standards for remuneration schemes of financial institutions'.

Mandatory payments and salary deductions must be made for the benefit of different social security institutions (eg, pension fund, unemployment insurance and accident insurance). These obligations are primarily set out in the following statutes:

- the Federal Law and Ordinance on Old-Age and Survivors' Insurance;
- the Federal Law and Ordinance on Invalidity Insurance;
- the Federal Law and Ordinance on Occupational Benefit Plans concerning Old-Age, Survivors and Invalidity;
- the Federal Law on Vested Benefits in Occupational Benefit Plans concerning Old-Age, Survivors and Invalidity;
- the Federal Law and Ordinance on Accident Insurance;
- the Federal Law and Ordinance on Income Compensation Allowances in case of Service and in case of Maternity;
- the Federal Law and Ordinance on Compulsory Unemployment Insurance and Allowances in case of Insolvency; and
- the Federal Law on the General Part on Social Insurance Law.

Finally, with regard to taxation issues especially, the following legislation is pertinent:

- the Federal Income Tax Law;
- the Federal Law on the Harmonisation of Direct Taxes;
- Cantonal Income Tax Acts;

- the Federal Ordinance on Certification Obligations in connection with Employee Participations; and
- Circular No. 37 of the Federal Tax Administration regarding Taxation of Employee Participations.

Enforcers

- 2 What are the primary government agencies or other entities responsible for enforcing these rules?

Mandatory Swiss legal provisions are enforceable through the Swiss judicial system. In most cases cantonal courts are competent for enforcement at first and second instance. At federal level, the Swiss Federal Tribunal ultimately hears executive compensation or employee benefit cases. Monetary claims may be enforced through expedited debt enforcement proceedings initiated by the competent cantonal debt enforcement authority.

Notwithstanding the aforementioned and in terms of mandatory social security contributions, taxes or the regulated financial sector, the competent cantonal or federal authorities may impose sanctions for non-compliance on companies, subject to their supervision.

GOVERNANCE

Governance requirements and shareholder approval

- 3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government agencies? What is the general process for obtaining approval?

The opportunity of granting employees new shares or pre-emptive rights to new shares (conversion or option rights) may require a share capital increase subject to shareholders' approval.

Within the scope of the CompO (ie, for listed Swiss companies) shareholders must take a binding vote each year on the compensation of the members of the board of directors, the executive management and the advisory council (if any). In this context, 'compensation' is understood in a broad sense including wages, fees, bonuses, waiver of claims and assignment of participation rights.

Consultation

- 4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

Swiss law does not provide for any such consultation obligation in the event of the establishment of, a change in, or the termination of an executive compensation or benefit arrangements.

Prohibited arrangements

5 | Are any types of compensation or benefit arrangements prohibited either generally or with respect to senior management?

Yes. Companies falling within the scope of the CompO are subject to numerous restrictions on the type of benefits and compensation permissible for the executive management, board of directors and the advisory council (if any). Two types of compensation are prohibited:

- compensation that is absolutely forbidden (ie, severance payments, compensation paid in advance, and 'commissions' for the acquisition or transfer of enterprises or parts thereof by the company or enterprises directly or indirectly controlled by the company); and
- compensation that is only allowed if a corresponding provision is contained in the articles of incorporation (ie, loans, credits, post-retirement benefits beyond occupation pensions, performance-based compensation, grant of equity securities, conversion rights and option rights).

Furthermore, any director, officer, board member or other such person representing a company is limited in such transaction in which the same person is also acting as the counterparty but in a capacity as a natural person (self-dealing). The Swiss Federal Tribunal generally deems such transactions invalid unless they are retrospectively approved by a secondary or superior body or are at arm's length. In any event, such transactions exceeding a value of 1,000 Swiss francs must be in writing.

Rules for non-executives

6 | What rules apply to compensation and benefits of non-executive directors?

No special rules apply to the compensation and benefits of non-executive directors. The CompO applies to all directors, whether executive or non-executive.

DISCLOSURE

Mandatory disclosure of executive compensation

7 | Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government? How?

Publicly traded Swiss companies must disclose their compensation reports on an annual basis. The report must be included in the yearly reporting in the notes to the balance sheet of each company. The compensation report must include all compensations by the company, whether directly or indirectly disbursed, to all current members of the board of directors, of the executive management and of the advisory board (if applicable). The compensations to be disclosed include fees, salaries, bonuses, benefits in kind, participation in turnover, loans and credit facilities. The amounts as well as the recipients of the aforementioned benefits should also form part of the compensation report.

EMPLOYMENT AGREEMENTS

Common provisions

8 | Are employment agreements required or prevalent? If so, what provisions are common? Are any terms prohibited or unenforceable?

While oral or tacit employment agreements suffice, written employment agreements are standard. Such employment agreements will regularly contain provisions on the commencement of employment, on the position itself, on the duties of the employee, the place of work and remuneration,

and expenses and other benefits. Also, such agreements will normally set out the working hours, the amount of paid holiday, the term (unlimited or fixed duration) and the duration of the notice period. Finally, such agreements may contain provisions regarding confidentiality, non-competition and other general provisions (eg, severability, assignability, choice of law and jurisdiction). Contractual provisions which contradict mandatory Swiss statutory law are inadmissible and therefore not enforceable. Instead of such inadmissible contractual provisions, mandatory law applies.

INCENTIVE COMPENSATION

Typical structures

9 | What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

While there is no data available for private companies, the annual PwC survey 'Executive Compensation & Corporate Governance 2018' found that the base salary of the chief executive officers of Swiss listed blue-chip companies never amounted to more than 30 per cent of compensation. The long-term incentives, in turn, were never less than 30 per cent (and often close to, or more than, 40 per cent) of the compensation. Other components of the compensation include performance-based cash bonuses and other payments. It is important to know that the term 'bonus' is not explicitly regulated under Swiss employment law. Rather, a bonus may qualify as gratification (in accordance with CO article 322d), or as salary (in accordance with CO article 322 to 322b). A bonus will likely be considered a salary component if it is determined by objective criteria, factors or targets (eg, achievement of financial or other reasonable business goals), which allow the employer no discretion in calculating the actual amount. Should a bonus qualify as salary, the employee is entitled to it as soon as the specific targets are met irrespective of any discretionary wording in the respective rules. In contrast, a bonus will generally qualify as gratification if the decision as to whether a bonus will be paid as well as its amount is at the employer's discretion.

Restrictions

10 | Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the compensation relative to the employer or the executive?

There are no general statutory limitations on the amount and structure of incentive compensation, but it is not possible to base an employee's salary solely on incentive compensation without ensuring that such employee will have a minimum annual income. Companies subject to the CompO must respect the obligations and limitations set out therein. These include the mandatory and binding vote of the shareholders on the compensation of certain key employees, reporting obligations in the compensation report, and certain forms of compensation that are forbidden. Finally, specific restrictions may apply within certain industries (eg, the banking industry, especially in connection with capital requirements).

Deferral

11 | Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

As long as incentive awards qualify as gratification and not salary, deferral and vesting of such awards is permissible under Swiss law (both as cliff and graded vesting). Gratification is compensation in addition and ancillary to the employee's salary and it is at the sole discretion of the

employer to what extent such gratification is paid, if at all. In contrast, salary is the consideration for the employee's work and can be fixed or variable (eg, depending on achievement of certain benchmarks). Such deferral or vesting limitations on salary are null and void.

Even with regard to gratification, however, there are certain limitations. Excessively long vesting or deferral periods will likely not be upheld by the Swiss courts. Depending on the individual case or the wording of the relevant provision, further restrictions may apply in situations in which the employment relationship is terminated.

12 Are there limitations on the individuals or groups eligible to receive the compensation? Are there aspects of the arrangement that can only be extended to certain groups of employees?

Swiss law provides no limitations on the individuals or groups eligible to receive incentive compensation, nor are there aspects that can only be extended to certain groups of employees.

Recurrent discretionary incentives

13 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement? Is this rebuttable?

Generally, the recurrent payment of discretionary incentive compensation will not become a contractual entitlement. According to the case law of the Swiss Federal Tribunal and a large body of Swiss scholars, however, the repeated payment of such incentive compensation without interruption and reservation during three years will suffice for an entitlement to such compensation to arise. Employers wishing to increase the degree of protection against such entitlements are advised to explicitly state with each such payment that the payment is made on a voluntary basis.

Effect on other employees

14 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

Neither the type nor the amount of incentive compensation awarded will per se affect the compensation that must be awarded to other executives or employees. Employees contractually participating in the same compensation schemes may, however, generally not be discriminated against in equal situations. Furthermore, based on the Federal Act on Gender Equality, employees may not be discriminated against based on their sex, especially with regard to salary.

Mandatory payment

15 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

As a general rule, Swiss law does not allow repayment obligations of incentive compensation. There is, however, an exception to this rule for listed companies: remuneration paid to employees that is either not permissible under the CompO or that has not been approved by the shareholders, has to be repaid.

16 Can an arrangement provide that payment is conditioned on continuing employment until the payment date? Are there exceptions?

Such arrangement is only enforceable in the case where the incentive compensation is to be qualified as a purely discretionary gratification.

Instead, an incentive payment may not be made subject to conditions (eg, continued employment relationship), if such incentive is to be considered as a salary component.

EQUITY-BASED COMPENSATION

Typical forms

17 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period? Must the arrangements be offered to a broad group of employees, or can the employer select the participants?

There are no typical employee participation programmes. Rather, it depends, for example, on the company structure, the funding possibilities for the company and the influence of the employees who are allowed to participate. In terms of the form in which equity compensation is awarded, the most prevalent appear to be shares or stock options. The most common length of vesting period is three years. Excessively long vesting periods (eg, longer than 10 years) are not permissible. Simply, the employer is free to select the employees participating in an equity compensation programme. However, owing to the principle of equal treatment of employees enshrined in Swiss employment law, participation rights shall be granted to all employees of the same group of employees (eg, executives, senior management and employees working in production, etc.) Therefore, the employer can include individual employee groups (eg, management) in a participation programme, but cannot select only individual employees within the group to be eligible to participate in an equity compensation programme.

18 Must equity-based compensation be granted by the company's board of directors (or its committee) or can the authority be delegated to officers or employees of the company? Are there limitations or requirements that apply to delegation?

Provided the grant of equity-based compensation has been properly delegated, this task can also be performed by an officer or employee of the company. There are no limitations or requirements that apply to the delegation of this task.

Tax treatment

19 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

Shares and other participation rights in a group company of the employer, as well as listed options and options to acquire such rights that are not blocked, are taxed when the employee legally acquires such rights or options. A discount applies if the sale of such shares or other participation is blocked. Any other equity compensation instrument (eg, blocked or unlisted options, derivatives or phantom stock) is only taxed when the employee realises the income.

Pro-rata taxation in Switzerland applies if the employee's tax residence in Switzerland starts or ends during the vesting period.

Depending on the (expected) price development of the employee's shares or options, the tax structuring of such equity compensation can be advantageous or disadvantageous (eg, if blocked options are given to the employee, which gain in value during the vesting period, the taxation may be higher than the taxation of non-blocked options). Note that the above answer is only a summary overview and the legal situation for each individual case may vary from case to case.

Registration

20 | Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

In order to provide employees with necessary shares, the company may obtain such shares either by increasing its share capital (usually from authorised share capital designated for such purpose) or by using treasury shares. Increasing the company's share capital requires the submission of various forms of documentation to the relevant cantonal company registry.

In situations in which a foreign or Swiss company issues new shares and such issuance is considered a 'public offer', an offering prospectus may be necessary. Such a public offering is triggered if the shares are offered to an indefinite number of potential investors. Whether such situation exists in the context of equity-based compensation must be analysed on a case-by-case basis.

If new shares are issued that are to be listed on the SIX Swiss Exchange, applicable listing rules will have to be respected and a listing prospectus may be necessary. An exemption, however, from the requirement to draw up a listing prospectus exists, inter alia, for shares offered to employees, board members or executive management, provided such shares are of the same class as those already listed, and that a document containing information on the number and type of shares, and the reasons for and details of the offer, is made available.

Withholding tax

21 | Are there tax withholding requirements for equity-based awards?

To the extent that the employee: does not have Swiss citizenship or a permanent residence permit in Switzerland; is not tax-resident in Switzerland; or moves his or her tax residency outside of Switzerland during a vesting period, the employer must remit withholding tax from the employee's salary. In particular, should the employee leave Switzerland during such a vesting period, the Swiss employer will be able to reclaim withholding tax from the employee.

Inter-company chargeback

22 | Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

Such agreements do not seem to be common. In any event, value-added tax issues as well as the price charged, hidden profit distributions or tax evasion issues should be considered.

Stock purchase plans

23 | Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

Especially in larger companies and start-ups, employee stock (shares or options) purchase plans are prevalent. The purchase of such shares or options at a discount may trigger tax and social benefits payment obligations. Furthermore, such shares or options given to an employee at a discount may either qualify as part of the salary or as a gratification. While salary is considered compensation for performance of work and can include a variable component (eg, reaching a specific target in order to receive the variable part of the salary), a gratification is in addition to salary and it is at the employer's sole discretion whether and in what amount such gratification is granted.

In situations where such compensation qualifies as salary, many protective provisions must be respected, including limitations on the withholding of salary by the employer and restrictions regarding the waiver of employee rights during the employment. When assessing whether such restrictions are applicable, the Swiss Federal Tribunal differentiates between situations in which the purchaser of such shares or options acts primarily as an employee and situations in which the purchaser is considered to be acting primarily as an investor. Generally, if the employee is considered an investor, protective employment provisions may not apply.

EMPLOYEE BENEFITS

Mandatory and voluntary employee benefits

24 | Are there any mandatory benefits? Are there limits on changing or discontinuing voluntary benefits that have been provided?

The following mandatory benefits under Swiss law are the most notable:

- a mandatory minimum of 20 work days' paid holiday is set out by the CO, and a minimum of 25 work days for all employees up to the age of 20;
- in an employment relationship that has lasted or has been concluded for longer than three months, the employer must continue to pay the employee salary for a limited time if such employee is prevented from working by no fault of his or her own (eg, illness, accident or legal obligations);
- the employer is generally obliged to deduct from the employee's gross salary certain social contributions while making matching contributions. These contributions include payments towards the old-age and survivors' insurance, disability insurance, pension fund, unemployment insurance and accident insurance; and
- maternity leave of at least 14 weeks must be granted to female employees after having given birth.

Should voluntary benefits have been contractually agreed upon, the employer may only change or discontinue such benefits with the consent of the employee or after the notice period when terminating the employment contract.

Typical employee benefits and incentives

25 | What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for such employee benefit arrangements?

Besides incentive-based compensation, which regularly include equity compensation, additional fringe benefits (eg, costs of mobile phones, company cars, gym membership and health insurance) are commonly granted, whereas certain benefits are often granted only to expatriates (eg, housing, school allowance and tax equalisation). Supplemental pension fund contributions are also prevalent. Moreover, it is common for executives to receive a tax-exempt lump-sum allowance covering petty expenses.

TERMINATION OF EMPLOYMENT

Rules for termination

26 | Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

While respecting the applicable notice period, an employment relationship may be terminated without stating a specific cause.

The first month of employment is considered a probationary period in which either party (ie, the employer or the employee) may terminate the employment contract by giving seven days' notice. This notice period, as well as the duration of the probationary period, may be altered or waived by the parties, but the probationary period may not exceed three months.

After the probationary period, or in the case of a waiver, the parties may terminate the employment relationship in accordance with the contractual notice periods. If no such notice periods have been agreed upon, the statutory default notice periods of between one and three months apply, depending on the years of service of the employee. In most cases, the contractual notice periods for executives will be between three and six months; for listed Swiss companies the CompO limits the maximum notice period to 12 months.

Without respecting any notice period, the employment contract may be terminated by mutual agreement or for cause (ie, for a justified reason), in which case the employment relationship ends immediately. This is true even if insufficient cause for such immediate termination is given, but in the latter case the terminated employee may have certain compensation and penalty entitlements. The threshold for proving a justified termination for cause is very high.

Finally, there are certain mandatory limitations to the right to terminate.

Mandatory severance pay

27 | Are there statutory or mandatory minimum severance requirements? Are there any other mandatory, post-employment benefits?

As a general rule, employees are not entitled to severance payments unless otherwise agreed in the employment contract. Severance payments are often used in the context of a termination by mutual consent. If, however, the employer has not funded adequate pension insurance for an employee, the termination of the employment relationship of an employee of at least 50 years of age and with 20 or more years of service triggers a severance payment. The amount of the severance payment may be fixed by written agreement, but may not exceed two months of the employee's salary.

Within the scope of the CompO, applying to listed Swiss companies, severance payments to executive employees are forbidden and their payment may result in criminal liability; however, the term 'severance payment' is not defined in the CompO. In this context, the term 'severance payment' is understood in a broad sense.

Mandatory accident insurance for the employee will continue for 30 days after the end of employment. The employer must grant the employee the option to extend such insurance for a total of up to 180 days.

Typical severance pay

28 | What executive severance payment level is typical?

Severance payments are not mandatory and may even be prohibited.

Reasons for dismissal

29 | Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined? Are there legal or customary rules relating to effecting a termination for 'cause' or 'constructive dismissal'?

An employment relationship may be terminated without having to state a specific cause. However, the employee may request a written statement of the reasons for the termination. Reasons may exist for the termination to be considered abusive (eg, if given based on the ethnic origin of an employee or in order to prevent employment entitlements). In such case

a court may order the terminating party to pay an indemnification of up to six months' salary (the termination remaining effective). Furthermore, termination given at an inopportune time within a certain time frame (eg, during pregnancy or 16 weeks after childbirth) may be considered null and void.

An employee contract may also be terminated with immediate effect if valid reasons are given. Such reasons are given when circumstances exist under which the terminating party cannot in good faith be expected to continue the employment relationship. The courts are rather strict in accepting such valid reasons. In any event, such termination must be made without any delay, otherwise it is to be assumed that the right to termination without notice has been waived or that the terminating party has indicated that it is not unreasonable for it to continue the employment relationship.

Gardening leave

30 | Are 'gardening leave' provisions typically used in employment terminations? Do they have any special effect on benefits?

Key employees are often put on gardening leave following a notice of termination. A contractual provision stating such an option is not necessary and, therefore, such explicit provisions are mostly never seen in Swiss law-governed employment contracts. During such gardening leave, the employee is entitled to his or her salary until the end of the notice period. Therefore, turnover or profit sharing, commissions, fixed allowances (as long as they do not have a real expense character), or a company car, which may also be used privately, are also owed. Variable salary during the gardening leave is calculated based on prior compensation periods.

In exceptional cases gardening leave is not permissible (eg, cases in which employees need to be able to effectively work in order to safeguard their professional future, such as a leading heart surgeon who is dependent on regular practice to maintain his or her skill).

Waiver of claims

31 | Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

The Swiss Federal Tribunal held that employees need to be justified in waiving or releasing claims against employers. Often, severance pay qualifies as such justifying reason. Further, employees may not, during the employment relationship and one month after its end, waive claims arising from mandatory legal provisions or mandatory provisions of collective bargaining agreements. Such mandatory provisions include certain salary payments, compensation for unjustified termination, and reimbursement of expenses paid by employees.

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Typical covenants

32 | What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

Employment agreements with executives often include provisions on post-contractual non-competition and non-solicitation. In order for such non-compete and non-solicitation agreements to be valid, they must be in writing and the employee must have had insight into the employer's client base or business secrets. Furthermore, the employee must be able to severely damage the employer using such insight. Finally, such a clause may not unduly restrict the professional advancement of the employee – thus, such a provision must be restricted with regard to geographical

scope, duration and subject matter - and it may not have lapsed owing to the fact that the employer no longer has a material interest in such a restriction. The statutory maximum duration for a non-compete covenant is three years, but the usual restriction period is one year.

Swiss law does not require that the employer compensate the employee for a post-contractual non-compete covenant, but a judge will take such payment into consideration when assessing the reasonableness of the covenant.

It is important to note that a post-contractual non-compete covenant generally lapses if it is the employer who gives notice of termination.

Enforceability

33 | Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

Yes, there are such limits and requirements. An excessively restricting non-compete or non-solicitation covenant is valid but may be limited by a court at its discretion to a reasonable standard, taking due account of all circumstances of the individual case (including any compensation payment made by the employer).

Remedies for breach

34 | What remedies can the employer seek for breach of post-employment restrictive covenants?

An employee breaching the relevant covenant is liable to pay compensation for any damages caused by the breach. It is common to include a provision according to which the employee is liable to pay liquidated damages in the event of such a breach, and the amount of liquidated damages generally should not exceed the employee's annual salary. Additionally, and if expressly agreed upon in writing, the employer may under certain circumstances request that the (former) employee cease and desist from the offending behaviour and restore the status quo.

PENSION AND OTHER RETIREMENT BENEFITS

Required retirement benefits and incentives

35 | Are there any required pension or other retirement benefits? Are there limits on discontinuing or modifying voluntary benefits that have been provided?

Swiss law requires employers and employees to each pay contributions towards old-age and survivors' insurance. Currently, the contributions are 4.2 per cent of the employee's salary for both employer and employee. Additionally, employers must make contributions to pension funds for employees earning more than 21,330 Swiss francs annually. The amount of the contribution varies depending on the employee's salary and the pension fund chosen by the employer.

In the event that voluntary benefits have contractually been agreed upon, the employer may only discontinue such benefits with the consent of the employee or after the notice period when terminating the employment contract.

Typical retirement benefits and incentives

36 | What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for such employee benefit arrangements?

Generally, the mandatory contributions also apply to executives. Beyond the maximum coordinated salary - currently 85,320 Swiss francs annually - for which pension contributions must be made, the employer

may opt to make additional pension fund contributions. Pension fund contributions made on salaries up to the current maximum insurable annual salary of 853,200 Swiss francs are tax-exempt. Additionally, tax-deductible compensatory payments into the pension fund may be made for such years in which no contributions had been made, but taxes will become due once the employee is retired and receives a pension or a one-off payment (as taxable income to be paid by said former employee). One-off pension fund payments will be taxed at a reduced rate.

Supplemental retirement benefits

37 | May executives receive supplemental retirement benefits?

Under Swiss law, it is permissible - and in fact common - that executives receive supplemental retirement benefits. These supplemental benefits usually result from higher amounts of the insured salary, additional risk coverage or additional pension fund contributions exceeding the statutory minimum contributions. All pension benefits must be applied on a basis consistent with similar groups of employees. Within the scope of the CompO, applying to listed Swiss companies, post-retirement benefits beyond the occupational pensions granted to the executive management, board of directors or the advisory council (if any) are forbidden.

INDEMNIFICATION

Directors and officers

38 | May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

It is permissible under Swiss law to insure executives, officers and directors against claims related to their actions in such functions (directors' and officers' insurance) and such insurance premiums may be paid by the company. Limitations to such insurance may be set out in the insurance policy (eg, for wilful misconduct or gross negligence). In any event, such policies may not cover criminal offences or deliberately damaging actions.

The question whether an executive may be indemnified by the company for such claims is less clear. Recent Swiss legal doctrine deems such an indemnification permissible (except in winding-up proceedings), at least to the extent concerning (slight) negligence.

CHANGE IN CONTROL

Transfer of benefits

39 | Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

Generally, if the transferred assets constitute a 'business' under Swiss law (an organisational unit) the employees employed in the respective business will automatically transfer. The employment relationships will transfer along with all rights and obligations, including benefits granted through an employment agreement with the former employer or granted based on a collective bargaining agreement. The purchaser or new employer - if subject to Swiss law - will also be bound by the mandatory contributions to old-age, survivors' and invalidity insurance, as well as mandatory pension fund contributions.

Executive retention

40 | Is it customary to provide for executive retention or related arrangements in connection with a change in control?

Usually, such arrangements are not put in place prior to a potential transaction. Upon a sale, it is often seen that the new owner grants retention

bonuses. Numerous restrictions apply to listed Swiss companies within the scope of the CompO with regard to such retention provisions, including prohibited commissions for the acquisition or transfer of enterprises.

Expedited vesting of compensation

41 | Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

Accelerated vesting remains permissible even under the rules of the CompO, applying to listed Swiss companies, and in change-of-control situations; however, within the scope of the CompO it is not permissible for an executive to be paid any compensation in the event that there is a change in control and such executive is let go (double-trigger payments). Furthermore, payments made solely based on a change in control (single-trigger payments) are not considered best practice and may qualify as impermissible 'commissions for the acquisition or transfer of enterprises'.

42 | Are there adverse tax consequences for the employer or the executive relating to benefits or payments provided pursuant to a change in control?

There are no such adverse tax consequences. However, the employee is subject to income taxes regarding such benefits or payments triggered by a change in control.

MULTI-JURISDICTIONAL MATTERS

Exchange controls

43 | Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

There are no foreign exchange controls restrictions regarding remittance of funds, transfer-of-employer equity or equity-based awards.

Local language requirement

44 | Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

There is no obligation under Swiss law to translate employment agreements, employee compensation or benefit plans, or award agreements as long as the employee is able to read and understand such documents in their original language. Should the employment relationship end in litigation, all documents submitted as evidence must be translated into the official language of the court hearing the case.

Net salary arrangements

45 | Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

There are no prohibitions on tax gross-up, tax indemnity or tax equalisation payments; however, such payments by the employer for the benefit of the employee will themselves be considered taxable income. Generally, the income tax burden is on the employee; it is often seen, however, that expatriates are paid an agreed net salary and the employer covers the respective taxes on the employee's salary.



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Choice of law

46 | Are choice-of-law provisions in executive employment contracts generally respected?

Generally, the law of the state in which the employee habitually performs his or her work is applicable. According to the Swiss Private International Law Act, parties may only submit the employment contract to the law of the state in which the employee has his or her habitual residence, or in which the employer has its place of business, domicile or habitual residence. Any other choice of law is not permitted under the applicable Swiss legal provisions. Furthermore, certain Swiss minimal protection provisions will remain in place regardless of any choice-of-law provision.

UPDATE AND TRENDS

Key developments of the past year

47 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The Swiss Parliament resolved in the summer of 2020 to incorporate the current say-on-pay rules into the Swiss corporate law statute. There are no material changes to the rules. It is not yet known when the new law will be enacted. Until the new law enters into force, the current rules continue to apply.

Coronavirus

48 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Short-time work is an instrument of the Swiss unemployment insurance that addresses a forced reduction of working time caused by a temporary loss of business or the temporary closure of a business caused by official measures. The employer has to pay only 80 per cent of the salary for the hours not worked up to a maximum of 12,350 Swiss francs. The unemployment insurance reimburses the employer for these salary payments. The employee will have to agree to short-time working.

Owing to the pandemic, the Swiss Federal Council significantly reduced the administrative hurdles for employers (applicable until 31 December 2020).

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