

# International Secondments (Switzerland)

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A Practice Note explaining the issues to consider when entering into an arrangement to second an employee into or out from Switzerland. This Note covers the legal principles and drafting issues for both secondment agreements and letters of secondment.

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An international secondment takes place when an employee (or group of employees) is temporarily assigned to work for a different part of their employer or employer's group in another jurisdiction or for a different organisation in another jurisdiction. It is imperative that the mandatory local laws of the jurisdiction where the secondment is taking place are considered from the outset so that when the secondment planning starts, the parties are aware of any potential issues that may or may not affect the decision to proceed with the secondment or the terms of the arrangements.

This Note looks at the issues regarding international secondments into Switzerland and international secondments going out from Switzerland. It does not cover domestic secondments within Switzerland.

This Note details the mandatory local laws of Switzerland that need to be considered when an individual is seconded into Switzerland. However, if contemplating a secondment out of Switzerland, in addition to the laws of Switzerland that may apply to that arrangement, the mandatory local laws of the relevant territory also will need to be considered, for example, whether a local employment contract is required.

There are several terms used for the three parties involved in a secondment arrangement. In this Note it is assumed that when a secondment is made to another organisation:

- The original (or seconding) employer is referred to as the secunder.
- The seconded employee is referred to as the employee or secondee.
- The organisation to which the secondee is to provide their services is referred to as the host.

Unless said otherwise, in this Note:

- Secondment Agreement means the commercial agreement between the seconder and the host.
- Letter of Secondment is a document between the seconder and the secondee setting out the terms of the secondment. However, see *Switzerland Secondment Structures*.

## Switzerland Secondment Structures

There is no one overall definition of secondment in Swiss law. Secondments affect a variety of domains, in particular, employment, immigration, social security and tax law and these fields do not always have the same requirements when it comes to how a secondment should be structured. Moreover, what is advantageous in one area, may not always be advantageous in another. These advantages and disadvantages are noted below in the relevant sections.

From a Swiss employment law standpoint, when a foreign employer seconds a worker into Switzerland for a limited time, three secondment structures are possible:

- A Letter of Secondment. That is:
  - the foreign seconder and the Swiss host company conclude a Secondment Agreement;
  - the foreign seconder provides the secondee with a Letter of Secondment; and
  - the employment agreement between the foreign seconder and the secondee remains fully in force, save as amended by the Letter of Secondment (for the duration of the secondment).

This structure is the primary focus of this Note.

- A Tripartite agreement. That is:
  - the foreign seconder, secondee, and the Swiss host company enter into a tripartite secondment agreement (that is, the agreement acts as both the employment contract and secondment agreement); and
  - the employment agreement between the foreign seconder and the secondee remains in place but is suspended for the duration the secondment.
- An employment agreement with the Swiss host company. That is:
  - the foreign seconder and the host company conclude a Secondment Agreement;
  - the secondee concludes an employment agreement with the Swiss host company; and
  - the original employment agreement between the seconder and the secondee remains in place but is suspended during the secondment.

However, some of these structures pose problems, or might not be acceptable in certain instances, from a Swiss immigration, social security or tax standpoint. When this is the case, the issues have been noted in the relevant sections below.

Moreover, the applicable employment laws of the foreign state must be reviewed and considered for any secondment structure that impacts the secondee's employment relationship with the foreign secondor.

## Mandatory Local Laws and Acquired Rights

Before initiating a secondment into or out from Switzerland, it is fundamental to understand the mandatory local laws that will apply to the seconded employee, any immigration requirements to allow the employee to work in Switzerland or in the host country, and any other restrictions on seconding employees from abroad into Switzerland and out from Switzerland into the host country.

### Posted Workers

The Posted Workers Act (PWA) applies when employees are seconded into Switzerland.

The PWA states that when foreign employers second employees into Switzerland, they must comply with the working and pay conditions prescribed by the Swiss Federal Acts and the Swiss Federal Council Ordinances, as well as applicable standard employment contracts (that is, there are standard contracts for certain industries in which the federal or cantonal authorities set a minimum wage for the sector), and collective employment contracts, in the following fields:

- Working hours and rest periods.
- Minimum annual paid holiday.
- Minimum pay.
- Health and safety. For example, the Swiss Federal Employment Act (EmpA).
- Protection of pregnant individuals, individuals who have recently given birth, children, and young people.
- Gender equality. For example, the Swiss Federal Act on Gender Equality (GEA).

In addition, even if the employment agreement is governed by foreign law, certain mandatory provisions of Swiss private law may apply to the posted worker. For more detail, see [Swiss Host](#).

### Swiss Secondor

#### Relationship Between the Swiss Secondor and the Secondee

When an employer secondor an employee out from Switzerland, provided the employment agreement between the Swiss secondor and the secondee is governed by Swiss law and the employee remains employed by the Swiss secondor, the Swiss Code of Obligations (SCO) (and its associated employee rights and protections) will apply for the duration of the secondment. However, the mandatory laws of the host state can also apply and may be preferential to the secondee.

#### Relationship Between the Swiss Secondor and Foreign Host

Under the Swiss Private International Law Act (PILA), the parties are free to decide on the governing law for the Secondment Agreement, as it is a commercial agreement. However, the mandatory laws of the host state concerning governing law rules may apply.

## Swiss Host

### Relationship Between the Swiss Host and the Seconded

When a foreign company secondes an employee to Switzerland, Swiss public law (that is, laws on immigration, social security, and labour laws), as well as the mandatory employment provisions of Swiss private law (that is, the mandatory provisions of the SCO), apply for the duration of the secondment, even if the employment agreement is governed by foreign law.

Although under the PILA the employment agreement or the commercial Secondment Agreement, or both, can be governed by the laws of the secondee's home country, Swiss public law and certain mandatory provisions of the SCO with regard to employment agreements still apply. There is no definitive list of provisions which are considered mandatory.

See *Posted Workers*.

### Restrictions on Foreign Seconded

Provided the respective legal requirements are adhered to, there are no specific restrictions with regard to a foreign seconded. However, foreign seconders who violate the provisions of the PWA can be blacklisted in Switzerland (that is, potentially excluded from being a foreign seconded in Switzerland).

Some sectors, in particular the financial sector, may require special authorisations. For instance, in the financial sector, the Swiss Financial Market Supervisory Authority may require authorisation or licensing to operate in a regulated financial sector for individuals to be seconded into Switzerland to work in that sector or industry.

## Immigration

Seconded will generally require authorisation from the Switzerland immigration authorities or a permit to work in Switzerland. There are exceptions to this rule, including secondments lasting up to only:

- Eight calendar days per calendar year.
- Ninety calendar days per calendar year.

### Eight-day Exemption

Except for certain industries (for example, construction, cleaning, security, and hospitality), foreign nationals may work in Switzerland for up to eight days per calendar year without obtaining authorisation or a work permit.

### Notification Procedure (the Ninety-Day Exemption)

Under the EU Agreement on the Free Movement of Persons, EU citizens and European Free Trade Association (EFTA) citizens (as well as third-country nationals deemed integrated in the EU and EFTA market) seconded to Switzerland by a seconded located in an EU or EFTA State for up to 90 days per calendar year, can use the notification procedure.

The notification procedure is an online notification, made using the State Secretariat for Migration's online portal.

### Authorisations and Permits

Depending on the duration of the secondment, authorisations and permits that may be requested, include:

- A 120-day work authorisation. It allows the holder to work in Switzerland for a maximum of 120 days per calendar year, without residing in Switzerland (this authorisation is renewable).
- A short-term permit (known as an L permit). It allows the holder to work and reside in Switzerland for up to one year (one renewal permitted).
- An ordinary permit (known as a B permit). It allows the holder to work and reside in Switzerland (this permit is renewable). Depending on the nationality of the individual, the B permit can be issued for one to five years.

Depending on the form in which the secondment is arranged (see *Switzerland Secondment Structures*), different conditions may apply to the granting of the authorisations and permits mentioned above.

When no local employment contract has been concluded between the secondee and the Swiss host, then it is necessary to show all of the following:

- The secondment is in the economic interest of Switzerland.
- The standard remuneration and working conditions in the place where the employee will be carrying out their employment activity are respected.
- There is no suitable candidate on the local market (an exception exists for secondments for the purpose of carrying out a specific mission or task).
- The secondee is a manager or executive, specialist, or otherwise qualified.
- The quotas are respected.
- The foreign employer pays for costs associated with the secondment (for example, food, travel, and housing).
- The secondee has been employed by the foreign employer for at least one year.

When an additional employment contract has been concluded between the secondee and the Swiss host, and the Swiss host is in the same company group as the foreign employer, less stringent conditions may apply as it is not necessary to show that no suitable candidate exists on the local market for the following types of intragroup transfers:

- International exchanges of senior managers and specialists.
- Intragroup transfers coming under the scope of the General Agreement on Trade in Services (that is, a treaty of the World Trade Organisation, which entered into force in 1995). These include transfers of managers, executives, and highly qualified specialists.

## Duration of Secondment

The secondment must be limited in time. Although this limitation is not specifically defined or set from a Swiss employment law perspective, it is generally considered to be the amount of time the secondee may remain affiliated with the social security system in their home country (see *Secondees Social Security*).

Depending on the type of authorisation or permit obtained or required to work in the host territory, the length of the secondment may be limited by the secondee's immigration status.

## Employer During Secondment

The employment relationship between the seconder and secondee should remain in place during the secondment. However, from a Swiss employment law standpoint, the parties are free to determine the active employing entity and the employment contract itself may be suspended for the duration of the secondment and superseded by a tripartite agreement or an employment contract with the host company for the duration of the secondment.

However, from a Swiss perspective, the secondment structure chosen can affect the classification of the secondment in other branches of law, in particular, tax, social security, and immigration law. For instance, from both an immigration law (unless applying for a permit based on an intragroup transfer) and social security perspective, there should be an active employment contract with a foreign entity. Additionally, a Swiss employer may have tax at source responsibilities (see *Host Tax*).

Further, the reality of the working relationship may result in another entity being found by a court to be the employer (see *Management During the Secondment*).

## Management During the Secondment

The employer is responsible for managing its employee and instructing them. It is possible to delegate this power (for example, to the host entity), but doing so may have repercussions and risks. In particular, with regard to what entity effectively is deemed the employer, which could pose a problem with regard to immigration and social security law (which often require there to be a foreign employer).

The question of management, including the power to give instructions and whose directives the secondee must follow during the secondment, may be addressed in the Letter of Secondment, Secondment Agreement, tripartite contract, or the second employment, as applicable, although this is not a requirement.

In any event, if an entity is found in reality to be managing and instructing the secondee, that entity may be deemed the employer of the secondee, irrespective of what is stated in any written agreement, which could affect the entity deemed to be the current employer and therefore responsible for certain obligations under public law (for example, rules on working time and pauses), and private law (for example, payment of salary, vacations).

## Payments

In principle, it is possible for payments to the secondee to be made by either the seconder or the host.

If a Swiss host pays the secondee or is seen as bearing the secondee's salary, certain complications may arise particularly in relation to tax and social security. In particular, the Swiss host may be considered the actual employer of the secondee or a permanent establishment of the foreign employer that is responsible for social security and withholding tax.

## Benefits

### Bonuses

During a secondment into or out from Switzerland, it is possible for any additional benefits the secondee is entitled to, for example bonuses, to be covered in the Letter of Secondment, the Secondment Agreement, the tripartite contract, or the second employment agreement, as applicable.

### **Annual Leave**

Under the PWA, the minimum annual paid holiday provided for under Swiss Federal Acts and any applicable collective employment contracts or standard contracts must be respected for secondments into Switzerland. Article 329a of the SCO provides for a minimum of four weeks' paid holiday a year for full time employees. Employees up to the age of 20 are entitled to five weeks paid holiday a year.

If the parties have chosen Swiss law to govern a secondment out from Switzerland and, provided that no mandatory provisions of local law apply (that are preferential to the secondee) and no foreign conflict of law rules state otherwise, from a Swiss perspective, the minimum Swiss holiday entitlement applies.

### **Sick leave**

Swiss employment law contains minimum requirements with regard to sick leave which apply to secondments out from Switzerland governed by Swiss employment law and may apply to all secondments into Switzerland. Although this has not yet been decided definitively by the courts, the prudent approach is to consider rules regarding sick leave to be mandatory. The amount of sick leave varies and depends on the length of the secondee's service.

If the parties have chosen Swiss law and, provided that no mandatory provisions of local law apply, the minimum sick leave should also apply to secondments out from Switzerland.

## **Working Hours and Overtime**

### **Work and Rest Periods**

For secondments into Switzerland, under the PWA, obligations which relate to working time and rest periods provided for under the EmpA and Ordinances (that enact the EmpA) must be respected.

It is debated amongst legal experts whether any of the EmpA provisions (for example, provisions related to pay for Sunday work) apply to employees performing work entirely outside of Switzerland (that is, employees seconded outside of Switzerland, but who remain employed by the Swiss seconder) and this question has not been settled by the Swiss courts. In addition, the secondee may benefit from relevant mandatory rights provided by the laws of the host country.

### **Overtime**

In Switzerland, there are two different types of overtime. These are:

- Statutory overtime.
- Contractual overtime.

Overtime payments are generally borne by the employer rather than the host unless, the host is the employer.

An employee seconded into Switzerland is covered by statutory overtime protection. As mentioned above, whether there are any circumstances in which an employee seconded out of Switzerland could benefit from statutory overtime has not been decided.

An employee seconded into Switzerland under a secondment governed by Swiss employment law also benefits from contractual overtime protection. It would be prudent to consider this provision mandatory and applicable to all secondments into Switzerland, regardless of the governing law chosen by the parties.



An employee seconded out from Switzerland, that remains employed by the Swiss seconder, will continue to benefit from the contractual overtime protection during the international secondment, provided the parties have decided that Swiss law applies and this is not superseded by local law.

### **Statutory overtime**

Statutory overtime concerns hours worked in excess of those prescribed under the EmpA. The working hours set out by the EmpA are:

- Forty-five hours per week for employees working in industry, office staff, technical and other employees in large retail stores.
- Fifty hours per week for other employees.

Under Article 13(1) EmpA, a 25% salary supplement is due for statutory overtime, unless compensated with time off within a certain period of time (under Article 25(2) of Ordinance 1 to the EmpA, 14 weeks, unless otherwise agreed upon by the parties, but in any case, not longer than 12 months).

For employees working in industry, office staff, technical sectors (for example, office workers, counter staff, lab workers, computer programmers, consultants, graphic artists, and so on) and other employees in large retail stores (that is, over 50 employees, pursuant to Article 2 of Ordinance 1 to the EmpA), compensation for statutory overtime is only due from the 61st extra hour per year.

### **Contractual overtime**

Contractual overtime concerns hours worked in excess of those specified under the employment agreement or provided for by custom, the standard employment contract (as determined by the relevant canton) or collective employment contract.

A 25% salary supplement is due for contractual overtime, unless compensated with time off within a certain period of time. The employment contract can provide that any compensation for any contractual overtime is included in the base salary, provided the employee can be considered appropriately compensated.

## **Changes to Terms and Conditions of Employment**

### **Terms of the Employment Contract**

The secondment may be governed by different conditions than those contained in the original employment contract, provided that all minimal applicable public and private law rules (which will vary based on applicable local law and the governing law chosen by the parties) are respected. However, from a Swiss employment law standpoint, if the proposed secondment out from Switzerland is on terms which are materially different from those in the employee's original employment agreement (for example, different work location, salary, and working hours), then the *congé-modification* process should be used.

The *congé-modification* process involves the termination of the original employment contract at the end of the notice period, in conjunction with a new employment offer to continue the employment relationship under new terms. If the new employment contract is not signed, the employment relationship ends at the end of the notice period.

If the conditions of the secondment are more favourable than those under the original employment agreement and the employee agrees to the new terms, in practice, the new agreement can enter into force before the end of the notice period. There is, however, a risk of these terms being deemed unenforceable in this case if, for example, the employee later objects to them.

In addition, unless the original employment contract was changed and it is agreed that these are permanent changes, in principle, these changes should only apply to the duration of the secondment. However, if this is not explicitly clear to the employee, they may try to claim continuing acquired rights (that is, beyond the term of the secondment) with regard to certain more favourable provisions (for example, if they received a bonus during the secondment).

## Continuity of Employment

Under the employment laws of Switzerland, certain employment rights and protections (for example, length of statutory notice periods) depend on the duration of service.

In the event of a secondment into or out from Switzerland, regardless of the secondment structure chosen (see [Switzerland Secondment Structures](#)), the employment relationship between the seconder and the secondee should be maintained throughout the secondment, otherwise the definition of secondment would not be met. Therefore, in the event of employment by the host entity, the employment with the seconder should be maintained and suspended, subject to applicable laws. However, in regard to a secondment into Switzerland, from both an immigration law (unless applying for a permit based on an intragroup transfer) and social security perspective, it is preferable to have an active employment contract with a foreign entity (see [Employer During Secondment](#)).

## Confidentiality and Restrictive Covenants

When seconding an employee, a seconder may want to ensure that certain protections are in place, including that the secondee must not share confidential information with the host company and must not join the host company after the secondment.

### Confidentiality

Under Swiss employment law, during the employment relationship the employee must not exploit or reveal confidential information obtained while in the employer's service. The employee remains bound by such duty of confidentiality even after the end of the employment relationship to the extent required to safeguard the employer's legitimate interests.

Specific confidentiality clauses can be included in the employment agreement or Letter of Secondment, but this change in terms constitute a material change to the initial employment agreement, meaning the *congé-modification* procedure applies.

### Non-Competition

#### Between the Seconder and Secondee

Where Swiss employment law applies, post-contractual non-competition and non-solicitation covenants are permitted. However, several conditions must be adhered to in order for these covenants to be considered valid. In some circumstances, even where these conditions have been met, restrictive covenants can be difficult to enforce.

To be valid, the covenants must be:

- In written form (that is, signed by hand or via an authorised electronic signature).
- Defined in scope regarding:

- duration;
- sector; and
- geographical limitations.

The employee must also have knowledge of the employer's clients or manufacturing and trade secrets, where the use of such knowledge might cause the employer substantial harm. The employer must not have terminated the employment relationship without a justified reason and the employee must not have terminated the employment relationship for a justified reason attributable to the employer.

A judge may reduce the scope of the covenants if they find that they unfairly compromise the employee's future economic activity. The payment of consideration to the employee in exchange for agreeing to the covenants can reduce the chance of the covenant being seen as unfairly compromising the employee's future economic activity, but under Article 340a(2) of the SCO, the judge has a large margin of appreciation in deciding this.

The introduction of restrictive covenants constitutes a change to the initial employment agreement, therefore the *cong -modification* procedure applies (see *Terms of the Employment Contract*).

#### **Between the Secunder and Host**

It is possible to include non-poaching clauses in the Secondment Agreement between the secunder and the host company. As this is a commercial agreement, under the SCO, no specific limits, beyond the prohibition on excessive duration (for example, a duration of ten or more years) should apply.

## **Discrimination and Harassment**

For secondments into Switzerland, the PWA states that obligations related to gender equality, provided for under Swiss Federal Acts and Ordinances, must be respected.

In particular, the GEA forbids discrimination against employees because of gender (see *Mandatory Local Laws and Acquired Rights*).

The GEA potentially allows the claimant to seek up to six months' salary in the case of unfair dismissal, as well as forcing the employer to rehire the employee. It also reduces the burden of proof on the employee in proving that the discrimination occurred. The EmpA also imposes duties on the employer to protect employees' health and integrity, which are considered to include protection from discrimination and harassment. Further, to the extent Swiss employment law applies, health and safety duties are imposed on the employer. An employee seconded out from Switzerland may benefit from relevant mandatory rights provided by the laws of the host country.

## **Liability**

### **Liability for the Secondee's Acts or Omissions**

An employer in Switzerland is liable for damage caused by their employee, unless they can prove that they (the employer) took all due care to avoid the damage or that the damage would still have occurred even if all due care had been taken.

The secondment structure chosen by the parties (that is, whether an additional employment agreement with the host entity is entered into) must be considered carefully as it could affect the liability of the parties. For example, if the secondee is employed by the Swiss host entity and the foreign secondment employment relationship is suspended, the starting position is that the Swiss host entity is responsible for the actions of the secondee. However, the actual fact pattern, and not just the contract, may be reviewed when considering the entity liable as employer.

It is possible to include an indemnification clause in the Secondment Agreement and this is often done in practice. However, there is a risk of it being considered excessive or an abuse of a right and therefore deemed unenforceable (see *Indemnity Between the Secondment and Host*).

## Indemnity Between the Secondment and Host

In certain cases, infractions committed in the context of a secondment can give rise to criminal liability, administrative liability, and civil liability. The Swiss legal authorities are free to decide against which entity to file criminal charges and levy administrative measures against. An agreement entered into between the secondment and host will not affect this.

The Secondment Agreement may contain an indemnification clause and, in practice, often does. However, in some cases, an indemnification clause may be found void on public order grounds, if it is seen as a way to avoid incumbent public law responsibilities.

## Data Protection

The Swiss Federal Data Protection Act (FADP) applies when the processing of personal data has an effect in Switzerland (for example, when the data is being processed by a Swiss entity or the data being processed concerns a Swiss resident, and so on). Additional data protection laws may also apply, depending on the state to which, or from which, the secondee is seconded. A new, stricter version of the FADP entered into force on 1 September 2023.

Swiss private employment law and labour law also contain additional data protection rules specific to the employment relationship.

## Federal Data Protection Act

### Collection of Personal Data

Under Article 6 and Article 31(1) of the FADP, before collecting or processing an individual's personal data, it is necessary to have one of the following:

- The consent of the data subject.
- An overriding private or public interest.
- A legal basis for processing personal data.

However, it is difficult to rely on consent given by employees as consent must be given freely, and this is difficult to establish in the context of the hierarchical relationship between an employer and employee.

In the context of a secondment, if the data controller is subject to the FADP (that is, a foreign secondment seconding an employee into Switzerland), it is necessary to ensure that there is a basis for collection and processing of personal data.

### Privacy notice

Also, under Article 19 of the FADP, the data subject must be provided with the following information regarding the collection and processing of all personal data:

- The identity and contact details of the data controller.
- The purpose of the processing.
- The recipients, or categories of recipients, to whom personal data will be disclosed (if applicable).
- The name of the state (or states) or international body (or bodies) to which the data will be communicated (if the personal data will be communicated abroad).
- If the State to which the data is being disclosed does not have adequate protections, the safeguarding or derogations in place which can be relied on to keep personal data safe.
- In the context of a secondment, if the data controller is subject to the FADP (that is, a foreign seconder seconding an employee into Switzerland), it is necessary to issue a privacy notice. Moreover, data controllers who are already subject to the FADP may need to modify their existing privacy notice (that is, with information regarding the state to which data are transferred).
- Further, privacy notices provided to other data subjects (for example, clients) may also need to be modified if the secondment results in a change with regard to the treatment of their personal data (for example, the data is sent to the employee who has been seconded abroad).

### Transfer of Personal Data Abroad

Articles 16 and 17 of the FADP also contain additional rules regarding personal data that is communicated abroad.

If the state to which the data is communicated does not have adequate protections (as required by the FADP), then the data controller must either rely on:

- A permitted safeguarding measure.
- A derogation.
- The question of the transfer of personal data abroad needs to be considered with regard to not only the seconded employee, but also other data subjects (for example, clients) whose data are sent to the seconded employee.

### Measures

Under Article 16(2) of the FADP, the primary safeguarding measures that could be relied on are:

- Data protection clauses in an agreement between the data controller and its contractual partner, after approval from the Federal Data Protection and Information Commissioner (FDPIC).
- Standard data protection clauses (SCCs) that have been preapproved by the FDPIC.

- Binding corporate rules, after approval from the FDPIC or the data protection authorities in a state considered to have an adequate level of data protection.

In practice, many Swiss employers opt for SCCs, as they are preapproved by the FDPIC.

### **Derogations**

Under Article 17 of the FADP, the primary derogations that may be relied on by an employer are either:

- That the data transfer is directly connected to the conclusion or performance of a contract between the data controller and the data subject (that is, the employee).
- Consent of the data subject (although for the reasons mentioned above, this is complicated in the context of an employment relationship).

## **Swiss Employment Law**

From a Swiss private employment law perspective (as opposed to the public labour law perspective), Article 328b of the SCO states that the employer may handle data concerning the employee only to the extent that such data is relevant to the employee's suitability for their job or is necessary for the performance of the employment contract.

### **Swiss Labour Law**

Swiss Labour law (Ordinance 3 to the EmpA (Health Protection)) states that it is illegal to use surveillance or monitoring systems to monitor the behaviour of employees at their workstations.

## **Intellectual Property**

Where Swiss employment law is applicable, inventions and designs produced by a seconded employee in the performance of their contractual obligations (that is, while carrying out tasks closely connected to their contractual duties), belong to the employer. Therefore, the question of who the employer is (including whether there is a second employment contract) is important from an intellectual property perspective, if the parties wish for the host company to acquire this intellectual property automatically.

The employer may reserve the right to acquire any inventions and designs produced by the employee outside of their contractual obligations but within the course of their work for the employer (that is, during the workday, but not closely connected to their contractual duties). This must be recorded in writing and signed by hand or with an authorised electronic signature. Moreover, the employer must:

- Notify the employee within six months as to whether they wish to acquire the invention or design or release it to the employee.
- Pay appropriate remuneration to the employee.

## **Tax and Social Security Considerations**

Specific tax and social security advice should be sought before entering into an international secondment arrangement, the information contained in this note is not intended to be exhaustive.

## Permanent Establishment Risk

In the context of an international secondment, there is a risk of the seconder being considered to have a permanent establishment in the state where the host company is located.

In the event of a secondment into Switzerland, the Swiss tax authorities will generally examine whether:

- The seconder has premises at its disposal in Switzerland.
- The secondee enters into contracts regularly on behalf of the seconder, or regularly plays important roles in the conclusion of contracts on behalf of the seconder, from Switzerland.

In the event of a secondment out from Switzerland, the question of whether there is a permanent establishment in the other state will depend on the tax laws and practice of that state.

## Service Tax Issues

In principle, the foreign seconder must pay Swiss VAT for work performed in Switzerland. An exemption applies when the foreign seconder's worldwide annual turnover is under CHF100,000.

## Secondee

### Secondee Tax

In general, anyone residing in Switzerland and intending to be established in Switzerland (that is, Switzerland is to be the centre of the individual's professional, social, and familial activities) is a Swiss tax resident and subject to Swiss wealth and income taxes on an unlimited, worldwide basis.

This is also the case if an individual spends, without notable interruption (that is, continuous or in several blocks), at least either:

- Thirty calendar days in Switzerland carrying out a gainful activity (that is, employed or self-employed activity).
- Ninety calendar days in Switzerland without carrying out a gainful activity.

In some cases, a double tax treaty may provide otherwise. Secondees may also benefit from certain special deductions of professional expenses under the Swiss Expat Ordinance.

### Secondee Social Security

A distinction must be made between:

- Secondees who come under the scope of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Regulation 883/2004).

- Secondees who come under the scope of another social security convention.
- All other secondees.

#### **Regulation 883/2004**

Secondees (into and out from Switzerland) covered under the scope of Regulation 883/2004, (that is, EU and EFTA citizens and refugees and stateless persons residing in an EU or EFTA State) may remain affiliated with the social security system with which they were affiliated before the secondment if all of the following apply:

- The secondee was affiliated with that social security system for at least one month before being seconded.
- It is not anticipated that the secondment will last more than 24 months (it is possible to request a period of up to six years from the competent social security authorities).
- The individual has not been seconded to replace another secondee.

#### **Other Social Security Conventions**

For secondees (into and out from Switzerland) coming under the scope of another social security convention, the social security system with which the secondee is affiliated may depend on the content of the convention.

#### **No Social Security Convention**

Secondees into Switzerland must be affiliated with the Swiss social security system.

Secondees out from Switzerland, may be able to remain affiliated with the Swiss social security system if all of the following apply:

- They are employed by a Swiss employer (who supports their salary).
- The employer agrees to maintain their Swiss social security affiliation.
- The employee was affiliated with the Swiss social security system for at least five years immediately prior to the secondment.

Moreover, whether the seconded employee must be affiliated with the social security system in the country to which they have been seconded will depend on the social security laws of that country.

## **Seconders**

#### **Seconders Tax**

In general, the Swiss seconder does not have additional Swiss corporate income or capital tax obligations arising from the international secondment. However, it is possible that they could encounter foreign tax obligations in the host country.

If the international secondment is intracompany, special attention must also be given to transfer pricing when drafting the Secondment Agreement.



The foreign secondner also may have Swiss tax obligations. If the secondment is deemed to create a permanent establishment, then the foreign secondner may have Swiss corporate income and capital tax obligations (see *Permanent Establishment Risk*).

### Secondner Social Security

The Swiss secondner may continue to have Swiss social security obligations if the secondee remains affiliated with the Swiss security system (see *Secondee*).

Additionally, in some cases, the Swiss secondner may have foreign social security obligations, in particular, if the secondee is seconded to an EU or EFTA country, and the employee was not able to remain affiliated with the Swiss social security system (see *Secondee*).

Generally, as long as the foreign secondner is not considered to have a permanent establishment in Switzerland, it should not have Swiss social security obligations, even if the secondee must be affiliated with the Swiss social security system (see *Secondee*). In this case, the secondee is what is known as an ANOBAG (from the German *Arbeitnehmende ohne beitragspflichtigen Arbeitgebe*) and is responsible for paying both the employer and employee social security contributions. However, in practice, many employers will reimburse the employee for the employer contributions.

If the foreign secondner is considered to have a permanent establishment (for social security purposes) in Switzerland, then it would have Swiss social security obligations. For a discussion on what happens if the host company is considered to be the permanent establishment of the foreign secondner, see *Host*.

Moreover, if the foreign secondner has its statutory seat or a permanent establishment in an EU or EFTA country and the employee was not able to remain affiliated with the foreign security system (see *Secondee*), then the foreign secondner would have Swiss social security obligations. However, if the foreign secondner does not have a permanent establishment (for social security purposes) in Switzerland, it may enter into an agreement with the secondee, requiring the secondee to pay all social security contributions. The foreign secondner should inform the competent social security authorities that such an agreement has been concluded.

## Host

### Host Tax

The Swiss host company may have Swiss tax obligations linked to the secondment. In particular, the Swiss host company may be responsible for withholding and paying tax at source due on the secondee's income arising from work carried out in Switzerland if:

- It has an employment agreement with the secondee.
- They are considered the de facto employer by the tax authorities for tax at source purposes.

If the international secondment is intracompany, special attention must also be given to transfer pricing when drafting the Secondment Agreement.

### Host Social Security

A Swiss host also may have social security obligations, if:

- The secondee is affiliated with the Swiss security system during the secondment (see *Secondee*).

- The Swiss host company has an employment agreement with the secondee or is deemed to be the employer for social security purposes.

The Swiss host can be responsible for making the required Swiss social security contributions, if the competent social security authorities consider the Swiss host company to be a permanent establishment (for social security purposes) of the foreign seconded.

## Termination of Secondment

### Seconded or Host

The rules for terminating the secondment arrangement depend on the secondment structure chosen and the content of the secondment documents. In practice, the Secondment Agreement usually explicitly states that the seconded or the host can end the secondment by terminating the Secondment Agreement.

As this is a commercial agreement, the parties are free to decide on the notice period and it is standard to provide for immediate termination in certain instances, such as the termination of the secondee's original employment agreement, the insolvency of a party or the failure of a party to comply with their legal obligations. However, terminating a Secondment Agreement to which the secondee is not a party will not terminate the secondee's employment.

### Termination of Secondee's Employment

The termination of the secondee's employment with the seconded may bring the secondment arrangement to an end (unless a substitute secondee is provided, see *Substitute Secondee*).

Otherwise, in principle, the secondee remains employed by the seconded after the Secondment Agreement has terminated and, if desired, the seconded would have to terminate the employment agreement.

If a second employment agreement has been entered into with the host entity, to end this employment the host entity must terminate the employment in accordance with the terms of the employment agreement and the applicable laws.

Where Swiss employment law applies, the notice period in the employment agreement should be respected, provided always that it must match or exceed the statutory minimum notice period (which depends on the length of service). Unless otherwise agreed in the employment agreement or the relevant collective bargaining agreement, the notice period is a multiple of a full calendar month and runs until the end of the calendar month (Article 335c (1), SCO).

### Return to the Seconded

Unless the secondment ended because of the termination of the secondee's employment with the seconded, the original employment agreement should continue to apply after the secondment.

Where Swiss employment law applies, the starting position is that the secondee returns to their previous role with the Swiss seconded. However, if the Swiss seconded wants the secondee to have a different position upon their return, the employment agreement will need to be modified and, depending on the difference between the new and old job duties, may constitute a *cong -modification* (see *Changes to Terms and Conditions of Employment*).

## Substitute Secondee

From an employment law perspective, there is nothing forbidding a substitute secondee. However, from an immigration standpoint, it is generally not possible to obtain a secondment work permit for a substitute secondee and under certain social security conventions (namely, Regulation 883/2004), substitute secondees are not permitted.

## Documenting the Secondment

### Secondment Agreement and Letter of Secondment

The Secondment Agreement and the Letter of Secondment should be recorded in writing, as they will need to be reviewed by Swiss authorities, in particular immigration authorities.

From an employment law perspective, special attention should be paid to clauses that require the written form. In particular, clauses related to non-compete and non-solicitation covenants, intellectual property, renouncing overtime, and the notice period, as these must either be signed by hand or via a qualified electronic signature.

### Language

The language in which the documents are drafted should not affect their validity. The authorities or courts may require the documents to be translated into the local language, although English is often accepted. It is recommended to verify whether in practice, the competent local authority will accept English documents.

### Governing Law and Jurisdiction

For more detail see *Mandatory Local Laws and Acquired Rights*.

#### Secondment Agreement

Under Article 116 of the PILA, within the limits of Swiss public order, public policy and mandatory law, the Swiss seconder and host company are free to decide on the governing law of the Secondment Agreement.

Under Article 112 and Article 113 of the PILA and Article 2(1) and Article 5(1) of the Lugano Convention, the action should be brought before the courts in which the defender is domiciled or where the contract should be executed.

See *Mandatory Local Laws and Acquired Rights*.

#### Letter of Secondment

A Letter of Secondment issued by a Swiss seconder is generally governed by Swiss private employment law.

In other cases, the parties may elect to have it governed by the private law of the other home country, within the limits of Swiss public order, public policy, and mandatory law. In practice, this refers to the mandatory provisions of the SCO, which apply when work is carried out from Switzerland. Article 115(3) of the PILA gives jurisdiction to the Swiss courts when the secondment is into Switzerland and the secondee carries out their employment activities in Switzerland.

Moreover, under Article 115(1) and (2) of the PILA, an employee may sue their employer before the Swiss courts where they are domiciled, where their employer has their statutory seat, or where they routinely carry out their work (the employer only may sue the employee before the Swiss courts where the employee is domiciled or where they routinely carry out their work).

Where the Lugano Convention applies, Article 19 of the Lugano Convention permits an employee to sue their employer before courts where their employer has their statutory seat or where they routinely carry out their work (under Article 20 of the Lugano Convention, the employer may only sue the employee before the courts where the employee is domiciled).

### **Execution and Other Formalities**

No specific formalities are necessary to execute a secondment into or out from Switzerland. However, when a work authorisation or permit is needed, the secondee should wait until approval has been received before carrying out any work from Switzerland.

It is also recommended that the necessary social security coverage is in place, and confirmed as such, by the foreign seconder before commencing the secondment in Switzerland.

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