Trends and Developments

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Introduction

Switzerland enjoys low unemployment rates; the November 2024 unemployment rate announced by the State Secretariat for Economic Affairs (SECO) was 2.6%.

Against this background, employers seeking to attract and retain top talent often must provide incentives.

This article provides an overview of (i) the practice with respect to employee incentives and (ii) the special rules applicable to listed companies.

Practice

Overview

As mentioned above, the Swiss employment market is competitive and, therefore, employers often want to provide incentives to hire and retain qualified individuals.

The following outlines (i) general trends around employee incentives, and (ii) practical considerations to have in mind when deciding on incentives.

Trends

In Switzerland, incentives can be provided in various forms – cash bonuses, stocks or stock options, monthly allowances, in-kind benefits (eg, a car that can be used for private purposes, a train pass, health insurance, cryptocurrency), etc.

However, given the number of different sectors and types of employers in Switzerland, it is difficult to draw conclusions as to one generalised practice with respect to employee incentives.

That said, generally, it can be said that there is a tendency to offer skilled workers incentives. Moreover, one of the most common forms of incentives is a long-term incentive plan.

It is possible to reach more specific conclusions around certain sectors, in particular, multinationals and start-ups, both of which have a strong presence in Switzerland.

Multinationals

Switzerland is home to many subsidiaries of multinational companies.

It is common for multinationals to have worldwide incentive plans that they wish to implement on a global level. This is especially the case with respect to senior employees. In particular, long-term incentive plans are common. Very often, such plans are linked to the company's performance, either via KPIs and milestones, or the awarding of stock or stock options (or phantom stock, linked to share value). Some companies choose to combine such plans with additional short-term incentive plans.

Moreover, it is common for multinationals to offer senior employees incentives in the form of deferred compensation payments. Further, multinationals often offer incentives at the start of the employment relationship, like signing bonuses. They may also offer allowances to help offset the costs of moving and living abroad, including a relocation allowance, school payments, health insurance and tax preparation.

Start-ups

Switzerland has a strong start-up sector.

Start-ups are typically faced with a unique challenge of trying to hire and retain talent on a limited budget, so they often rely on alternative incentive models to remunerate employees. In this context, many start-ups will pay a lower

base salary, combined with other incentives, in particular, stock. This incentivises employees to help grow the business and, if the business is ultimately successful, awards employees who got in on the ground floor.

Another trend seen with some start-ups, particularly those in the new technology sector, is to incentivise employees with payments in cryptocurrency.

It also is common in start-ups (although, by no means limited to start-ups) to see individuals wearing two hats – that of investor and that of employee.

Practical considerations

There are a number of practical considerations that employers should have in mind when deciding on whether, and in what form, to award incentives in Switzerland.

In particular, it is important to consider: (i) the qualification of the incentive (ie, variable salary or agreed-upon bonus v true discretionary bonus); (ii) issues around payments in cryptocurrency; (iii) the role of the individual (ie, employee or investor) and (iv) non-discrimination.

Specific considerations for listed companies are addressed below under "Special Rules for Listed Companies".

Qualification of the incentive

The notion of "bonus" does not exist as such under Swiss employment law.

From a Swiss employment standpoint, an incentive may be qualified as (i) variable salary or an agreed-upon bonus, or (ii) a true discretionary bonus.

The following details are outlined below: (i) the criteria used to make such a qualification; (ii) their consequences; and (iii) key takeaways.

- Qualification criteria:
  - (a) Variable salary: In addition to the base monthly salary, salary includes variable salary and other contractual benefits (eg, monthly allowances). With respect to bonus plans, the line between variable salary and a truly discretionary bonus can be difficult to delineate in some instances. The title of the plan (ie, whether the word discretionary is used or not) is not decisive; a plan labelled discretionary may still be requalified as variable salary. If the payment of a bonus is based on predetermined and objective criteria (eg, a formula, milestones, target, etc), it should be qualified as variable salary.
  - (b) Agreed-upon bonus: Under certain circumstances, a bonus that is not deemed variable salary may, nevertheless, not qualify as a true discretionary bonus as it may be considered an agreed-upon bonus. In particular, this can occur if the bonus is paid on a regular basis (ie, over three or more years), without stating that it is discretionary, or is paid over a long period of time (ie, ten or more years), even if it is stated that it is discretionary. This is also the case if the bonus represents a large percentage of total remuneration received by an employee; however, this does not apply to employees earning more than five times the Swiss median wage (ie, approximately CHF400,000).
  - (c) True discretionary bonus: Conversely, a bonus is considered a true discretionary bonus if the employer has at least some discretion regarding both the entitlement to the bonus (ie, whether or not it is is-

sued) and its amount (typically, if some of the criteria are subjective), and none of the requalification criteria listed above apply.

- Consequences of the qualification:
  (a) Variable salary: An employee has a right to their salary and this right encompasses all salary components, not only the base salary. Thus, an employer cannot decide to not provide an employee with a bonus that is considered to be salary. Moreover, these amounts must be paid on a pro rata basis at the end of the employment relationship, even if the employee is not employed, or is under notice, when payments typically would be made. This also means that certain aspects of bonus plans, especially stock-option plans, may not be enforceable. In particular, problems may arise with respect to lock-up periods and vesting. However, legal scholars consider that, in principle, a right of repurchase or redemption in favour of the employer should be admissible, insofar as the exercise price is set at least at the intrinsic value at the time of repurchase/redemption. Further, from a Swiss employment law perspective, when the employment relationship ends, all claims arising therefrom fall due.
  (b) Agreed-upon bonus: With respect to agreed-upon bonuses, the employer retains freedom as to the amount to be paid (unless the same amount has always been paid) and the payment may be subject to the condition that the employment agreement has not been terminated.
  (c) True discretionary bonus: Employees have no right to true discretionary bonuses, so bonuses qualified as such should not need to be paid to employees. In particular, it is possible to stipulate that the bonus will not be paid if the employment agreement is terminated prior to when bonuses are paid. In such instances, legal scholars are of the opinion that, in principle, lock-up periods (at least up to five years) and vesting clauses should be permissible.
- Key takeaways:
  (a) Special attention should be paid as to whether an incentive will be qualified as variable salary or an agreed-upon bonus, or as a true discretionary bonus. This especially applies to incentive plans, where the line between variable salary and true discretionary bonus may be harder to demarcate. Therefore, it is important to review in detail both the full wording of the plan, the applicable criteria and how it is applied in practice. If an employer wants to reduce the chance of its incentive plan being considered variable salary, merely stating in the title that the plan is discretionary is unlikely to be enough. In this context, multinationals may have to choose between adapting their existing global plan (ie, a plan based on milestones) to the Swiss context, or accepting a risk of requalification as variable salary.
  (b) Moreover, it is important to be aware that even though deferred compensation is industry standard for senior employees and, indeed, part of good corporate governance, such incentives may give rise to a Swiss employment law claim if the employment relationship is terminated prior to all deferred amounts having been paid out and those amounts are considered part of a variable salary.
  (c) Qualification as salary could also prevent claw-back of signing bonuses and other retention bonuses and/or force vesting at

the end of the employment relationship.

(d) Employers, especially start-ups, should also pay attention to the percentage of remuneration paid as incentives, as paying a large percentage of remuneration in the form of incentives could also risk requalification of the incentives with regard to middle- and lower-level employees (ie, those earning less than around CHF400,000 per year).

Cryptocurrency

Special considerations apply with respect to payments made in cryptocurrency.

Given the newness of the field, we are not aware of any specific case law from the Swiss Federal Supreme Court.

The following details are outlined below: (i) rules concerning payment in cryptocurrency; and (ii) key takeaways.

- Payment in cryptocurrency:
  - (a) Many legal scholars differentiate between whether a bonus paid in cryptocurrency should be classified as variable salary or a true discretionary bonus. With respect to salary, there is debate among legal scholars as to whether the Swiss Code of Obligations (CO) (Article 323b CO, in conjunction with Articles 361 and 362 CO) permits salary to be paid in a non-fiat currency. The prevailing view is that such payments are permissible and constitute a form of in-kind remuneration.
  - (b) Moreover, some legal scholars have expressed concerns that given the extreme volatility of many cryptocurrencies, payment of salary exclusively in cryptocurrency could create the potential for a violation of other obligations, in particular: (i) payment of salary/knowledge of agreed-upon salary (Article 322 CO), and (ii) responsibility of the employer to support economic risks (Article 324 CO). These concerns do not seem pertinent to us, especially when the employment agreement specifically provides that part of the remuneration will be paid as cryptocurrency and that amount paid by the employer corresponds to the agreed-upon amount.
  - (c) With respect to true discretionary bonuses, there is no right to a true discretionary bonus, and Swiss employment law does not set rules as to the form of such gratification.
- Key takeaways:
  - (a) Pragmatically, for salaries, employers could reduce the risks associated with paying salaries in cryptocurrency by only partially paying salaries in cryptocurrency. This should also give employees more visibility regarding their salary.
  - (b) For true discretionary bonuses, in our view, the rules applicable to employee stock (option) plans could be thought to apply by analogy, especially given the volatile nature of both stocks and cryptocurrencies.
  - (c) However, it should be noted that there is a minority of legal scholars who feel that, especially given the extreme volatility of cryptocurrencies and the difference in purpose (ie, not to incentivise employees to increase the value of the employing company), even though employee stock option plans are allowed under Swiss employment law, this does not necessarily mean that cryptocurrency incentive plans should be allowed.

Role of the individual

The following details are outlined below: (i) rules concerning individuals acting as an employee and an investor, and (ii) key takeaways.

- Applicable rules:
  - (a) Legal scholars generally accept that when an employee acquires shares or other participation rights as an investor (ie, freely acquired at market price and financed by the employee), the parties have more freedom with respect to remuneration in connection with the investment. At the very least, the rules with respect to true discretionary bonuses should apply. In such instances, procedural questions may also arise in the event of litigation with respect to the application of procedural rules reserved for employment disputes and/or the competence of employment tribunals. Legal scholars are of the opinion that, at least when the investment was made based on a plan open only to employees, employment law procedural rules should apply and employment tribunals should be competent.
- Key takeaways:
  - (a) When individuals have multiple roles (ie, employee and investor), importance should be given to the role in which the individual will be participating in an investment plan.
  - (b) In particular, consideration should be given as to whether the individual will need to acquire the participation rights at market price and fully finance this acquisition. Providing a reduced acquisition price and/or financing could be used as another incentive, but doing so could exclude the possibility in the future of being able to invoke the larger contractual freedom applicable to acquisitions made as an investor.

Non-discrimination

The following details are outlined below: (i) rules concerning protection from discrimination; and (ii) key takeaways.

- Protection against discrimination:
  - (a) Swiss employment law prohibits employers from discriminating against employees, and this principle also applies with respect to incentives.
  - (b) Discrimination is forbidden generally under Article 328 CO, as the Swiss Federal Supreme Court and many legal scholars consider equal treatment of employees to be part of an employer's general duty to protect employees' personality rights.
  - (c) Moreover, the Gender Equality Act contains additional protection with respect to gender-based discrimination and expressly forbids both direct discrimination (ie, unequal treatment directly imposed, such as by an employer's internal policy) and indirect discrimination (ie, the application of said policy results in certain groups of individuals being treated less favourably).
  - (d) Against this background, the courts have found that some limits can apply, even in the case of true discretionary bonuses and other prerogatives of an employer, especially in the event of gender-based discrimination. For instance, the Swiss Federal Supreme Court found that excluding any possibility of a raise for employees absent for more than six months constitutes unacceptable, indirect gender-based discrimination (Swiss Federal Supreme Court decision 8C_605/2016 of 9 October 2017, consid. 3). However, given the general principle of contractual free-

dom, the Swiss Federal Supreme Court has also said such limits must be applied in a very restrictive manner.

(e) Recently, the Swiss Federal Supreme Court ruled that plans that disadvantage individuals on maternity leave (by taking into consideration employee performance) do not constitute prohibited discrimination from nine weeks after childbirth, as individuals may return to work after eight weeks, although they are not required to do so (Swiss Federal Supreme Court decision 4A_597/2023 of 15 May 2024, consid. 3.3.1); this decision concerned an agreed-upon bonus.

(f) Further, the Swiss Federal Supreme Court has stipulated that Article 328 CO may only apply when an individual employee is placed in a significantly less favourable position than a large number of other employees, but not when the employer merely places individual employees in a better position. For instance, an employee may not claim a "right" to an exit bonus on the basis of Article 328 CO simply because some of his/her colleagues had received one previously (ATF 129 III 276, consid. 3).

- Key takeaways:
  - (a) With respect to truly discretionary bonuses, in general, the principle of contractual liberty prevails.
  - (b) However, special attention should be paid to avoid awarding these bonuses in a manner that results in an individual employee being placed in a significantly less favourable position or in direct or indirect gender-based discrimination occurring.

Special Rules for Listed Companies

Overview

Additional rules apply with respect to remuneration of the board of directions, executive board and board of advisers of listed companies. This includes incentives.

In 2013, the Swiss population accepted the Executive Pay Initiative (the Minder Initiative), which introduced an amendment to the Swiss constitution requiring Swiss listed companies (whether listed in Switzerland or abroad) to comply with certain rules.

These rules include requiring that the general meeting vote on the total remuneration provided to the board of directions, executive board and board of advisers.

The rules were first implemented via the Ordonnance on Abusive Remuneration in Listed Companies (ORAb), which entered into force on 1 January 2014. The ORAb was abolished on 1 January 2023, the date on which the Company Law Act entered into force.

The Company Law Act introduced these rules, along with others, directly into the CO (Articles 732 et seq CO).

Under the Company Law Act, listed companies must have a remuneration committee, comprised of board members and voted on by the general meeting (Article 733 CO), and the general meeting must vote on the remuneration that the board of directors, the executive board and the board of advisers directly or indirectly receive from the company (Article 735 CO).

Further, the board of directors of listed companies must prepare an annual remuneration report (see below).

Before delving into the specifics of the remuneration that must be listed in the annual remuneration report, it should be noted that the Company Law Act also included a requirement that information about gender representation in the board of directors and in the executive board be included (for listed companies, subject to an ordinary audit) "unless each gender makes up at least 30% of the board of directors and 20% of the executive board" (Article 734f CO). Although this requirement entered into force on 1 January 2021, it has been grandfathered in so that it applies: (i) to the board of directors from, at the latest, the financial year that begins five years after the new law comes into force; and (ii) to the executive board from, at the latest, the financial year that begins ten years after the new law comes into force (Article 4 par 2 of the Transitional Provision to the Amendment of 19 June 2020), meaning that this obligation will apply for the first time, with respect to the board of directors, for the 2026 financial year.

This represents a general trend towards increased reporting with respect to non-financial matters. Although beyond the scope of this article, it is worth noting that there are also new reporting obligations on: (i) transparency in raw materials companies (Articles 964d – 964i CO); (ii) transparency on non-financial matters, namely environmental matters, in particular the CO_2 goals, social issues, employee-related issues, respect for human rights and combating corruption (Articles 964a – 964c CO); and (iii) due diligence and transparency in relation to minerals and metals from conflict-affected areas and child labour (Articles 964j – 964l CO).

Remuneration report – remuneration of the board of directors, the executive board and the board of advisers

Notably, the remuneration report must include information regarding: (i) remuneration of the board of directors, the executive board and the board of advisers (Article 734a CO); (ii) loans and credit facilities for the board of directors, the executive board and the board of advisers (Article 734b CO); and (iii) participation rights and options on such rights (Article 734d CO).

Remuneration includes:

- fees, salaries, bonuses and account credits;
- shares of profits paid to board members and commissions, participation in turnover and other forms of participation in the business results;
- services and benefits in kind;
- the allocation of equity securities, and conversion and option rights;
- joining bonuses;
- guarantee and pledge commitments and other collateral commitments;
- waivers of claims;
- expenditures giving rise to, or increasing, occupational benefit entitlements;
- all payments and benefits for additional work; and
- compensation connected with the prohibition of competition (Article 734a par 2 CO).

Given the expansive notion of remuneration taken by the Minder Initiative and the Company Law Act, these rules have significant effects on the granting of incentives by listed companies to executive employees.

In practice, this has especially been felt with respect to signing bonuses and exit payments.