

Employment News No.

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Flexibilization of working time and resting period provisions Amendments to Ordinance 2 to the Labour Code (ArGV 2)

The Federal Council has relaxed the working and rest time provisions for information and communication technology (ICT) companies and for service companies in the areas of auditing, accounting and tax consultancy. The amended Ordinance 2 to the Labour Act (ArGV 2)¹ will come into force at the beginning of July 2023. In the following, you will find out what it is all about.



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Existing legal regulations

Currently, a maximum weekly working time of 45 hours applies to employees in industrial enterprises, office staff, technical and other employees as well as sales staff in large retail businesses. For all other employees, the maximum working time is 50 hours per week.

Any overtime work that exceeds the maximum weekly working time is considered extra time. As a general rule, extra time must not exceed two hours per day and must not exceed a total of 170 hours per calendar year for employees with a maximum weekly working time of 45 hours, or 140 hours for employees with a maximum weekly working time of 50 hours.

Looking at the working time rules for a day, the basic rule for all employees subject to the Labour Code is that the working time must be on weekdays between 6.00 am and 11.00 pm. In addition, the daily working time, including breaks and overtime, must be within a time frame of 14 hours. Therefore, a person who starts to work at 6.00 am may not work after 8.00 pm, even if several hours of breaks have been taken in between. There is a basic rest period of eleven hours between two working days.

Finally, work activity during the night or on Sundays is generally prohibited and there is an obligation to record working and rest times. Deviations from the legal obligation to record working hours are possible if this is provided for in a collective agreement (cf. article 73a ArGV 1) or on the basis of an agreement with the workers (cf. article 73b ArGV 1).

The existing regulations of the Labour Code largely date back to the middle of the last century, when employment relationships were predominantly shaped by industry and the working conditions there. Today, most people agree that the rigid working time regulations tailored to the industrial production process no longer meet the requirements of our service-based economy.

Content of the revised Provisions in ArGV 2

The revised ArGV 2 which will come into force in July 2023 will include two new special provisions designed to take into account the modern service society and is supported by the social partners:

Service Companies in the Fields of Auditing, Accounting and Tax Consultancy

For service providers in the fields of auditing, accounting and tax consultancy, a working time model with annual working hours can be introduced in accordance with the new article 34a ArGV 2. This does not apply to all employees, but only to adult employees who cumulatively meet the following conditions:

- They have a great degree of autonomy in their work and can set their own working hours for the most part.
- They are supervisors or specialists in the field of auditing, accounting or tax consultancy.
- They have a gross annual income of more than 120,000 Swiss francs (full-time basis) or a qualification at least at Bachelor level or level 6 of the National Qualifications Framework.

Within the scope of the annual working time model, the following principles apply:

The provisions on maximum weekly working hours (cf. article 9 ArG) and extra hours (cf. article 12 and 13 ArG) are not applicable, although a maximum weekly working time of 63 hours applies. Under the annualised working time model, the maximum weekly working hours in auditing, accounting and tax consultancy are thus massively increased. However, it remains the case that the average weekly working time must not exceed 45 hours. The daily rest period must be at least nine hours, and again eleven hours on average over four weeks. In addition, up to nine Sundays a year may be worked without official

authorisation for a maximum of five hours each.

At the end of the calendar or financial year, the balance of hours worked more than the maximum annual working time may not exceed 170 hours. Hours worked in excess of the maximum annual working time must be compensated in the following calendar or business year by time off of at least the same duration or a wage supplement of at least 25 per cent must be paid for them.

In addition, employers are obliged to take preventive measures in the area of health protection, in particular with regard to psychosocial risks, with the participation of employees or their representatives.

The effective introduction of the annual working time model requires a written agreement setting out the annual working time target and the way in which overtime will be compensated. Employees can revoke this agreement at any time by giving three months' notice. The annual working time model also excludes the possibility of waiving the recording of working time based on a collective agreement.

Information and Communication Technology (ICT) Companies

Exemptions from the ban on night and Sunday work already apply to employees with tasks in information and communication technology under certain conditions. The new article 32b ArGV 2 adds further flexibilities for information and communication technology (so-called ICT) companies and for adult employees engaged in project-related or time-bound ICT activities.

Information and communication technology includes the development, customization, testing and maintenance of software, the planning and design of computer systems consisting of hardware, software and communication technology, and the on-site management and operation of such com-

puter systems or other data processing equipment of customers.

For employees of such ICT companies or for persons involved in ICT tasks, the daily recorded working time including breaks and overtime/extra time may in future be within an extended time frame of 17 hours. In this case, the daily rest period must be at least nine hours and eleven hours on average over four weeks.

This extended working time window does not apply to all tasks, but depends on an objective necessity, i.e., in the case of international cooperation with different working times of the participants (different time zones) or in the case of urgent and unforeseeable activities.

Conclusion

While the changes represent only marginal liberalisation for ICT companies, the possibility of introducing an annual working time model in the audit, accounting and tax consultancy sectors represents a significant change. In particular, the possibility of working up to 63 hours per week and up to nine Sundays per year without permission will give new impetus to the previously very rigid corset of the Labour Code. This is not only in the interest of employers, who depend on the flexible deployment of their employees during peak periods. Employees will also gain more autonomy in determining their working hours and will be able to spread their working hours over the year.

At the same time, it should be noted that the new rules do not affect the obligation to keep full records of working time, and even extend it in the annual working time model, where it will no longer be possible to exclude it by collective agreement.

Finally, the new provisions in article 34a ArGV 2 introduce new undefined legal terms, such as *"supervisors"*, *"specialists"* or companies that *"mainly offer services in the areas of auditing, accounting or tax consultancy"*.

The guidelines to the ArGV 2 and ultimately the case law will show how these terms are to be interpreted. However, it is likely that the description of the purpose in the commercial register will play an important role in defining the main service provided, which may be crucial for companies wishing to use the annual working time model. As regards the definition and delimitation of the term *"specialist"*, case law has been developed in the context of migration law, the principles of which could also be applied in the context of the new article 34a ArGV 2.

In particular, it remains to be seen whether the annual working time model will prove its worth and be made available to other sectors in the future. There would certainly be good reasons for this.

Please do not hesitate to contact us for further information.

Footnotes

- 1 The text of the regulation is available at the following link:
<https://www.newsd.admin.ch/newsd/message/attachments/78123.pdf>
[last accessed on 16. May 2023].

Employment News reports on current issues and recent developments in Swiss labor law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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