

Employment News No.

52

Revision of Labour Act Ordinance 1: statutory amendments with a focus on the new regulations on cross-border business trips

On 1 November 2020, the amendments to Ordinance 1 to the Swiss Labour Act (Labour Act Ordinance 1) adopted by the Swiss Federal Council came into force. This newsletter provides an overview of these amendments with selected priorities.



By **Ueli Sommer**
Dr. iur., LL.M., Attorney at Law
Partner
Phone +41 58 658 55 16
ueli.sommer@walderwyss.com



and **Chiara Wirz**
MLaw, Attorney at Law
Associate
Phone +41 58 658 52 46
chiara.wirz@walderwyss.com

The revision of Labour Act Ordinance 1 does not only lead to more clarity and legal certainty due to a specification of the legislative text, but in addition, (cross-border) business trips, which are of practical importance, are addressed under the aspects of the Labour Act for the first time.

Objectives of the Revision

With the amendments to the Ordinance 1 to the Swiss Labour Act (**Labour Act Ordinance 1**) which became effective on 1 November 2020, the Federal Council's primary purpose was to eliminate existing uncertainties in the application of working and resting time regulations and to adjust the legal provisions to the practice that had developed in the meantime. In addition, various clarifications and formal adaptations are intended to simplify the application of the Labour Act by companies and inspectorates.

Overview of the Revised Legal Provisions

The revision mainly concerns the second and third chapter of Labour Act Ordinance 1, and thus selected provisions (hereinafter referred to as «nArt.») on working hours, rest periods and night work measures.

This newsletter focuses on the new and practically important regulation on working and resting time during cross-border business trips (nArt. 13 para. 3^{bis} Labour Act Ordinance 1). Furthermore, an overview is given of the legal consequences, now concretised in the law, resulting from work performed on Sundays or on public holidays equivalent to Sundays (nArt. 32a Labour Act Ordinance 1). For the sake of completeness, reference is made to another substantive amendment (nArt. 45 Labour Act Ordinance 1) concerning the medical examination and consultation of certain employees, namely adolescents, who perform permanent or regularly recurring night work. This amendment primarily serves the purpose of legal harmonisation with existing provisions of the Youth Work Protection Ordinance (Labour Act Ordinance 5) and Traffic Licensing Ordinance.

Further changes to the working and resting time regulations result from the clarification of existing provisions of Labour Act Ordinance 1:

- In nArt. 16 para. 1 Labour Act Ordinance 1, the beginning and end of the "working week" are now defined in terms of time (beginning on Monday at 0.00 a.m.; ending on Sunday at midnight), replacing the scope for interpretation that existed under the previous regulation with a clear rule. This specification of the working week corresponds to the interpretation in the guidelines to the Labour Act and to its Ordinances 1 and 2¹ of the State Secretariat for Economic Affairs SECO (**SECO Guidelines**). The previous distinction between single and multi-shift working time systems, which in practice has repeatedly led to uncertainty, is not adhered to. The described temporal specification of the working week, which is the central aspect for defining the maximum weekly working time (Article 9 Labour Act) and thus indirectly protects the health of employees, is certainly welcome.
- Moreover, the prerequisites for permitted work in a composite uninterrupted business operation (*zusammen gesetzter ununterbrochener Betrieb*) in weekend shifts (between Thursday evening, 8 p.m., and Monday morning, 5 to 7 a.m.) are fleshed out by adding the following passage to Article 39 para. 2 Labour Act Ordinance 1: «[...] an employee who works 10 hours per night within 12

¹ Available (in German only) under: <<https://www.seco.admin.ch/seco/de/home.html>>, Services & publications > Publications > Labour > Working Conditions > Wegleitungen zum Arbeitsgesetz.

hours may not work for more than 3 nights.» This provides clarification of the application and, in particular, the precedence of Article 17a para. 2 Labour Act concerning permitted work with respect to night work (a maximum of 10 hours within 12 hours for a duration of no more than three subsequent nights) over the said regulation on composite uninterrupted business operation; the same conclusion has resulted so far from the SECO Guidelines.

Treatment of Cross-Border Business Trips under the Labour Act

A significant reform is achieved by the revised Article 13 Labour Act Ordinance 1 which regulates the notion of «working time» and is supplemented by a new paragraph 3^{bis}. NArt. 13 Labour Act Ordinance 1 provides for the following: «If the employee travels abroad in the course of his or her employment, the time spent on the outward and return journey in Switzerland shall be considered working time at least to the extent of paragraph 2. If the outward or return journey takes place in part or entirely during the night or on a Sunday, the work of the employee during these working hours is not subject to a permit. The rest period of 11 hours shall be granted immediately after the return journey and commences upon the arrival of the employee at his or her place of residence».

NArt. 13 Labour Act Ordinance 1 addresses various issues that often arise in practice in view of the provisions on working hours and rest periods when employees go on business trips abroad: the applicable working hours, the (potential) obligation to obtain a permit for night and Sunday work and the observance of statutory rest periods.

- **Applicable working hours:** in principle, the time during which the employee must (and actually does) remain at the employer's disposal is considered working time in accordance with the Labour Act; time spent on the way to and from the place of work is generally not

considered working time (nArt. 13 para. 1 Labour Act Ordinance 1². There is an exception to this rule if an employee with a fixed (contractual) place of work has to perform his or her work at other work locations. In this case, the difference between the usual travel time (to the contractual place of work) and the longer travel time (to the specific work location) is counted as working time (Article 13 para. 2 Labour Act Ordinance 1). In other words, the time usually spent on the way to the place of work must be deducted from the longer travel time.

Basically, the employee also remains at the employer's disposal if he or she goes on a business trip abroad due to work duties. However, the question to which extent the time spent on a business trip counts as working time, which can be quite important in practice, has remained unclear until the statutory revision discussed herein. NArt. 13 para. 3^{bis} Labour Act Ordinance 1 now clearly states that the time spent in Switzerland for the outward and return journey, at least to the extent of Article 13 para. 2 Labour Act Ordinance 1, counts as working time (i.e. the time usually spent on the way to the place of work must be deducted from the additional travel time on Swiss territory). The period of travel time determined in this way is deemed to be working time in accordance with the Labour Act, regardless of the means of transport the employee uses for the business trip and whether he or she is actually working during the travel time.

Swiss legislation is generally limited to situations that take place within national borders. Therefore, the time an employee spends on foreign territory (e.g. air travel, transfers, hotel stays, etc.) is not part of the regulation of nArt. 13 para. 3^{bis} Labour Act

Ordinance 1. The parties of the employment relationship may reach an individual agreement in this regard, unless there are mandatory foreign rules to the contrary or the regulations of a collective bargaining agreement or standard employment contract apply. In practice, travel time is often regulated unilaterally by instructions of the employer (Article 321d para. 1 Swiss Code of Obligations (CO)) in its regulations, especially in the working time regulations. This permits a standardised regulation for all affected employees, which can subsequently (unilaterally) be amended and thus adapted to new circumstances or legal provisions.

- **Statutory release from the permit requirement for night and Sunday work:** if the outward or return journey during a business trip to a foreign country takes place entirely or in part during the night or on a Sunday, no official permit is required for work during these working hours. This exception is expressly stipulated in nArt. 13 para. 3^{bis} Labour Act Ordinance 1. Wage supplements or time bonuses as well as substitute rest periods are, however, mandatory legal consequences of night or Sunday work and not affected by this exception. Consequently, they must still be paid or granted by the employer.
- **Commencement of the rest period:** the minimum daily rest period which the Labour Act generally defines as 11 consecutive hours (Article 15a para. 1 Labour Act) must be granted immediately after the return journey of the employee from the (cross-border) business trip. The rest period begins with the arrival of the employee at his or her place of residence. This corresponds to the rule for the return from a work location within Switzerland other than the contractual agreed place of work (Article 13 para. 3 Labour Act Ordinance 1).

² The revision led to a more precise wording of the mentioned provision in its German version.

To sum up, the statutory extension of Article 13 Labour Act Ordinance 1 regarding cross-border business trips provides clarity with respect to the described problem areas of the Labour Act and takes into account the principle of territoriality according to international law.

Wage Supplements (and Substitute Rest Periods) for Sunday Work and Public Holiday Work

NArt. 32a Labour Act Ordinance 1, which should be read together with Article 19 Labour Act, now regulates wage supplements in more detail when working on Sundays and public holidays (Article 19 para. 3 Labour Act). For the relevant distinction between «temporary» or «permanent and regularly recurring» Sunday work, one should refer directly to the new statutory definitions of nArt. 32a para. 1 and 2 Labour Act Ordinance 1 and not, as previously, to Article 40 para. 3 and 4 Labour Act Ordinance 1 setting out the delimitation criteria to determine the competent authority approving Sunday working. Nevertheless, the said legal definitions of Sunday work are widely consistent.

The employer remains obliged to pay wage supplements even if it only becomes apparent in the course of a calendar year that an employee, contrary to expectations, works on more than 6 Sundays, including public holidays (nArt. 32a para. 3 Labour Act Ordinance 1). With this regulation, the previous practice is newly anchored in the law; it follows the same guiding principle as Article 31 Labour Act Ordinance 1 which regulates the details of wage supplements and time bonuses payable and/or to be granted by the employer for night work. While the employer owes the compulsory wage supplements (50 %) only in the case of temporary Sunday work, a substitute rest period must be granted to the employee in any case of Sunday work. The latter is regulated in Article 20 para. 2 Labour Act as before.

Outlook and Recommendations

In view of the amendments due to the revision discussed herein, it is advisable to examine the necessity of adjusting the contractual framework, especially with respect to the new regulation on working hours during cross-border business trips. In particular, a company's working time regulations must, insofar as the employee is not already in a better position due to an existing regulation, be brought into line with the new minimum standard; i.e. at least the travel time for the outward and return journey on Swiss territory is, after the deduction of the time usually spent on the way to the place of work, considered working time.

Whether the employee must be involved in the process of amending the working time regulations depends on whether these regulations were issued (unilaterally) by the employer or (mutually) declared as an integral part of the employment contract. In the first case, the employer can make the changes without the employee's participation, whereas subsequent amendments to a specific working time regulation defined as part of the contract framework require the employee's consent. If, however, the employer and the employee have agreed that the company's working time regulations shall apply in their current version, the specific adaptation provisions of these regulations must be observed. The employee's consent may be required if his or her working conditions are adversely affected by the unilateral amendment of the regulations.

Finally, from the employer's point of view, it is, as prior to the revision, advisable to regulate the extent of the working time applicable on foreign territory as precisely as possible, particularly in the case of longer travel times and subsequent stays abroad.

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.

© Walder Wyss Ltd., Zurich, 2020

Contact persons



Ueli Sommer
Partner, Zurich
Phone +41 58 658 55 16
ueli.sommer@walderwyss.com



Philippe Nordmann
Partner, Basel
Phone +41 58 658 14 50
philippe.nordmann@walderwyss.com



Daniel Staffelbach
Partner, Zurich
Phone +41 58 658 56 50
daniel.staffelbach@walderwyss.com



Davide Jermini
Partner, Lugano
Phone +41 58 658 44 02
davide.jermini@walderwyss.com



Olivier Sigg
Partner, Geneva
Phone +41 58 658 30 20
olivier.sigg@walderwyss.com



Irène Suter-Sieber
Partner, Zurich
Phone +41 58 658 56 60
irene.suter@walderwyss.com



Christoph Stutz
Counsel, Zurich
Phone +41 58 658 56 57
christoph.stutz@walderwyss.com



Fabian Looser
Managing Associate, Basel
Phone +41 58 658 14 61
fabian.looser@walderwyss.com



Simone Wetzstein
Managing Associate, Zurich
Phone +41 58 658 56 54
simone.wetzstein@walderwyss.com



Alex Domeniconi
Senior Associate, Lugano
Phone +41 58 658 44 06
alex.domeniconi@walderwyss.com



Flora V. Palovics
Senior Associate, Lausanne
Phone +41 58 658 83 79
flora.palovics@walderwyss.com



Laura Luongo
Senior Associate, Geneva
Phone +41 58 658 30 21
laura.luongo@walderwyss.com



Jonas Knechtli
Senior Associate, Basel
Phone +41 58 658 14 82
jonas.knechtli@walderwyss.com



Gaurav Bhagwanani
Associate, Zurich
Phone +41 58 658 52 80
gaurav.bhagwanani@walderwyss.com



Nadine Mäder
Associate, Zurich
Phone +41 58 658 56 31
nadine.maeder@walderwyss.com



Yannik A. Moser
Associate, Basel
Phone +41 58 658 14 85
yannik.moser@walderwyss.com



Nathalie Möri
Associate, Zurich
Phone +41 58 658 53 03
nathalie.moeri@walderwyss.com



Nadja D. Leuthardt
Associate, Basel
Phone +41 58 658 14 62
nadja.leuthardt@walderwyss.com



Sarah Eichenberger
Associate, Zurich
Phone +41 58 658 58 69
sarah.eichenberger@walderwyss.com



Chiara Wirz
Associate, Zurich
Phone +41 58 658 52 46
chiara.wirz@walderwyss.com