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SWISS INVESTMENT REPORT* 4

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* The Swiss Investment Report is provided by Wenfei Attorneys-at-Law Ltd. ("Wenfei"), a Swiss law firm with its seat in Zurich, which has gained extensive experience in providing services in Greater China.

The Swiss Investment Report is especially designed for Chinese Investors, who are intending to extend their business to Switzerland or Europe or are already doing business in Switzerland.

Of course, the Swiss Investment Report is also addressed to any other person who is interested in obtaining background information on the Swiss investment-related legal framework as well as information on current developments in the Swiss legislation from a foreign investor's perspective.

Employment of Chinese and local staff in Switzerland – what is the legal framework?

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Employment of Chinese and local staff in Switzerland – what is the legal framework?

1. Topic

When establishing a new entity or acquiring a company in a foreign country, a foreign investor often wants to fill the key positions with its own managers and often intents to send its staff abroad.

This Swiss Investment Report focuses on two main issues, which have to be looked at, when sending personnel from China to Switzerland or recruiting local staff: (i) work permit and (ii) the Swiss employment law.

2. Work Permit

Foreign investors in China have experienced that setting up a foreign invested company can be a very time consuming, complex and costly undertaking. However, after the new company has been established, obtaining work and residence permit for its foreign employees is - in practice – generally only an administrative procedure to go through. Hence, the Chinese labor market for foreigners may be considered as relatively open. This is in contrary to the Swiss situation. The establishment of a company in Switzerland is a very simple procedure. However, foreign funded as well as domestically funded companies, not infrequently experience difficulties when they want to employ managers and/or staff with a non EU/EFTA[1] country.

Obtaining a work permit for employees, who are not Swiss nationals, EU/EFTA citizens or have not a permanent establishment in Switzerland or in an EU/EFTA-country, has become rather difficult in recent years. The main reasons for this development are the bilateral treaties, which have been concluded between the EU and Switzerland. One core principle of the bilateral treaties is the so-called "freedom of movement and residence". According to this principle, residents of Switzerland and EU/EFTA are basically entitled to work and live in Switzerland or any of the EU/EFTA countries without further permits. Since Switzerland with a population of approximately 7 Mio is a rather small country and anxious about too many foreigners moving to Switzerland, it has tightened the requirements for foreigners from outside the EU/EFTA countries, who apply for work permits.

[1] EU means European Union. EFTA means European Free Trade Association. Switzerland is not a member to the EU, but to the EFTA, and has entered into various bilateral treaties with the EU.

By holding a work permit, a foreigner has simultaneously obtained a temporary residence permit. Therefore, he or she is not required to apply for a separate residence permit.

A. Requirements

For persons, who are not EU/EFTA citizens and wish to apply for a work permit in Switzerland, the following requirements must be met:

1. The Federal Council has determined the maximum number of short-term and long-term work permits, which the state and local cantonal authorities may issue in each year. These numbers must not be exceeded.

2. Foreigners are only entitled to obtain a work permit, if the employer can proof that no suitable Swiss national, foreigner with a permanent residence/work permit or resident from an EU/EFTA-country may be found for the position in question (so-called "Native Priority").

3. Foreigners have to be employed to employment and salary conditions, which are usual for the particular place, profession and industry.

4. As a general rule, short-term work permits (usually up to 12 months, exceptionally up to 24 months) are only issued to executive managers, specialists and other qualified employees. For long-term work permits (from 12 months), it is additionally required that professional qualification, professional and social ability to adapt, language knowledge and age provide a basis for a sustainable integration in the Swiss labor market and society.

5. Notwithstanding the requirements mentioned in point 3 above, work permits may be issued for:

    a) Investors and entrepreneurs, who preserve or create new jobs;

    b) Acknowledged persons in the fields of science, culture and sport;

    c) Persons with special professional knowledge or skills, if there is a need for such persons;

    d) Persons, who are transferred within the higher management of international companies;

    e) Persons, whose employment in Switzerland is indispensable within economically important business relationships.

6. Foreigners are only entitled to a work permit, if they have a proper accommodation.

B. Documentation

The following documents have to be submitted:

1. The following documents have to be submitted:

2. Application letter (which may be submitted electronically)

3. Reasons for the application (including information on the employer and project)

5. CV

4. Certifications for qualifications

5. Employment Agreement or Dispatch Confirmation of the foreign employer (including information on salary, allowances and expenses)

6. Proof of recruiting efforts in Switzerland and the EU/EFTA ("Native Priority").

C. Practical Tipps

Obtaining a work permit for a non-EU/EFTA citizen or resident is difficult. Therefore, it is very important to comply with the requirements from the very beginning of the application procedure and provide the authorities with a comprehensive and persuasive application. Asking a specialized local law firm for assistance in such procedure is advisable; at least when a foreign invested company is applying for the first time for such work permits and has not gained much experience.

3. Swiss Employment Law

Basically, the Swiss employment law is liberal, or in other words employer-friendly. The Swiss Labor Act provides the mandatory framework for the protection of employee's physical health. The contractual relationship between the employer and employee is regulated in the employment contract law, whereas only a few key provisions of it are mandatory. Following are some of the main features of the Swiss employment law:

A. Conclusion of Employment Contract

With the exception of a few circumstances, there are no form requirements regarding the conclusion of an individual employment contract. It may be concluded orally or even tacitly, i.e. the employee provides services for an employer, which under the given circumstances are only to be expected for a salary. However, from the employer's as well as the employee's perspective, it is advisable to conclude a written contract. Firstly, the written contract serves as evidence and, secondly, some clauses, i.e. non-competition covenant, are only binding, if agreed in writing. Furthermore, as mentioned above, if a non Swiss or non-EU/EFTA citizen is employed, who has no residency in Switzerland, a written employment contract or dispatch confirmation is needed for the application for a work permit.

B. Working Hours

The ordinary working hours are regulated in the individual employment contract or for a specific industry, i.e. construction industry, in collective bargaining agreements. These are between 40 and 44 hours per week.

Additionally, the law provides a weekly maximum working time, which is for employees in industrial enterprises, for office, technical and other staff as well as sales personnel in large retail companies 45 hours. For the remaining employees, the maximum working time is 50 hours per week. These provisions, however, are not applicable for employees with a higher management function.

Working time exceeding the ordinary working hours up to the maximum working time is called "over working hours ("OWH"). The employee is obliged to provide OWH as he or she is capable and it is in good faith acceptable. Unless agreed to the contrary, the employee is entitled for an extra compensation of 25% for OWH. If the employee agrees to it, the employer may also compensate the OWH with free time, at least equivalent to the OWH.

Excess of the maximum working time is called overtime. Overtime must not be more than two hours per day and in total, overtime must not exceed 170 hours for employees with a weekly maximum working time of 45 hours and 140 hours for employees with a weekly maximum working of 50 hours per calendar year. Unless compensated with free time, overtime must mandatorily be compensated with an extra salary of 25%.

C. Employer's Duty

The employer shall respect and protect the personality of the employee, take care of his health and care for the protection of morals. The employer shall pay the salary, which is agreed or usual or determined by normal respectively collective bargaining agreements.

D. Employee's Duty

The employee has to fulfill his or her tasks with care and must obey the legitimate interests of the employer in good faith. The employee shall particularly operate and use machines, working utensils, technical equipment and facilities as well as vehicles professionally. During the term of employment the employee shall not work for a third party against payment, if he – by doing so - breaches his duty of loyalty, particularly competes with his employer. Furthermore, the employee shall not disclose secret information, particularly manufacturing or business secrets, which he has obtained during his employment. After the termination of employment, the employee is still bound to the non-disclosure duty, if it is required for the protection of the employer's legitimate interests. Finally, the employee must give account for everything, i.e. money, which he has obtained from third parties on behalf of the employer, and must render it immediately to the employer.

E. Probation Period

By law the probation period is one month. However, the parties may extend the probation period to a maximum of three months. During the probation period the employment may be terminated by either party with a notice of 7 days.

F. Termination of Employment

As a principle, employer as well as employee may freely terminate the employment contract, subject to the notice period agreed in the contract or according to law. During the first year the employment may be terminated with a notice period of one month, from the second year until ninth year with a notice period of two months and from then onwards with a notice period of three months, each time by the end of a month. The notice period may be changed. It must not be shorter than one month, unless agreed in a collective bargaining agreement and only for the first year.

Unless a termination of employment is abusive, neither the employer nor the employee has to pay compensation. The notice of termination of an employment relationship is abusive if a party gives it:

a) because of a quality inherent in the personality of the other party, unless such quality relates to the employment relationship or significantly impairs cooperation within the enterprise;

b) because the other party exercises a constitutional right, unless the exercise of such right violates a duty of the employment relationship or significantly impairs cooperation within the enterprise;

c) to solely frustrate the formation of claims of the other party arising out of the employment relationship;

d) because the other party asserts in good faith claims arising out of the employment relationship;

e) because the other party performs compulsory Swiss military service, civil defense service or a legal duty not voluntarily assumed.

The notice of termination of the employment relationship by the employer is, moreover, abusive, if it is given:

a) because the employee belongs or does not belong to an employee association, or because he lawfully exercises a union activity;

b) during the period the employee is an elected employee representative in a company institution or in an enterprise affiliated thereto, and, if the employer cannot prove that he had a justified motive for the termination;

c) in connection with a mass dismissal without prior consultation with the employees' representative body or, if there is none, the employees.

Exceptionally, with good reason the employee as well as the employer may terminate the employment without prior notice. Good reasons are particularly any circumstances, which, in accordance with the principle of good faith, render the continuation of the employment unacceptable for the person who terminates the employment. In practice, the threshold for the assumption of a justified immediate termination is high.

G. Non-Competition Clause

The employee with capacity to act may undertake not to compete with the employer after the termination of the employment, particularly not to run his/her own business, which competes with the employer's business, nor to work for such a competing business as employee nor to take a stake in such a competing business.

The undertaking must be in writing. Furthermore, the con-competition covenant is only binding on the employee, if during the employment the employee had access to the clientele or fabrication or business secrets and the usage of such knowledge might materially damage the employer. The covenant not to compete must be reasonably limited with respect to place, time and object; so that an inequitable aggravation of the employee's economical advancement is excluded. Subject to special circumstances, the covenant not to compete must not be longer than three years.

The employee shall pay damages to the employer, if he breaches the non-competition obligation. The parties may agree on a contractual penalty for breaching the non-competition covenant. Unless otherwise agreed, the employee has the right to release himself from the non-competition obligation by paying the contractual penalty. The non-competition obligation ceases to exist, if (i) the employer does not have a material interest to keep it up, (ii) the employer terminates the employment, but the employee has not given a good reason for such termination; or (iii) the employee terminates the employment and the employer gave a good reason for such termination.

4. Conclusion

The Chinese investor in Switzerland has to keep in mind that obtaining a work permit for its managers and, particularly lower level staff, is not an easy administrative task. He shall be well prepared for such application and take into consideration administrative hurdles, which he might face. On the other hand, the Swiss employment law is rather flexible and employer-friendly. Particularly, compared to other European Countries and China, Switzerland has very long working hours and, unless it has been abusive, a termination with prior notice does not require the employer to pay compensation.

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