

NEWS

OBLIGATION TO ADVISE VACANCIES AND BITCOINS AS SALARY – WHAT EMPLOYERS SHOULD KNOW

OBLIGATION TO ADVISE VACANCIES

Following the Swiss people's acceptance of the initiative "Contre l'immigration de masse", the Parliament was compelled to implement an obligation to advertise vacancies within positions subject to high unemployment rates, in order to ensure national preference. The obligation aims to promote job seekers in Switzerland within the labor market. The new provisions and their repercussions for employers are laid out below.

Applicable provisions

On July 1st, 2018, art. 21a of the Federal Act on Foreign Nationals and art. 53a and following of the Ordinance on Recruitment and the Hiring of Services will come into force. These new provisions introduce an **obligation for employers to advertise vacancies** to the public employment service for occupations (the "ORP") where the national unemployment rate is of 8% or more. As of January 1st, 2020, this threshold will be lowered to 5%. The list of concerned occupations is available on the following website, <https://www.travail.swiss> (the « Job Room »), which is intended to receive vacancies advertisements. Additionally, the advertised vacancies will be **banned from other means of advertising** (e.g. within the press, on internet, etc.) **during 5 working days** as of the date of publication of the vacant occupation in the Job Room.

In order to give priority to the registered job seekers, the ORP will, within 3 working days following the publication of the advertisement in the Job Room, provide the employer with the details of available job seekers whose profiles are relevant or inform said employer if none are available. If the ORP sends matching profiles, the employer shall invite to an interview or a professional skill test any applicant he considers appro-

From July 1st, 2018, employers will have to comply with new requirements when hiring workers in some business sectors. These obligations will be explained hereinafter.

Virtual currencies like Bitcoin are in the spotlight and are gaining importance in the real economy. This also raises the question of whether salary payments are permitted in cryptocurrencies and what has to be considered.

appropriate. The employer shall keep the ORP informed and indicate a) which applicants are considered appropriate and which applicants have been invited to a job interview or a professional skill test, b) if a suggested applicant has been hired and c) if the position remains vacant.

Exemptions

However, the employer does not have to advertise vacant positions, when a) the vacant position is filled by a person who has been working for at least 6 months within the company, b) the vacancy is filled by a family member of an authorized signatory of the company, c) the employment is not envisaged for more than 14 calendar days, d) the employer voluntarily hires a job seeker registered with an ORP.

Penalty in case of breach of obligation to advertise vacancies

It should also be noted that the breach of the obligation to advertise vacancies or requirement to conduct an interview or skill test constitutes a **criminal offense** which can result in a fine amounting up to CHF 40'000.-.

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BITCOINS AS SALARY

The Federal Councilor Schneider-Ammann hopes that Switzerland will become a crypto-nation, and the State Secretariat for International Financial Matters creates a working group to review the legal framework to identify, among other things, the need for action on virtual currencies. Until legislators issue specific provisions for virtual currencies, however the question arises as to whether employees can currently be paid, for example, with bitcoins.

What is the Bitcoin?

Nowadays, Bitcoin is the main virtual currency. Bitcoin, as a virtual currency, performs the same functions as traditional money, however it can only be traded on the internet. Moreover, it should be noted that Bitcoin, similar to other virtual currencies, is based on blockchain technology. The decentralised nature of this technology, means that it is not controlled by the State and that its rate can consequently be subject to significant fluctuations. Despite this lack of state regulation and its high potential volatility, Bitcoin can nevertheless be converted into the most important traditional currencies.

Bitcoins as salary

Considering the fact that freedom of contract also applies to employment contract, it is not impossible to contractually provide that the salary will be paid in Bitcoins (e.g. 1 Bitcoin per month; at the end of June 2018, one Bitcoin corresponds to approximately CHF 6'000.-). However, since Bitcoin is not a legal tender in Switzerland, such remuneration will be qualified as salary in kind, respectively as a salary in foreign currency.

Furthermore, to assess the eligibility of a salary in Bitcoins, account must also be taken of the function attributed to the salary, namely furnishing the worker the means to support himself. This function has also led the legislator to provide some mechanisms aimed to prevent employers from evading their obligation to pay salary, or to reduce the risk of a loss of salaries for workers (e.g. onerous nature of the employment contracts, prohibition of discrimination, certain predictability of salary levels, prohibition on employers transferring the risks of exploitation to the workers, etc.).

Finally, the Bitcoin rate and to an even greater extent other virtual currencies, may fluctuate significantly with the result that the amount of the salary will increase or decrease.

Selected issues and potential solutions

The increase of Bitcoin's price does not allow the employer to reduce unilaterally the salary (e.g. payment of 0.6 Bitcoin instead of 1 Bitcoin). However, the risk of an increase in the price of Bitcoin may be reduced if the employment contract gives the employer the option to pay a predetermined amount in Swiss francs instead of the salary in Bitcoins. Such an option must be distinguished from the possibility for the employer to pay in Swiss francs a salary in Bitcoins. In such a case, the employer can only choose to pay the equivalent in Swiss francs of the salary in Bitcoins, but must bear the full consequences of the increase in the price of Bitcoin.

On the one hand, the employer bears the risk of an increase in the price of Bitcoin, on the other hand the employee bears the risk of a price decrease. In extreme cases, it is even possible that the worker must work for free, which contradicts the fundamental principle according to which the worker performs his service for remuneration. A similar situation may arise where the employment contract provides that the remuneration is composed exclusively of variable elements such as provisions. In this type of situation, the worker is only paid when he provides clients or business to his employer and if he fails to do so, he is not paid. According to the case law of the Federal Court, such contracts are admissible provided that, on average, the worker receives a sufficient salary for his work. The worker will thus have to bear any decrease in his salary, provided that the sum of salaries received over several months is sufficient.

If we transpose this reasoning to a salary in Bitcoins, it means that it would be eligible on the condition that the fluctuations of the price do not prevent the employee's salary to be sufficient on average. To ensure this, the employment contract could, for example, guarantee a minimum salary in Swiss francs.

To assess the eligibility of a salary in Bitcoins, it is still necessary to ensure that this does not transfer the risks of the exploitation onto the worker. Indeed, as indicated before, the risks of exploitation must be borne exclusively by the employer. Thus, it would be problematic that the payment of a salary in Bitcoins allows the transfer of the risks related to the fluctuation of the price, whereas in the absence of such salary, these risks would have been borne by the employer.

Finally, it should be noted that the use of Bitcoins

does not pose any particular problem for fringe benefits (e.g. a bonus). Indeed, in such a situation, the worker still receives his basic salary.

Conclusion

As Bitcoins and other virtual currencies become increasingly more important in the real economy, companies may be more tempted to use these currencies to pay their employees. In fact, offering salaries in Bitcoins can allow an employer to emphasize its innovative side. Nevertheless, we believe that the lack of stability in the exchange rate of this currency does not, at the moment, make

it possible to accept an agreement providing for the payment of a specified number of Bitcoins as the sole salary. Thus, the establishment of such salaries will require the establishment implementation of mechanisms to protect both the worker and the employer. Furthermore, in order to be able to benefit optimally from the advantages of a salary in Bitcoins, the potential solutions outlined above must be explored and adapted into specific cases. If not, it will not be possible to exclude the risk of a significant increase in salary costs or, in the event of decrease or fall of the prices, the risk of disputes arising under labour law.



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