



The Legal 500 Country Comparative Guides Switzerland EMPLOYEE INCENTIVES

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This country-specific Q&A provides an overview of employee incentives laws and regulations applicable in Switzerland.

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SWITZERLAND

EMPLOYEE INCENTIVES



1. What kinds of incentive plan are most commonly offered and to whom?

We estimate that incentive plans providing for performance-based cash payments are most common in Switzerland. Apart from cash payments, many incentive plans provide for shares or options to acquire shares of the employer company or an affiliated company within the same group of companies. The terms and conditions of the different incentive plans vary significantly so that each incentive plan must be analysed carefully.

2. What kinds of share option plan can be offered?

There are no specific types of share option plans under Swiss law. Therefore, share option plans may vary significantly depending on the size of the company and the beneficiaries of the plan.

Typically, share option plans grant the option to employees to buy shares at a defined price (which can be lower than market value) or to receive shares for free. The option is normally subject to a vesting period following which the entitled employee may exercise its option during a fixed period. In case an employee leaves the company, the non-vested options usually laps and the exercise period of an already vested option is reduced significantly.

3. What kinds of share acquisition/share purchase plan can be offered?

In Switzerland, popular share acquisition / share purchase plans entitle employees to buy shares at a discounted price or to receive free shares. Employees are generally not allowed to trade such shares during a certain period.

Other less common share acquisition / share purchase plans consist of incentives for employees to buy shares in the company (Share incentive plans [SIP] and Share matching plans [SMP]). Such plans typically include a

matching element, i.e. the company grants discounted or free shares according to the number of shares the employee purchases. The discounted or free shares are usually subject to vesting conditions as well.

4. What other forms of long-term incentives (including cash plans) can be offered?

Common forms of long-term incentive other than share (option) plans are phantom share (option) plans.

Under a phantom share option plan, the employee is granted the option to exercise such option at a fixed exercise price and to receive a cash amount that consists of the difference between the market value of the underlying company shares and the fixed exercise price.

A phantom share plan offers the possibility for employees to buy "virtual" or "phantom" shares in the company that reflect the value of the actual shares. Economically, phantom shareholders are treated as actual shareholders, i.e. phantom shareholder benefit from the increase of value of the actual shares. However, phantom shares have no voting rights and are not entitled to receive dividends (usually phantom shareholders receive an equivalent cash payment instead). By selling phantom shares, employees receive a cash payment equivalent to the market value of the underlying actual shares. The right to sell phantom shares may be linked to a specific "exit event". Phantom shares cannot be traded and only sold back to the company.

5. Are there any limits on who can participate in an incentive plan and the extent to which they can participate?

Eligible employees are determined by the incentive plan itself. It is accepted to treat employees differently on objective grounds. Consequently, incentive plans often distinguish between different management levels.

However, due to the principle of equal treatment of employees in Swiss employment law, participation rights shall be granted to all employees belonging to the same employee group. Therefore, the employer may include individual groups of employees in an incentive plan but may not only select individual employees within the group to be eligible to participate in an equity incentive plan.

Non-employees (e.g. consultants) may also be included in incentive programs. However, in light of the prospectus requirements the company is advised to strictly limit the non-employee participants.

6. Can awards be made subject to performance criteria, vesting schedules and forfeiture?

As a rule, the contracting parties of an incentive plan are free to agree on performance criteria, vesting schedules and forfeiture rules under Swiss law. Case law of the Swiss Federal Supreme Court may however limit the extent of validity and enforceability of the terms and conditions of an incentive plan with the effect that employees may claim for variable remuneration where this was not intended. To safeguard the voluntary character of an incentive remuneration, it is highly recommended to draft the plan carefully considering the case law of the Swiss Federal Supreme Court.

7. Can awards be made subject to post-vesting and/or post-employment holding periods. If so, how prevalent are these provisions both generally and by reference to specific sectors?

In principle, awards may be made subject to post-vesting and/or post-employment holding periods. Depending on whether the award forms part of the employee's salary, however, those clauses may not be enforceable. If the variable remuneration of the employee is voluntary in its legal nature, post-vesting and post-employment holding periods are valid and enforceable under Swiss employment law. There is an abundance of case law of the Swiss Federal Supreme Court on the question whether awards under an incentive plan form part of the employee's salary or whether this remuneration has a voluntary character.

8. How prevalent malus and clawback provisions are and both generally and by

reference to specific sectors?

In the last few years, malus and clawback provisions have become increasingly widespread in incentives schemes, not only in the Swiss financial sector but also in many other commercial branches such as the pharmaceutical industry or the insurance sector. For financial institutions, malus and clawback provisions are recommended by the Swiss Financial Market Supervisory Authority FINMA.

Under Swiss employment contract law, however, the validity or enforceability of malus and clawback clauses may be limited in some instances. Due to recent case law of the Swiss Federal Supreme Court, it must be carefully examined in each case to what extent the parties may validly agree on terms and conditions regarding variable remuneration of employees.

9. What are the tax and social security consequences for participants in an incentive plan?

(i) on grant;

Pecuniary benefits from employee participations, with the exception of blocked or unlisted options as well as contingent rights to employee shares, are taxable as income from employment and are subject to social security contributions at the time of acquisition. The taxable base corresponds to its market value less any purchase price.

In the case of employee shares, blocking periods are taken into account with a discount of 6 percent per blocking year on their market value, for a maximum of 10 years.

(ii) on vesting;

The vesting itself does not trigger any taxation.

(iii) on exercise;

Blocked or unlisted options as well as contingent rights to employee shares are taxed and subject to social security contributions at the time of sale or exercise of the option or the conversion of the contingent right into employee shares.

The taxable benefit corresponds to the market value of the share when exercised less the exercise price.

(iv) on the acquisition, holding and/or disposal of any underlying shares or securities; and

See above (i) and (iii).

(v) in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan.

Interests shall be calculated at market level and are generally deductible by the employee for income tax purposes. If the interest is charged below arm's length, the benefit may be considered employment income for the participant.

10. What are the tax and social security consequences for companies operating an incentive plan?

(i) on grant;

In case of pecuniary benefits from employee participation, apart from blocked or unlisted options as well as contingent rights to employee shares, the employer must deduct and settle the social security contributions at the time of acquisition by the participant.

In case of employees that are not Swiss nationals or do not have a C-permit, the employer must deduct income taxes at source.

(ii) on vesting;

The vesting itself does not trigger any taxation.

(iii) on exercise;

For blocked or unlisted options as well as contingent rights to employee shares, the employer must deduct and settle social security contributions at the time of sale or exercise of the option or the conversion of the contingent right into employee shares.

In case of employees that are not Swiss nationals or do not have a C-permit, the employer must deduct income taxes at source.

(iv) on the acquisition, holding and/or disposal of any underlying shares of securities;

See above (i) and (iii).

(v) in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan.

Interests shall be calculated at market level and charged

to the participant.

11. What are the reporting/notification/filing requirements applicable to an incentive plan?

Reporting obligations apply only in connection with tax and social security matters. The company has to report details of grants and monetary benefits on the annual certificate of salary (Lohnausweis). Employees have to report the monetary benefits resulting from a plan in their annual tax returns, based on the annual certificate of salary issued by the employer. Please see question 10 for tax and social security consequences.

12. Do participants in incentive plans have a right to compensation for loss of their awards when their employment terminates? Does the reason for the termination matter?

Generally, employees do not have a claim for compensation for loss of their awards if they resign from employment. It will, however, depend on the terms of the incentive plan, whether the reason for the termination matters. There are also plans providing for compensation although the employee resigned. Moreover, if awards form part of the employee's salary pursuant to the case law of the Swiss Federal Supreme Court, employees have a claim for their awards and awards may not be forfeited at the end of employment although plans may provide for the contrary. As the rules of Swiss case law on this point are rather complex and as the wording of each plan differs significantly, it must be carefully examined in each case whether an award forms part of the salary and if the employee has a claim.

13. Do any data protection requirements apply to the operation of an incentive plan?

The general principles regarding the processing of personal data of employees are applicable. The employee must be informed on how and for which purposes his or her data are processed. Only employee data may be processed under Swiss law that are necessary for the operation of the incentive plan.

If the operation of the incentive plan requires transferring employee data abroad, employers must adhere to the provisions of cross-border disclosure. As a principle, personal data may be transferred abroad only if the legislation in the receiving country provides for

adequate data protection from a Swiss point of view. That is not the case with U.S. legislation on privacy rights and data protection for the time being.

Employers subject to Swiss data protection legislation are required to take enough protective measures, if the level of data protection is not adequate in the receiving country. For example, contractual clauses must be put in place to safeguard the personal data that are transferred abroad.

To the extent that the administrator of the incentive plan and/or the issuing company, if any, are not subject to Swiss data protection law, Swiss employers must contractually ensure that those data administrators and/or companies comply with the provisions of Swiss data protection law.

14. Are there any corporate governance guidelines that apply to the operation of incentive plans?

The Swiss Code of Best Practice for Corporate Governance, issued by the Swiss corporate union "Economiesuisse", recommends taking into account the effects of the implementation of a share (option) plan. In case of deferred compensation that is share-based, the Board shall use appropriate performance criteria and matching maturities. Large Swiss companies usually comply with these recommendations on a voluntary basis.

15. Are there any prospectus or securities law requirements that apply to the operation of incentive plans?

In situations where a foreign or Swiss company issues new shares and such an issue is considered a "public offering", a prospectus may be necessary pursuant to the Swiss Financial Services Act ("FinSA"; in force since 1 January 2020). Exemptions may apply in respect of the type of offer, the type of securities or for admission to trading: For example, if the public offer is addressed at less than 500 investors, no prospectus has to be published, as an offer to a limited group of investors is not to be deemed as "public". Furthermore, no prospectus has to be published where securities are involved which are offered or allocated by employers or affiliated companies to current or former members of the board of directors or management board or their employees.

With respect to shares listed or traded on a stock exchange, participants have to consider the regulations

concerning insider trading regulations. Participants who have inside information are not allowed to trade in options and shares during certain periods. Inside trading is punishable under the Swiss Criminal Act.

16. Do any specialist regulatory regimes apply to incentive plans?

There are no specialist regulatory regimes that apply to incentive plans.

17. Are there any exchange control restrictions that affect the operation of incentive plans?

Listed companies have to disclose key elements of any employee share (option) plan in their annual report. Specific disclosure obligations apply to manager. In particular, substantial transfers by members of the management are subject to ad hoc publicity.

Swiss law provides for publicly listed companies to have all fixed and variable compensation approved by the shareholders' meeting and to issue a compensation report (Ordinance against Excessive Remuneration in listed companies limited by shares [ERCO]). Moreover, the articles of association must include the principles of any incentive plan. Any equity-based remuneration has to meet the principles included in the articles of association.

18. What is the formal process for granting awards under an incentive plan?

Eligible employees sign an award agreement agreeing to participate in the plan and acknowledging the terms of the plan and award. There are no further specific requirements to be signed and/or acknowledged by the employee.

19. Can an overseas corporation operate an incentive plan?

Swiss employees may participate in incentive plans offered by overseas companies. The extent to which Swiss employment law applies to such overseas incentive plan is unclear. It is recommended to have incentive plans, for which Swiss employees are eligible, to be reviewed and, if necessary, modified in order to comply with Swiss employment law requirements.

20. Can an overseas employee participate in an incentive plan?

Companies are free to determine the employees to be eligible to participate in an incentive plan. This includes overseas employee.

21. How are share options or awards held by an internationally mobile employee taxed?

Employee options or contingent rights to employee shares that the participant acquired during a period in which he was resident abroad and which he realizes after moving to Switzerland are being “imported” employee options/shares under Swiss laws. “Imported” employee participations are taxed at the time of grant and can be realized tax-free in Switzerland.

Earned income of “imported” employee participations which are taxed under Swiss law at the time of realization, is taxed proportionally only, if there has been a change of residence between the time of grant and the realization of the employee participation. The pecuniary benefit will be taxed as a proportion at the ratio between the total time of the vesting period and the time spent in Switzerland.

In case of an “export” of employee participations that are taxed under Swiss law at the time of the realization, the proportional taxation at the ratio between the total time of the vesting period and the time spent in Switzerland applies accordingly. Tax at source applies.

22. How are cash-based incentives held by an internationally mobile employee taxed?

Cash-based incentives held, such as Phantom Stocks or Stock Appreciation Rights, that the participant acquired during a period in which he was resident abroad and

which he realizes after moving to Switzerland, are being “imported” employee incentives.

Earned income of “imported” cash-based incentives which are taxed under Swiss law at the time of realization, is taxed proportionally only, if there has been a change of residence between the time of grant and the realization of the employee participation. The pecuniary benefit will be taxed as a proportion at the ratio between the total time of the vesting period and the time spent in Switzerland.

In case of an “export” of the cash-based incentives that are taxed under Swiss law at the time of the realization, the proportional taxation at the ratio between the total time of the vesting period and the time spent in Switzerland applies accordingly. Tax at source applies.

23. What trends in incentive plan design have you observed over the last 12 months?

Startup companies regularly use phantom share (option) plans in order to keep a small and manageable shareholder base but at the same time allowing employees to participate in the growth of the company.

24. What are the current developments and proposals for reform that will affect the operation of incentive plans over the next 12 months?

There are currently no reforms pending that target specifically the operation of incentive plans. In general, the Swiss company law revision is expected to be put into effect at the beginning of 2023. The revision replaces the Ordinance against Excessive Remuneration in listed companies limited by shares (ERCO) by federal law.

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