Economic downturns and staff reduction

What companies need to consider in practice

Recently, numerous Swiss companies have announced job cuts (see here). They usually justify this with the weak economic situation, which is also likely to see modest growth in 2024 according to SECO forecasts (see here). To many experts, this is a delayed consequence of the pandemic.

Redundancies pose a challenge on many levels. For this reason, companies planning larger job cuts should start preparing well in advance and particularly familiarize themselves with the legal stumbling blocks to avoid any unpleasant surprises afterwards.

In this article we summarize the most important practical problems and aspects of a staff reduction.

What problems typically arise in practice?

There may be a wide range of problems and reactions from employees in redundancy situations. Among the most common are the following:

- Decline in motivation and adverse effects on operational processes (including sickness-related absences)
- Lack of communication with and organization of (and with) the employees (e.g. works council)
- Unforeseen natural staff turnover prior to the issuance of terminations
- Uncertainty whether a mass dismissal is present from a legal perspective and/or whether a ‘business’ is affected and whether a social plan obligation applies
- Violation of confidentiality obligations and disclosure of internal information
- Media reports and possible handling by external associations and/or trade unions
- Correct payroll and tax accounting as well as exemption from certain social security contributions

How do companies deal with the inherent loss of motivation?

This issue is often difficult to tackle in practice, as a loss of motivation is characteristic for any redundancy scenario. Some companies try to overcome this by offering contractually agreed sprint bonuses that are linked to the achievement of certain targets (e.g. clean handover). Further, they tend to be more generous when it comes to granting

(voluntary) bonus payments in a given year. Nonetheless, such payments often have limited impact, as the workload is particularly high during transition phases. Also, such payments are contingent on the business having sufficient financial strength. Finally, the prospect of social benefits may alleviate the situation to a certain extent.

Can an employer dismiss a large number of employees without further ado?

As a general rule, an employer has the right to terminate employees in accordance with the agreed notice periods and modalities (e.g. in writing). However, statutory blocking periods remain reserved (e.g. triggered by illness or accident through no fault of the employee), during which no notice of termination may be given for a limited period of time. Regardless, terminations can be considered abusive if they are issued for a reason that is not permitted by law (e.g. due to ethnicity or in response to the assertion of rights). In such cases, penalties of up to six months' salary may be due.

However, special procedures need to be followed in case of mass dismissals. Irrespectively, if the applicable cantonal thresholds are reached (generally 6 or 10 dismissals), the competent government office must be provided with certain minimum information before any terminations are issued. Failing to do so may result in a fine.

What constitutes a mass dismissal?

A mass dismissal occurs when an employer in a business, with usually more than 20 employees, terminates a certain number of employees within 30 days for operational reasons. The thresholds are specified in the law:

Number of employees usually working in the business*	Minimum number of dismissals, for a mass dismissal to be present
21 to 99 employees	10
100 to 299 employees	10% of the workforce
At least 300 employees	30

In determining the number of employees usually employed, the "headcount" is decisive. Nonetheless, the used reference period is critical. To date, neither the law nor the Federal Supreme Court has defined a binding reference period, causing frequent headaches in practice. This is why a careful preliminary analysis is indispensable.

What is the relevant business*?

In order to avoid a mass dismissal, employers are sometimes tempted to define the business rather narrowly or broadly, as the situation may require. Therefore, the key question is: what constitutes a relevant business. The Swiss Federal Supreme Court defines a business as "an organized structure that is equipped with personnel, tangible and intangible resources that enable it to achieve its work objectives and that enjoys a certain degree of autonomy, without this autonomy having to be of financial, economic, administrative or legal nature". Hence, it is possible and fairly common for an employer in the legal form of a limited company to have several businesses. Most recently, the Swiss Federal Supreme Court for example ruled that each post office is deemed to be an independent business.

Whether, for example, an own IT department or a production site qualifies as autonomous business, should therefore be assessed by legal and corporate strategy experts.

In the event of a mass dismissal, what are the main obligations of the business concerned?

The employees of the business must be adequately informed and consulted before any terminations are issued, so that they have the opportunity to submit proposals on how the redundancies can be avoided, limited and/or their consequences mitigated. Such consultation must be initiated as soon as it is clear that a mass dismissal is a valid option.

While the information must be provided in writing, there are no formal requirements for the consultation procedure. The law is silent on the duration and structure of the consultation phase, which has led to different approaches being adopted in practice depending on the industry, company size and culture as well as the number of terminations. Further, employers must give appropriate notification of the initiation and conclusion of a consultation procedure, including the results, to the competent cantonal employment office.

Careful preparation for a potential mass dismissal is absolutely crucial in practice from a human, operational, legal and communication perspective. A coordinated approach between all areas helps everyone involved to cope with this difficult situation.

At the same time, the communication aspects and planning for the continuation of business operations should not be underestimated, especially with regard to customer relationships (including any associated obligations).

Is an employer bound to the consultation proposals of the employees?

No, the employer is generally not bound to follow the employees' suggestions. However, the law does require the employer to seriously consider the proposals and likely to provide an opinion on them.

However, in practice, an outright rejection of the proposals would typically lead to great frustration among employees. This is why employers are well advised, if their financial situation permits it, to carefully consider the proposals and take them into account if necessary – not least to keep the affected employees motivated during the transition phase. It is recommended to maintain a direct exchange with employees (or their elected representatives), e.g. in staff meetings.

Having a transparent and well thought out communication strategy is key, not least because waves of redundancies are often picked up by the media, which in turn increases the pressure on the company. What has proven helpful in practice are regular written FAQs that address the questions expressed or expected by employees.

What happens if the mass dismissal procedure rules are not observed?

Any employee who is dismissed as part of a mass dismissal could allege unfair dismissal and claim up to two months' salary as a penalty. Particularly in cases where there was no or insufficient notification or communication to the employment office, the dismissals could also be void, which would lead to a considerable delay and increase the cost of the mass dismissal.

Is it mandatory for an employer to establish a social plan in any case?

No, a social plan only has to be negotiated if the relevant company or employer (a controversial issue among scholars) usually employs at least 250 employees (collective labor agreements remain reserved).

There is no legal requirement as to when the social plan must be negotiated. Nonetheless, in practice, it is advisable to start negotiations as early as possible (e.g. parallel to the consultation procedure and beyond).

Depending on the circumstances, the negotiating partner is the (entire) workforce, the employee representatives (if any) or the trade union (which is a party to the applicable collective labor agreement).

Even where there is no obligation to establish a social plan, many employers in practice establish benefit plans under which they then voluntarily grant certain social benefits.

Finally, many employers try to align the social benefits they offer in advance with other (known) social plans or benefit packages, which in practice often proves difficult, as these are mostly kept under wraps. Moreover, the respective circumstances are many times not similar (e.g. financial strength of the employer and employee demographics).

What happens if the compulsory social plan negotiations fail?

Either negotiation party can appeal to an arbitration tribunal to bindingly determine a social plan. This compulsory arbitration process is a novelty in Swiss law and has been widely criticized for leaving many procedural issues, such as legitimacy and applicable procedural principles, unresolved. This is why both employers and employees often shy away from going to arbitration. Due to the uncertain application of certain procedural principles, employers are sometimes tempted to initially offer lower social benefits so that they are not (de facto) bound to any higher initial positions during arbitration proceedings.

In addition, only a few arbitration rulings are (publicly) known in Switzerland, which is why such rulings likely are rather rare.

Are there ways to optimize social benefits from a social security and tax law perspective?

Principally, every social benefit is deemed to have been received under the employment relationship, which is why the general social security and tax law rules apply. There are, however, situations, particularly in the case of mass dismissals, in which certain social benefits are exempt to a limited extent from the obligation to pay social security contributions. Under local tax laws, social benefits may e.g. be taxed preferentially if they have a pension character. Additionally, the salary statements must also be prepared correctly.

Before negotiating a social plan or offering social benefits, the respective social benefits should therefore be carefully assessed from a social security and tax law perspective to achieve the best possible outcome for employees and employers and, above all, avoid paying unpleasant additional social security contributions for employers in hindsight.

Which steps should an employer take in the event of a staff reduction in conclusion?

Assessment of whether a staff reduction is a legitimate possibility or whether it can be prevented or mitigated

- Assessment of whether the planned redundancies fulfill the requirements for a mass dismissal
- If so, it is indispensable to plan and observe the necessary information and consultation procedures, communicate with employees and notify the relevant cantonal authorities
- Identification of and, if necessary, communication with other interest groups (e.g. media, associations, trade unions)
- Assessment of whether a social plan obligation applies to the employer and whether other obligations such as notification obligations (threshold values) or collective labor agreements are applicable
- Assessment of whether any social benefits can be optimized from a social security and tax law perspective

During all these steps, careful preparation and close coordination between the various areas is essential. In the event of larger job cuts, apart from financial and legal experts, communication, tax & social security as well as accounting experts should always be consulted as well.

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