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Employment

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Modification of the Federal Act on Gender Equality

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Key Take-aways

- 1.** In December 2018, the Swiss Parliament adopted a revision of the Federal Act on Gender Equality, which will enter into force on 1 July 2020.
- 2.** The new provisions require employers with a workforce of at least 100 employees to conduct an internal equal pay analysis.
- 3.** The analysis will have to be verified by an independent body and its results will have to then be communicated to employees.

1 Background

Since 1981, the Federal Constitution of the Swiss Confederation stipulates that "*Men and woman have the right to equal pay for work of equal value*". In addition, on 1 July 1996 the Federal Act on Gender Equality ("**GEA**"), which prohibits discrimination based on sex in the field of employment, entered into force.

Thus, **the prohibition of pay inequality between women and men** has been firmly anchored in Swiss legislation for several decades.

However, according to the Federal Office for Gender Equality ("**FOGE**") and the Federal Statistical Office, the principle of equal pay for women and men has still not yet been achieved in Switzerland. The legislator has therefore deemed it necessary to **strengthen existing protection measures** by introducing new provisions.

On 5 July 2017, the Federal Council proposed an amendment to the GEA to enable **better implementation of equal pay**. Concretely, the new provisions provide for **three stages**: an equal pay analysis, verification of the analysis by independent third parties and the communication of information to employees on the results of the analysis.

The Parliament adopted the amendment to the GEA on 14 December 2018. The referendum deadline expired on 7 April 2019.

On 21 August 2019, the Federal Council set the 1 July 2020 as the date for the entry to come into force of the amendment to the GEA, and adopted an ordinance on the verification of equal pay analysis.

The new provisions will apply to **both the private and public sectors**. The GEA applies to all employers, regardless of the sector or industry to which they belong. For this reason, the obligation to carry out an analysis and have it verified applies in principle to both sectors across all industries.

analysis and any costs incurred will be at their own expense.

The equal pay analysis should in principle **be repeated every four years**. If the number of employees falls below the threshold of 100 during this period, it must be repeated only when the number of 100 is reached again.

However, the new provisions provide that if the equal pay analysis indicates that equal pay is respected, the employer is relieved of the obligation to repeat the analysis. Thus, if the analysis carried out between July 2020 and June 2021 demonstrates that equal pay is respected, the employer will not have to repeat the analysis four years later. Otherwise, the employer will have to repeat the analysis between the 1 July 2024 and the 30 June 2025.

In addition, the new provisions provide for **exemptions** from the obligation to conduct an analysis in certain cases. Employers who during the year are subject to an equal pay analysis as part of a public procurement procedure or an application for subsidies are exempted from carrying out such a pay analysis again. Employers who have already been subject to such an analysis during the previous four years are also exempted, provided that the analysis has shown compliance with equal pay.

The new provisions specify that the equal pay analysis must be carried out following **a scientific method, which complies with the law**.

The employers can carry out the analysis themselves for example by using the complimentary tool provided by the Confederation (called Logib). Indeed, the Swiss Confederation has developed a self-review tool (Logib) for companies with at least 50 employees, which can be accessed on the FOGE website (<https://www.ebg.admin.ch/ebg/fr/home/prestations/logib.html>).

When the analysis is done using a method other than the federal tool, employers must submit evidence of its scientific quality and compliance with the law. The evidence must include explanations on how to verify the analysis in question. Its scientific quality and legal conformity must also be validated by an independent body (e.g. university, research institution, public administration or court).

The concerned companies must have carried out an equal pay analysis by the end of June 2021 at the latest.

2 Equal pay analysis

The new provisions **require employers employing 100 or more workers** to carry out an internal **equal pay analysis**. 0.9% of the companies employing 46% of all employees in Switzerland should be subject to these provisions.

To determine which employers have a workforce of at least a 100 workers, the calculation must take into account the number of employees at the beginning of a calendar year, regardless of their activity rate, - with the exception of apprentices. Employers themselves are responsible for carrying out the

3 Independent third-party verification

Employers subject to the Swiss Code of Obligations must have their equal pay analysis **verified by an independent body**. They may choose to use the services of:

- a. a licensed auditing company within the meaning of the Federal Auditing Act (see explanations below on auditing by an auditor); or
- b. an organisation within the meaning of Article 7 GEA (organisations that have been in existence for at least two years and that have to promote gender equality or safeguard the interests of employees, pursuant to their articles of incorporation) or to an employees' representation within the meaning of the Participation Act. When the employer has opted for an audit by an organisation or employees' representation, he must conclude an agreement with the latter on the procedure for the audit and the submission of the report to the company management.

With regard to the verification of equal pay analyses for federal government employees, the Confederation does not benefit

from this choice. The Confederation must call upon a licensed auditing company.

The Federal Council has set in the Ordinance the criteria for the training of auditors in charge of the review. In particular, the Ordinance provides for a special training course to ensure that the auditing of equal pay analyses complies with minimum quality standards and that the employers concerned are in principle treated equally. The date of entry into force of the new provisions was chosen to allow sufficient time for the auditors to be trained.

Employees must be informed of the results of the analysis within one year of its verification.

The verification of an equal pay analysis does not consist of verifying the company's compliance, or non-compliance, with equal pay. The auditing firm verifies that **the analysis has been carried out in the required form**.

When the employer uses the services of a licensed auditing company, he must provide the latter with all the documents and information it needs to perform the audit. The auditing company must check whether there are facts which show that the equal pay analysis does not meet the following requirements:

- the equal pay analysis has been carried out within the time limit prescribed by law;
- there is evidence that the equal pay analysis was carried out using a scientific method, which complies with the law;
- all employees have been included in the analysis;
- all salary components have been included in the analysis;
- all necessary data, including personal and job-related characteristics, were included in the analysis.

Evidence that the analysis has been carried out with a scientific and lawful method must include full and transparent documentation regarding the method used. Its scientific quality as well as its compliance with the law must be validated. If the equal pay analysis was carried out using the tool developed by the Swiss Confederation (Logib), proof of its scientific and legal quality can be easily provided, with the FOGE providing a declaration of conformity in such cases.

The auditing firm shall issue a **report** on the execution of the equal pay analysis to the attention of the management of the audited company within one year after the analysis has been carried out.

4 Information to employees

Employers will have to **inform their employees in writing** of the result of the equal pay analysis no later than one year after it has been verified. According to the Federal Council's

message, employers will be able to provide this information, for example, by means of a circular or in writing at a meeting.

The one-year period (after the audit) for providing the information is intended to allow time for the company to take any corrective actions that may be required.

Special provisions have been adopted for companies whose shares are listed on the stock exchange and for public sector employers. Companies whose shares are listed on the stock exchange will have to publish the result of the equal pay analysis in the annex of their annual report. Public sector employers will be required to publish the detailed results of the equal pay analysis and audit.

5 Deadlines and limited validity of the new provisions

As soon as the amendment to the Act enters into force (1 July 2020), employers will have **one year to carry out their (first) internal equal pay analysis**. Therefore, the companies concerned must have carried out their (first) equal pay analysis by the end of June 2021 at the latest. The audit firm will then have to submit its **report within one year** after the analysis has been carried out, i.e. by the end of June 2022 at the latest. Employees and shareholders will therefore have to be informed of the results of the analysis within **one year of its verification**, i.e. by the end of June 2023 at the latest.

The Swiss Parliament **limited** the period of validity of the obligation to carry out equal pay analyses (sunset clause) **to twelve years**. The amendment to the Gender Equality Act and the accompanying Ordinance should therefore automatically cease to apply on 1 July 2032.

In the meantime, an evaluation of the effectiveness of the new measures will have to be carried out.

6 Comments on the new provisions

The amendment to the GEA adopted by the Swiss Parliament **has been subject to a lot of criticism**. Trade unions, the left wing and women's organisations have criticized a timid reform. The right wing and employers' organisations denounced this measure as "*excessive, bureaucratic and unnecessary*".

It should be noted that systematic analyses of equal pay in an enterprise do not prejudice individual cases. It is therefore not excluded that, even if the result of the analysis shows that equal pay is respected (overall analysis), individual claims for equal pay may still be brought by employees. On the other hand, if the analysis shows irregularities, it will not have the effect of proving any individual claim, if the wage differences in a concrete case are based on objective and admissible justifications.

Above all, the new provisions do not provide for **any specific sanctions** in the event of violations of the new provisions and/or in the event of irregularities being found (apart from the obligation to repeat the analysis four years later). This raises the question of what will be the consequences if an employer does not comply with its obligation to carry out an equal pay analysis (outside the framework of public procurement) and/

or to communicate the result to its employees. Furthermore, if the analysis leads to the conclusion that gender-based pay inequalities exist within the company, the question also arises as to what the consequences will be for the employer in global terms (outside public procurement) if the latter does not take concrete action to remedy the problem.

Therefore, many points need to be clarified to assess the impact of the new provisions.



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