



Labor Law Newsletter Switzerland

The Federal Supreme Court holds that shares and options which are granted to an employee as part of the employee's salary and over which the employee cannot immediately dispose of are in violation of Art. 323b Abs. 3 of the Swiss Code of Obligations ("CO") which prohibits any agreement between the employer and employee regarding the use of the salary in the interest of the employer

In the case decided by the Federal Supreme Court, the employee was granted certain options as part of the calculation of his variable target salary. The employee terminated his employment agreement. Because of the locking period, the employee was not in a position to exercise certain options. In the annual salary statements, these options were listed with a value of CHF 5'000. The Company paid to the employee an amount of CHF 3'317 for the options that could not be exercised. The employee claimed the difference between the amount paid by the employer for the options that could not be exercised and the amount stated in the annual salary statements. Upon appeal by the employer, the Federal Supreme Court upheld the decision of the lower court, pursuant to which the employer was ordered to pay the amount claimed by the employee.

The decision rendered by the Federal Supreme Court in October last year did not receive a widespread attention. However, its impact is of paramount significance. Companies who have as part of the employees' salary issued shares or share options to their employees which are not immediately disposable, risk that the respective clauses in their agreements will be held null and void and that the employees may be entitled to a monetary claim for the value of these shares and options. It is important to note, that the Federal Supreme Court rejected the

employer's argument that the prohibition set out in Art. 323b para. 3 CO was only to apply to clerical employees, arguing that employees who have a managing position are not needy of the protection set out in Art. 323b para. 3 CO.

In light of the recent decision of the Federal Supreme Court, employment agreements pursuant to which part of the salary or bonuses are paid in shares or options will have to be revisited. Only where the shares or options are readily disposable by the employee or where such shares and options are issued discretionary (i.e. do not form part of the salary), is the company not at risk.

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