



Legal News Switzerland

/ April 13, 2026

Very senior management personnel and proof of extra hours

The Zurich Labor Court addressed the definition of very senior management personnel (in German: "Arbeitnehmer in höherer leitender Tätigkeit") and the documentation of extra hours. The main issue was whether an IT project manager with executive responsibilities is subject to the Labor Act. The decision also addressed the question of whether the extra hours he worked is eligible for compensation.

In its decision, the Zurich Labor Court addressed two important issues in labor law. On the one hand, it concerns the hastily assumed classification of "very senior

management personnel” within the meaning of Art. 3(d) of the Labor Act (**ArG**); on the other hand, it concerns the proof and approval of extra hours.

The decision concerned an IT project manager at an advertising company. After the employer terminated the employment relationship, the employee claimed compensation for accrued extra hours in the amount of CHF 607,855.

Very senior management personnel

First, the court had to determine whether the employee in question was covered by the ArG at all, or whether he fell within the category of very senior management personnel under Art. 3(d) ArG, which would mean that the provisions of the ArG—with the exception of those regarding occupational health and safety—would not apply, and the employee would have no claim to compensation for extra hours worked.

The definition of very senior management personnel is narrowly interpreted, and in cases of doubt, the ArG is deemed applicable. Neither the authority to sign documents or issue instructions nor a high salary, on their own, constitutes a very senior management position. Rather, the decisive factor for a positive determination is whether the employee can influence decisions of major significance and/or exert a lasting influence on the structure, the course of business, and/or the development of the enterprise (Art. 9 of Ordinance 1 to the Labor Act (**ArGV 1**)). This is the case, among other things, when the employee is responsible for the hiring and deployment of staff, the scheduling of working hours, wage policy, or fundamental issues of business policy. This description applies primarily only to a member of the highest management hierarchy, i.e., the executive management of a company. Furthermore, the corresponding responsibility must not be overlooked; the employee must be accountable for their decisions and, if necessary, be held liable.

A position of trust or the authority to bind the company by signature is not sufficient to establish a very senior management position under Art. 3(d) ArG.

In this regard, the court concluded that the direct management of five out of a total of 500 employees in Switzerland, the indirect management of 25–35 employees, and ten external consultants, is insufficient to qualify as an employee in a very senior management position. The number of employees managed was deemed too modest in relation to the size of the company. The employee in question was not a member of the executive board; he merely had the authority to sign consulting contracts and was involved in hiring, terminations, and employee evaluations. However, the final decision-making authority rested with the company’s CFO. The employee in question therefore did not perform a very senior management role, meaning that the provisions of the ArG, particularly those regarding extra hours, applied to him.

This conclusion by the court is certainly open to criticism. It places heavy emphasis on the fact that the employee in question was not a member of the executive board and

gives greater weight to the formal classification than to the actual circumstances. However, the decisive factor for very senior management personnel is whether the employee holds a position of special trust due to increased responsibility within the meaning of Art. 9 ArGV 1 and how his role actually manifests itself in the concrete day-to-day operations of the company. What matters, therefore, is not so much the powers formally granted to the employee, but rather how decision-making processes and competencies were actually exercised within the company.

Especially in modern corporate structures, actual influence often lies not exclusively with executive board, but also with project managers who have far-reaching operational and strategic responsibilities. In the present case, the employee had considerable authority, particularly in personnel matters, in resource planning, and in the budget area. To the extent that certain powers were not formally vested in him, he exercised them de facto in practice or assumed them independently. His influence on the course of business and the development of the company was thus de facto established.

These competencies exercised in day-to-day work are ultimately also reflected in his very high compensation, which was comparable to that of members of the executive board.

Extra hours

In the present case, the employee was unable to fulfill the tasks assigned to him within the contractually agreed weekly working hours of 42.5 hours, which is why he regularly worked overtime and extra hours. Extra hours refers to working hours performed in excess of the statutory maximum working hours pursuant to Art. 9 ArG. This must generally be compensated either by a wage supplement of at least 25 percent or by time off of equal duration.

A prerequisite for compensation for extra hours is that it was objectively necessary and that the employer was aware of this or, at the very least, should have been aware of it. If the employer knows or should have known that the employee is working beyond the agreed working hours, the employer's silence may be interpreted as approval of the additional work. Furthermore, if the employer has reviewed the time sheets and raised no objection, the employer is precluded from subsequently refusing compensation on the grounds that the hours worked were neither known nor necessary.

In this specific case, the employee had informed his supervisor that he was occasionally overburdened. Furthermore, his workload was repeatedly discussed in performance reviews. The court therefore concluded that the employer was aware of the extra hours worked and cannot claim that it was unknown to them or unnecessary.

In its legal evaluation, the court attaches too little weight to the fact that the extra hours worked was the result of inefficient micromanagement and was neither in the

employer's interest (lack of operational necessity for the extra hours) nor expressly ordered.

In this context, the employer's insufficient and unclear communication proved particularly detrimental. The employer should have consistently monitored the issue of extra hours approval so that it would have been clear at all times which extra hours was considered approved and thus subject to compensation. Transparent and timely communication with the employee would have been crucial in this regard. In particular, it should have been clearly defined under what conditions extra hours is considered operationally necessary and therefore approved—and when it is not—rather than leaving this implicitly open.

According to Art. 8 of the Swiss Civil Code, it is the employee's responsibility to prove the existence of extra hours, as they derive a claim for compensation from it. Tools or spreadsheets for recording working hours serve as proof. It should be noted that the employer is obligated to systematically and comprehensively record employees' daily and weekly working hours. However, with the advent of new working time models and organizational structures, it has become common practice to leave the recording of working hours to employees under a trust-based model. Regardless, the responsibility for accurate time tracking remains with the employer. In the present case, the employee maintained an Excel spreadsheet that was used by all IT staff with the employer's consent. The court therefore legally classified this as a record of working hours.

Conclusion

After the Zurich Labor Court ruled out a very senior management role, it concluded—based on the accurate time tracking and the employer's proven awareness—that the employee in question was entitled to extra hours compensation. This decision partially overlooks the reality of modern work arrangements with a high degree of autonomy, not only at the highest level of management. Employers are therefore well advised to precisely define the areas of responsibility for employees in higher positions from the outset and to clearly and unambiguously establish the rules regarding extra hours—particularly with regard to approval and operational necessity—as well as to communicate them transparently throughout the entire employment relationship. In addition, it makes sense to explicitly state in the employment agreement that the parties assume that the employee falls within the category of very senior management personnel and that the agreed compensation has been determined on this basis. This can further reduce the risk of subsequent disputes regarding the position's classification and any extra hours claims.

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