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DROIT DU TRAVAIL

LE PORTAGE SALARIAL vs PAYROLLING vs
LOCATION DE SERVICE



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PORTAGE SALARIAL vs PAYROLLING vs HIRING SERVICES

The 'portage salarial' model, which originated in neighbouring France, is increasingly being offered in Switzerland. Can this model be transposed unchanged to Switzerland? Can it be likened to 'payrolling' or 'service leasing'? This article answers these questions.

In France, the "portage salarial" model first appeared in the late 1970s. Since 2008, it has been expressly provided for and defined in Article L1251-64 of the French Labour Code. According to this article, 'portage salarial is a set of contractual relations organised between an administration company, an employee and client companies, involving, for the employee, the status of salaried employee and remuneration by the administration company for the services provided to the client. It guarantees the rights of the staff member in respect of his or her clients'.

"Portage salarial" is thus a tripartite contractual relationship between the 'employee', the administration company and the client company.

According to the official French government website^[1], a "porté" employee is someone who enters into an employment contract with an administration company and provides a service on behalf of a client company. Any person with the expertise, qualifications and autonomy to seek out clients can be a "porté" employee. The "porté" employee must negotiate the conditions under which the service is provided and set the price with the client company. It is up to the "porté" employee to choose the administration company".

According to this official website, the administration company enters into an employment contract with the 'employee'. However, it is

not obliged to provide work to the “employee”. It also signs a commercial contract with the client company, which merely formalises the terms and conditions of the assignment negotiated by the employee’.

The “porté” employee therefore has a certain degree of autonomy – not to say independence. It is the employee who finds the client, negotiates the terms of the assignment with the client and sets the price with the client. The administration company is nothing more than an intermediary that does not give any instructions to the employee about how to carry out the work, that does not acquire the clientele and that does not assume any responsibility.

And that is where the problem lies from a Swiss point of view and from the point of view of Swiss social insurances.

From a Swiss point of view and from the point of view of Swiss social insurances, the “porté” employee will be considered as a self-employed person and not an employee. In other words, the employee will be considered as fictitious employees.

As the Swiss Federal Social Insurance Office (OFAS) explains, *“in the field of social insurances, the delimitation between salaried and self-employed activity is decisive, in particular for affiliation to unemployment insurance, compulsory occupational benefits and compulsory accident insurance”*^[2].

In the case of ‘portage salarial’, the “porté” employee is not an employee of either the “portage” company or the client company. The “porté” employees assume all the entrepreneurial risk on their own. *“If the “employee” fails to win business, he/she earns nothing. Moreover, they are solely responsible for running their business, including obtaining and maintaining the necessary premises and equipment.*

The simple fact that a self-employed person invoices through a “portage” company, that this person often does not act in his/her own name but has the contract with the client concluded through the portage company and that he/she does not draw up the statement of social security contributions himself/herself, does not make him/her an employee, nor does it make the “portage” company an employer. Rather, the status of employee is fictitious. From the point of view of social insurance law, therefore, people who pay via administration companies are generally considered to be self-employed. If the social security authorities find that people who are actually self-employed are registered as employees, they will treat them as self-employed”.

Thus – and the Swiss Federal Social Insurance Office is clear on this point – *“the practice of ‘portage salarial’ ‘does not comply with Swiss social insurance law. In particular, the people concerned risk being denied certain social insurance benefits even though they have paid social contributions”.*

The French model of “portage salarial” cannot therefore be transposed as it stands to Switzerland, and great caution should be exercised if such a model is proposed in Switzerland.

However, other models are possible in Switzerland.

One of these is what is known as “payrolling”. In this model, too, there is a tripartite relationship. A first company (‘the assignment company’) intends to use the services of an employee (‘the employee’) but does not intend to hire him or her itself. It therefore calls on a second company (‘the employing company’) to hire this person and make him or her available.

It is the assignment company that gives the instructions to the employee, but it is the employer company *“that pays the salary and handles the settlement and payment of social security contributions and, in the case of foreign workers, registration with the tax and migration authorities”.*

Unlike the ‘portage salarial’ model, the employee does not assume the entrepreneurial risk. They do not seek out clients or set the terms and price of the assignment. They also follow the instructions of the assignment company. They therefore have real employee

status in terms of Swiss social insurances.

This “payrolling” model is in fact a form of service leasing Or hiring services. Service leasing is authorised in Switzerland and is governed by the Swiss federal law on employment services and service leasing (LSE).

Service leasing is also a tripartite relationship between a company (“service lessor” and “employer”) that leases the services of its employees to a third-party company (“service lessee” or assignment company). The lessee company gives instructions to the “leased” employee and integrates him or her into its work organisation. However, the lessor assumes all the responsibilities of an employer. It pays the salary and social security contributions. As for the “leased” employee, he or she assumes no entrepreneurial risk and has true employee status in terms of Swiss social insurance.

The hiring out of services on a professional basis, i.e. when the lessor company sells the services of employees to third parties as a commercial trade, is subject to authorisation. This is a subject in its own right which will not be developed here but which may be the subject of a future article by the undersigned.

In conclusion, however, the undersigned would advise companies and the self-employed to exercise the utmost caution if the “portage salarial” model is proposed to them in Switzerland. This model does not comply with Swiss social security law and there is a risk that the “porté” employee will be considered a fictitious employee and will be denied social security benefits, even if social security contributions have been paid.

[1] <https://entreprendre.service-public.fr/vosdroits/F31620>

[2] <https://www.bsv.admin.ch/bsv/fr/home/assurances-sociales/ueberblick/lohntraegerschaft.html>

Source : <https://www.wg-avocats.ch/en/actualites/portage-salarial-vs-payrolling-vs-hiring-services/>