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## The New Adoption Leave

Author

**It has been just about a year and a half since the statutory paternity leave entered into force on January 1<sup>st</sup>, 2021, and the next novelty is just around the corner: On January 20<sup>th</sup>, 2022, the referendum deadline for the adoption leave bill expired without referendum, which means that the new leave will enter into force. The exact date has not yet been decided, but we anticipate that this will happen on January 1<sup>st</sup>, 2023.**



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### 1. Where is the adoption leave regulated?

The new adoption leave is basically regulated in two sections: On the one hand, the adoption leave is regulated in the new Art. 329j of the Swiss Code of Obligations ("CO"). This legal provision stipulates the employee's right towards the employer to take time off for the adoption leave. On the other hand, the new Art. 16t to 16x of the Loss of Earnings Compensation Act ("LECA") regulate the adoption leave allowance.

### 2. Which employees are entitled to adoption leave?

According to Art. 329j para. 1 CO, employees who welcome a child for adoption and fulfil the requirements for adoption leave allowance stipulated in Art. 16t LECA are entitled to adoption leave. This means that the entitlement to take time off for adoption leave depends on the entitlement to adoption leave allowance.

According to Art. 16t para. 1 LECA, a person is entitled to adoption leave allowance if:

- a child who is less than four years old is placed in the employee's home for adoption;
- the employee has been insured under the Old Age and Survivors Insurance Act during the nine months preceding the placement of the child and had a gainful occupation for at least five months, and
- is an employee (or self-employed) within the meaning of social security law or works in the spouse's business against remuneration at the time when the child is placed.

If the child is adopted jointly, both adoptive parents must fulfil these requirements in order to be entitled to adoption leave compensation (Art. 16t para. 2 lit. a LECA).

It is not decisive for the entitlement to adoption leave whether the formal adoption has already taken place at the time the child is welcomed into the adoptive parents' family or whether the formal adoption process is still ongoing.

In the case of adoption of a stepchild there is no entitlement to adoption leave (Art. 16t para. 5 LECA).

### 3. What is the duration of the adoption leave?

The entitlement to adoption leave is two weeks (Art. 329j para. 1 CO). It may be taken on a weekly or daily basis at the employee's discretion (Art. 329j para. 4 CO). The two weeks are for both adoptive parents together (Art. 329j para. 3 CO; Art. 16t para. 2 lit. b and para. 3 LECA), which means that if both parents wish to take

adoption leave, they have to divide the available leave days between them. In addition, they need to take the adoption leave on different days; it is not possible for both adoptive parents to take adoption leave at the same time (Art. 329j para. 3 CO). Alternatively, the adoptive parents may agree that only one of them takes the entire adoption leave.

Adoption leave must be taken within a period of one year (Art. 329j para. 2 CO; Art. 16u para. 1 LECA), which starts on the homecoming day of the child (Art. 16u para. 2 LECA).

The entitlement to adoption leave compensation - and consequently also to the leave as such - ends ahead of time if the child or the entitled employee dies, even if there are some adoption leave days left (Art. 16u para. 3 lit. c and d LECA).

#### **4. Are employees entitled to salary during adoption leave?**

During adoption leave, the employee is not entitled to salary from the employer, unless agreed otherwise. Instead, they are entitled to daily adoption leave allowances paid by the competent social security carrier. The daily allowance amounts to 80% of the average income (Art. 16w para. 1 LECA) and is capped at CHF 196 per day (art. 16w para. 3 and art. 16f LECA). If the employer has advanced the amount during the adoption leave, the employer is entitled to the adoption leave allowance for the respective period.

Employees can claim the adoption leave allowance from the competent social security carrier via their employer using the form provided by the social security carrier. If the employer has advanced the adoption leave allowance and the employee fails to claim the allowance from the competent social security carrier, the employer may do so on the employee's behalf.

#### **5. What is the rule if several children are adopted?**

If several children are placed for adoption one after the other with a time lapse between each adoption, the employee will have a distinct entitlement to adoption leave for each new adoption. If, on the other hand, several children are placed for adoption at the same time, the entitlement to adoption leave remains the same (Art. 16t para. 4 LECA). For example: the simultaneous placement of two children for adoption does not double the leave entitlement. The regulation is thus the same as for maternity leave and paternity leave.

#### **6. What happens if the job is changed before the adoption leave has been entirely taken?**

There is no explicit provision in the law governing this situation. However, in analogy with the paternity leave, it can be assumed that the unused adoption leave entitlement does not expire when the employment relationship ends but can be transferred to a new employment relationship. We anticipate that the social security carriers will provide a corresponding form, so that it will be possible to claim the adoption leave allowance in the event of a change of employment as well. However, the one-year period for taking adoption leave must be observed irrespective of a job change.

#### **7. Does the taking of adoption leave have an influence on the holiday balance?**

The entitlement to adoption leave is independent from the employee's holiday entitlement. Accordingly, the holiday entitlement may not be reduced as a result of taking the adoption leave (Art. 329b para. 3 lit. e CO).

#### **8. Can the employer give notice of termination during the adoption leave?**

Yes, the adoption leave does not trigger a protection period. Also, the notice period continues to run if the adoption leave is taken during the notice period. However, the employee may not be at home during the adoption leave, so that it may not be possible to deliver the notice letter.

## 9. Is it a mandatory entitlement?

The provisions relating to adoption leave are mandatory provisions of Swiss law. It is not allowed to deviate from the statutory provisions to the disadvantage of the employee. However, it is permissible to agree on or to introduce a more generous regulation. For example, the employer may round up the adoption leave allowance to 100% of the salary or grant a longer adoption leave.

## 10. Is there a need for action for employers?

Since the new adoption leave is based on mandatory provisions, it is, in principle, not necessary to change existing employment contracts or internal policies. However, if there are such regulations regarding adoption leave in place, it is advisable to check whether they are in line with the new statutory provisions and, if necessary, to adapt them in order to avoid contradictions. Furthermore, based on the employer's duty of care, it is advisable to inform the employees about the new adoption leave regulations.

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