



DISCLOSURE OBLIGA- TIONS OF THE EMPLOYER IN THE CASE OF EMPLOYEE PARTICIPATIONS

In the case of employee participations, the employer has extensive disclosure obligations in the context of the salary statement. These differ depending on the type of the employee participation and secondly a distinction must be made whether the employee acquires, simply holds or realises the employee participation.



Employee participation plans are popular and powerful instruments to attract and retain employees. Especially for start-ups, they are an interesting option to compensate employees whilst preserving liquidity. Employee participation plans can be designed in many different ways and can be adapted to the specific needs of the company.

However, there are certain issues to be aware of from a tax and social security perspective, such as the employer's disclosure obligations. These are described below for each individual employee participation instrument. This guideline does not cover source tax aspects. A graphical representation and a summary of these explanations can be found in the annex.

1. Principles of tax filing obligations

The tax filing obligations differ depending on the type of the employee participation instrument. In principle, a distinction must be made between genuine and phantom share schemes. Genuine employee participations are defined by the fact that the employee actually becomes or can become a shareholder of the company. In this case, employee shares or options for the subsequent purchase of employee shares are issued. In contrast, in the case of phantom shares, the employee does not acquire any shares, but instead benefits from an economic representation of a share or an option. As a consequence, phantom employee participations are remunerated by cash payments, whose amount is usually driven by the performance of the underlying security, such as the share or the option. Thereby, employees are economically on equal terms with shareholders.

Both genuine and phantom employee participations have in common the basic principle that the (non) monetary benefit generated by the employee is subject to income tax and social security contributions. However, the calculation of the (non) monetary benefit may vary.

Therefore, the employer is obliged to disclose this monetary benefit on the salary statement¹ and to declare certain additional information about the employee participation on a supplementary sheet to the salary statement.

Furthermore, the employer must declare and pay the social security contributions and, if applicable, the source tax.

The disclosure obligations to be summarized on a supplementary sheet to the salary statement are specified for each different type of employee participation compensation in the Employee Participation Ordinance (MBV)². The disclosure obligations apply not only when a (non) monetary benefit is received, but also when an employee share is granted, held or sold, even when these actions are not necessarily subject to taxation. There are no formal requirements for the supplementary sheet to the salary statement, however, the Swiss Tax Conference provides templates of such statements in Excel format.³ These templates are accepted by all tax authorities. In addition, the Federal Tax Authorities provide concrete examples for the completion of these sample statements as guidance.⁴

If a tax ruling has been obtained from the tax authorities for the respective employee participation plan, it is recommended that a reference to this tax ruling is made on the supplementary sheet to the salary statement (e.g. "Employee participation declared in accordance with the tax ruling of 2 May 2023 with the Zurich tax authorities").⁵

Specifically, the employer has the following disclosure obligations on the salary statement (including the supplementary sheet):

¹ In paragraph 5 of the salary statement

² Ordinance on the Certification Requirements for Employee Participations dated 27 June 2012 (as of 1 January 2021), SR 642.115.325.1.

³ Download possible at: <https://www.steuerkonferenz.ch/?Lohnausweis:Mitarbeiterbeteiligungen>

⁴ Annexes 2 to 5 to the Circular No. 37 dated 30 October 2020 of the Federal Tax Authorities

⁵ See also Guidelines for completing the salary statement or pension certificate, paragraph 68.

«IN PRINCIPLE, A DISTINCTION MUST BE MADE BETWEEN GENUINE AND NON-GENUINE EMPLOYEE PARTICIPATION.»

2. Employee stock options and entitlements to employee shares

For the disclosure obligations of employee stock options, a distinction must be made between shares that are freely tradable as well as listed on the stock exchange and are therefore taxed at the time of the acquisition of the right, and shares that are not freely tradable and are not listed on the stock exchange. In the case of the latter, the taxation only takes place at the time the right is exercised.

2.1. Disclosure obligations for freely tradable, listed employee stock options

In the case of freely tradable and listed stock options, the employer must disclose the following information on the supplementary sheet to the salary statement at the time of acquisition (Art. 5 para. 1 in conjunction with Art. 4 MBV):

- Name of the employee participation plan;
- Date of the acquisition of the employee stock options;
- Fair market value of the employee stock options;
- Any blocking periods as well as the duration of any repurchase obligations;
- Agreed purchase price;
- Number of employee stock options acquired;
- The monetary benefit disclosed on the salary statement or declared for source tax purposes.

With regard to the holding and sale of employee stock options, the employer has no additional disclosure obligations for freely tradable and listed options. However, the employee must declare the option in the tax return at the current fair market value (as of 31 December).

2.2. Disclosure obligations for non-listed employee stock options and entitlements to employee shares

The following disclosure obligations are related to non-listed or not freely tradable employee stock options as well as entitlements to employee shares that are taxed at the time when the monetary benefit is realised (Art. 5 para. 2 lit. a and b MBV):

a) Disclosure obligation at the time of acquisition
At the time of acquisition of employee stock options and entitlements to employee shares, the employer must certify the following information⁶:

- Name of the employee participation plan;
- Date of the acquisition of the employee stock options or the entitlement;
- Date of the formation of the exercise right (if determinable);
- Number of the employee stock options or entitlements acquired.

b) Disclosure obligation at the time of realization

Furthermore, the employer also has a disclosure obligation at the time of realisation - i.e. at the time of the exercise, the sale or the conversion of the stock options or the entitlement to employee shares. The statement must contain the following information:

- Name of the employee participation plan;
- Date of the acquisition of the employee stock options or the entitlement;
- Date of the exercise, the sale or the conversion;
- Fair market or formula value of the underlying non-listed share at the time of the exercise, the sale or the conversion;
- Agreed exercise, sale or conversion price;
- Number of employee stock options or entitlements exercised, sold or converted;
- The monetary benefit disclosed on the salary statement or declared for source tax purposes.

3. Phantom employee participations

In the case of phantom employee shares, the disclosure obligations are identical to those that apply for non-listed employee stock options. Disclosure must be made at the time of the acquisition, even if the employee has not yet realized any monetary benefit (cf. section 2.2. a). A further detailed disclosure must be made at the time of the payment of the phantom employee participation (cf. section 2.2. b).

4. Employee shares

In the case of employee shares, the employer must issue a statement for the acquisition and the sale. There is no formal disclosure obligation during the holding period. Nevertheless, it is recommended that the employer makes a disclosure.

⁶ See also Guidelines for completing the salary statement or pension certificate, marginal number 69.

4.1. Acquisition of employee shares

Monetary benefits from employee shares are taxed at the time of acquisition. The disclosure obligations at the time of acquisition are identical to those for employee stock options, which are taxed at the time of the grant (cf. para. 2.1). If no fair market value (e.g. stock exchange price) is available, the applicable formula value must be disclosed.

4.2. Holding of employee shares

In case the employee is neither receiving an employee share nor realises an employee share for income tax purposes in a certain tax period, the employer has no formal disclosure obligation according to the aforementioned Employee Participation Ordinance. This also applies if the corresponding employee share is subject to a blocking period. Nevertheless, it is recommended that the employer makes a disclosure, since employee shares must be declared annually by the employee in their tax return for wealth tax purposes at the fair market or formula value. Such a voluntary declaration by the employer can be made, for example, on the salary statement under "Remarks" (paragraph 15), stating the number of shares and the fair market or the formula value as applicable.

4.3. Sale of employee shares

If the employee shares are sold, the employer's disclosure obligations are identical to those for the exercise, sale or conversion of stock options (cf. section 2.2).

4.4. [Side note] calculation of the formula value

In the case of non-listed employee shares, there is usually no fair market value that could be applied in order to determine the relevant value of the shares. Therefore, a formula value – determined according to a recognised method – can be applied in place of the fair market value. In principle, if no other formula has been agreed with the tax authorities, the formula value is calculated based on the practitioner's method⁷. The calculation of the practitioner's method is as follows:

$$\frac{(2 * \text{Capitalised Earnings Value} + 1 * \text{Net Asset Value})}{3} : \text{Numbers of shares}$$

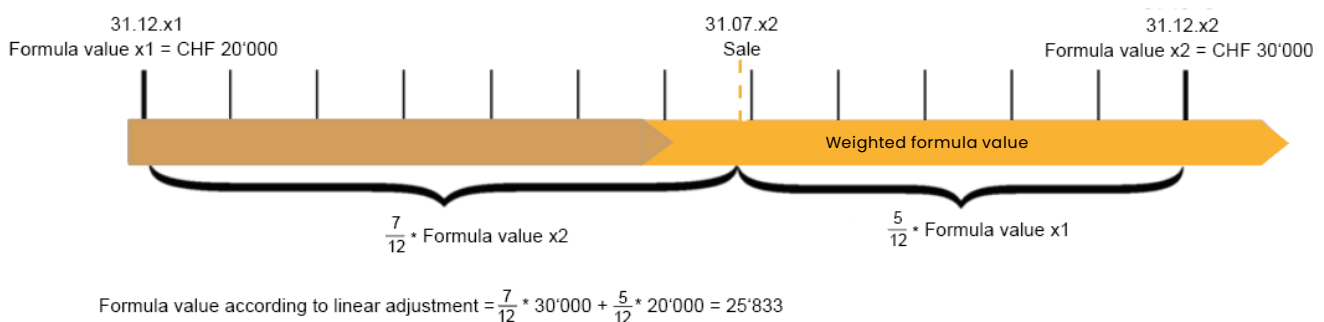
For the determination of the capitalised earnings value within the framework of the practitioner's method, the cantonal tax authorities apply two different models: The calculation model 1⁸ takes the net profits according to the last two annual financial statements into consideration, whereby the net profit of the past business year is weighted twice. In the cantons where the calculation model 2⁹ is applied, the net profits of the last three financial years are applied and each is weighted once. For the determination of the capitalised earnings value, extraordinary income statement effects are to be neutralised and the relevant net profit is capitalised, applying the capitalisation rate published annually by the Federal Tax Authorities¹⁰.

With regard to the formula value, it should be noted that for sales of employee shares taking place more than six months after the last balance sheet date, a linear adjustment must be made between a formula value based on the previous financial statements and one based on the future financial statements. Within such a linear adjustment, the two formula values are weighted according to the number of days that lie between the balance sheet dates and the sale of the employee shares. The linear adjustment is calculated – with a balance sheet date of 31 December – see the graphic below.

It should be noted in particular that the "future" formula value is given relatively greater weight (i.e. 7/12 as of 31 July, as in this example).

4.5. Special case of employee shares with a blocking period

A special case for blocked employee shares is the premature cancellation of the blocking period. If employee shares are issued with a blocking period, a reduction in value due to the blocking period is taken into account by a discount of 6% for each full blocking year, which is deducted from the relevant fair market or formula value (calculation formula: $100 / 1.06^n$, where n is the number of blocking years). If this blocking period is cancelled prematurely, the employee realises a monetary benefit at that time due to the discount granted earlier, which represents additional earned income. Such monetary benefit is calculated by the following formula: $x - x \div 1.06^n$, where x is respectively the fair market or the formula value of the share at the time of the cancellation of the blocking period and n is the number of years of the remaining blocking period. The number of blocking years to be cancelled are taken into account on a pro rata basis according to the number of days.



7 Cf. also: Circular No. 28 of the Swiss Tax Conference
 8 Model 1: AG, AI, AR, BE, BL, BS, FR, GL, GR, JU, LU, NW, SH, SO, SZ, TI, UR, VS, ZH
 9 Model 2: GE, NE, OW, SG, TG, VD, ZG
 10 The capitalisation rate in 2023, for example, is 8.5%.

In the event of a cancellation of a blocking period, the employer must issue a statement containing the following information (cf. Art. 11 MBV):

- Name of the employee participation plan;
- Date of the ordinary expiration of the blocking period;
- Date of release;
- Discount for the remaining blocking period, rounded to three decimal places;
- Fair market or formula value of the employee share at the time of the cancellation of the blocking period;
- Monetary benefit per employee share;
- Number of employee shares;
- Monetary benefit disclosed on the salary statement or declared for source purposes.

A blocking period has to be distinguished from a vesting period in which employees earn the award over a certain period of time, e.g. in which the employee may not terminate the employment contract.

In case of a vesting period, the allocation of the employee participation is made with suspensive effect. In the case of a reverse vesting, the allocation of the employee participation is made directly, but the employee participation must be returned by the employee if the vesting conditions are not subsequently fulfilled.

Another special case is when employees are contractually obliged upon termination of the employment relationship to return or sell their employee shares to the employer (i.e. to the company or to other shareholders) without compensation or below the fair market or formula value (cf. Art. 12 MBV). In this case, the employee can claim the value reduction for tax purposes (i.e. claim a tax deduction), which is calculated according to the following formula: $x \div 1.06^n - y$. In this case x is the fair market or formula value of the share at the time of the return, y is the price at which the share is returned and n is the number of years of the remaining blocking period (if any).

Annex: Summary of disclosure obligations

Figure 1: Disclosure obligations

- Name of the employee participation plan
- Date of the acquisition of the employee participation
- Fair market or formula value of the employee participation
- Any blocking periods and the duration of any return obligations
- Agreed purchase price
- Number of employee stock options or employee shares acquired
- Monetary benefit disclosed on the salary statement or declared for source purposes

Figure 2: Disclosure obligations

- Name of the employee participation plan
- Date of the acquisition of the employee participation
- Date of the accrual of the exercise right (if determinable)
- Number of employee stock options or vested rights acquired

Figure 3: Disclosure obligations

- Name of the employee participation plan
- Date of the acquisition of the employee participation
- Date of exercise, sale or conversion
- Fair market or formula value of the underlying unlisted share at the time of the exercise of the sale or the conversion
- Agreed exercise, sale or conversion price
- Number of exercised, sold or converted employee stock options, entitlements or employee shares

	Granting/Acquisition	Hold	Sale
Employee stock options (freely tradable and listed)	✓ cf. figure 1	X	X
Employee stock options (not listed or not freely tradable) and vested rights	✓ cf. figure 2	X	✓ cf. figure 3
Employee shares	✓ cf. figure 1	(✓) ¹¹	✓ cf. figure 3
Phantom employee participations	✓ cf. figure 2	X	✓ cf. figure 3

✓ = disclosure obligation; X = no disclosure obligation

¹¹ The employer has no formal disclosure obligation. Nevertheless, it is recommended that the employer discloses the employee participations, as genuine employee shares must be declared annually by the employee in their tax return at the fair market value or respectively the formula value for wealth tax purposes.

This value reduction must be disclosed separately by the employer and must not be offset against gross income on the salary statement. Therefore, the disclosure may only be made on a supplementary sheet to the salary statement and is not disclosed under paragraph 5 on the salary statement. The declaration by the employee is made in his/her tax return as "other professional expenses". If more than the current fair market or formula value is nevertheless remunerated on return, the tax filing must contain, *mutatis mutandis*, the above mentioned information about the cancellation of the blocking period.

4.6. Other special cases

The Employee Participation Ordinance also regulates other special cases in which the employer is subject to disclosure obligations. For example, in the event of an employee who has benefited from an employee participation plan moving in or out of Switzerland, or in the event of multiple changes of domicile.¹¹ However, this does not apply to employees who are taxed at source or to board members who are resident abroad since their monetary benefit from the employee participation is subject to source tax.¹² In addition, it should be noted that the employer is still obliged to disclose the realisation of a monetary benefit even after the termination of the employment relationship.¹³

5. Conclusion

Employers have various disclosure obligations in connection with employee participations, which must be fulfilled within the salary statement or on a supplementary sheet to the salary statement. Since the salary statement is a legally binding deed, the disclosure obligations require increased attention. It is therefore advisable for employers to accurately implement the framework conditions brought into effect by the legislator with the Employee Participation Ordinance and to consult experts in case of uncertainty.



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¹² See Art. 7 to 9 of the Employee Participation Ordinance (MBV).

¹³ See Art. 14 Employee Participation Ordinance (MBV) in conjunction with Art. 93 para. 3 DBG.

¹⁴ See Art. 15 Employee Participation Ordinance (MBV).