When is a stock option scheme covered by the "new" rules in the Stock Options Act from 2019?

Michael Klejs Pedersen
Attorney, Senior Director

Mai Tran
Attorney, Senior Associate

Sara Gade Løgsted
Assistant Attorney

In a judgment handed down on 21 February 2025, the Danish Supreme Court decided when the Danish Share Option Acts of 2004 and 2019, respectively, apply.

On 1 January 2019, the 2019 Share Option Act came into force. It repealed section 5 of the 2004 Share Option Act, abolishing the rules on "good leaver" and "bad leaver".

Following the repeal of section 5 of the Share Option Act, there was freedom of contract to regulate the terms and conditions applying to not vested share options upon the end of an employment relationship. This means that it is possible to agree, for instance, that employees entitlement to warrants and share options will forfeit upon the end of their employment relationships.

However, this applies only if the scheme is subject to the 2019 Act.

Section 5 of the Share Option Act provides that employees will retain the entitlement to any warrants and share options granted but not yet exercised if they can be deemed "good leavers". This means that, in situations

where employees have not been dismissed summarily or in any other way breached their employment contracts, they will be deemed “good leavers”.

In the case at issue, two employees had, as part of their employment, been granted Restricted Stock Units ("RSUs") and share options under award agreements:

1. in January 2019 under a share option plan from 2010 (the “2010 Plan”); and
2. in September 2020 under a share option plan from 2019 (the “2019 Plan”).

Both award agreements provided that RSUs and share options that had not been vested would lapse upon the end of the employment relationships.

The employees argued that the condition regarding lapse upon the end of the employment relationship was invalid, including that both award agreements were subject to the 2004 Share Option Act.

The Supreme Court found that neither the 2010 Plan nor the 2019 Plan were “schemes” subject to section 1 of the Share Option Act, as the plans did not contain any binding commitment from the employer to grant warrants or share options that the individual employee could rely on.

As a result, the employees were not entitled to the RSUs and share options until the employees were granted the rights in the award agreements in January 2019 and September 2020.

On this basis, the Supreme Court found that the grants were subject to the 2019 Share Option Act. The condition in the award agreements providing for the employees forfeiting their entitlement to any RSUs and share options that had not been exercised at the end of the employment relationship was therefore not invalid.

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