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Swiss Employment Law

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Introduction

Switzerland follows the Continental European tradition of distinguishing between public and private law. This fundamental distinction affects, inter alia, the body of law applicable to employment relationships in that there is a different legal basis for employment relationships of government personnel and those of private employees.

While employment relationships with private employers are essentially governed by individual contracts, collective employment agreements and statutory rules contained in the Swiss Code of Obligations *(CO)*, employment relationships of federal, state, or local government personnel are subject to the public law of the respective public entity. Still, public law also has a considerable impact on private employment relationships and, for example, the Swiss Labor Act (and the various ordinances thereto) regulates in detail e.g. the maximum weekly working hours, the requirements and conditions of night and Sunday work as well as the protection of pregnant and minor employees also for private employment relationships.

The following overview of Swiss employment law, revised and updated as per January 2017, is confined to the statutory (private and public) law governing private employment relationships. It is intended to give foreign HR and legal professionals a first overview of Swiss Employment law.

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The Private Employment Contract

A. Essential Elements of a Private Employment Contract

Under Swiss law, an employment contract is a contract whereby the employee is obliged to perform work in the employer's service for either a fixed or an indefinite period of time, and the employer is obliged to pay salary either based on time periods or based on the work performed. As any other contract, the employment contract is concluded by a legally binding offer and a corresponding acceptance, i.e. by mutual agreement.

As compared to other contracts involving the rendering of personal services, the most distinctive feature of the employment contract is that the employee's personal and organizational dependence reflects a relationship of legal subordination, i.e. the employee is not free to choose the time, place or type of work he or she will perform. By contrast, for example, contracts for legal services concluded between attorneys and their clients typically lack such legal subordination and, accordingly, do not qualify as employment contracts. Consequently, different statutory rules will apply. The distinction between such mandate agreement and an employment relationship is not always easy to make but may be of utmost importance, e.g. with regard to social security contributions or termination regulations.

B. Formation of a Private Employment Contract

1. No Written Contract Required

As for contracts in general, there is no statutory requirement that an employment contract be in writing in order to be valid. An employment contract may be concluded orally or even be inferred from the parties' conduct. Therefore, an employment contract is deemed to have been concluded when the employer accepts a person to work in his or her service for a given time, if such work, under the circumstances, is only to be expected for a salary. Moreover, if an employee performs work in good faith under an employment contract which subsequently proves to be invalid, both parties are bound to fulfill their duties under the employment relationship in the same manner as if the contract were valid until the employment relationship is terminated.

2. Written Form required for Certain Contracts or Individual Provisions

In deviation from these general rules, some employment contracts, such as apprenticeship contracts and travelling salesman contracts, must be in writing in order to be valid.

Moreover, even if a particular employment contract does not need to be in writing, certain individual provisions within them must be in writing in order to be enforceable. For example, if the parties to an employment contract stipulate that the notice periods for termination of the employment contract are shorter than the ones provided by the statutory default rule, they can only do so in writing. Furthermore, the employee may bind himself in writing only to refrain from any competing activity after termination of the employment relationship.

3. Duty to provide certain Information in Writing

Finally, it has to be noted that if an employment relationship has been entered into for an indefinite period of time or for more than one month, the employer must inform the employee in writing a) of the names of the parties to the employment agreement, b) of the date of commencement of employment, c) of the tasks of the employee, d) of the employee's salary and e) of employee's weekly working hours.

C. Sources of Employment Contract Terms

1. Express Terms

As a rule, the content of a private contract may, in accordance with the principle of freedom of contract and within the limits of the law, be established at the discretion of the parties. Therefore, oral or written express terms are the primary source of contract terms.

2. Statutory Default Rules

In the event that the parties to an employment contract do not incorporate an express term regarding a certain issue, there are statutory default rules that may apply. Because these rules apply to every employment contract in the absence of an express term to the contrary, the statutory default rules perform the function of implied terms. For example, the employee has an implied duty of loyalty, of confidentiality, and of due care regardless of whether these duties are expressly agreed upon in the individual employment contract. The same is true for the employer's implied duties, such as the duty to care for the employee's health and safety.

3. Mandatory Statutory Rules

There are certain mandatory statutory terms which automatically apply to every employment contract under the CO. The CO breaks these terms into two categories: those which cannot be altered to the detriment of either party, and those which cannot be altered to the detriment of the employee only.

4. Incorporated Terms

In order to facilitate the administration of the workforce, companies may wish to use standard employment conditions or employee manuals or other pre-formulated terms and conditions. If the employee does not actually agree to these standard agreements, they only apply (as long as they can not be qualified as mere directive, which may be implemented unilaterally by the employer) if they were properly incorporated into the individual employment contract, which may be done by reference.

5. Judicial Amendments

If the individual employment contract is silent on a certain issue in dispute, and if there is no applicable statutory or customary law, the court may "amend" the contract based on what the parties would have reasonably agreed upon had they included an express term governing the dispute. In the case of "typical" contracts, however, the court may "amend" the contract based on a rule it would create if it were the legislature, i.e. based on a rule that is sufficiently broad to be applicable to any "typical" contract as opposed to just the one at issue.

One important variation of a judicial amendment is the reduction of an agreement of the parties, that is considered excessive by a judge, to what the judge still considers to be reasonable. The most important examples of such judicial amendment both relate to post-contractual non-compete obligations. If a corresponding undertaking of the employee is considered excessive (e.g. with regard to its duration), the undertaking is not void but a judge may reduce it to what he or she still considers to be reasonable (e.g. from two years to six months). Furthermore, a judge may also reduce an excessive contractual penalty stipulated in case of a violation of the post-contractual non-compete obligation to what she or he still considers to be reasonable. In both cases, the fact that the undertaking of the employee is considered to be excessive does not make the whole respective clause void.

D. Variation of Contract

According to a general principle of the Swiss law of contracts, the terms of a contract may not be changed unilaterally. Alterations to contractual terms require mutual consent, unless a right to modify is provided for in the contract itself within the limits of the law. Therefore, if one party wishes to change the terms of the employment contract, the existing contract must be terminated and the terms of the new contract have to be negotiated anew. If, as a factual matter, one party nevertheless "changes" the terms of the contract unilaterally, and the other party does not object to such change, but continues to perform the contract according to the new terms, then that party may be deemed to have consented to the new contract with the new terms. The same applies to a unilateral implementation of a modification of incorporated terms.

Remuneration

A. General Rule

The amount of the salary owed to the employee by the employer depends on the individual contract or the applicable collective employment contract, if any.

B. Legal Regulation of Remuneration

Generally, there is no statutory minimum salary in Switzerland. However, since individual contractual provisions may deviate from collective employment contracts only if such deviation is in favor of the employee, the (minimum) salaries contained in collective employment contracts may be considered the minimum salary where such collective employment contracts apply.

C. Salary Deductions

The employer is obliged to deduct social security contributions from the employee's salary. Income taxes are not withheld by the employer, unless the employee is a non-resident alien, in which case the employer is generally obliged to withhold source taxes. If the employer does not live observe such obligation, he may be liable towards the tax authorities for the respective tax payments of the employee.

D. Salary Protection

Swiss law provides a number of rules aimed at protecting the employee to ensure that the employee is free to dispose of his or her salary upon payment:

— First, the employee is to be given a written salary statement, and the salary is to be paid in legal currency, unless otherwise agreed upon or customary. While a lot of employers no longer provide their employees with a written salary statement each month, they would still be legally obliged to do so.

— Second, the employer is allowed to set off his or her counterclaims against salary claims only to the extent that the salary claim in question could be subject to attachment in debt collection proceedings, i.e. to the extent the salary is not unconditionally necessary for the employee and his or her family. The only exception is for claims arising out of wilful damages caused by the employee, which may be set off against salary claims without limit. It should be noted that if the employer continues to pay the full salary despite being aware of a potential damage claim against the employee, such behaviour is usually seen by the courts as a binding waiver of such claim by the employer. Hence, the employer may, for example, no longer set off its claim dating back a few months if the employee sues the employer after the end of the employment relationship e.g. for a bonus payment.

— Third, agreements as to the use of the employee's salary in the employer's interest are null and void, and so are the assignment and pledge of future salary claims to secure liabilities other than support and alimony obligations arising under family law.

Vacation

A. Vacation Entitlement

Employers are obliged to grant to each employee at least four weeks of paid annual leave in each year of service, and at least five weeks in the case of juvenile employees until the completion of their twentieth year of age.

As a rule, at least two weeks of vacation shall be granted consecutively in the course of the respective year of service. The employer determines the time of vacation; taking into consideration the employee's wishes to the extent they are compatible with the interests of the enterprise.

The (formerly popular) contractual provision that any holiday entitlement not taken by March of the following year shall lapse, is void and the employee's vacation entitlement is only time-barred after five years.

B. Vacation Reductions

The employer may reduce the employee's vacation entitlement by one-twelfth for each full month that the employee is prevented from working if the employee's absence is the employee's fault, e.g. because the employee caused an accident when driving while intoxicated that then prevented him or her from working.

By contrast, if the employee was prevented from working and if the employee's absence was not the employee's fault (illness, accident, fulfillment of statutory duties, etc.), the employee's vacation claim may only be reduced if such absence exceeds two full months. Moreover, vacation claims may not be reduced if a female employee was prevented from performing her work for up to three full months due to pregnancy or due to the receipt of maternity leave pay.

C. Salary Payments during Vacation

Because vacation is paid annual leave, the employer is obliged to pay to the employee the full salary otherwise due. In order not to defeat the purpose of the vacation, the employee may not forfeit his or her time off and take pay or other benefits instead, at least during the employment relationship. By the same token, the employer may refuse to pay the vacation salary and ask for a refund of any payments already made, if the employee performs work for a third party for payment during his or her vacation, provided that such third party work runs counter to the employer's legitimate interests.

D. No Pay-out of Vacation Entitlement during the Employment Relationship

According to mandatory law, the employee's holiday entitlement may not be paid out in cash during the employment relationship; at least not as far as the mandatory minimum vacation entitlement is concerned. To the contrary, at the end of the employment relationship, any untaken vacation has to be paid out to the employee.

Sick Pay

If the employee is unable to perform the work contractually undertaken due to illness, accident, or pregnancy, the employer generally is still obliged to pay the salary for a limited period of time, provided that the employment relationship has existed for more than three months or if the agreed upon term was more than three months. The duration of such obligation depends on the years of service of the employee and may vary from Canton to Canton. The courts of the Canton of Zurich e.g. apply the following schedule:

— First year of service (above three months): three weeks
— Second year of service: eight weeks
— Third year of service: nine weeks
— Fourth year of service: ten weeks [and so on].

Alternatively, the employer may conclude insurance for the continuance of salary payments, as long as such solution is at least as beneficial for the employee as the statutory rules. Insurances provide a variety of solutions. As a standard solution, the insurance covers 80% of the employee's salary for max. 720 days, whereby no payment is owed for the first three days of an illness and whereby the employer bears at least half of the premium of the respective insurance.

Remedies

A. Employer's Remedies

1. Employee's Duties

The employee's principle duty is to personally perform the work contractually undertaken and it is implied that the employee has to do so by observing a certain standard of care. Furthermore, the employee owes the employer the duty to loyally safeguard the employer's legitimate interests. As far as the employer's remedies for breach of any such duty are concerned, Swiss law distinguishes between a breach of the principal duty to work and breaches of secondary duties. At any event, however, the employee is liable, according to the general rules governing contracts, for any damages caused by a breach of any of the above duties.

2. Primary Duty

If the employee does not perform his or her duty to work without justified reason to do so, the employer has the following remedies:

— The employer may refuse to pay the salary agreed upon.
— The employer may sue for specific performance, but he or she may generally not obtain injunctive relief preventing the employee from working for another employer.
— The employer may sue for monetary damages.
— Regardless of any monetary claims, the employer may terminate the employment relationship without notice.

3. Secondary Duties

If the employee performs work, but breaches the duty of care or the duty of loyalty or any other secondary duties arising out of the employment relationship, the employer may neither withhold salary payments nor require the employee to work for free in order to make up for the employee's breach of the duty of care.

However, the employer has the following options:

— The employer may sue for monetary damages caused by the employee. He or she may set off such damage claim against the employee's salary claim, but only if the employee is at fault, as clauses stipulating liability irrespective of the employee's fault are null and void. It should be noted that the standard of care as applied to employees is lower than the general standard of care in contract law, because one factor to be considered is the employee's abilities and qualities about which the employer knew or should have known.
— The employer may also terminate the employment contract within the ordinary notice periods. In the absence of intent, a breach of the duty of care is generally no reason for immediate termination without notice. However, the employer may enforce the duty of loyalty by obtaining a court order prohibiting the employee from causing further damage to the employer.
— Under certain circumstances and within certain limits, the employer may also use disciplinary measures, especially warnings.

B. Employee's Remedies

1. Employer's Duties

In terms of remedies available to employees, Swiss law distinguishes between a breach of the employer's principal duty to pay the salary and breaches of secondary duties.

2. Primary Duty

If the employer refuses to pay the salary agreed upon, the employee may pursue three courses of action:

— The employee may refuse to work and still be entitled to payment for the period during which he or she refused to work in response to the employer's failure to pay the salary for work already performed. Such refusal may not be considered as a reason for a termination by the employer.
— The employee may enforce his or her salary claim by instituting debt collection proceedings or by suing the employer in court for specific performance and damages.
— In cases of repeated and persistent refusals to pay, the employee may terminate the employment immediately and without notice. This is permissible even when the employer's failure to pay is due to insolvency, unless the employee is given security for the salary claim within an adequate period of time.

3. Secondary Duties

If the employer breaches his or her duty of assistance rooted in the principle of good faith, which includes, *inter alia*, the safeguarding of the employee's rights derived from personhood (rights of personality) and protection against third party breaches, i.e. by customers, co-workers and supervisors, the employee has the following options:

— The employee may refuse to work.
— The employee may sue for specific performance and for compensation of monetary damages.
— The employee may terminate the employment contract, but will generally have to comply with the notice period requirements applicable to ordinary termination.
— In the event that the employer discriminates against the employee due to gender, the employee is entitled to further remedies based on the Swiss Gender Equality Act (see below).

Working Time

A. Background

The Swiss Labor Act and the corresponding Federal Council Ordinances are the most important sources of regulations governing working hours. Generally, the Labor Act applies to public and private enterprises; an "enterprise" exists whenever an employer permanently or temporarily employs one or more employees. However, there are numerous exemptions. For instance, the federal, state, and local governments are generally not subject to the Labor Act, and neither are employees in executive management positions, scientists, or teachers in private schools. Therefore, the applicability of the Labor Act and its provisions has to be determined on a case-by-case basis.

B. Working Hours

As a general rule, the maximum weekly working hours for employees subject to the Labor Act is 50 hours. However, for employees in industrial enterprises and for office personnel, technical personnel and sales personnel in large retail enterprises, the maximum workweek is 45 hours. The hours a particular employee works during the daytime (6 a.m. through 8 p.m.) and in the evening (8 p.m. through 11 p.m.) must lie within a total range of 14 hours, including rest periods and overtime.
While temporary overtime work is allowed under certain circumstances, it may not exceed two hours a day and a total of 140 hours a year, unless the maximum weekly working time is 45 hours, in which case overtime may not exceed a total of 170 hours a year. The employer is generally obliged to pay at least 25% extra for overtime work unless it is compensated in the form of vacation time.

C. Registration of Working Time

As a general rule, the employer has a duty to ensure that all employees maintain a detailed record of their working time. Only employees in very senior and executive positions, i.e. the few members of the top management, are exempt.
Since 2016, it is possible to waive the recording of working time for certain categories of employees by means of a collective bargaining agreement. Furthermore, if specific conditions are met, simplified time recording may be implemented for certain categories of employees based on a respective agreement with the employees' representation. For businesses with less than 50 employees a simplification is provided, as the implementation of simplified time recording may be individually agreed on in writing with the employees concerned.

D. Night Workers

As a general rule, night time work is prohibited. Night time is defined as the period between 11 p.m. and 6 a.m. However, there are exceptions to this rule. Temporary night work may be allowed by the competent Cantonal Office, if an urgent need for such work is proven, and continuous or regularly recurring night time work will be allowed by the Swiss State Secretariat for Economic Affairs (SECO) if it is indispensable for technical or economic reasons.
An employee's night time work may not exceed nine hours within 24 hours and must be carried out within ten consecutive hours, including rest periods. Even if allowed, the employer may only select employees who consent to night work. The employer must, as a general rule, increase the salaries paid by at least 25% for night work.

E. Sunday Workers

Employees are generally prohibited from working between Saturday, 11 p.m., and Sunday, 11 p.m., but there are exceptions. Occasional work on Sundays may be allowed by the competent Cantonal Office, if an urgent need for such work is proven, and continuous or regular Sunday work may be allowed by the Swiss State Secretariat for Economic Affairs (SECO) if it is indispensable for technical or economic reasons. However, even in such cases, the employer may only select employees who consent to work on Sundays. For Sunday work, the employer must increase the salaries paid by 50%.

F. Rest Periods

Under the Labor Act, employees are entitled to certain minimum breaks, which may not be traded in for monetary compensation or other benefits, except at the end of the employment relationship. The length of the rest periods depends on the total daily working hours:

— If the daily working hours are more than five and a half hours, the minimum rest period is fifteen minutes;
— If the daily working hours are more than seven hours, the minimum rest period is thirty minutes;
— If the daily working hours are more than nine hours, the minimum rest period is sixty minutes.

Furthermore, employees are entitled to a daily rest period of at least 11 consecutive hours, and if the workweek spreads over more than five days, the employees are entitled to have half a day off per week.

G. Exceptions and Specific Regulations

Whenever the Labor Act applies to a particular employer and the employer is not exempt, the employer may not opt out of the regulations. However, it should be noted that Federal Council Ordinances issued based on the Labor Act provide for various exceptions to the rules mentioned above.

H. Remedies

As far as the enforcement of the Labor Act is concerned, there are two different mechanisms to be distinguished. To the extent that the Labor Act imposes a public law obligation on employers and employees that could be part of an individual employment contract, each party is entitled to enforce such obligation as if the obligation were part of the individual employment contract.

In addition to such private action, the Labor Act is enforced by the cantonal administrative authorities under the supervision of the Federal Council. These government authorities may use general administrative law measures to achieve compliance with the Labor Act on the part of employers and employees. Additionally, wilful breaches of certain provisions of the Labor Act may give rise to criminal liability.

Equal Opportunities

A. Background

Under Swiss law, the principle of equal treatment in employment matters is based on the employer's statutory obligation to respect and protect the employee's personhood.
In order to prevent arbitrary treatment of individual employees, this obligation prohibits less favorable treatment of a certain employee in relation to other employees in comparable positions without justified reasons for such different treatment and may thus be viewed as the basic rule addressing equal opportunities at the workplace. In addition, Swiss law offers more specific statutory rules relating to gender discrimination and, to a lesser extent, relating to the right to equal pay for equal work.

B. Gender Discrimination

1. Objective
The Swiss Gender Equality Act is based on the constitutional mandate requiring the legislature to ensure both de facto and de jure gender equality. In other words, the legislature is not only required to eliminate laws which unjustifiably discriminate between the genders but also to assure that the laws are effective in promoting day-to-day equality in real life situations.
In line with this objective, the Gender Equality Act applies to all employment relationships, regardless of whether the employer is the government or a private entity.

2. Prohibition of Gender Discrimination
Less favorable treatment of employees on account of marital status, family situation, or pregnancy qualifies as gender discrimination and is therefore prohibited. Sexual harassment – which includes but is not limited to threats, the promising of advantages, coercive acts, or the exercise of pressure in order to obtain favors of a sexual nature – constitutes gender discrimination by statute. However, employers are expressly allowed to discriminate against employees based on gender, if such discrimination consists of reasonable measures whose objective is to achieve equality in fact (affirmative action).

3. Remedies
In addition to statutory or contractual claims for damages or emotional distress according to the general rules, victims of unlawful gender discrimination have, at their option, the following additional remedies:
— court order prohibiting imminent discriminating actions;
— court order eliminating the effects of existing discrimination;
— declaratory judgment if the negative effects of the discrimination in question persist;
— court order for the payment of the salary owed to the employee.

These general remedies are modified in the case of sexual harassment and if the discriminatory behavior relates to hiring or dismissal:

— If the discrimination consists of sexual harassment, the employee is entitled to an additional remedy. The judge or the competent administrative agency may oblige the employer to pay an indemnity of a maximum amount of six months' salary, provided that the employer fails to prove that the employer took necessary and reasonable steps to prevent sexual harassment from happening.
— If the discriminatory behavior relates to hiring or dismissal in the context of a private employment contract, the remedies above are replaced by a claim for payment in an amount to be determined by the judge according to the circumstances and based on the employee's potential or actual salary. The maximum amount of such payment is three months' salary for discriminatory hiring and six months' salary for discriminatory dismissal.

4. Procedural Simplifications

In order to facilitate the enforcement of claims based on gender discrimination, the Gender Equality Act provides for two particular procedural devices:

— Employees benefit from a presumption of discrimination in the context of distribution of tasks, working conditions, salary structure, continuing education, promotion, and dismissal, if the employee is able to show the probability of such discrimination.
— Certain organizations may, in their own name, file an action for a declaratory judgment that specific discrimination exists, if it is foreseeable that the outcome of such action will affect a large number of employment relationships.

C. Disability Discrimination

While legislation has been enacted to give effect to a constitutional provision aimed at eliminating disadvantages affecting individuals with disabilities, such legislation does not apply to private employment contracts. As a result, the general rules against discrimination apply (see above).

D. Enforcement and Remedies in Discrimination Cases

Except for gender discrimination (see above), Swiss law does not set out any particular remedies for discrimination cases. In other words, the general rules regarding the employer's breach of contract apply (see above).

E. Equal Pay for Equal Work

The Swiss Constitution provides for equal protection under the law and specifically emphasizes the applicability of this principle to gender issues. However, as constitutional rights, they are rights to be asserted against the government and do not typically directly apply to contractual relationships between private parties. Nevertheless, there is an exception relating to the right to equal pay for equal work for men and women, which is directly applicable in the context of private employment contracts by virtue of constitutional law.

Termination of Employment

A. General Methods of Termination

1. Overview

Generally, employment contracts may be terminated by mutual consent, by expiration of a fixed term, by death of the employee or by unilateral notice of termination.

2. Termination by Mutual Consent

Because there are numerous mandatory provisions governing notices of termination which could be circumvented by using other means of termination, Swiss law provides for certain rules aimed at defeating any such attempts to circumvent. Consequently, a mandatory provision prevents the employee from waiving any claims resulting from mandatory statutory rules or from mandatory rules contained in collective employment contracts for one month after termination of the employment relationship. Hence, a waiver of all further claims in a termination agreement concluded during such time frame is only enforceable if the agreement represents a real compromise between the interests of both parties. This is an important parameter that has to be kept in mind when negotiating a termination agreement. It should be noted as well that, according to case law, the employer has to give the employee sufficient time to consider a draft of a termination agreement (usually five to seven working days), which has to be taken into account in case the employer intends to negotiate a termination of the employment relationship without issuing a notice of termination prior to such negotiations.

3. Expiration of a fixed term

Furthermore, in the event of an automatic termination of the contract due to expiration of a fixed term, Swiss courts may read the fixed-term contract as a contract concluded for an indefinite period of time, if there was no genuine reason for using a contract for a fixed-term other than to circumvent mandatory statutory rules governing the termination of contracts concluded for an indefinite period.

It should be noted that, in light of the fact that the termination of a contract concluded for an indefinite period is usually quite easy, it is common in Switzerland to conclude employment contracts for an indefinite period, except where there is a specific reason to conclude a fixed-term employment contract. Even in case of a fixed-term contract, the parties may agree that the employment relationship may be terminated during the fixed term (the fixed term being a maximum duration of the employment relationship in such cases).

4. Unilateral Notice of Termination

Unless stipulated otherwise, a notice of termination need not be in writing (such is, however, highly recommended for reasons of proof) and need not state any reasons for termination in order to be effective. However, the reasons for termination must be provided in writing if the non-terminating party so requests. Upon receipt, the notice of termination becomes irrevocable. Under Swiss law, notices of termination cover the entire agreement, i.e. individual provisions alone may not be terminated. There are two different types of notices of termination, namely a) ordinary termination with notice and b) extraordinary termination for cause without notice.

B. Ordinary Termination with Notice

1. Basic Rules

Any employment contract concluded for an indefinite period of time may be unilaterally terminated by both employer and employee, subject to statutory notice periods ranging from one to three months, depending upon the length of service. These notice periods may generally be altered by mutual consent, provided they are the same for both employer and employee. However, after expiration of the probation period, the notice periods may be reduced to less than one month only by collective employment contract and only for the first year of service.

If the specific contract does not contain any wording in this regard, the first month of the employment relationship serves as a probation period. During such probation period, each party may terminate the employment relationship at any time with a notice period of seven days. Such probation period may be waived or be extended to a maximum of three months. During the probation period, the regulations regarding untimely termination (section 3 below) do not apply.

As a general rule, an employment contract may be terminated by either party for any reason. However, Swiss statutory law provides for protection from termination by notice for both employer and employee, distinguishing between *abusive* and *untimely* notice of termination. Unless the law provides otherwise, it is the non-terminating party who has to show that the notice of termination was abusive or untimely.

2. Protection against Abusive Termination

With the exception of the last three bullet points below, which apply to employers' terminations only, termination of the employment contract by either party is considered abusive if given for one of the following reasons (non-exhaustive list):

— because of personal characteristics of one party (e.g. race, creed, sexual orientation, age, criminal record), unless they are relevant to the employment relationship or significantly impair cooperation within the enterprise;
— because of the other party's exercise of a constitutional right, unless the exercise of such right breaches a duty of the employment relationship or significantly impairs cooperation within the enterprise;
— for the sole purpose of frustrating the formation of claims arising out of the employment relationship;
— because the other party asserts, in good faith, claims arising out of the employment relationship;
— because the other party performs compulsory Swiss military service, civil service, Red Cross service or another compulsory statutory duty (e.g. jury duty).
— because the employee belongs to or does not belong to an employee association, or because of the lawful exercise of union activities;
— during the period the employee is an elected employee representative in a company institution or in an enterprise affiliated with it, and, if the employer cannot prove a justifiable reason for the termination;
— in connection with a collective dismissal without prior consultation with the employees' representative body or, if there is none, with the employees.

The party which abusively terminated the employment relationship is legally bound to pay an indemnity which may be up to the employee's salary for six months, above and beyond any claims for damages based on other legal grounds. In order to preserve the claim for indemnity, the party whose contract was abusively terminated must object to the termination in writing by no later than the end of the regular notice period. If such objection was validly made and if the parties cannot agree on a continuation of the employment relationship, the claim for indemnity must be asserted in court within 180 days after the end of the employment relationship, otherwise the claim will be forfeited.

3. Protection against Untimely Termination

Termination of the employment relationship after the expiration of the probationary period, if any, is considered untimely, if it was made by the employer – and under certain conditions also by the employee – during the following periods of time (exhaustive list):

— during compulsory Swiss military service, civil service or Red Cross service lasting more than eleven days, and during four weeks before and after the end of such service;
— during the period that the employee is prevented from performing his or her work fully or partially by no fault of his or her own due to illness or accident for 30 days in the first year of service, for 90 days as of the second year of service until and including the fifth year of service, and for 180 days as of the sixth year of service;
— during pregnancy and 16 weeks after the employee has given birth;
— during foreign aid service in which the employee participates with the employer's consent, and where such service has been ordered by the competent federal authority.

Any untimely notice of termination is null and void. In order not to defeat the purpose of the protective periods listed above, the termination notice must be renewed after the expiration of such periods.

C. Extraordinary Termination for Cause without Notice

1. General Rules

Both employers and employees have a right to terminate the employment contract immediately and without notice for cause, no matter whether or not the contract was concluded for an indefinite period of time and regardless of any statutory notice periods which would apply to an ordinary termination. By statute, there is cause if the terminating party cannot reasonably be expected to continue the employment relationship, but ultimately, determination of just cause is left to the courts to decide. As a general rule, the case law is quite strict and only severe breaches of the employee's duties (e.g. criminal acts against the employer, but never the mere underperformance of an employee) are considered to be a just cause.

As a general rule, the employment relationship has to be terminated within a short time period after the occurrence of such event (two to three working days); otherwise, the employer is deemed to have waived its rights to a termination for cause and a delayed termination without notice will be treated as unjustified (see below).

The consequences of extraordinary termination depend on whether the termination was justified, i.e. whether or not there was cause.

While there may be a claim for an indemnity payment in cases of unjustifiable termination without notice, the legal relationship between employer and employee remains terminated despite the unlawful termination. In other words, there are no rights to reinstatement or reengagement (aside from the option of temporary reinstatement pending a court decision about the validity of a notice of termination under the Gender Equality Act if that notice followed an employee's formal complaint about sexual discrimination).

2. Consequences of Justified Extraordinary Termination

If the extraordinary termination was justified, because it was for cause, the court will determine the financial consequences of such termination, taking into account all relevant circumstances.

3. Consequences of Unjustified Extraordinary Termination

If the employer dismisses the employee without notice and without cause, the termination is valid but the employee is entitled to compensation in the amount of what he or she would have earned if the employment relationship had been terminated in compliance with the applicable notice period or until the expiration of the fixed agreement period. In particular, in the case of long contractual notice periods, the court will reduce such compensation, if the employee found or could have found a new employment during such notice period. Furthermore, the court, in its discretion and taking into account all circumstances, may oblige the employer to pay an indemnity to the employee, which may be up to the employee's salary for six months.

Similarly, if the employee terminates the employment relationship without notice and without cause, the termination is valid but the employer is entitled to general compensation equal to one quarter of one month's salary and compensation for further damages. However, the court may reduce such compensation at its discretion, if no damage was caused, or if the actual damage was less then the above general compensation. In order to avoid forfeiture of the claim for compensation, the employer must bring a legal action or initiate formal debt collection proceedings within 30 days of the termination by the employee.

D. Redundancy and Collective Dismissals

1. Background

Swiss law has special rules regarding collective dismissals. Collective dismissals are deemed to be notices of termination given by the employer within a timeframe of consecutive 30 days for reasons unrelated to the person of the employee affecting:

— at least 10 employees in enterprises usually employing more than 20 and less than 100 persons,
— at least 10% of all employees in enterprises usually employing more than 100 and less than 300 persons, or
— at least 30 employees in enterprises usually employing at least 300 employees.

2. Consultation
An employer planning a collective dismissal must first consult with the employees' representative body or, if there is none, with the employees, and provide them with the opportunity to make suggestions on how to avoid the dismissals or to limit the number of dismissals and to alleviate their consequences. The employer is obliged to provide all pertinent information to the employees' representative body (or to the employees) and to the Cantonal Labor Office. In any case, the employer must inform them in writing about the following issues:
— the reasons for the collective dismissal,
— the number of employees to be dismissed,
— the number of persons usually employed,
— the time period within which the notification of the dismissals is to be given.

According to the case law, such consultation would have to be effected prior to the final decision with regard to the dismissal (although, in practice, the consultation obligation is most often, a mere formality).

3. Termination
If an employer terminates the employment relationship with an individual employee by notice as part of a collective dismissal, the employment relationship ends 30 days after notification of the planned collective dismissal to the Cantonal Labor Office, unless the termination becomes effective at a later time in accordance with contractual or legal provisions.

Individual notices of termination are considered abusive by statute, if such notice was given in the context of a collective dismissal and if the employer breached the above consultation obligation. In such case, the employer is legally bound to pay an indemnity up to an amount equivalent the employee's salary for two months.

4. Duty to Conclude a Social Plan
As of 1 January 2014, (larger) employers are obliged to negotiate a social plan in certain cases of collective redundancies. According to this far reaching revision of the law, an arbitral tribunal will establish a social plan by way of an arbitral award if such negotiations fail.

The employer is obliged to enter into social plan negotiations if it (i) usually employs at least 250 employees and (ii) intends to terminate at least 30 employees within 30 days for reasons that are unrelated to the individual employee. Terminations that are issued over time (i.e. within more than 30 days) but based on the same operational decision have to be taken into account and added together. Hence, the employer may not avoid the duty to conclude a social plan by staggering the notices of termination.

Accordingly, the new legislative provision concerns in particular restructurings of larger companies. Pursuant to the Federal Department of Justice, more than one third of all employees in Switzerland work in companies that could be affected by the new obligation to conclude a social plan. Collective redundancies in insolvency situations are exempt from the obligation to conclude a social plan.

The employer negotiates a social plan with the employees' representative body (i.e. an employees' organization, depending on the collective labour agreement); when there is no employees' representative body, the employer will negotiate directly with the employees. According to the wording of the law, employees may enlist the services of "experts". Such experts will most likely be trade union representatives; trade unions had also been the driving force behind the present legislation amendment. The object of these negotiations is the preparation of a social plan.

Pursuant to the legal definition, a social plan is "an agreement, in which the employer and the employees determine the measures aimed at preventing or limiting terminations and mitigating their consequences." The definition is unclear with respect to the phrase "measures aimed at preventing […] terminations"; this wording goes beyond the usual content of a normal social plan. In our opinion it is clear that this passage is not supposed to mean that an arbitral tribunal, when determining the content of the social plan, may prohibit an employer from issuing terminations. Both the relevant message of the Swiss Federal Council as well as the parliamentary consultations do not give any indication that this revision of the law would allow for such a massive intrusion of the arbitral tribunal into the decision-making sovereignty of employers.

If the parties are unable to agree on a social plan, then an arbitral tribunal must be appointed. The law does not define, however, when negotiations have failed. Thus, the employer must always expect that the negotiations on the social plan will be conducted under the permanent "threat" of arbitral proceedings being initiated if the employer fails to meet the demands of the employees. This is particularly the case if trade unions are involved on the employees' side.

The arbitral tribunal will establish a social plan by way of an arbitral award. In general, the arbitral tribunal will require the employer to make severance payments to the terminated employees and to e.g. assist them with their job search efforts. As a result, in cases of collective redundancies that are subject to a social plan, there is a considerable uncertainty for the employer with respect to the respective financial consequences until the arbitral tribunal makes a decision. And it is of little help that the law's sole principle for the content of a social plan merely states that such social plan must not jeopardize the continued existence of the company.

Young Workers

The employment of children under the age of fifteen is prohibited, but there are certain narrowly-tailored exceptions, namely:
a) for children over thirteen under specific circumstances and
b) for children under fifteen who contribute to cultural, artistic, or athletic performances or who work in advertising.

Young workers, defined as employees who have not yet completed their eighteenth year of age, enjoy a right to particular assistance and care by the employer. Furthermore, they benefit from a limitation of the maximum working hours to nine hours a day, whereas the work has to be performed within a time frame of twelve hours. Young workers may not be selected for night work or Sunday work, and if they are under the age of sixteen, they are not eligible for overtime work.

Maternity and Parental Rights

A. Background

Under Swiss law, there are specific provisions addressing the particular situation of pregnant and breastfeeding women and of employees with family duties.

B. Health and Safety

Pregnant women may only work if they consent to work. They are entitled to leave work or stay home based on a simple notification. Eight weeks prior to giving birth, they may not work between 8 p.m. and 6 a.m. Breastfeeding women may also only work if they consent to work, and they must be given the necessary time off for breastfeeding. Moreover, women may not work at all for eight weeks after giving birth, and thereafter, they may not work for eight more weeks without their consent.

Pregnant women who are employed between 8 p.m. and 6 a.m. must be offered comparable work between 6 a.m. and 8 p.m. This obligation also applies between the eighth and sixteenth week after giving birth. If no comparable work can be offered to these women during these periods, they still have a right to claim 80% of their salary, without any pay increase for night-time work.

Employees with family duties, i.e. employees who have children under the age of fifteen or who care for family or for persons close to them that are in need of care, may only be ordered to work overtime if they consent. At their request, they must be given a lunch break of at least ninety minutes.

They must be given the necessary time off – up to three days – to care for their sick children, provided that they show a corresponding medical certificate. Finally, due consideration to their situation must be given by the employer when determining work time and work breaks.

C. Protection from Dismissal

An employer's termination of the employment relationship during the pregnancy of the employee or sixteen weeks after her giving birth is considered untimely.

Note also that discrimination based on pregnancy is prohibited in all employment relationships, including hiring.

D. Maternity Pay and Maternity Leave

If the employee is unable to perform her work due to pregnancy, the employer is still obliged to pay the salary for a limited period of time; provided that the employment relationship has existed for more than three months, or that the agreed-upon term was more than three months.

While the employer may reduce the employee's vacation entitlement if the employee is prevented through his or her fault from working for more than one month in total, such reduction is not allowed if the employee is prevented from working for up to two months due to her pregnancy or because she obtained maternity pay under the applicable regulations.

After giving birth, a female employee has a right to a minimum of fourteen consecutive weeks of maternity leave. During this period, the employee has, under certain conditions, the right to maternity pay in the amount of 80% of her previous average salary paid in the form of daily allowances up to a maximum of CHF 196 per day.

E. Breastfeeding

Since June 1, 2014, and in accordance with the Maternity Protection Convention of the ILO, the breaks or the reduction of daily hours of work for breastfeeding shall be counted as working time and remunerated within certain limits. More specifically, the respective amendment provides that breastfeeding mothers can take daily breaks off work to breastfeed their child or to express milk. During the first year of the life of the child, the time used for breastfeeding or expressing milk is counted as working time and remunerated within the following limits: for a day of work up to four hours, 30 minutes break minimum; for a day of work over four hours, 60 minutes break minimum; for a day of work over seven hours, 90 minutes break minimum. This time can be taken off at once or divided according to the individual needs of the child. Such time to breastfeed or express milk cannot be considered as legal rest time or be deducted from work overtime.

Business Transfers

A. Background

As a general rule, if the employer transfers a business or part thereof to a third party, the employment relationship is transferred to the acquiring party including all rights and obligations as of the date of transfer, unless the employee declines the transfer. If a collective employment contract applies to the employment relationship that is transferred, the acquiring party is obliged to comply with it for one year, unless it expires earlier or is terminated by notice. Other than in the context of such business transfer, the employer is not entitled to transfer individual rights under an employment contract to a third party, unless otherwise agreed upon.

B. Effects of the Transfer

If the employee refuses to have his or her contract transferred, the employment relationship will be terminated upon expiration of the *statutory* term of notice, as opposed to a potentially deviating *contractual* term of notice. The acquiring party and the employee are legally bound to perform their contractual duties until that termination date. Furthermore, the previous employer and the acquiring party are jointly and severally liable for an employee's claims which became due prior to the transfer and those which will later become due until the date upon which the employment relationship could have been validly terminated by contract or is terminated at the refusal of the transfer by the employee.

C. Duty to Inform and Consult

Prior to the transfer, the employees or their representative body shall be informed about the reason for the transfer, and about the legal, economic and social consequences of the transfer for the employees.

If the transfer may result in measures affecting the employees, the employees' representative body must be consulted in time prior to a decision on these measures.

Collective Rights

A. Collective Employment Contracts

Swiss law provides rules on so-called "collective employment contracts", which are contracts whereby employers, or associations thereof, and labor unions jointly establish provisions concerning the conclusion, content and termination of the individual employment relationships of the participating employers and employees.

In terms of the legal effects of collective employment contracts, Swiss law distinguishes between provisions resulting in purely contractual rights between the parties to the contract and provisions which are equivalent to statutory rules despite their contractual origin. The latter are mandatory in that they (i) directly apply to the participating employers and employees and (ii) may not be changed to the detriment of the employee, unless otherwise provided for by the collective employment contract itself.

It should be noted that collective employment contracts are limited to participating employers and employees and are generally not binding on outsiders. However, upon request by all parties to the collective employment contract, the federal or cantonal government or even a municipality may, under certain circumstances, extend the applicability of the contract to outsiders within the same industry or profession, thereby providing the contract with the legal authority of a statute. It is worth noting that the extent of such collective employment contracts with binding effects on outsiders as well has grown considerably in the last few years.

B. Works Councils

Switzerland has enacted a statute on informing and consulting with employees in enterprises providing specific participation rights for employees. Elections for works councils must be held if requested by at least twenty percent of the employees in the case of enterprises with more than fifty employees, or if requested by one hundred employees if the enterprise employs more than five hundred employees.

Works councils have the right to be informed by management in all matters relevant to the fulfillment of their tasks. Furthermore, works councils have a right of participation in matters regarding health and safety measures, mass dismissals and (under certain circumstances) transfers of businesses.

As a general rule, the competences and influences of works councils are much lower in Switzerland than in other European countries (like Germany or France).

Employment Disputes

A. Labor Courts

In Switzerland, depending on the subject matter of the particular dispute, a variety of courts may have jurisdiction over employment disputes. For collective labor disputes, for example, there are conciliatory agencies and arbitral bodies which may have jurisdiction.

In general, the organization of the court system on the Cantonal level is subject to Cantonal laws, which provide for different schemes according to the needs and resources of the particular Canton. About half of the Cantons have specialized labor courts whose three-judge panels generally consist of a chairperson, who is an ordinary judge, and two members representing employers and employees, respectively. The details, however, vary from Canton to Canton.

In Zurich, for instance, the labor court has jurisdiction over any disputes between employer and employee arising out of their employment relationship, but its jurisdiction does not extend to disputes between the government and its personnel. Furthermore, after the dispute has arisen, the parties may stipulate in writing that their dispute is subject to the jurisdiction of the ordinary courts instead.

In Cantons which have labor courts, appeals are generally taken to ordinary appellate courts and not to specialized labor appeals court. Depending upon the amount of money in dispute, the aggrieved party may appeal decisions by Cantonal appellate courts to the Swiss Federal Supreme Court.

B. Procedural Particularities

The Code of Civil Procedure provides for a simple and expeditious procedure for cases in which the amount in dispute does not exceed CHF 30'000, and no court fees or court expenses shall be charged to the parties for such proceedings, except to parties bringing frivolous actions. Moreover, the court shall ex officio establish the facts and appraise the evidence at its discretion.

The Code of Civil Procedure provides for a conciliatory hearing to settle the dispute prior to the commencement of formal litigation. The conciliatory proceedings are mandatory, and the parties may (except in specific cases) not be represented by a lawyer in such conciliatory hearing (however, a lawyer may accompany his client in such hearing). Again, the organization of such conciliation authority may vary from Canton to Canton. In some Cantons (including the Canton of Zurich), a layperson acts as conciliation authority, whereas in other Cantons (e.g. Lucerne, Aargau), there is a conciliation hearing before a panel consisting of a labour court judge and two assessors.

Note also that collective employment contracts may provide for private conciliatory proceedings instead of governmental proceedings for disputes between labor unions and individual employees.

C. Forum Selection

In purely Swiss disputes, the forum for employment litigation is either the domicile of the defendant or, alternatively, the place of the business where the employee typically works. This forum is mandatory in the sense that employees may not validly agree to change this forum in advance, i.e. before the dispute in question arises.

The rules are virtually identical in international employment litigation involving member states of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter "Lugano Convention"), the general forum is the domicile of the defendant or, alternatively, the place of performance, which is defined as the place where the employee usually works. Forum selection clauses excluding this forum are only valid if they have been agreed upon after the dispute arose.

These rules are slightly modified in international employment litigation that does not involve member states of the Lugano Convention. Provided that no specific international treaty applies, Swiss courts at the defendant's domicile or at the place where the employee usually performs his or her work have jurisdiction. In addition, however, Swiss courts at the employee's domicile or usual residence also have jurisdiction, provided that the lawsuit is initiated by the employee. These jurisdictional provisions are not mandatory, however, and they may be changed by forum selection clauses, at least to the extent that the dispute regards monetary claims.

D. Choice of Law

In international employment matters, the law applicable to employment contracts is the law of the country in which the employee usually performs his or her work. If the employee usually performs his or her work in several countries, the law applicable to the employment contract will be the law of the country of the employer's business establishment or, if such establishment does not exist, the law of the country of the employer's domicile or residence. The parties may provide for a choice of law clause, but their choice is limited to the law of the countries in which (i) the employee usually resides, (ii) the employer's business establishment is located, or (iii) the employer has his or her domicile or usual residence.

Whistleblowing and Data Protection

A. Whistleblowing

Switzerland currently does not have a separate statute dealing with the issue of whistleblowing. Instead, the general principles governing employment contracts apply. Because of the employee's duty of loyalty, he or she may not provide any information to third parties such as the news media or even government agencies, if the disclosure of such information might be harmful to the employer's reputation, regardless of whether the employee is able to prove that the information disclosed is true. In rare circumstances, a disclosure of internal information to third parties may be absolutely necessary to protect interests that outweigh the employer's right of confidentiality. But even in such cases, the employee must first raise the issue with the employer prior to releasing any information to outsiders. Otherwise, the employee may be in breach of contract.

If the facts to be disclosed encompass manufacturing or trade secrets, there are additional rules to be considered, because the employee is bound by a statutory obligation not to make any use of or inform others of any such secrets. This obligation continues even after the termination of the employment relationship, to the extent required to safeguard the employer's legitimate interests. It should be noted that the breach of the employee's duty of confidentiality need not be intentional in order to constitute a breach of contract. However, if the disclosure was made intentionally, criminal liability may attach in addition to liability for breach of contract.

B. Data Protection

The employer may have a legitimate interest in collecting information about a particular employee in order to assess the employee's performance and ability to perform the duties contractually undertaken. However, the employer may only do so to the extent that the data to be collected relates to the fulfillment of the employment contract. Upon request of the employee, the employer has to provide a copy of the personnel file to the employee.

Furthermore, the employer must comply with the Swiss Data Protection Act. This means that the employer must disclose to the employee that he or she is collecting data about the employee; otherwise, the employer must register any data collection with the Federal Data Protection Officer. Thus, employees must generally be notified in advance about any monitoring of telephone conversations, of the use of the internet or of business e-mail by the employer; the same applies to the use of video surveillance equipment by the employer. As a general rule, the use of content scanners to control the employee's use of internet and e-mail is not permitted.

Any application materials submitted by a potential employee for the purpose of recruitment must be returned to the applicant or destroyed, unless the applicant expressly agrees to the employer's keeping the materials on file. An applicant who is rejected by a potential employer is entitled to a written statement about the data processed in the context of the application. During the employment relationship, the employer must ensure that the data collected about the employee is and remains accurate and that such data is safe from unauthorized access by third parties.

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