Labour & Employment 2021

Contributing editors
Matthew Howse, K Lesli Ligorner, Walter Ahrens, Michael D Schlemmer and Sabine Smith-Vidal

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Getting The Deal Through

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Matthew Howse, K Lesli Ligorner, Walter Ahrens, Michael D Schlemmer and Sabine Smith-Vidal

Morgan, Lewis & Bockius LLP

Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Labour & Employment*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Hong Kong, Hungary, Mauritius, Romania, Singapore and Taiwan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Switzerland

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Wenger Plattner

LEGISLATION AND AGENCIES

Primary and secondary legislation

1 What are the main statutes and regulations relating to employment?

The laws on Swiss employment and labour are composed of statutory laws that regulate the private relationship between two contracting parties, including employers, employees and labour organisations (private law), as well as public laws that provide for government rules that must be followed at work. The sources of Swiss employment and labour law are, therefore, manifold. In many sectors of the Swiss economy, collective labour agreements further provide for mandatory rules on the terms and conditions of a working relationship between two parties. The laws on Swiss social security and social insurance also have a significant impact on employment.

At the federal level, there are some important acts with corresponding ordinances that must be consulted quite often in practice. These include the:

- Code of Obligations (SR 220);
- Federal Work Act (SR 822.11);
- Federal Act on Gender Equality (SR 151.1);
- Federal Act on Worker's Participation (SR 822.14);
- Federal Act on Deployment (SR 823.20);
- Federal Act on Placement Agencies and Staff Leasing Services (SR 823.11); and
- Federal Ordinance against Excessive Compensations with Listed Companies (221.331).

Protected employee categories

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Although protected classes are not recognised under Swiss law, several laws provide for similar protection. Examples are as follows.

- age: unlawful dismissal may apply if a termination notice was given purely based on the grounds of age and despite the fact that the employee had performed his or her job well (article 336(1)(a) of the Code of Obligations);
- race: unlawful dismissal may apply if a termination notice was given purely based on the grounds of race and despite the fact that the employee had performed his or her job well (article 336(1)(a) of the Code of Obligations);
- disability: unlawful dismissal may apply if a termination notice was given purely based on the grounds of disability and despite the fact that the employee performed his or her job well; and
- gender: employers may not discriminate against employees on the basis of gender, marital status, family situation or pregnancy.

Enforcement agencies

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

At the federal level, the State Secretariat for Economic Affairs is the primary government agency responsible for the enforcement of labour laws in Switzerland. Further, each canton has an enforcement agency as well, which is often called the Office for Economy and Labour.

The courts ensure the uniform and correct application of laws. A distinction is made between judicial assessment at the cantonal level and the judicial assessment at federal level.

At the cantonal level, the court at the domicile or registered office of the party against whom an action is brought or at the place where the employee performs his or her ordinary work is competent. As a rule, the conciliation authority is the first point of contact for labour disputes. Conciliation proceedings are free of charge up to a value in dispute of 30,000 Swiss francs. If no agreement can be reached through the conciliation hearing, the civil courts organised by the canton (in most cantons, these are labour courts of first instance) have jurisdiction. If the parties disagree with the ruling, the dispute can be taken to the next higher instance, the cantonal high court. If, in turn, the parties do not agree with the ruling, the matter is referred to the federal level and, thus, to the Federal Supreme Court, provided that the conditions are met (for labour disputes, article 74(1) of the Federal Act on the Federal Supreme Court requires a dispute value of at least 15,000 Swiss francs). The Federal Supreme Court is the final appeal instance for labour disputes.

WORKER REPRESENTATION

Legal basis

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

In Switzerland, the Labour Act and the Federal Act on the Information and Participation of Employees in Businesses (SR 822.14) (the Participation Act) provide for the possibility of establishing employee representatives. All private companies that permanently employ employees in Switzerland are subject to the Participation Act (article 1). If an establishment has more than 50 employees, they may appoint one or more representatives from among them (article 3).

In accordance with article 6 of the Participation Act, employee representatives are appointed by universal and free election. At the request of

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one-fifth of the employees, it must be held in secret. A secret ballot can be used to determine whether most voters are in favour of employee representation (article 5 (1)).

Pursuant to article 7(1) of the Participation Act, the size of the employee representation is determined jointly by the employees and the employer and is based on the size and structure of the company. However, the representation must consist of at least three persons (article 7(2)).

Powers of representatives

5 | What are their powers?

The employee representatives represent the interests of the employees towards the employer and regularly inform the employees about them (article 8 of the Participation Act). The employees' representatives have the right to comprehensive and timely information on all matters of which knowledge is a prerequisite for the proper performance of their duties (article 9(1) of the Participation Act). In addition, the employee representatives have the following participation rights pursuant to article 10 of the Participation Act:

- in matters of occupational safety (within the meaning of article 82 of the Accident Insurance Act, and in matters of employee protection within the meaning of article 48 of the Labour Act);
- in the case of transfers of businesses (within the meaning of articles 333 and 333(a) of the Code of Obligations);
- in the case of collective redundancies (within the meaning of articles 335(d) to 335(g) of the Code of Obligations); and
- with regard to joining an occupational benefits institution and the termination of an affiliation contract.

Further rights of participation for employees or their representatives are regulated in article 48 of the Work Act. The right to have a say applies to all matters relating to health and safety, the organisation of working time and the organisation of timetables, as well as to the measures provided for night work in accordance with article 17(e) of the Work Act. The right to a say includes the right to consultation and hearing before the employer decides. In addition, there is the right to be given reasons for the decision if the decision does not or does not sufficiently consider the objections of the employees or their representation in the company (article 48(2) of the Work Act).

BACKGROUND INFORMATION ON APPLICANTS

Background checks

6 | Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

If the applicant is in a non-terminated employment relationship, the current employer may not be contacted by the potential employer without the applicant's consent. In principle, references may only be obtained with the employee's consent, and former employers may not say more than what is already stated in the job reference. However, clarifications regarding the job reference are permitted.

If no reference is available, the former employer may not even confirm that an employment relationship existed between it and the applicant. It is also questionable to what extent the inclusion of personal information from the internet, and especially from social media platforms, during the application procedure is permissible. Some scholars opine that employers must abstain from these practices; others think that employers are under an obligation to confront the applicant with online search results.

Although the data that can be found on the internet is publicly accessible, this does not release the employer from the obligation to limit the processing of personal information relevant to the issues of suitability and feasibility of an employment relationship (article 328(b) of the Code of Obligation). If an external graphological expertise or a psychological aptitude test is to be carried out, the consent of the applicant is always required. Here too, the question of relevance to the job to be filled arises. Thus, if external specialists are commissioned to conduct a background check, they must always act responsibly, cautiously and with respect for the privacy of the candidates.

Medical examinations

7 | Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Applicants must answer questions relating to health conditions truthfully if the data is necessary to assess the applicant's eligibility for the job. If necessary, for the job, the employer may also have the applicant's suitability for the employment relationship from a health point of view examined by a doctor. If a medical examination takes place, the doctor is bound by the duty of confidentiality. He or she may only make statements to the employer regarding the suitability of the applicant for the position to be filled. However, he or she may not pass on any diagnosis to him. This also applies if the medical examination is carried out by the company doctor. Thus, if the medical data is necessary for a final assessment of the applicant, an employer may refrain from hiring if the examination is refused.

Drug and alcohol testing

8 | Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Applicants can be requested to undergo drug and alcohol screening tests if these test results are necessary to assess his or her eligibility for the job. The consent of the data subject is required for each test owing to the lack of a legal basis. If the applicant does not give his or her consent, he or she cannot be forced to take the test. If there is an overriding security interest, the employer can refuse to employ an applicant who does not wish to be tested.

HIRING OF EMPLOYEES

Preference and discrimination

9 | Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

According to the article 8(2) of the Constitution, no one may be discriminated against based on race; origin; language; mental or spiritual disability; social position; religious, political and ideological convictions; or based on gender.

The law ensures the factual and legal equality of men and women (article 8(3) of the Constitution), particularly in the areas of education, family and work. Men and women are entitled to equal pay for work of equal value.

In labour law, the Equal Treatment Act applies. This promotes actual equality between the sexes (article 1). According to article 3(1) of the Act, employees may not be discriminated against, either directly or indirectly, based on their gender (eg, because of marital status, family situation or pregnancy). This prohibition applies to remuneration, promotion and dismissal, the allocation of tasks and the organisation of working conditions. In the event of a refusal of employment based on discrimination, the employee is entitled to compensation under article 5(2) of the Act.

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10 | Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

No. As a rule, employment contracts are not subject to any specific formal requirement (article 320 of the Code of Obligation). However, written contracts are recommended and are common. For some types of contracts, the written form is even a validity requirement. Article 330(b) of the Code of Obligations requires a written information letter after the commencement of work, including the names of the contracting parties, the date of commencement of the employment, the function of the employee, the salary and wage supplements and the weekly working hours.

11 | To what extent are fixed-term employment contracts permissible?

'Chain employment contracts' are not permitted. These are a series of several fixed-term contracts. If a fixed-term employment contract is continued for a further fixed-term contract period, it is not a prohibited chain employment contract. It is, therefore, crucial that no new employment contract is created, but that an existing contract is extended for a certain period.

If the purpose of extending a fixed-term contract is to circumvent provisions on protection against dismissal or other statutory claims dependent on a certain minimum duration, this is prohibited. The question, therefore, arises as to how often a fixed-term employment contract can be extended without this leading to an employment relationship of indefinite duration. In our opinion, a fixed-term contract should only be renewable twice. Thereafter, an unlimited contractual relationship is generally to be assumed.

Probationary period

12 | What is the maximum probationary period permitted by law?

The maximum probationary period permitted by law is three months (article 335(b)(2) of the Code of Obligations). An extension of this probationary period is not permitted, neither by agreement nor at the discretion of the employer. Where, however, the probationary period is interrupted by illness, accident or performance of a legal obligation, it will be extended accordingly (article 335(b)(3) of the Code of Obligations).

Classification as contractor or employee

13 | What are the primary factors that distinguish an independent contractor from an employee?

The classification of an individual as an employee or a contractor is governed by articles 18 and 319 of the Code of Obligations, as well as by case law. Work control, the grade of subordination and integration into the business organisation are crucial factors in determining the legal classification of the contract.

Temporary agency staffing

14 | Is there any legislation governing temporary staffing through recruitment agencies?

Temporary staffing through recruitment agencies is governed by the Federal Act on Placement Agencies and Staff Leasing Services.

Recruitment agencies leasing out the services of their employees or placing personnel require an authorisation from the competent authority. This authorisation is granted by the cantonal employment office. An additional authorisation of the State Secretariat for Economic Affairs is required if the agency is leasing out the services of employees or placing personnel to an employer abroad or from abroad to an employer in Switzerland.

The leasing out of services of personnel into Switzerland by an employer domiciled abroad is not permitted (article 12(2) of the Federal Act on Placement Agencies and Staff Leasing Services)

FOREIGN WORKERS

Visas

15 | Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

As a rule, admissions of non-EU nationals and nationals of a country not belonging to the European Free Trade Association (EFTA) are limited in number (quota places).

EU and EFTA nationals benefit from the freedom of movement under the bilateral agreement between Switzerland and the European Union on the free movement of persons (SR 0.142.112.681).

Employees transferring within an international group of companies are subject to the same rules of admission to the Swiss labour market as any other foreign worker. However, the admission requirements for intra-company transfers are slightly less stringent under the Foreign Nationals and Integration Act (FNIA); for example, the precedence rule (no Swiss worker available) does not apply to operational transfers for senior managers and essential specialists in international companies (article 30 of the FNIA).

Spouses

16 | Are spouses of authorised workers entitled to work?

As a rule, spouses of Swiss nationals and of foreign nationals holding a residence permit (permit C or B) do not need to go through an additional work permit process to obtain self-employed status or to take up employment. Spouses of people holding a short-term permit (permit L) require an additional work permit.

General rules

17 | What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Switzerland follows a dual system for granting foreign nationals access to the Swiss labour market. Regardless of their qualifications, workers from EU and EFTA states are granted easier access under the Agreement on the Free Movement of Persons. Regarding nationals from all other states – known as third-states – only a limited number of highly qualified workers can be admitted.

The admission criteria are listed in the FNIA and the Ordinance on Admission, Residence and Employment. These are explained in more detail in the directives of the FNIA.

Foreign workers from third-states are admitted if it is in the overall (economic) interest of Switzerland (articles 18 and 19 of the FNIA) and if it is not possible to recruit a person who qualifies for precedence from the labour market in Switzerland or in an EU or EFTA state (article 21 of the FNIA). Admissions are limited to managers, specialists and other qualified workers. In addition to professional qualifications, certain integration criteria must be taken into account, such as language skills, age and adaptability (article 23 of the FNIA).

Admissions of non-EU and non-EFTA state nationals are limited in number. To this end, the Swiss government determines the maximum numbers on an annual basis.

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Salary and employment conditions must correspond to those that are customary for the job and the region, and evidence must be presented of the fulfilment of some personal requirements (language, age, adaptability, etc).

The sanctions for employing a foreign worker who does not have a right to work in the jurisdiction are a custodial sentence up to one year or a monetary penalty (and up to three years plus a monetary penalty in serious cases) (article 117 of the FNIA).

Resident labour market test

18 | Is a labour market test required as a precursor to a short or long-term visa?

As a rule, a rigorous labour market test is required to obtain a work permit for individuals holding citizenship from a third country, who are non-EU and non-EFTA nationals.

Employers in Switzerland are encouraged to first hire individuals that are already admitted to the Swiss labour market. In that regard, the job registration requirement for employers in Switzerland came into effect on 1 July 2018. Employers have been legally required to register with the regional employment centre (RAV) vacancies in occupations where the national average unemployment rate meets or exceeds a certain threshold (article 21(a) of the FNIA). The relevant unemployment rate is redefined every year based on the labour market situation. Since 1 January 2020, this threshold has been an employment rate of 5 per cent. The definitive list of occupations that have to be registered is published every autumn online and is valid for the subsequent calendar year (1 January to 31 December).

The job vacancy must be exclusively published for five working days on an online job portal that can only be accessed by jobseekers registered with the RAV before it can be advertised elsewhere (publication ban). In this way, jobseekers registered with the RAV are informed first about vacancies in occupations with a high level of unemployment. This will give them a five-day head start over other candidates in which to apply. It will also allow the RAV to send employers a list of suitable candidates.

There are exceptions to the job registration requirement; for example, jobs within a company, an association of companies or a group that have been filled by internal staff employed there for at least six consecutive months do not have to be registered.

TERMS OF EMPLOYMENT

Working hours

19 | Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

As a rule, the maximum weekly working hours are 45 or 50 hours depending on the category of worker. The employee is obliged to comply with the employer's instructions concerning working hours.

Overtime pay

20 | What categories of workers are entitled to overtime pay and how is it calculated?

The following answers refer to employment contracts under private law. Employment relationships under public law, such as employment in administration or in state-owned companies, are usually subject to their own rules, so the following answers do not apply to them or only apply to a limited extent.

There are two types of overtime under Swiss law. 'Overhours' is defined as working time that exceeds the contractually agreed working hours, whereas 'overtime' is defined as working hours that exceed the statutory maximum working hours provided by the Federal Work Act. The Federal Work Act allows for a maximum of 45 working hours per week in industrial companies and for office staff and technical and other employees as well as sales staff in large retail companies. In other companies, the maximum working time is 50 hours per week.

Employers must compensate overhours and overtime with a supplemental pay of at least 25 per cent. Instead of compensation pay, overhours and overtime may be compensated by time off in lieu, which must be of (at least) equal duration. The parties must agree on time off in lieu.

An employee is obliged to perform overtime to the extent that he or she is able and may reasonably be expected to do so.

21 | Can employees contractually waive the right to overtime pay?

By mutual agreement, overhours and overtime may be compensated by time off in lieu, which must be of (at least) equal duration. For overhours, the parties may agree in writing that there will be no extra compensation or time off in lieu, but that this is included in the normal salary. To the contrary, the statutory right to payment or compensation of overtime cannot be waived by mutual agreement.

Vacation and holidays

22 | Is there any legislation establishing the right to annual vacation and holidays?

The minimum entitlement for paid vacation is four weeks (20 working days) and five weeks' vacation (25 working days) for employees under 20 years (article 329(a)(1) of the Code of Obligations). There are also paid public holidays (eg, 1 August, article 20(a)(1) of the Federal Work Act).

The employer has the final decision with regard to the timing of the vacation days; however, it must consult with the employees and grant vacation days upon an employee's request whenever possible.

Sick leave and sick pay

23 | Is there any legislation establishing the right to sick leave or sick pay?

The Code of Obligations provides for the right to sick leave and sick pay. Furthermore, employees are legally protected against dismissal in times of sick leave.

The law provides that if an employee is prevented from working owing to illness or accident and the legal requirements are met, the employer is obliged to continue salary payments for a limited time (article 324(a) of the Code of Obligations). It is quite common in Switzerland for employers to purchase daily sick allowance insurance to cover the risk of continued salary payments. An employee's right to sick pay is, therefore, not a major concern for Swiss employers.

Leave of absence

24 | In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

There is no general statutory entitlement to (unpaid) leave, not even for the purpose of further education.

During each year of service, the employer must grant employees under the age of 30 leave of up to one working week for the purpose of carrying out unpaid leadership, care or advisory activities in connection with extracurricular youth work for cultural or social organisations and for related initial and ongoing training (article 329(e)(1) of the Code of Obligations). The employee does not receive pay during this time. A different arrangement may be made in favour of the employee (article 329(e)(2) of the Code of Obligations).

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After giving birth, a female employee is entitled to maternity leave of at least 14 weeks (article 329(f) of the Code of Obligations). During this period, the employer is, in principle, exempt from the obligation to pay wages as the employee generally receives benefits from the compulsory maternity insurance (article 16(b) of the Loss of Earnings Act). An employee who is the legal father of a child at the time of its birth or who becomes the legal father within the following six months is entitled to paternity leave of two weeks. Paternity leave must be taken within six months of the birth of the child and can be taken either by the week or by the day (article 329(g) of the Code of Obligations). If the legal conditions are met, the father receives compensation for loss of earnings during paternity leave pursuant to the Loss of Earnings Act (article 16(i) of the Loss of Earnings Act).

The employee is further entitled to paid leave for the time necessary to care for a family member, domestic partner or partner with a health impairment. However, the leave shall not exceed three days per occurrence and 10 days per year (article 329(h) of the Code of Obligations).

Mandatory employee benefits

25 | What employee benefits are prescribed by law?

Employers must get national insurance for any employees. The following insurances are mandatory:

- old-age and survivors' insurance (OASI);
- disability insurance (DI);
- insurance for loss of earnings during service, maternity and paternity (APG);
- unemployment insurance (ALV);
- pension fund;
- accident insurance; and
- non-occupational accident insurance.

The OASI should cover the basic requirements of payers of contributions. The DI covers the financial consequences of disability. The APG system compensates, in part, loss of income owing to military service, civic protection service or civic service. These types of insurance are financed by employer and employee contributions, the state and the cantons.

Part-time and fixed-term employees

26 | Are there any special rules relating to part-time or fixed-term employees?

Employment contract law does not contain special rules for part-time work.

Fixed-term employment contracts end on a fixed date. It is not possible to terminate a fixed-term employment contract before the stated date unless the contract provides for an early termination or good cause exists.

Public disclosures

27 | Must employers publish information on pay or other details about employees or the general workforce?

Employers are not obliged to publish information on pay or other details about employees or the general workforce.

Pursuant to new federal law entering into force on 1 July 2020, companies employing more than 100 employees at the beginning of a given calendar year are under a legal obligation to undergo a scientific analysis of their salary policies to prevent gender pay gaps. Under the new rules, firms with 100 or more employees will have to provide a gender pay gap analysis every four years. Companies must inform employees and shareholders about the results.

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Validity and enforceability

28 | To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-termination non-compete and non-solicitation covenants are valid under restrictive conditions. To be enforceable, these clauses must be drafted carefully and respect the statutory limits.

Non-compete covenants are only valid if they are agreed on in writing and with an employee that is legally capable of acting. Also, the prohibition of competition is binding only where the employment relationship allows the employee to have knowledge of the employer's clientele or manufacturing and trade secrets and where the use of such knowledge might result in substantial harm to the employer. In case those conditions are not met, no valid non-compete clause may be agreed on.

In addition, the covenants must be limited with respect to time (maximum of three years), place (only the region to which the business was extended) and scope. The limitations must be of such nature that the future professional development of the employee is not aggravated unreasonably by the covenant. In the case that the non-competition covenant exceeds the mandatory limits, the courts can and will reduce the covenant's content to the reasonable extent. When doing this, the courts will have to consider the circumstances of the case. With regard to the limitation in time, non-compete clauses that protect manufacturing secrets are usually valid for a longer period than non-compete clauses that protect relationships to clients only.

The same rules apply to non-solicitation covenants.

Infringement of a valid non-compete or non-solicitation covenant leads to damages owed by the employee. A contractual penalty can also be agreed to. If agreed so expressly in writing, the employer may insist that the situation that breaches the contract be rectified to the extent justified by the injury or threat to the employer's interests and by the conduct of the employee.

Non-compete and non-solicitation obligations are extinguished if the employer terminates the employment relationship without the employee having given it any good cause to do so, or if the employee terminates it for good cause attributable to the employer.

Post-employment payments

29 | Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

The payment of salary or any compensation while the former employee is subject to post-employment restrictions is not required. However, it is possible to contractually agree on such compensation. In the case that compensation is being paid, courts tend to accept non-compete covenants that are more restrictive in respect to time, place and scope.

LIABILITY FOR ACTS OF EMPLOYEES

Extent of liability

30 | In which circumstances may an employer be held liable for the acts or conduct of its employees?

An employer is liable for the damage caused by its employees or ancillary staff in the performance of their work unless it proves that it took all due care to avoid damage of this type or that the damage would have occurred even if all due care had been taken.

The employer has a right of recourse against the employee who caused the damage to the extent that the employee is liable for the damages. However, if the damage caused was a consequence of the normal risks immanent in the work performed, the employee is not liable

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for the damages. In addition, as far as the employee has not caused the damage on purpose or through gross negligence, the employee will only have to bear part of the damages.

TAXATION OF EMPLOYEES

Applicable taxes

31 | What employment-related taxes are prescribed by law?

Employees must declare their income in their yearly tax declaration. Basically, all salary components are taxable income (base salary, bonus and payment for overtime hours or vacation). Exceptions exist for expense allowances, but only if they cover real expenses and do not qualify as hidden salary components.

As a rule, employees that are not Swiss citizens and do not have a permanent residence permit (permit C) or are married to such a person, or employees that live abroad are subject to taxation at source. Employers must deduct the tax at source from the salary and deliver it to the tax authorities on a monthly basis. Tax rates for taxation at source depend on the taxable income, on the civil status of the employee, the number of children that he or she is responsible for and on his or her membership in a national church.

EMPLOYEE-CREATED IP

Ownership rights

32 | Is there any legislation addressing the parties' rights with respect to employee inventions?

Employers own all IP rights that employees create during the performance of contractual work obligations.

By written agreement, an employer may reserve the right to acquire inventions and designs that were created during employment but not during the performance of contractual work obligations.

Since there is no specific provision regarding copyright – in contrast to the other IP rights – it is recommended that the issue of copyright is clarified accordingly in the employment contract.

Trade secrets and confidential information

33 | Is there any legislation protecting trade secrets and other confidential business information?

For the duration of the employment relationship, the employee must not exploit or reveal confidential information obtained while in the employer's service, such as manufacturing or trade secrets.

The employee also remains bound by the duty of confidentiality even after the end of the employment relationship to the extent required to safeguard the employer's legitimate interests. However, after the end of the employment contract, the secrecy obligation only persists to the extent that it does not unreasonably hinder the employee's professional development.

DATA PROTECTION

Rules and obligations

34 | Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The employer may handle data concerning the employee only to the extent that the data concerns the employee's suitability for his or her job or is necessary for the performance of the employment contract (article 328(b) of the Code of Obligation). In all other respects of employment data processing, the provisions of the Federal Act on Data Protection are applicable.

35 | Do employers need to provide privacy notices or similar information notices to employees and candidates?

Not required.

36 | What data privacy rights can employees exercise against employers?

Employees may at any time request insight into their full personnel file, and the employer must provide copies of it. Employees may ask for correction if the data collected is not correct or incomplete.

BUSINESS TRANSFERS

Employee protections

37 | Is there any legislation to protect employees in the event of a business transfer?

In the case of a transfer of business, all employment relationships are automatically transferred to the new owner by law. The former employer and the acquirer will become jointly and severally liable for any claims (based on the employment agreement) of an employee that became due before the transfer or that will become due between the transfer of business and the date on which the employment relationship could normally be terminated.

The employee has a right to object to the transfer, in which case the employment contract of that specific employee will end after expiration of the legal notice period.

All employees must be informed in due time before the transfer. If there are measures planned (such as dismissals) because of the transfer, the employees must have the possibility to comment on these and to make proposals on how the dismissals may be prevented.

A sale of shares (share deal) alone does not qualify as a transfer of business. Usually, an outsourcing of services does not qualify as a transfer of business under Swiss law; however, this is based on the circumstances of the outsourcing. Whether it exceptionally qualifies as a transfer of business requires careful analysis.

TERMINATION OF EMPLOYMENT

Grounds for termination

38 | May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

In the case of an employment relationship under private law for an indefinite period, a distinction must be made between ordinary termination (when statutory or contractual periods and deadlines are complied with) and exceptional termination (without notice).

In principle, no cause is required in the case of an ordinary termination; however, the termination must not be abusive. The party giving notice of termination only has to give cause for the ordinary termination in writing if the other party so requests.

In principle, a good cause must be given for an exceptional termination (without notice); however, such a termination is valid even without a good cause for termination (but is then unjustified, which leads to compensation). Good cause is given if it is unreasonable to continue the employment relationship (eg, in the event of a serious breach of duty by the employee or insolvency of the employer).

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Notice

39 | Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

In principle, no cause needs to be given for an ordinary termination (the principle of freedom of termination).

In the case of an exceptional termination, a distinction must be made between whether the employment relationship is under private law or public law. In the case of a private law relationship, it is not required to state the cause for termination before the dismissal. In the case of a public law relationship, the right to be heard must be granted beforehand.

40 | In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

The principle of freedom of dismissal applies in Switzerland. This is limited by abusive practices and the protection against dismissal for a certain period. Even an exceptional termination (without notice) is valid without important reasons for termination (however, it would be unjustified in that case).

An employee who is unjustifiably dismissed without notice is entitled to compensation and damages.

Severance pay

41 | Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

The legally prescribed severance pay is not of great importance nowadays. There is a legal entitlement to a statutory severance pay if the employee is at least 50 years old, and the employment relationship has lasted at least 20 years.

However, contractual severance pay is not unusual in current practice and is often paid to top earners. This severance pay is a voluntary benefit paid by the employer. In this context, the Ordinance of 20 November 2013 against Excessive Remuneration in Listed Companies Limited by Shares must be observed, which prohibits contractually agreed or statutory severance payments for members of the board of directors, the executive board and the advisory board.

The amount of the severance pay is primarily based on the employment contract.

Procedure

42 | Are there any procedural requirements for dismissing an employee?

Unless otherwise agreed, the termination does not require any special form. Consequently, no prior approval of a state authority is required for a termination. In principle, it is also possible, for example, to give notice orally or by text message (in the case of mass redundancies, however, different rules apply). The termination must only be brought to the attention of the contractual partner in a specific and clear manner and in good time.

Employee protections

43 | In what circumstances are employees protected from dismissal?

Among other things, a dismissal is considered to be abusive if:

- it is owing to personal characteristics;
- it is imposed owing to the employee's exercise of a constitutional right;
- it is intended to avoid employment entitlements;
- it is out of revenge;
- it is because of the performance of services in the national interest (in particular military service);
- it is carried out owing to the employee's membership or non-membership of a trade union;
- the employee is an elected employee representative and the employer has no justified reason for termination; or
- there is no prior consultation of the employees in the event of mass redundancies.

Moreover, there are periods during which an employer may not dismiss an employee, namely during:

- military service, civil protection or civil service;
- absence owing to illness or accident;
- pregnancy and after childbirth; and
- a relief operation abroad ordered by the federal authority.

Mass terminations and collective dismissals

44 | Are there special rules for mass terminations or collective dismissals?

Before taking a final decision on mass redundancies, the employer must inform and consult the workers' representatives or, if no such representatives exist, the employees. All relevant information must be provided in writing (ie, the reasons for the mass redundancies, the number of employees to be dismissed, the total number of employees employed and the period of possible dismissals).

The employer is not bound by the employees' proposals; however, it must examine these in good faith. Mass dismissals without prior consultation with the employee representatives or with the employees are abusive and entail a penalty payment of a maximum of two months' wages.

Class and collective actions

45 | Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

The law provides for group actions. In particular, associations that aim to achieve equality between men and women have a right to sue.

Professional and trade associations are entitled to take legal action against unfair competition.

Employee and employer associations are only entitled to file an action for a declaratory judgement. When implementing a collective employment agreement, employee and employer associations may bring an action for a declaratory judgement on the violation of a normative provision of the collective employment agreement.

Mandatory retirement age

46 | Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

In principle, the employment relationship does not end with retirement unless the employer and the employee have reached an agreement to this effect. Early retirement, on the other hand, is equivalent to termination. The notice periods must be observed.

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DISPUTE RESOLUTION

Arbitration

47 | May the parties agree to private arbitration of employment disputes?

Domestic employment disputes can only be referred to arbitration where parties can freely dispose of the claims in question (article 354 of the Civil Procedure Code). However, the parties cannot freely dispose of mandatory employment law claims under article 341 of the Code of Obligations, which includes, among other things, disputes regarding wrongful termination, termination with immediate effect and holiday pay. These claims can only be referred to arbitration by way of a separate arbitration agreement, following the expiry of a one-month period after the termination of the employment.

Contrary to the above, in international employment matters (eg, employees residing abroad), all disputes involving financial interests are arbitrable (article 177(1) of the Federal Act on Private International Law).

Employee waiver of rights

48 | May an employee agree to waive statutory and contractual rights to potential employment claims?

For the period of the employment relationship and for one month after its end, the employee may not waive existing claims arising from mandatory provisions of law or the mandatory provisions of a collective employment contract (article 341(1) of the Code of Obligations). Mandatory provisions are, for example, holiday entitlements and claims for compensation for overtime work performed.

Existing mandatory claims may, however, be waived by way of a settlement or termination agreement between the employer and the employee. The concessions made by both parties must be fair (that is, approximately equivalent); otherwise, the waiver is void, and the agreement may be challenged.

Future claims are not subject to the prohibition of a waiver.

Limitation period

49 | What are the limitation periods for bringing employment claims?

The limitation period for the employment claims of an employee is five years if the claim relates to the remuneration of the employee's work in the broadest sense (article 128(3) of the Code of Obligations). Other claims of the employee become time-barred after 10 years, such as the issue of a works certificate or claims for damages. Longer limitation rules may apply to cases involving personal injury.

An employer's claims against an employee become time-barred after 10 years (article 127 of the Code of Obligations).

UPDATE AND TRENDS

Key developments of the past year

50 | Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

A bill proposed by the government for the protection of whistle-blowers was rejected by Parliament in March 2020 after controversial debates; therefore, there is still no legal definition of a lawful reporting of grievances at work.

On 1 July 2020, the amendment to the Federal Act on Gender Equality to improve the enforcement of equal pay came into force. Companies with 100 or more employees must review and analyse their compensation system periodically. The first in-house wage equality analysis must be carried out by the end of June 2021 at the latest.

Due to the pandemic, Switzerland saw a strong trend towards work performed at home (home office work) or elsewhere outside the office spaces of the employer as well as the use of videoconferencing services and other means of electronic communication and exchange.

Coronavirus

51 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Swiss Federal Council temporarily declared a national lockdown with the decree of 13 March 2020. The lockdown decree and its subsequent amendments and alterations contained several binding guidelines concerning Swiss labour and employment laws. On 25 September 2020, the Swiss Parliament issued the federal law on the legal basis for the Federal Council to order measures to fight the covid-19-Pandemic (SR 818.102). Pursuant to article 4 Covid-Law, the Federal Council is competent to order protective measures for employees if deemed necessary.

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The Federal Council ordered, inter alia, a duty of employers to check whether employees can perform work from home and a duty to send employees to their home office, if this is feasible with reasonable efforts. Further, the usage of protection concepts are imposed on most working fields. For example, employees need to wear masks when working inside a building, unless they are alone in a single space office.

In support of employers, the Federal Council heavily extended the possibilities for short-time work in Switzerland. Moreover, the Federal Council unbureaucratically granted credits on a large scale to enterprises with severe economic difficulties due to the pandemic situation. Those programmes are meant to prevent mass dissmissals and bankruptcies.

The measures against the spread of covid-19 vary from time to time depending on the pandemic situation. For example, with the resurgence of the pandemic in October 2020 some restrictions of March 2020 were partly reintroduced. It is, therefore, necessary to always check the latest version of covid-19 legislation.

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