The Employment Law Review

Third Edition

Editor

Erika C Collins

Law Business Research

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THE EMPLOYMENT LAW REVIEW

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Editor
Erika C Collins

Law Business Research Ltd

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EDITOR'S PREFACE

Erika C Collins

Employment relations in 2011, and legislative and judicial developments in the area of labour and employment law, continue to be coloured by the financial downturn that began in 2008 along with related economic uncertainty, including the recent sovereign debt crisis throughout the Eurozone. As was the case last year, the 'Year in Review' and 'Outlook' sections of nearly every chapter in this edition detail efforts by countries both to address the continuing effects of the economic downturn and to implement regulations aimed at preventing similar crises in the future. Governments continue to seek ways to decrease financial burdens on businesses, including the costs of labour, in an apparent effort to increase competitiveness and stimulate business. In Italy and Greece, for example, new rules regarding collective bargaining permit companies to agree to company-level collective labour agreements that are less favourable to employees than the sector-level collective agreements that otherwise would govern. And in the United Kingdom, the government confirmed its commitment to the Red Tape Challenge, a deregulation programme expressly aimed at reducing the burdens on businesses. On the flip side, many governments also sought to implement rules and regulations aimed at preventing the types of behaviour that are viewed as having caused or contributed to the ongoing financial crisis. In Brazil, for example, the Central Bank has approved a resolution aimed at reducing risk-taking in banking activity by tying executive compensation to long-term results, through the requirement that specified percentages of incentive compensation are paid in company equity and/or deferred over a period of several years. And in Ireland, the Prevention of Corruption (Amendment) Act 2010, signed into law in December 2010, and the Criminal Justice Act 2011 both provide for protection for whistle-blowers who report certain offences.

Another trend during 2011 has been an increasing focus, in a number of jurisdictions, on privacy and protection of individuals' personal data – a topic that can be of utmost importance to employers, who typically collect and hold a great deal of personal, and sometimes sensitive, information about their employees. There has long been a dichotomy between the US and EU approaches to data privacy. In the US the workplace is not considered private, and the US has taken a sectoral, 'patchwork'

approach to data protection that consists primarily of reacting to data privacy issues as they have arisen in various industries. Accordingly, where privacy rights exist in the US they are largely the product of industry-specific laws. In the EU, by contrast, there is an overarching right to privacy stemming from the European human rights charter that all European countries are party to, and the EU data protection directive applies to all handlers of personal data, whether they are financial institutions, employers or internet retailers. It appears from recent developments that the EU approach is winning the day. In the last year, a number of countries – including, notably, India, Korea, Malaysia, Mexico and Singapore – have passed or implemented data privacy and protection laws that follow the EU model.

The third edition of *The Employment Law Review* includes several enhancements meant to better serve employers and employment-law practitioners operating in the global arena. These include two general-interest chapters – one addressing employment issues in cross-border mergers and acquisitions and the other social media in the workplace – as well as a new section in each country chapter addressing translation requirements for employment documents. This edition also boasts the addition of seven new countries, bringing the number of covered jurisdictions to 51. As with the first two editions, this book is not meant to provide a comprehensive treatise on the law of any of these countries but rather is intended to assist practitioners and human resources professionals in identifying the issues and determining what might land their client or company in hot water.

The third edition of *The Employment Law Review* has once again been the product of excellent collaboration, and I wish to thank our publisher and all of our contributors, as well as Michelle Gyves, an associate in the international employment law practice group at Paul Hastings, for their tireless efforts to bring this book to fruition.

Erika C Collins
Paul Hastings LLP
New York
January 2012

Chapter 45

SWITZERLAND

Ueli Sommer[1]

I INTRODUCTION

The employment law in Switzerland is mainly based upon the following sources, set out in order of their priority:

a the Federal Constitution;
b public law, in particular the Federal Act on Work in Industry, Crafts and Commerce ('the Labour Act'), and five ordinances issued under this Act regulating work, health and safety conditions;
c civil law, in particular the Swiss Code of Obligations;
d collective bargaining agreements, if applicable;
e individual employment agreement; and
f usage, custom, doctrine and case law.

The following sources also play an important part in Swiss employment law:

a the Federal Act on the Equal Treatment of Women and Men;
b the Federal Act on Personnel Recruitment and Hiring-out of Employees;
c the Federal Act on Information and Consultation of workers ('the Participation Act');
d the Federal Data Protection Act;
e the Federal Merger Act;
f the Federal Act on Private International Law; and
g the EC/EFTA Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters ('the Lugano Convention');
h the Agreement on Free Movement of Persons between Switzerland and EC/EFTA; and
i the Federal Act on Foreigners.

1 Ueli Sommer is a partner at Walder Wyss Ltd.

In most of the Swiss cantons claims arising from an employment relationship must to be filed with a district court. Some cantons have established specialised employment courts. Appeals from the district courts are submitted to the cantonal court and subsequently to the Federal Supreme Court.

For amounts in dispute not exceeding 30,000 Swiss francs the cantons must provide for a simple and expeditious procedure. Up to that amount, the parties shall not be charged any court fees and the judge shall *ex officio* establish the facts and appraise the evidence at his or her discretion.

Federal, cantonal, and communal authorities – except the courts – in general do not play a very important role with regard to individual employment contracts. In some areas, however, the authorities may play a greater role, such as in the issuing of work and residence permits, notification of collective dismissal, or authorisation for night shifts or work on Sundays.

II YEAR IN REVIEW

There has not been any major employment law revision in Switzerland in 2011.

However, the Swiss parliament enacted a new law on employee participation governing any kind of equity-based incentives to employees which will enter into force on 1 January 2013. The new law only rules on tax consequences which indirectly also has an effect on the social security treatment of the incentives. Unfortunately, the new law does not address any employment aspects of the incentives. Hence, the legal qualification of such incentives remains very unclear in practice. Further, the law is poorly drafted and not in line with definitions used generally for the structuring of incentives. At this stage, the Federal Council has not issued any ordinances under the new law so many tax aspects remain unclear for the moment.

Since 30 April 2011, the new EU countries take full benefit from the Agreement on Free Movement of Persons. Certain restrictions and exceptions only remain for nationals from Bulgaria and Romania.

III SIGNIFICANT CASES

i Variable pay and termination of employment

Swiss law makes an important distinction between salary and a 'gratification', which is fully discretionary. The term 'bonus' is not regulated in employment law. Hence, a bonus either qualifies as salary or as gratification. During the last few years the Swiss Federal Court confirmed several times that the payment of any variable salary can not be made subject to the condition that the employment has not been terminated. This case law is much discussed and heavily disputed by some part of the doctrine.

The Swiss Supreme Court more often had to deal with bonus entitlements, in particular with *pro rata* entitlements in the case of terminated employment agreements. The Code of Obligations distinguishes between entitlement to salary and as outlined above, gratification (and does not mention 'bonus'). Whereas the employee has a statutory right to receive a salary, the entitlement to gratification only exists in the case of an agreement. Without any agreement it is basically at the discretion of the employer

to provide gratification. Therefore, it is crucial whether the bonus is considered salary or gratification as only in the latter case may the employer have a chance to deny a (*pro rata*) entitlement of an employee leaving the company. The Swiss Supreme Court has established certain rules to distinguish between the two payments (e.g. by considering the justified expectations of employees and the quota of the bonus compared to the salary). In addition, although the Code of Obligations states that the *pro rata* entitlement for gratification only exists in case it was agreed upon, the Swiss Supreme Court decided that such agreement may be made implicitly. Hence, it is extremely important to include appropriate wording into bonus plans that stipulate the contrary and include a wide discretion of the company in regard to the determination of the actual bonus. Otherwise, there is a substantial risk that the employer is being forced to pay any pro-rate bonuses to leaving employees.

ii Increasing termination protection

The case law is continuously increasing the termination protection. Although the law provides for an 'employment at will' concept with very limited termination protection, the courts use their discretion to widen the protection by expanding the fiduciary duty of the employer and the principle to execute rights in a diligent way. If such principles are not followed courts quite often conclude that a termination is abusive (see also Section XII, sub-section (i), *infra*). For instance, the Swiss Federal Court ruled that in the case of a long-term employee who was shortly before retirement and whose performance was never substantially criticised may not be terminated for an undoubtedly wrongful behaviour without first contemplating less harsh disciplinary measures (i.e. the court implemented to some extent an age discrimination protection). In another case the Swiss Federal Court held that alternative measures shall be considered in the case of a lack of performance, in other words – although not clearly said – it ruled for a limited duty to set up a performance improvement plan prior to issuing a termination.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Article 319 et seq of the Code of Obligations sets out the mandatory, semi mandatory and optional provisions relating to individual employment contracts. An individual employment contract can, basically, be made in writing, orally, or even implicitly (with a few exceptions, such as apprenticeship contracts, which must be in writing) and the law stipulates no time limits with regard to the conclusion of an employment contract. However, certain provisions must be agreed in writing if the parties want to deviate from the provisions set forth in the Code of Obligations (e.g., notice periods, probation periods). Collective bargaining agreements may also stipulate that deviations from the provisions require written form.

Furthermore, Article 330b of the Code of Obligations states that for employment relationships with an indefinite term or with a term of more than a month, the employer must provide the following information in written form to the employee no later than one month after the starting date:

a names of the contracting parties;
b starting date;
c the employee's function;
d salary (including bonuses, allowances, and other remuneration); and
e working time per week.

The written form is usually recommended for all individual employment contracts. In addition to the above elements, it is advisable to include the following:
a term of the employment relationship;
b rules on probation and notice periods that deviate from the law;
c holiday entitlement;
d rules on continued payment of wages when ill or pregnant; and
e other specific agreements made during contractual negotiations (e.g., non-competition undertakings).

Changes to an employment contract can be made by mutual agreement, by concluding an amendment agreement or by issuing a formal notice of change.

ii Probationary periods

If not stated otherwise in the employment contract, the first month of employment is considered the probationary period. During this period, the employment agreement may be terminated with seven days' notice. The parties may mutually agree on a longer probation period, which may not exceed three months. Any inability to work during the probation period (e.g., due to illness) may extend the probation period.

iii Establishing a presence

A foreign company that is not registered in Switzerland may hire employees to work in Switzerland. It may also hire Swiss employees through a Swiss agency or a third party without registering. A foreign company may also hire an independent contractor, however, due care must be taken that such contractor does not be qualify as an actual employee because the risks involved can be substantial (e.g., lack of insurance coverage).

Whether an independent contractor may create a permanent establishment for tax purposes ('PE') depends on the form of organisation and the work performed. The more a contractor gives the appearance of being a part of the organisation of the foreign company, for example, with offices acting in the name or on behalf of the company, the higher the risk of creating a PE. A company that establishes a PE is subject to taxation in Switzerland.

Generally, the foreign company and its Swiss employees become subject to the same social security regime as any Swiss company. Therefore, the foreign company must register with all social security organisations and establish a pension scheme for the

employees. The employees' social security contributions must be withheld by the foreign company. Withholding of income tax only applies to employees that do not have a permanent residence permit.

V RESTRICTIVE COVENANTS

Pursuant to Swiss employment law, an employee may make a commitment to the employer to refrain from any competitive activity during and for a period after termination of the employment relationship. A post termination non-competition clause is only binding if the employment relationship gives the employee access to customer data, manufacturing secrets or business secrets, and if the use of such knowledge could significantly damage the employer. The non-competition clause must be made in writing and shall be reasonably limited in terms of place, time and subject in order to preclude an unreasonable impairment of the employee's economic prospects. The maximum duration of a post termination non-competition clause is three years. The law does not require consideration for the post-termination non-competition covenant.

A judge may limit an excessive prohibition against competition. If an employer gives consideration in return for a non-competition undertaking – although this is not legally required – it is more likely that the covenant will be fully enforceable. A prohibition against competition lapses if the employer no longer has a significant interest to uphold the prohibition. Furthermore, it also lapses if the employer terminates the employment relationship without justification.

VI WAGES

i Working time

The Labour Act determines the maximum weekly hours of work, distinguishing between two categories of employees:

a workers employed in industrial enterprises and white-collar workers (office workers, technical staff and other salaried employees) as well as sales staff in large retail undertakings; and

b other workers, mainly workers in the construction sector and craftsman, in commerce as well as sales staff in small retail undertakings.

The maximum hours of work are fixed at 45 hours a week for the first category and 50 hours a week for the second. If both categories of employees are employed in the same enterprise the maximum of 50 hours applies to both categories. Within these limits the effective hours of work are fixed by collective agreements and individual contracts.

Working between 11pm and 6am is considered night work. As a rule, night work is forbidden. However, a special permit for such work may be issued if the employer evidences a special or urgent need. In any case the night work may not exceed nine hours in a maximum time frame of 10 hours, including breaks. If the employee provides services only on three out of seven consecutive nights, the night work may amount to 10 hours in a maximum time frame of 12 hours, including breaks. Employees may be entitled to a time or salary premium when working at night.

The Labour Act does not apply to very senior management personnel with regard to working hours and overtime. Very senior management personnel are those employees that are allowed to make important decisions that can affect the structure, the course of business and the development of a business or a part of business.

ii Overtime

Under Swiss law there are two categories of overtime work. The first category is addressed in Article 321c of the Code of Obligations and concerns cases in which the employee works more than the working hours stipulated in the contract up to the maximum working time allowed under the Labour Act. Pursuant to the Code of Obligations, any overtime not compensated for by time off must be paid by the employer with a supplement of at least 25 per cent of the applicable wage, unless there is an agreement to the contrary in writing (i.e., collective agreement or individual employment contract). Thus, an agreement may provide that no supplement applies or that any overtime is included in the standard wage. Generally, the second option is often used in management contracts.

The second form of overtime work relates to the hours worked in excess of the Labour Act limits of 45 or 50 hours. The payment of a wage supplement of 25 per cent of the hourly wage is a mandatory provision from which the parties may not depart by agreement (in contrast to the first category of overtime.). The Labour Act specifies that for white-collar workers and sales staff in large retail undertakings, the supplement is due only if the overtime work exceeds 60 hours per calendar year.

Pursuant to the Labour Act, the overtime of a single employee may not exceed two hours per day except on a free weekday or in the case of urgency and may not, for employees with a maximum working time of 45 hours per week, exceed 170 hours per year. For employees with a maximum working time of 50 hours per week the maximum overtime per year may not exceed 140 hours.

VII FOREIGN WORKERS

Switzerland has a dual system for the admission of foreign workers. Nationals from EC or EFTA countries benefit from the Agreement on Free Movement of Persons and, in general, do not need a work permit if residence is taken in Switzerland, subject to certain restrictions and exceptions for nationals from Bulgaria and Romania. In regard to non-EC and non-EFTA nationals, only a limited number of management-level employees, specialists and other qualified employees are admitted from all other countries (subject to a quota as determined by the Federal Council).

If non-EC or non-EFTA nationals (without residence in Switzerland) work in Switzerland temporarily for more than eight days for a non-Swiss company, such employees must be reported to the authorities in advance even if no work or residence permit is required. Furthermore, the employer must comply with the standard working conditions, including minimum salary levels. For certain employment sectors, reporting, or even a permit, is required from the first day of work.

There is no limit as to how many foreign employees may work for one company and no obligation on the employer to maintain a list of foreign workers.

All foreign employees resident in Switzerland but with no permanent residence permit are subject to tax at source. Foreign workers are subject to the same working conditions and benefits as Swiss employees.

Pursuant to the Federal Act on Private International Law, the applicable law regarding employment relationships is the country where the employee usually performs his or her duties. The parties may, however, agree that either the law of the country in which the employee has his or her permanent residence or the law of the country in which the employer is domiciled apply. Consequently, it may be possible to submit foreign workers of foreign entities to the laws of their home country. However, social security obligations may not be overridden by such choice of law.

VIII GLOBAL POLICIES

The employer may establish general directives and give specific instructions about the execution of work and the conduct of employees in the company. Furthermore, the employer must take prescribed measures to protect the life, health and integrity of the employees and in particular to take care that the employee is not subject to sexual harassment or discrimination. Therefore, it is very common in Switzerland to set up rules on accepted behaviour and the consequences in case of non-compliance. Usually, the employees must confirm receipt of a future compliance with the rules in writing. There is no strict requirement, however, that employees sign such policies, but it is recommended to have evidence on file that an employee received the policy. Further, the employer must ensure that employees understand the language in which policies are written and that the current version of the rules are easily accessible (e.g., on an intranet).

The purpose of the Federal Act on the Equal Treatment of Women and Men ('ETA') is to ensure equal treatment at work by means of a general prohibition of discrimination based on gender – including a prohibition of sexual harassment. The ETA provides for sanctions in case of non-compliance of the employer.

IX TRANSLATION

In principle, there are no regulations regarding the required language of employment documents. However, employees need to be able to understand the employment conditions because otherwise such conditions may not be enforceable. Therefore, it is recommended to translate all employment conditions into a local language. This is very important in particular for the main documents such as the employment contract and general employment conditions.

There are no formalities for the translation. However, it should be clearly stated which language shall prevail in the event of any conflict between the languages. Further, it needs to be noted that formal translation by a recognised translator may be necessary if only foreign documents exist in case of a court dispute. This is not the case when the document was already translated when it was entered into.

X EMPLOYEE REPRESENTATION

Pursuant to the Participation Act, employees may elect a works council in companies with at least 50 employees. The works council representatives have to be informed on all matters on which they need information to fulfil their tasks, and they must be consulted on the following matters:

a security at work and health protection;
b collective dismissals;
c affiliation to an occupational pension fund and termination of the affiliation agreement; and
d transfer of undertakings.

The establishment of a works council must be passed by a resolution of at least one-fifth of all employees. Once a positive decision has been made, the election of the representatives may take place. The number of representatives must be determined by the employer and the employees according to the size of the company but may not be below three. The employer must inform the works council at least once a year about the impact of the course of business on the employees. Within the framework of the Participation Act the works councils may decide how to organise themselves.

Apart from the Participation Act, the law sets out no special rights for works councils within the company, but such rights are recognised by some collective agreements.

Generally, a substantial number of companies with more than 50 employees do not have a works council.

XI DATA PROTECTION

i Requirements for registration

Private persons must register their database if they regularly process sensitive personal data or personality profiles; or if they regularly disclose or transfer personal data to third parties. However, because the employers must collect certain data of the employees pursuant to social security laws, tax law and also the Code of Obligations (e.g. with regard to the data required to issue a reference letter), they are exempted from the duty to register. If, however, companies collect additional data that need not be collected by law, there could be a duty to register.

Pursuant to the Federal Data Protection Act, personal data must be acquired lawfully, and processing must be lawful, in good faith and not be excessive, and is only allowed for the purpose indicated for the processing or evident under the circumstances or given by law. Employment law further extends the scope of protection granted under the Act. Article 328b of the Code of Obligations only allows the processing of data that refers to the employee's aptitude for the job or is necessary for the performance of services.

Personal data must be protected from unauthorised processing through adequate technical and organisational measures. The employee must be informed about the collection and processing of sensitive personal data or personality profiles (see below),

for example, in a data protection and privacy policy. The employee may request at any time access to the employee file.

ii Cross-border data transfers

Cross-border data transfers without the employee's consent are permitted if adequate cross-border data protection agreements are in place and information about such agreements is given to the Federal Data Protection and Information Commissioner or if the respective countries provide for an adequate level of data protection. With regard to the processing of data of private individuals, the Commissioner has established a list of countries that have implemented equivalent data protection legislation, which is publicly available on the internet.[2] For example, the level of protection provided for private individuals by EU countries is deemed adequate. Pursuant to the safe-harbour framework agreement between the US and Switzerland, self-certification of the US companies to the US Department of Commerce to comply with the data protection rules as set out by the agreement is sufficient. It is important to note that mere recourse to the safe-harbour framework agreement between the US and the European Union is insufficient.

The processing of personal data may be assigned to third parties by agreement or by law if the data is processed only in the manner permitted for the instructing party itself; and it is not prohibited by a statutory or contractual duty of confidentiality.

iii Sensitive data

Personal data pursuant to the Data Protection Act means all data that refers to a certain person. Sensitive personal data means all data on

a religious, ideological, political or trade union-related views or activities;
b health, personal life racial origin;
c social security measures; and
d administrative or criminal proceedings and sanctions.

The processing of sensitive personal data is only allowed if the relevant person is informed about the controller, the purpose of the processing and the categories of data recipient if a disclosure of personal data is planned.

iv Background checks

As a rule, the employer may not conduct background checks or have these checks performed by third parties without the explicit consent of the applicant. Even if the applicant consented to a background check, the check would be – in consideration of the applicant's privacy – limited to information that strictly relates to whether the applicant fulfils the requirements of the job. For instance, any questions in regard to the applicant's health must be directed to find out whether the applicant is currently fit to work. Any further investigations to find out whether there is a general risk that the applicant could become ill in the long term would not be allowed.

2 http://www.edoeb.admin.ch/themen/00794/00827/index.html?lang=en

XII DISCONTINUING EMPLOYMENT

i Dismissal

A contract concluded for an indefinite period terminates after a notice given by either of the parties (ordinary termination). In principle, no cause to terminate an employment relationship is required. The minimum notice period is set forth in the Code of Obligations. The parties may not, however, reduce such period to less than one month, subject to any longer periods set forth in collective bargaining agreements. Nevertheless, because of the protection against abusive termination, the employee has a statutory right to be informed of the reasons for the termination in writing, on request.

A termination of an employment agreement must not be abusive. A party, that abusively gives notice of termination of the employment relationship, must pay an indemnity to the other party. The termination of the employment contract by either party is considered abusive if, for example, it occurs for one of the following reasons:

a personal characteristic of one party (e.g., race, creed, sexual orientation, age), unless they are relevant to the employment relationship or significantly impair the cooperation within the enterprise;

b the other party makes use of a constitutional or contractual right; or

c where the sole purpose was to frustrate the formation of claims arising out of the employment relationship.

If any of the parties has a 'significant cause' it may terminate the contract at any time, without prior notice (extraordinary termination or summary dismissal) and may claim the other party to compensate for the damage caused. But, if the employer terminates the contact with immediate effect without a significant cause, the employer must compensate the employee for the damage that has thus been caused to him plus a penalty up to six months' remuneration.

Generally, if an employee aged 50 or older leaves employment after 20 or more years of service, the employer must pay a severance compensation of between two and eight months' salary. Such severance pay, however, is not very common in Switzerland, because the employer can deduct the contributions made to the (mandatory) pension plan from the mandatory severance pay.

The parties may agree upon (immediate) termination of an employment agreement at any time. The Code of Obligations sets forth no explicit provisions with regard to a termination agreement. However, according to the case law, the mandatory provisions of the Code shall be taken into account and the agreement must include benefits for both employer and the employee. Otherwise, the judge may declare the termination agreement as null and void.

No categories of employees are protected from dismissal in general. But there are certain periods during which a notice of termination is invalid. After the probation period has expired, the employer may not terminate the employment relationship at the following times:

a when the employee is performing military or civil defence;
b when the employee is prevented from working through no fault of his or her own due to sickness or accident (for a certain period depending on the year of employment, up to 180 days);
c during pregnancy and for 16 weeks following the birth of the baby; or
d when the employee participates in an official aid project in another country.

Any notice to terminate an employment contract during such period is invalid. Any notice served before such period starts is suspended when the period begins and then recommences after recovery from illness or accident or expiration of the protection period.

In principle, an employee who is dismissed by ordinary termination may be released from his or her duty to work ('gardening leave') at any time. The employer must continue to pay salary until expiry of the ordinary termination period, but the employer may set off any income generated by the employee during the time of the release (if the employee was allowed to start a new job).

Apart from the regulations regarding mass dismissal the company has no duty to inform any authority about a dismissal (exceptions apply in regard to apprenticeship contracts).

ii Collective dismissals

The Code of Obligations provides special rules regarding collective dismissals. Article 335d Code defines 'collective dismissals' as notices of termination in enterprises issued by the employer within a period of 30 days for reasons unrelated to the person of the employee and that affect:

a at least 10 employees in companies usually employing more than 20 and fewer than 100 persons;
b at least 10 per cent of all employees in companies usually employing more than 100 and fewer than 300 persons; and
c at least 30 employees in companies usually employing at least 300 persons.

Regarding collective dismissal, the employer must inform and consult with the works council or the employees. Employers also must inform the cantonal labour office of every planned collective dismissal.

Non-compliance with the procedural rules by the employer constitutes abusive termination of the affected employment, which may lead to damages payment and additional remunerations and in the case of substantial non-compliance the terminations can be found void and reinstatement ordered.

By law, there is no obligation to issue a social plan for the terminated employees. However, there can be obligations to negotiate or issue a plan based on collective

agreements. In addition, any mandatory early retirement obligations set forth in the pension plan regulations of a company should be considered.

XIII TRANSFER OF BUSINESS

Generally speaking, the Swiss law applicable to transfer of undertakings is quite similar to the provisions laid out in the European Union Council Directive 2001/23 of 12 March 2001. Pursuant to Article 333 of the Code of Obligations, the employment relationship is transferred from the employer to a third party, if the employer transfers the enterprise or a part thereof to such third party. Article 333 of the Code of Obligations is also applicable if a single business unit of the enterprise is transferred. However, it is required that the business unit maintains its structure and organisation after the transfer, although it is not required that any assets are transferred together with the employment relationship. Article 333 may also apply in the case of an outsourcing or re-sourcing. It depends on how the outsourcing or re-sourcing is structured, namely, the services that are outsourced or re-sourced, the assets transferred and the organisation of the provision of the services before and after the outsourcing or re-sourcing.

If a transaction qualifies as (partial) business transfer, the employment relationships existing at the time of the transfer (including the ones under notice) are automatically transferred including all rights and obligations as of the date of transfer, unless an employee objects to the transfer. If an employee objects to a transfer, the employment relationship is terminated upon the expiration of the statutory notice periods even if longer or shorter contractual notice periods apply.

It is important to note that the current employer and the new employer are jointly and severally liable for an employee's claims that have become due prior to the automatic transfer and that will later become due until the date upon which the employment relationship could have validly been terminated.

If a collective employment contract applies to any employment relationship transferred, the new employer would need to comply with it for one year unless the collective employment contract expires earlier or is terminated by notice.

If any redundancies, terminations or changes in the working conditions are planned in connection with a business transfer, the works council, if any, or otherwise the employees need to be consulted in due time prior to the decision that employees are made redundant or the changes in the working conditions implemented. This consultation process is also necessary if the employees will be dismissed or the changes implemented after the transfer (by the new employer), because such dismissals and changes would be seen as a result of the transfer of the business if implemented within the first few months after the transfer. It is very important to note that the consultation process needs to be conducted before any decisions in regard to any measures are made. The employer needs to give the works council or the employees at least the possibility to make suggestions on how to avoid any measures, specifically on how to limit the number of dismissals.

The employer has to provide all pertinent information to the works council or to the employees. According to the case law, the employees or the works council need to have at least 14 days to make their suggestions or proposals. In the case of a breach of the duty to consult, the employer could become liable for any damages of

the employees. Further, the government can force the involved parties to conduct the consultation process (which could delay a contemplated transfer considerably) and can fine the parties. In addition, it is argued by some scholars that any terminations issued or implemented changes are void.

After the consultation, or directly if no consultation is required, the works council or the employees, if no works council is established, need to be informed in due time prior to the transfer on:

a the reasons for the transfer;
b the results of the consultation process (if any required); and
c the final legal, economic and social consequences of the transfer for the employees (including the number of dismissals; changes in the working conditions).

XIV OUTLOOK

i Bonus payments

In the wake of the continuing financial crisis, bonus payments remain a very hot topic. A public initiative for a new article in the Swiss constitution against excessive bonus payments will come up for a public vote, most likely during 2012. Currently, there are several alternative proposals discussed in the Swiss parliament but are very regularly rejected. For all employers it will be very important to have these developments in mind if new compensation schemes are set up.

ii Employment law revision projects

The Federal Council proposed to the parliament, inspired by the law of other countries, an amendment of the Code of Obligations with regard to the protection of whistle-blowers. However, although the protection of whistle-blowers is generally supported, the draft has been widely criticised. At this point in time it is very unlikely that the law will enter into force before 2014.

Furthermore, the Swiss Federal Council published a first draft of a legislative proposal to increase the termination protection of employees. This is in line with the continuing development to increase the rather low Swiss termination protection by a widening of qualification of termination events as abusive. The draft provides for, *inter alia*, a substantial increase to the penalty for abusive termination from six to 12 months.

Appendix 1

ABOUT THE AUTHORS

UELI SOMMER

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Ueli Sommer is a partner of Walder Wyss Ltd, one of the leading law firms in Switzerland. Ueli heads the law firm's employment group. He has many years of experience in all aspects of employment law, with a focus on compensation schemes, options and participation plans. He also advises international companies and private individuals on immigration and choice of domicile issues. He supported many companies and high-level executives in regard to the conclusion and termination of employment agreements and termination arrangements.

Born in 1970, Ueli Sommer was educated at Zurich University (*lic iur* 1995, *Dr iur* 1999) and at the University of New South Wales in Sydney (LLM 2001). In 2001 and 2002, he worked as a foreign associate for Allens Arthur Robinson in Sydney.

Ueli Sommer acts currently as co-chair of the International Employment Law Committee of the Section of International Law of the American Bar Association. He is also a board member of the European Employment Lawyers Association ('EELA'). Further, he publishes regularly in legal journals and speeches at national and international congresses. Ueli Sommer is recommended by Chambers and Partners for his employment expertise and is mentioned as leading in his field by Practical Law.

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