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Employment

Switzerland

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Contents

| | | | |
|---|-----|---|------|
| 1. Introduction | p.3 | 6. Collective Relations | p.9 |
| 1.1 Main Changes in the Past Year | p.3 | 6.1 Status/Role of Unions | p.9 |
| 1.2 COVID-19 Crisis | p.3 | 6.2 Employee Representative Bodies | p.10 |
| 2. Terms of Employment | p.4 | 6.3 Collective Bargaining Agreements | p.10 |
| 2.1 Status of Employee | p.4 | 7. Termination of Employment | p.10 |
| 2.2 Contractual Relationship | p.4 | 7.1 Grounds for Termination | p.10 |
| 2.3 Working Hours | p.5 | 7.2 Notice Periods/Severance | p.11 |
| 2.4 Compensation | p.6 | 7.3 Dismissal for (Serious) Cause (Summary Dismissal) | p.11 |
| 2.5 Other Terms of Employment | p.6 | 7.4 Termination Agreements | p.12 |
| 3. Restrictive Covenants | p.8 | 7.5 Protected Employees | p.12 |
| 3.1 Non-competition Clauses | p.8 | 8. Employment Disputes | p.13 |
| 3.2 Non-solicitation Clauses – Enforceability/Standards | p.8 | 8.1 Wrongful Dismissal Claims | p.13 |
| 4. Data Privacy Law | p.8 | 8.2 Anti-discrimination Issues | p.14 |
| 4.1 General Overview | p.8 | 9. Dispute Resolution | p.14 |
| 5. Foreign Workers | p.9 | 9.1 Judicial Procedures | p.14 |
| 5.1 Limitations on the Use of Foreign Workers | p.9 | 9.2 Alternative Dispute Resolution | p.14 |
| 5.2 Registration Requirements | p.9 | 9.3 Awarding Attorney's Fees | p.15 |

1. Introduction

1.1 Main Changes in the Past Year

Obligation to Perform Analysis of Wage Equality

The Swiss Federal Act on Gender Equality (GEA) was revised on 1 July 2020. As a new rule, companies with more than 100 employees must perform a so-called internal analysis of wage equality. The analysis has to be conducted for the first time between 1 July 2020 and 30 June 2021. If the first analysis yields a positive result, meaning that no significant inequality is detected between genders, no further analysis has to take place, but the analysis has to be repeated after four years if the result is negative. However, the provision of the GEA is temporary: it will be revised by the parliament after nine years and will cease to be in force by 1 July 2032.

Employers are obliged to inform their employees of the outcome of the analysis within one year of the completion of the audit. Listed stock corporations must also inform their shareholders. There is no obligation to report to authorities and, accordingly, there will be no direct consequences for negative outcomes. However, detected inequalities (or not performing an analysis at all) may lead to reputational repercussions. Furthermore, a negative result might qualify as a (rebuttable) presumption of wage discrimination in individual wage discrimination lawsuits.

Amendment to Statute of Limitation regarding Claims due to Personal Injury or Death

The statute of limitations for claims arising from death or bodily injuries was amended on 1 January 2020. While the limitation periods in employment law generally remain the same, the amendment regarding death or bodily injuries also applies to claims arising in the context of employment relationships.

According to the new article 128a of the Swiss Code of Obligations (CO), claims resulting from bodily injuries or death become time-barred three years after the person affected became aware of the damage, but in any case, 20 years after the harmful conduct took place or ceased. This entails a considerable improvement for employees who have discovered only years later that an adverse work environment was the cause for their health impairments. Under the old law, employment claims arising from death and bodily injury were denied after ten years.

Increased Contribution of Employers and Employees to Social Security

With effect from 1 January 2020, the Swiss government increased the rates for contributions to old-age and survivors' insurance for the first time in more than 40 years. The contribution now amounts to 8.7% of gross wages, which means that both employees and employers must pay 0.15% more. All together, security contributions levied on wages regarding the

risks of old age, invalidity, unemployment and compensation for income due to motherhood or military service currently amount to 12.75% on average.

1.2 COVID-19 Crisis

Amendments to Provisions on Short-Time Work Compensation

In Switzerland, the unemployment insurance fund generally compensates 80% of the loss of earnings in the event of unavoidable loss of work (so-called short-time work compensation), with the aim of ultimately avoiding dismissals and major increases in unemployment rates.

By way of emergency legislation, the Swiss Federal Council has temporarily amended the existing provisions on short-time work to facilitate the process of applying for short-time work and to broaden the scope of employees entitled to it. This includes the following measures in particular:

- While under normal circumstances employers must pre-register ten days in advance with the cantonal labour office if they intend to initiate a period of short-time work, during the peak of the lock-down (from the end of March 2020 until 31 May 2020) no pre-registration was required for short-time work. Employers could claim compensation starting on the day of the initial registration.
- The duration of the validity of permits has been increased from three to six months, and no written consent from short-term employees needs to be submitted.
- Until 31 August 2020, employers could also obtain compensation for short-time work for employees that have fixed-term contracts, and for temporary workers and apprentices.
- Until 31 May 2020, compensation was also paid out for "employer-like employees" (such as members of the highest decision-making board), whereas under normal circumstances no compensation for this type of employees was granted. However, such compensation was limited to CHF3,340 per month, while for all other employees the unemployment insurance compensates 80% of a maximum of CHF12,350 per month.
- The maximum period for which short-time work can be financially compensated within a timeframe of two years has been extended from 12 to 18 months. The respective amendment will be in force until 31 December 2020.

Compensation for Loss of Working Hours due to Childcare or Quarantine

During the lock-down, many grandparents were no longer able to care for their grandchildren, and schools, kindergartens and crèches were temporarily closed. As a result, many parents were confronted with conflicts between their childcare obligations and their work duties. The Swiss Federal Council, therefore,

introduced a special compensation for employees who were forced to stay at home due to the lack of third-party child care regarding their children under 12 years of age.

A special governmental compensation is granted to employees who must stay at home because of a quarantine ordered by competent authorities or by a doctor, and who cannot perform work from home due to the nature of their occupation. Employees who have travelled to a country indicated by the Swiss government as a COVID-19 risk area must remain in quarantine for ten days after their return, but are not eligible for the compensation.

The compensation for parents and employees in quarantine is limited to ten daily payments per incident that has occurred since 17 March 2020. The payments amount to 80% of the income that was paid out before the claim arose, but is limited to CHF196 per day.

Provisions on Protection of Employees at Special Risk

On 28 February 2020, the Swiss Federal Council introduced a new obligation for employers to ensure special protection for employees at particular risk of contracting COVID-19 ("Employees at Risk"). The respective decree has been amended several times, with the appendix that lists the different health conditions that lead to a special risk of COVID-19 infection being modified and expanded over time. Persons aged 65 or older have always explicitly been qualified as Employees at Risk.

Under the decree, the employer had to allow and enable Employees at Risk to perform work from home within the scope of operational possibilities. If this was not possible, the employer had to assign the Employee at Risk equivalent substitute work that can be carried out from home. If this could not be offered and the Employee at Risk was not willing to perform his/her work in the workplace even if special protective measures were met, the employer had to grant him/her paid leave.

The COVID-19 emergency legislation ceased to be in force by 22 June 2020, at which point the explicit special obligation of the employer regarding Employees at Risk was abolished; the amended COVID-19 decree now provides for a general obligation of the employer to guarantee protection according to the recommendations of the Swiss Federal Office of Public Health for all employees. Additionally, the amended decree refers to the general employee health provisions of the Federal Act on Work in Industry, Trade and Commerce (the Labour Act) and clarifies that the competent cantonal labour enforcement authority (in general the labour inspectorate) must be granted access to the business premises in order to conduct controls regarding the implementation of COVID-19 measures.

2. Terms of Employment

2.1 Status of Employee

Blue-Collar vs White-Collar Workers

As a matter of principle, Swiss employment law does not provide for the traditional differentiation between blue-collar and white-collar workers. Occasionally, however, it provides for similar differentiations. This particularly applies to the following provisions contained in the Labour Act, relating to the maximum weekly working time and minimum rest periods:

- Employees holding a higher executive position, employees performing a scientific activity and employees performing an autonomous artistic activity are entirely exempt from any maximum weekly working time and minimum rest periods.
- For ordinary employees in industrial businesses, office staff, technical and other employees (ie, employees performing predominantly intellectual work in offices or office-like jobs), including sales personnel in large retail trade companies, the maximum weekly working time is principally 45 hours (see **2.3 Working Hours**).
- For all other employees, particularly those with a predominantly manual field of activity, the maximum weekly working time is 50 hours. The same applies to office staff, technical and other employees, including sales personnel in large retail trade companies, working in establishments or parts thereof that employ a majority of employees to whom this maximum weekly working time of 50 hours applies (see **2.3 Working Hours**).

Other Employee Statuses

There is a whole range of other employee status categories that are subject to special protection (particularly in connection with their working conditions and terminations) due to their particular personal situation. This applies, inter alia, to:

- pregnant women and young mothers (see **2.5 Other Terms of Employment** and **7.5 Protected Employees**);
- employees with family responsibilities (see **2.5 Other Terms of Employment**); and
- older employees with many years of service (see **7.5 Protected Employees**).

2.2 Contractual Relationship

Permanent vs Fixed-Term Employment Contracts

There are two main types of employment contracts in Swiss employment law: permanent and fixed-term employment contracts.

While permanent employment contracts are entered into for an indefinite period and may only end upon notice of termination, fixed-term employment contracts cease automatically (at

the end of their fixed term) and may, as a matter of principle, not be terminated prematurely. The only exception to the latter concerns summary dismissals (see 7.3 **Dismissal for (Serious) Cause (Summary Dismissal)**).

(Limited) Parties' Freedom to Choose their Type of Employment Contract

As a matter of principle, the parties are free to choose the type of employment contract that best suits their needs. They may even agree on a hybrid construct – ie, an employment contract that provides for a fixed (maximum) term but may also be terminated earlier by way of notice of termination.

In order to guarantee a minimum of employee protection, however, case law has developed limits to such parties' freedom. Most notably, multiple consecutive fixed-term employment contracts are to be reinterpreted into one permanent employment contract if there has been no objective reason for choosing consecutive fixed-term employment contracts over one permanent employment contract (so-called "illegal chain employment contracts").

(No) Formal Requirements for Employment Contracts

An employment contract is concluded by way of mutual, corresponding declarations of intent by the employer and the employee, pursuant to which the employee undertakes to work in the service of the employer for a limited or unlimited period and the employer undertakes to pay remuneration to the employee for such work. As a matter of principle, such agreement does not require the observation of any form and can therefore also be concluded orally or even implicitly (eg, if the employer accepts the performance of work over a certain period of time and if said performance, under the circumstances, can only be expected in return for remuneration). However, specific employment contracts such as apprenticeship contracts and contracts with temporary workers require observance of the written form (ie, the contract must be signed by all persons on whom it imposes obligations).

Formal Requirements for Specific Contractual Provisions

Also, for reasons of legal certainty and employee protection, a considerable number of specific contractual provisions may only be bindingly agreed upon observing the written form. This applies, inter alia, to:

- deviations from the statutory compensation for overtime (see 2.3 **Working Hours**);
- deviations from the statutory provisions regarding continued salary payments in case of an employee's incapacity for work (see 2.5 **Other Terms of Employment**);
- amendments to the statutory notice periods (see 7.2 **Notice Periods/Severance**);

- non-compete clauses (see 3.1 **Non-competition Clauses**); and
- selected provisions in homemaker contracts.

2.3 Working Hours

Maximum Working Time per Week/Day

Pursuant to the Labour Act, the weekly working time may only exceed 45 or 50 hours (the applicable maximum depends on the employee category) in exceptional circumstances (see 2.1 **Status of Employee**), and various provisions with regard to minimum rest periods (in particular mandatory minimum breaks and the general prohibition of work during the night and on Sundays/public holidays) must be observed, which inter alia result in a maximum daily working time (including breaks) of 12.5 or 13 hours (depending on the calculation method).

However, these principles do not apply to all categories of employees and businesses (see 2.1 **Status of Employee**). Part-time employees are generally subject to the same provisions as full-time employees – ie, the maximum working time is not calculated pro rata temporis.

(No) Possibility of Flexible Arrangements

The parties' freedom to deviate from the above-mentioned principles is very limited; the provisions are basically mandatory.

Overtime and Extra Hours

Swiss employment law differentiates between overtime (ie, the hours an employee works in excess of the contractually agreed or customary weekly working time) and extra hours (ie, the hours an employee works in excess of the applicable maximum weekly working time, if any – see 2.1 **Status of Employee**).

While the employee is obliged to perform overtime if such overtime is required and to the extent that the specific employee is able and may conscientiously be expected to do so (less frequently the case for part-time employees), the performance of extra hours requires the existence of exceptional circumstances (in addition to the requirements for the performance of mere overtime).

Compensation for Overtime and Extra Hours

Pursuant to the statutory provisions, overtime and extra hours are principally compensated by corresponding time off (if the employee consents) or an additional salary payment including a 25% surcharge (absent such employee's consent).

While the parties may (and often do) contractually exclude any compensation (whether in cash or in kind) for overtime as long as they observe the written form, compensation is mandatory with regard to extra hours. However, for office staff, technical and other employees, including sales personnel in large retail

trade companies, such mandatory compensation for extra hours only applies from the 60th extra hour per calendar year.

2.4 Compensation

Minimum and Maximum Compensation

As a matter of principle, the parties are free to agree on the employee's compensation, although there are deviations from this principle.

The most practically relevant minimum compensation requirements are as follows:

- Selected cantons provide for a general hourly minimum salary (Neuchâtel: CHF20; Jura: CHF20; Ticino: CHF18.75 to 19.25).
- Various collective bargaining agreements (see **6.3 Collective Bargaining Agreements**) and so-called standard employment contracts (ie, a special kind of legislative decree) provide for minimum salaries in selected sectors.

The most practically relevant compensation cap is the following: Swiss stock corporations whose shares are listed on a Swiss or foreign stock exchange must comply with the Ordinance against Excessive Remunerations in Listed Stock Corporations, which provides for restrictions with regard to the compensation paid to members of the board of directors, the executive board and the advisory board (eg, the prohibition of severance payments contractually agreed or provided for in the company's articles of association).

Thirteenth Monthly Salary

The parties are free to agree that the employee's salary shall be paid in 13 instead of 12 monthly installments. Absent a different agreement, such 13th monthly salary shall become due at the end of the year. Due to its legal nature as a salary component, the payment of the 13th monthly salary may not be declared subject to conditions, and must be paid on a pro rata basis if the employment ends before its due date.

Bonus

The term "bonus" is not defined by Swiss law. Accordingly, established case law provides that, depending on the specific (bonus) agreement and the pertinent company practice, a bonus can be qualified either as a salary component or as a gratification (or as one remuneration element consisting of two independent parts).

Legal Qualification as Salary Component or Gratification

A bonus qualifies as a salary component if the payment of the bonus and its amount are not subject to the employer's discretion. This is also the case if the exact bonus amount is clearly

determinable (eg, by way of a formula) independent of any subjective assessment.

A bonus qualifies as a gratification, however, if it is a voluntary extra compensation, meaning that the entitlement per se or at least the exact amount of the bonus is ultimately at the employer's discretion.

Additionally, if an employee's total compensation is below the fivefold Swiss median salary (approximately CHF374,880), Swiss law requires that the bonus is only of an accessory nature. The bonus is of an accessory nature if it is of secondary importance in relation to the employee's salary; as a rule of thumb, the bonus may not exceed 100% of the salary. Absent such accessoriness, at least part of the bonus qualifies as a salary component.

Consequences of such legal qualification

The respective legal qualification (salary component vs. gratification) is of utmost importance: to the extent that the bonus qualifies as a salary component, it may not be declared subject to conditions (such as an ongoing/not yet terminated employment, vesting, forfeiture, etc) and the employee has a mandatory (pro rata) claim. The exact opposite is true for bonuses qualifying as entirely voluntary gratifications. In the case of gratifications to which the employee is entitled in principle, the employee has a mandatory claim to part of the bonus (which may not be determined arbitrarily).

2.5 Other Terms of Employment

Vacation

An employee is entitled to at least four weeks of fully paid vacation per year (five weeks if the employee is under the age of 20), at least two weeks of which must be taken consecutively. A reduction of the corresponding entitlement may only be considered for absences exceeding one month (and depending on the exact reasons for such absence). The timing of the employee's vacation is determined by the employer, who has to take due account of the employee's wishes, however.

The employee's vacation entitlement is mandatory and may, in principle, not be replaced by monetary or other benefits during the employment. A (financial) compensation is only possible after termination of the employment.

Other Absences

As a general rule, the employee is only required to perform his/her work to the extent that this can reasonably be expected from him/her. However, the fact that an absence is justified does not necessarily mean that it is also paid.

The most practically relevant reasons for absence are as follows:

- Illness, accident, legal obligations, public duties and pregnancy – if an employee is prevented from working by one of these (or equivalently severe) personal circumstances without being at fault, the employee remains entitled to his/her full compensation for a limited time, depending on (and increasing with) the employee's years of service, but only if the employment has lasted or was concluded for longer than three months. Provided that the chosen alternative solution is no less favourable to the employee, it is possible to deviate from this rule (in writing) in employment contracts, standard employment contracts or collective bargaining agreements (see **6.3 Collective Bargaining Agreements**). In connection with absences whose financial consequences are already covered by compulsory insurance (eg, in connection with accidents, disability and official duties), the employer is only obliged to pay a potential difference between the insurance benefits and 4/5 of the employee's compensation.
- Maternity – female employees are exempt from the obligation to work for 14 weeks after giving birth. To the extent that the Labour Act applies, the respective exemption is 16 weeks and the employee is even prohibited from working during the first eight weeks. During the first 14 weeks, the employee is generally entitled to receive maternity allowances of 80% of the previous average income (but not more than CHF196/day).
- Family responsibilities – if an employee needs to care for close relatives (in particular, children and spouses), they must be granted the necessary time off without losing their entitlement to compensation. This is at least to the extent that the absence could not have been averted by suitable organisation. Subject to special cases, the general rule established in the Labour Act (three days off per case to care for sick children upon presentation of a medical certificate) should provide a suitable guideline in this regard.
- Customary hours and days off – the employee is entitled to the customary hours and days off for dealing with urgent personal matters (such as doctor's appointments and searching for a new job during the notice period) as well as important family matters (such as the passing away of close relatives), but only to the extent that they cannot reasonably be dealt with during the employee's spare time. In spite of the absence of a general employer's obligation to continued compensation payments during such customary time off, the latter is assumed once the parties have – as in most cases – agreed on a monthly or weekly salary without an express exception in this regard. The opposite principle is true for hourly salary earners, however.

Confidentiality and Non-disparagement

Pursuant to the statutory employee's duty of loyalty, the employee must not exploit or reveal confidential information obtained while in the employer's service, such as manufacturing or trade secrets. While the respective confidentiality obligation applies unrestrictedly during the employment, its application after the end of the employment is limited to the extent required to safeguard the employer's legitimate interests.

The same duty of loyalty also requires the employee to principally refrain from any actions that could be economically damaging to the employer, including making any derogatory statements towards third parties (irrespective of their truthfulness). Whistleblowing is only protected under very limited prerequisites – ie, if the employee strictly adheres to the principle of proportionality (eg, by placing an internal complaint before informing the competent authorities and informing the competent authorities before going public).

Employee Liability

Principle

Subject to a few special provisions, the employee is generally liable for any financial damage he/she causes to the employer, whether deliberately or by negligence. While the burden of proof for the existence of a financial damage resulting from an employee's breach of contract lies with the employer, it is the employee who must prove that he/she was not at fault.

The main difference compared to the usual contractual liability lies in the special standard of care and the various circumstances that can lead to a reduction or even complete elimination of the employee's liability.

Circumstances reducing or eliminating the employee's liability

Of particular importance is the employee's degree of fault: mere minor negligence (ignoring something that should have been considered on closer consideration) may result in an extensive reduction or even complete elimination of the employee's liability. Medium negligence (ignoring important rules of conduct but not downright elementary duties of caution) may at least result in a significant reduction of such liability.

Other practically relevant circumstances are the occupational risk, the level of education or technical knowledge required for the work in question, and the specific characteristics of the employee of which the employer is or should be aware.

Possibility of deviations in favour of the employee

The above-mentioned statutory principles represent the maximum employee liability. Contractual deviations are only possible in favour of the employee.

3. Restrictive Covenants

3.1 Non-competition Clauses

Statutory Prohibition of Competition during the Employment

During the term of the employment, an employee is already prohibited from competing with his/her employer by virtue of the statutory duty of loyalty.

Post-contractual Non-compete Clauses

Validity and enforceability

The employer may only validly agree and enforce a non-compete undertaking subject to the following prerequisites:

- The non-compete clause must be agreed in writing, and must particularly determine the time, place and scope of the non-compete undertaking.
- The employee must have gained insight into the employer's customer base or manufacturing or business secrets in the course of the employment.
- The employer must face substantial harm as a result of such insight (this is not the case if, for example, the employee's services were predominantly characterised by his/her personal abilities).
- The employer must have a substantial interest in the prohibition of competition (such interest particularly ceases if the employment is terminated by the employer without the employee having given the employer reasonable cause to do so or by the employee after the employer has given the employee reasonable cause to do so).
- The enforceability of a non-compete undertaking requires appropriate limitation in terms of place, time and scope so that there is no unreasonable impediment to the employee's economic advancement. While this is no validity requirement, agreeing on a (substantial) consideration for the employee's compliance with the non-compete clause at least significantly increases the chances of the latter's enforcement. If a court, in its free discretion, deems an agreed non-compete undertaking to be unreasonable, it will reduce the respective undertaking to a reasonable extent.

Consequences of a violation

If the employee violates a valid and enforceable non-compete clause, he/she becomes liable to pay damages to the employer. In order to free the employer from the rather difficult proof of financial damages resulting from such violation, the parties regularly agree on a contractual penalty. The engagement in a competing activity as such may only be prohibited if this has been expressly and unambiguously agreed upon in writing, and if this is exceptionally justified by the employer's violated or threatened interests and the employee's particularly inappropriate behaviour.

3.2 Non-solicitation Clauses – Enforceability/Standards

Non-solicitation Clauses with Reference to Employees

The statutory duty of loyalty not only prevents the employee from competing with the employer (see **3.1 Non-competition Clauses**) but also from enticing away employees during the term of the employment.

Pursuant to the rather controversial case law of the SFSC, however, the fact that the statutory provisions only address post-contractual competition on the supply market (but not on the demand market) shall, as a matter of principle, exclude any valid agreements on the prohibition of enticing away employees after the termination of the employment. The situation shall only be different if such actions also affect the supply market, as is the case when temporary employees are being enticed away.

Non-solicitation Clauses with Reference to Customers

Since this always involves competition, any prohibitions with regard to enticing away customers are governed by the same restrictions as common non-compete clauses (see **3.1 Non-competition Clauses**).

4. Data Privacy Law

4.1 General Overview

According to art. 328b CO, the employer may handle data concerning the employee only to the extent that such data concerns the employee's suitability for his/her job, or if it is necessary for the performance of the employment contract. In all other respects, the general provisions of the Swiss Federal Data Protection Act (DPA) apply to employment relationships. The DPA stipulates a number of principles, including the principles of proportionality, transparency and purpose limitation. Accordingly, personal data may only be processed and kept if it is necessary, if it is conducted in the least invasive way, and if the person concerned is informed about the processing and granted access upon his/her request. As a consequence, the employer may not (without a justifiable reason) hand over personal data of the employee to third parties. Moreover, under the DPA the employee may at any time request information from the employer regarding all available data concerning him-/herself, as well as the purpose of the respective processing. In practice, it is very common for employees who have been dismissed by their employer to request information about their personal data under this title. This regularly serves to prepare for subsequent civil proceedings.

Monitoring and control systems designed to monitor the behaviour of workers at the workplace are prohibited. If monitoring or control systems are required for other reasons, they must par-

ticularly be designed and arranged in such a way that the health and freedom of movement of workers are not affected by them.

The legal remedies against violations of data protection and personality rights are rather weak (claims for omission of illegal data processing or disclosure to third parties, or destroying of personal data; compensation for damages, which is regularly difficult to substantiate).

5. Foreign Workers

5.1 Limitations on the Use of Foreign Workers

In Switzerland, a dual system exists for the admission of foreign workers to the local labour market. While nationals of Member States of the European Union and the European Free Trade Association (EU-27/EFTA Nationals; special regime for Croatian citizens) benefit from the Treaty of Free Movement (TFM) and generally do not need to meet special requirements in order to be permitted to work in Switzerland, the access of nationals of other countries (Third-Country Nationals) is severely restricted.

Transitory provisions provide for the same conditions for nationals of the United Kingdom as under the TFM until December 2020, but it is yet to be defined which special regime will apply for this group after January 2021. Switzerland and the United Kingdom have already agreed bilaterally that respective rights that have been acquired until the end of the transition period will be maintained afterwards.

According to the Swiss Foreigners and Integration Act, Third-Country Nationals may be granted access to the Swiss labour market as employees if:

- their performance of work in Switzerland is in the economic interests of Switzerland;
- their future employer has submitted a corresponding application;
- the quotas for work permits for Third-Country Nationals have not yet been exhausted (quotas are defined annually – for 2020 and 2019 the quota amounted to 8,500 permits);
- the future employer substantiates that it was unable to find a person suitable for the job in Switzerland or within the EU/EFTA area;
- the terms and conditions of the employment contract are equivalent to the conditions customary in the specific area, for the specific profession and sector; and
- the applicant will occupy an executive position, is a specialist, or is an otherwise especially qualified person. Qualified workers are primarily persons with a university degree, special technical training and several years of professional experience. In addition, the applicant has to be able to

persuade the authorities that he/she will be able to integrate him-/herself appropriately into the local labour market and into the social environment on the basis of his/her professional, linguistic and social skills.

5.2 Registration Requirements

EU-27/EFTA Nationals wanting to engage in a remunerated activity in Switzerland according to the TFM are granted a residence permit, which automatically includes a work permit. After immigration to Switzerland, they must register at the community office of the future place of residence and apply to the responsible cantonal authorities for the residence permit. Subject to presentation of a respective employment contract and depending on the duration of it, either a short-term residence permit L or a residence permit B (for durations of one year or more) are generally granted. Cross-border commuters who do not have their main residence in Switzerland and who return to their home country at least once per week may apply for a special cross-border permit for the duration of five years. All three permits may be prolonged.

No application for a residence permit is required for EU-27/EFTA Nationals under certain circumstances, and a prior online notification via the so-called notification procedure suffices. This applies in the case of:

- a temporary employment contract with a Swiss employer with a duration of less than three months;
- immigration to Switzerland for assignment(s) of a foreign employer for a maximum of 90 days per year; or
- a self-employed service provider performing work in Switzerland for a maximum of 90 days per year.

Third-Country Nationals, as well as Croatian citizens, primarily have to apply for a work permit before a residence permit will be issued. Once the employer has submitted the application for the respective employee with all necessary documents, the cantonal labour office will assess it and, if approved, forward it to the federal immigration authority where, in case of a positive decision, the work permit will be granted. Upon further request, the residence permit (permit L or B) is issued by the cantonal migration office.

6. Collective Relations

6.1 Status/Role of Unions

In Switzerland, fewer than 1/3 of employees are unionised. Trade unions play a marginal role in some sectors, while for other sectors such social partners are highly relevant and active.

In a nutshell, the role of trade unions is to represent employees vis-à-vis employers and to assert the interests of employees on the political stage. Traditionally, this includes the fight for better working conditions, efficient social security and higher wages. Furthermore, in Switzerland trade unions have established self-help and social institutions, such as unemployment insurance. One of the most important tasks of trade unions is the negotiating of collective bargaining agreements (see **6.3 Collective Bargaining Agreements**) as counterparties to the employers' associations.

6.2 Employee Representative Bodies

The participation rights of employee representative bodies in Switzerland are regulated in the Federal Participation Act, according to which employees of a company with a headcount of 50 or more are entitled to constitute a works council. At the request of 20% of the employees (or in a company with a headcount of more than 500, if 100 employees demand it), a vote must be held in order to determine whether the majority of those employees casting a vote are in favour of the suggested constitution of a works council.

If a works council has been set up, the management must provide it all the information necessary to carry out its tasks properly. In particular, the employer must inform the works council at least once a year about the business performance and its effects on the employment relationships.

Swiss employment law provides for the information and consultation rights of the works council in specific events. This applies to questions of occupational safety, the process of transfer of undertakings, and mass dismissal procedures.

In the following rare cases, the works council has a right of co-decision or, in other words, a type of veto right:

- in the agreement on a social plan in connection with an upcoming mass dismissal;
- in decisions concerning an affiliation to an occupational pension scheme or the termination of such an affiliation contract; and
- in the implementation of simplified working time recording.

The consequence of failing to involve the works council in the above-mentioned cases vary: the dismissal of employees despite the absence of an agreement on a social plan is valid, but can be abusive (see **8.1 Wrongful Dismissal Claims**). According to recent case law, the termination of an affiliation contract without the consent of the works council/employees is null and void.

6.3 Collective Bargaining Agreements

A collective bargaining agreement (CBA) is a contract between the employers or an employer's association and an employees' association.

The normative regulations become part of the individual employment contract. Those provisions are mandatory and are directly applicable to all employees who benefit from a CBA by contract or by law. Deviating clauses in employment contracts are invalid. Very often, the participating employers also apply the CBA to non-organised employees. Furthermore, CBAs regularly contain contractual provisions that regulate the general obligations and rights of the parties to it, as well as the enforcement of the CBA.

Upon the request of a party to the CBA, the competent authorities may declare a CBA to be generally binding. The effect of this is that the CBA automatically applies to all employers and employees in an economic sector or profession, including the ones which do not belong to any association or are not even aware of the existence of the CBA. This procedure has a big practical impact: as of 1 July 2019, as many as 74 CBAs had been declared generally binding (46 on a national level and 28 on a cantonal level).

7. Termination of Employment

7.1 Grounds for Termination (Limited) Freedom of Termination

Unlike summary dismissals (see **7.3 Dismissal for (Serious) Cause (Summary Dismissal)**), ordinary terminations of employment (ie, terminations observing the applicable notice period) do not require a particular lawful reason. Nevertheless, the party giving notice must state its respective reasons in writing if the other party so requests. This is not least because the principle of freedom of termination is limited by the prohibition of terminations in bad faith (so-called abusive terminations – see **7.5 Protected Employees** and **8.1 Wrongful Dismissal Claims**).

Collective Redundancies

Collective redundancies (ie, the dismissal of a certain minimum number of employees within 30 days and for reasons not pertaining personally to the affected employees) are subject to specific procedural requirements. An employer may not decide to carry out collective redundancies before having informed (in writing and with a copy sent to the cantonal employment office) and consulted the works council or (if there is none) the employees. In the context of such consultation, the employer must at least provide the opportunity to formulate (non-binding) proposals on how to avoid redundancies, limit their

number and/or mitigate their consequences, failing which any respective dismissal would qualify as abusive (see **8.1 Wrongful Dismissal Claims**) and entitle each employee to a compensation claim of up to two monthly salaries. The minimum duration of such consultation depends on the circumstances of the individual case; for standard cases, two weeks is a suitable point of reference.

Only if the employer still intends to carry out collective redundancies after such consultation may it take this decision and issue the required notices of termination. Moreover, the employer must inform the cantonal employment office about the results of the consultation and provide it with further appropriate information in writing and with a copy sent to the works council or (if there is none) to the employees. The latter is of particular importance since individual employment relationships terminated in the course of collective redundancies may not end until at least 30 days after such notification.

Duty to Issue a Social Plan

An employer normally employing at least 250 employees and intending to make at least 30 employees redundant within 30 days for reasons not pertaining personally to the affected employees is obliged to agree on a social plan with the works council or, in its absence, the employees – ie, an agreement setting out measures to avoid redundancies, to reduce their number and to mitigate their consequences. If no agreement can be reached, however, the social plan will eventually be issued by an arbitral tribunal.

7.2 Notice Periods/Severance

Notice Periods

Required observance of notice periods

Unless the employer or the employee claims that there is good cause for a summary dismissal (see **7.3 Dismissal for (Serious) Cause (Summary Dismissal)**), terminating a permanent employment contract always requires the observance of a notice period.

Statutory notice periods

Pursuant to the statutory provisions, the following notice periods apply:

- During the probation period (by default the first month of an employment), the employment may be terminated at any time by giving seven days' notice.
- After completion of the probation period, if any, the employment may be terminated at one month's notice during the first year of service, at two months' notice between the second and the ninth year of service and at three months' notice thereafter, with all such notice to expire at the end of a calendar month.

Possible deviations from the statutory notice periods

Subject to the following restrictions, both the probation period and the notice periods (including their effective date) may be varied by written agreement, standard employment contract or collective bargaining agreement (see **6.3 Collective Bargaining Agreements**):

- While it is perfectly possible to exclude any probation period, the probation period may not be extended beyond three months.
- The notice period may not be less than one month (unless agreed within a collective bargaining agreement and for the first year of service only).
- The notice periods must principally be the same for both parties (unless the employer has already given notice for economic reasons or at least expressed such intention). If the parties nevertheless agree on unequal notice periods, the longer period is applicable to both parties.

Severance

Pursuant to the statutory provisions, the employer is only required to pay the employee compensation during the notice period. While the employer may not unilaterally move the termination date forward by providing a payment in lieu of the notice period, it may put the employee on garden leave during such period (possibly offsetting at least part of the employee's vacation and overtime balance and a replacement income), unless the employee exceptionally claims a legitimate interest in effectively rendering his/her work (eg, professional athletes and surgeons). Subject to the respective prohibition contained in the Ordinance against Excessive Remunerations in Listed Stock Corporations (see **2.4 Compensation**), providing for severance payments in employment contracts or collective bargaining agreements (see **6.3 Collective Bargaining Agreements**) is perfectly possible, though.

(No) Formalities to be Observed

Other than in connection with collective redundancies (see **7.1 Grounds for Termination**) or in case of a respective contractual agreement, issuing a valid notice of termination does not require the observance of any formalities. For evidentiary purposes, however, it is most recommendable to issue notices of termination in such a way that the fact and date of receipt can be proven.

7.3 Dismissal for (Serious) Cause (Summary Dismissal)

Summary Dismissal

Either party may at all times terminate an employment with immediate effect. While the law declares summary dismissal subject to the existence of good cause, even summary dismissal without good cause results in an immediate termination of the

employment. The (non-)existence of good cause therefore only determines the further legal consequences of summary dismissal. Nevertheless, as in connection with ordinary terminations (see **7.1 Grounds for Termination**), the party declaring summary dismissal must state its respective reasons in writing if the other party so requests.

Good Cause

Good cause is assumed if the party declaring summary dismissal may not reasonably be expected to continue the employment until the expiry of the applicable notice period or the agreed fixed term. While the competent court has a large margin of discretion when assessing this requirement and will consider all circumstances of the particular case, it is well established that good cause may only be affirmed in exceptional, particularly severe cases. Also, in order not to forfeit the right to summary dismissal, it is necessary that the dismissal is declared within a few days (usually two to three working days) of becoming aware of the relevant (good) cause.

Consequences of Summary Dismissal

As already explained, any summary dismissal results in the immediate termination of the employment.

In the most practically relevant constellation that the employer issues summary dismissal due to an employee's (alleged) breach of contract, the following applies:

- If the employer succeeds in proving good cause (which is rather difficult), the employee loses any not yet earned claims arising from the employment (in particular future salary payments) and becomes liable to pay damages to the employer.
- If the employer fails in proving good cause, the employee is entitled to what he/she would have earned if the employment had been terminated observing the applicable notice period or by expiry of an agreed fixed term (minus any savings and a replacement income resulting therefrom) and to an additional penalty payment of up to six monthly salaries.

(No) Formalities to be Observed

With regard to (the absence of) formalities to be observed, the explanations in connection with ordinary terminations (see **7.2 Notice Periods/Severance**) principally apply *mutatis mutandis*. The only (rather theoretical) difference is that summary dismissal may not even be declared subject to the observation of contractually agreed formalities.

7.4 Termination Agreements Permissibility and Requirements

Swiss employment law principally allows for the conclusion of termination agreements, but there are strict limits on the par-

ties' freedom of contract. Most importantly, termination agreements may not be concluded in order to circumvent statutory provisions protecting employees' interests (in particular, mandatory provisions in connection with incapacities for work due to illness or accident – see **7.5 Protected Employees**), but must rather constitute actual settlements in which the employer also makes concessions. In most cases, one of the very purposes for concluding termination agreements is to obtain clarity with regard to the termination date by excluding any prolongation of the employment in connection with an employee's incapacity for work, so the parties regularly agree on an additional "voluntary" employer's payment to compensate the employee for such concession. Another popular motive for such additional employer's payment is to compensate for the impending consequences of an abusive termination (see **8.1 Wrongful Dismissal Claims**).

Reflection Period

Pursuant to (controversial) case law, the conclusion of a termination agreement initiated by the employer requires the employee to be granted a sufficient reflection period. There are no other specific procedures or formalities to be observed when concluding termination agreements.

Consequences of Non-compliance

As non-compliance with the "actual settlement" or reflection period requirements may lead to the entire termination agreement being declared null and void, strictly adhering to these requirements is of utmost importance in order to actually obtain the legal certainty envisaged in connection with the conclusion of termination agreements.

7.5 Protected Employees

Temporal and Substantive Protection against Dismissal

Notwithstanding the governing principle of freedom of termination (see **7.1 Grounds for Termination**), Swiss employment law provides for both temporal and substantive protection against dismissal (see also **8.1 Wrongful Dismissal Claims**). In this context, there are categories of employees who benefit from stronger protection than others.

Categories Benefiting from Specific Temporal Protection

In particular, the following categories of employees benefit from specific temporal protection against dismissal:

- employees performing Swiss compulsory military service, civil defence service or alternative civilian service – protection against termination during such performance and potentially during a certain period before and after;
- employees being (partially) incapacitated for work due to illness or accident through no fault – protection against termination during such incapacitation, but at most for 30, 90 or 180 days (depending on the length of the employment);

- pregnant employees and new mothers – protection against terminations during the pregnancy and for 16 weeks after delivery; and
- employees participating with the employer's consent in an overseas aid project ordered by the competent federal authority – protection against terminations during such participation.

Generally, each of these circumstances triggers separate “proscribed periods”; although an exception to this principle applies for incapacities for work arising from one and the same medical condition (relapses in particular).

Any notice of termination given during such proscribed periods is considered void and must be re-issued after the expiry of the proscribed period in order to become effective.

Where notice of termination has been given prior to the commencement of a proscribed period, said notice remains effective. In this case, however, the notice period is temporarily suspended and does not resume until the expiry of the proscribed period. Finally, unless agreed otherwise, the prolonged employment is further extended until the next end-of-month to ensure consistency with the usual job change dates.

Categories Benefiting from Specific Substantive Protection

The following categories of employees benefit from specific substantive protection against dismissal (see **8.1 Wrongful Dismissal Claims**):

- employees performing non-voluntary legal obligations – protection against terminations due to such status;
- members of a trade union and employees performing trade union activities (in a lawful manner) – protection against terminations due to such status;
- members of the works council or elected members of a body linked to the business – protection against terminations due to such status; and
- older employees with many years of service – this category benefits from an increased employer's duty of care so that the employer must timely inform and consult the employee regarding an intended termination, and also evaluate possibilities to continue the employment before effectively giving notice.

Any termination due to such status in violation of the employer's increased duty of care would be considered abusive (see **8.1 Wrongful Dismissal Claims**).

8. Employment Disputes

8.1 Wrongful Dismissal Claims

Grounds for Wrongful (“Abusive”) Termination Claims

Despite the principle of freedom of termination, terminations can be considered abusive when issued in bad faith (see **7.1 Grounds for Termination**). This general criterion is specified in a non-exhaustive legal enumeration of circumstances leading to a termination's abusiveness.

A notice of termination is considered abusive particularly when given by either party:

- on account of an attribute pertaining to the person of the other party, unless such attribute relates to the employment or substantially impairs co-operation within the business;
- because the other party exercises a constitutional right, unless the exercise of such right violates an obligation arising from the employment or substantially impairs co-operation within the business;
- solely in order to prevent claims under the employment from accruing to the other party;
- because the other party asserts claims under the employment in good faith; or
- because the other party is performing a non-voluntary legal obligation (see **7.5 Protected Employees**).

Furthermore, a notice of termination given by the employer is considered abusive when it is given:

- because the employee is or is not a member of a trade union or because he/she carries out trade union activities in a lawful manner (see **7.5 Protected Employees**);
- while the employee is an elected employee representative on the works council or on a body linked to the business and the employer cannot cite just cause to terminate the employment (see **7.5 Protected Employees**); or
- in the context of mass redundancies, without having consulted the organisation that represents the employees or, where there is none, the employees themselves (see **7.1 Grounds for Termination**).

Consequences of Abusive Terminations

Even an abusive termination remains valid and there is, in principle, no claim to continued employment (see **8.2 Anti-discrimination Issues** for an exception to this principle). However, the terminated party is entitled to a compensation payment of up to six monthly salaries (two monthly salaries in connection with mass redundancies – see **7.1 Grounds for Termination**). The exact amount of compensation is to be determined considering all circumstances of the particular case (such as the seriousness of the terminating party's misconduct).

Procedural Requirements

In order to avoid the forfeiture of such compensation claim, the party receiving notice must submit a written objection against the termination before the expiry of the notice period, and must bring the claim before the courts within 180 days of the end of the employment.

8.2 Anti-discrimination Issues

General Principles

Anti-discrimination issues are generally raised in connection with abusive termination claims (see **8.1 Wrongful Dismissal Claims**). In this context, it is the terminated party that must prove the existence of the circumstances leading to the abusiveness of the termination.

Specific Provisions Regarding Gender Discrimination

Federal Act on Gender Equality

The GEA provides for specific protection against both direct and indirect discrimination on the basis of sex in all areas of working life (ie, not limited to terminations of employment). This is not least by providing for a special burden of proof and additional damages/relief.

Burden of proof

The GEA provides for a lowered burden of proof: in connection with the allocation of duties, setting of work conditions, pay, basic and continuing education and training, promotion and termination (but not in connection with a discriminatory refusal of employment and sexual harassment), discrimination is presumed if the employee can at least substantiate this with prima facie evidence.

Applicable damages/relief

Under the GEA, an employee may challenge a termination if it takes place without good cause following an employee's internal complaint of discrimination based on sex or an employee's initiation of respective proceedings before a conciliation board or a court (so-called revenge dismissal). However, according to an express GEA provision, the employee may also opt against continuing the employment and claim a compensation payment for abusive termination.

Besides that, the GEA also provides for a whole range of remedies against gender discrimination beyond the field of terminations of employment. In particular, an employee may claim the (retrospective and future) elimination of a discriminatory pay gap. In the case of discrimination by way of sexual harassment, the employee may, inter alia, claim a compensation payment of up to six monthly average salaries in Switzerland, unless the employer proves that it took measures that have been proven in practice to be necessary and adequate to prevent against sexual

harassment and which it could reasonably have been expected to take.

In case of a discriminatory refusal of employment, the employee may claim a compensation payment of up to three monthly salaries.

9. Dispute Resolution

9.1 Judicial Procedures

Specialised Employment Forums

As a matter of principle, employment disputes between private parties are adjudicated by the ordinary judicial instances. Many cantons have established specialised employment courts for this purpose.

Special provisions apply for employment disputes where the amount in dispute is less than CHF30,000, or for disputes that are based on the GEA (see **8.2 Anti-discrimination Issues**). In these cases, the court generally establishes the facts ex officio and the respective proceedings are characterised by their simplicity and effectiveness in terms of time and costs (there are no court fees, for example; see **9.3 Awarding Attorney's Fees** for costs for professional representation, however).

(No) Class Action Claims

Swiss law does not provide for class action claims. The strengthening of collective redress is a recurring and current topic in the legislative process, however. Also, as the law stands, the court may already decide to order the joinder of separately filed claims.

Representations in Court

Generally, only lawyers are allowed to act as professional representatives in court proceedings. Cantonal law may provide for exceptions from this principle, however, particularly in connection with employment law disputes.

9.2 Alternative Dispute Resolution

Domestic Arbitration

While the topic of the domestic arbitrability of employment disputes is intensely debated in Swiss doctrine, the SFSC has recently confirmed that an employee's claims against his/her employer are not arbitrable if they arise from mandatory provisions of the law or a collective bargaining agreement (see **6.3 Collective Bargaining Agreements**). The situation looks different for arbitration agreements concluded one month after the termination of the employment, however. From this point in time, the parties may conclude an arbitration agreement with regard to any and all claims arising from the employment.

International Arbitration

In international arbitration, employment disputes shall principally be arbitrable without any specific restrictions.

9.3 Awarding Attorney's Fees

In most cantons/cases, the general rule applies that procedural costs (court fees and costs for professional representation) are allocated in proportion to the outcome of the case (ratio of prevailing and losing; see **9.1 Judicial Procedures** for the absence of court fees in cases with an amount in dispute below CHF30,000). A few cantons do not even grant the reimbursement of costs for professional representation in employment disputes with amounts in disputes below CHF30,000.

Moreover, it is important to note that the costs for professional representation do not correspond to the actual costs incurred but are determined based on cantonal tariffs, mainly depending on the amount in dispute and hardly ever matching the effective costs. Subject to a respective (standard) agreement, any difference must be borne by the client.

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ised employment team, which is spread across Zurich, Basel, Bern, Lausanne, Geneva and Lugano for seamless client service across offices and languages – French, Italian and German. The team currently consists of seven partners, three counsels, two managing associates, four senior associates and seven associates. Out of these, three partners, one counsel, two managing associates and seven associates deal exclusively with employment law issues.

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Trends and Developments

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New Analysis of Wage Equality

Compared to other European countries, there are relatively few statutory requirements regarding equal pay among gender in Switzerland. However, on 1 July 2020, a new rule under the Swiss Federal Act on Gender Equality (GEA) came into force. It obliges companies employing 100 or more employees (full or part-time) to conduct a so-called internal analysis on wage equality. Apprentices, trainees, temporary workers and expats do not count towards the 100-employee threshold; impats do so only if they have a local employment agreement. Consequently, the new GEA rule seems to be limited in scope, since as little as 0.9% of Swiss companies are estimated to employ 100 or more employees. However, the workforce of that 0.9% accounts for about 46% of all Swiss employees. Therefore, the wage equality analysis will in fact have a considerable impact on the Swiss labour market.

The analysis

The new GEA rule comprises three steps. First, the companies concerned conclude an internal analysis by 30 June 2021, using either their own software or the free standard analysis tool (Logib) provided by the Swiss government. Company-specific software must be based on scientific and legal methods. Logib's method takes different variables into account, such as the standardised gross wage (according to the uniform definition of "wage" provided by the Department of Home Affairs) and potential justifications for unequal treatment of employees, including education, qualification, language skills, years of service, experience and professional status. The method aims to assure that unequal pay based on non-discriminatory factors or other company-specific objective factors does not lead to a negative result for the analysis. If wage differences exceed a tolerance threshold of 5% (inexplicable wage difference), the company has not passed the analysis.

Auditing the analysis

In a second step, employers must have the results of their analysis audited by an independent body within a year of the equal pay analysis. Companies may choose between an auditing company, the company's employees' representation or a recognised organisation that aims to promote gender equality or safeguard employees' interests. Auditing companies merely carry out a plausibility check, but do not review the content of the analysis. If an employer chooses an organisation or the employees' representation, the parties must agree on the procedure for the audit.

The duty to inform

As a final step, the company must inform its employees about the outcome of the analysis within one year of the conclusion of the audit. Listed stock corporations must additionally inform their shareholders (in the attachment to the annual financial statements). This transparency obligation and its potential risks to a company's reputation are the main levers of the new GEA rule. Furthermore, it is expected that a negative outcome of the analysis may have an impact on individual wage discrimination lawsuits, due to the (rebuttable) presumption of wage discrimination it evokes. The revised GEA, however, does not provide for any penalties in case of a negative result or a company failing to perform the analysis in the first place, nor does it provide for any reporting obligations to public authorities.

Repetition of the analysis

If the analysis reveals a positive result, meaning that the unexplained wage difference between female and male employees is below 5%, the company does not have to perform another analysis. On the other hand, if the company's gendered wage inequality exceeds the threshold of 5%, the process associated with the wage equality analysis has to be repeated after four years. The new legislation is limited in time, however: it will expire automatically by 1 July 2032.

Amendment to the Statute of Limitations for Claims Based on Personal Injury or Death

The Swiss statute of limitations has been revised and the new provisions entered into force on 1 January 2020. In principle, the limitation period for employment law claims remains unchanged: claims of employees based on the employment relationship are barred after five years. However, according to the prevailing scholarly opinion, this five-year period does not apply to all employee claims, but only to those based on wage entitlements. For all other claims, the general contractual limitation period of ten years applies.

The revised statute of limitations has changed the period of limitation for damages arising from death or bodily injuries, which also applies to claims regarding death or bodily injuries resulting from an employment relationship. The new article 128a of the Swiss Code of Obligations determines the following limitation periods: claims are denied three years after the day the person affected became aware of the damage (relative) and at

SWITZERLAND TRENDS AND DEVELOPMENTS

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the latest 20 years after the harmful event took place or ceased to take place (absolute).

The need for introducing the longer absolute period of limitation for death or bodily injuries was recognised after various instances became public, in which employees discovered several years after an employment has ended that their health impairments were in fact caused by conditions immanent to their work environment. However, this legal revision comes too late for all the construction workers who were exposed to asbestos at their workplace, before the turn of the millennium, namely because – according to the transitional provisions – the new limitation periods only apply to claims that have not already been time-barred on 1 January 2020, based on the previously applicable limitation periods.

Obligation to Compensate Employees for Home Office Expenses

In Switzerland, the COVID-19 pandemic has, as in most countries, rendered working from home indispensable for sustaining business operations. Home office solutions were previously unpopular with many Swiss employers, but major companies were forced to put them in place and provide the necessary infrastructure to employees. Among the most pertinent issues arising from this adaptation is the question of whether an employer is obliged to (partly) reimburse its employee for rental costs and expenses for equipment, which the employee provided himself or herself.

Recent case law concerning home office expenses

This issue has given relevance to a recent decision of the Swiss Federal Supreme Court (SFSC) that was issued before the COVID-19 outbreak. According to a mandatory provision in the Swiss Code of Obligations, all expenses incurred by the employee in performing his/her work duty in a place other than the workplace provided by the employer must be reimbursed by the latter. Several legal scholars have claimed that, if the employer does not offer the employee a suitable workplace or none at all, the work infrastructure at home is a necessary prerequisite for the performance of the work duty and therefore must be reimbursed by the employer, at least partially. The SFSC in its recent decision agreed with this opinion and held that, in these cases, the employee may successfully claim an adequate compensation for a part of his/her rent for a location which is (amongst other things) used to carry out work for the employer.

Limited scope of the Supreme Court decision

However, the prevailing scholarly opinion limits the applicability of the SFSC decision to situations in which the employer permanently does not provide a workplace or at least for a longer period of time. Thus, it is assumed that employees who temporarily performed their work from home due to the measures

preventing the spread of COVID-19, but under normal circumstances work from an office space provided by the employer, will not be successful in asserting claims for compensation.

Pre-emptive solutions

To avoid uncertainties, employers frequently making use of home office solutions or even depending entirely on employees working from their homes should consider making flat rate agreements with their employees. Under Swiss law, it is permitted to determine an adequate flat rate amount to compensate for all potential expenses incurred by an employee using his/her home as an office. Such agreements prevent disputes about the employer's possible obligation to reimburse the employee for unexpected home office expenses and in particular for rental costs. Such pre-emptive solutions are beneficial for both employer and employee.

Euro-Wages

The Freedom of Movement Treaty (FMT) between Switzerland and the EU/EFTA Member States prohibits the discrimination of citizens of Member States. Annex I to the FMT substantiates that nationals of Member States must be treated equally, specifically regarding remuneration. Provisions in collective or individual employment agreements which violate this duty and provide for discriminatory conditions are null and void, according to the FMT. To date, there is no Swiss case law that addresses whether this non-discrimination provision is applicable directly to employment relationships under civil law.

However, in two recent decisions, the SFSC decided on claims against Swiss companies that had agreed with their employees commuting across borders that they would pay them in Euros while their Swiss colleagues would continue to receive their salaries in Swiss Francs. The Supreme Court rejected the claims in the amount of the difference in salary between the employees receiving Euros and their Swiss counterparts caused by the exchange rate. It was held that invoking the anti-discrimination provision under Annex I to the FMT under the special circumstances of the case was abusive. The employees concerned had explicitly agreed to amending their contracts and receiving Euros instead of Swiss Francs. They had known that the company was in economic difficulties resulting from an extremely high exchange rate between the two currencies and were willing to agree to the measures, which were intended to save their jobs.

Amendments to Provisions on Access to Swiss Labour Market

In 2014, a federal popular initiative brought forward by the conservative Swiss Popular Party was adopted, aimed at reducing the immigration of foreigners to Switzerland and, in particular, to the Swiss labour market. In 2017, the Swiss Parliament finally overcame the difficult task of fulfilling its duty to implement the

initiative and harmonising its provisions with the obligations of Switzerland laid out in the FMT. To this end, the Swiss Foreign Nationals and Integration Act (FNIA) was amended.

Priority for local workers

The respective clause in the FNIA came into effect in mid-2018. It provides for a prioritisation for local workers (including EU-27/EFTA nationals residing in Switzerland) who are registered as unemployed and are seeking a job in a sector of professions with a high level of unemployment. An employer wanting to employ a professional in these affected sectors has a general obligation to notify the competent governmental unemployment office. The employer is not allowed to advertise its vacancy to the public before the sixth day after it has been reported. On 1 January 2020, by way of implementing the new rule, a 5% threshold of unemployment rates for professions was set, above which the reporting obligation is triggered. As a result, in 2020, vacant jobs such as auxiliary staff in construction, restaurants, food production and gardening, painters, plasterers, constructors and sociologists must be reported.

Exceptions from the obligation to report vacant positions exist where job openings can be filled directly with an applicant who is registered with the cantonal unemployment office, a person who is married or closely related to one or more of the company's signatories or an internal applicant who has already worked for the specific company or a company within the same group of companies for at least six months. Vacancies for jobs lasting less than 14 days are also exempt.

Consequences of and compliance with reporting obligations

After having reported a vacancy, unemployment offices contact the employer regarding suitable candidates, whom the employer may then invite for an interview. The employer must subsequently report back to the unemployment office, indicating which proposed candidates are considered suitable for the position, which applicants have been invited to an interview and which applicants, if any, have been hired.

To ensure compliance with the described provisions, the competent cantonal labour authorities check whether employers applying for work permits for foreigners have observed the abovementioned obligations. If an employer failed to report a vacant position in a sector in which unemployment rates are 5% or higher, the work permit is denied. Furthermore, non-compliance with the reporting duty is a criminal offence and may be sanctioned with a fine of up to CHF40,000 if the employer acted wilfully, or up to CHF20,000 if the employer was negligent.

The future of local employees first

Since the Swiss Popular Party is not satisfied with the way the Parliament implemented its initiative, it has launched a new

popular initiative that mainly aims to further restrict immigration to Switzerland. Due to the effects of the COVID-19 pandemic on Switzerland, the popular vote on this initiative has been postponed to 27 September 2020.

Contractual Penalties for Breaches of Non-competition Covenants

It is permitted under Swiss law to agree on contractual penalties for breaches of non-competition clauses in an employment context. While such penalties may undoubtedly sanction post-contractual violations of non-competition agreements, the rules applying to punitive measures against breaches of a non-competition clause that took place during an ongoing employment relationship are more nuanced.

The differentiation derives from the mandatory Swiss employment law protection of employees regarding liability for damages caused wilfully or by negligence during an ongoing employment relationship. According to a recent decision of the SFSC, a clause providing for a penalty is void if it includes an increase of liability at the disadvantage of the employee. Penalties for prohibited competition during an ongoing employment may, however, be valid if they have a purely disciplinary function. This means that actual sanctions are possible, as long as they are not aimed at compensating any kind of economic disadvantage of the employer.

The provision of such sanctions must meet the general requirements for contractual disciplinary sanctions in employment relationships: respective clauses need to clearly specify which circumstances lead to the imposition of the penalty, and distinctly define the amount thereof. This amount has to be proportionate.

Due to the described recent case law, many existing provisions concerning the sanctioning of competition during an ongoing employment relationship may now have to be interpreted as being invalid, and can therefore not be enforced. It is thus recommended that Swiss employers review their non-competition agreements and amend them accordingly, with the consent of the employees concerned.

Changes Regarding Contributions to Old-Age and Survivor's Insurance

At the beginning of 2020, the Swiss Federal Law on Tax Reform and Old-Age and Survivor's Insurance Funding came into force. It aims particularly to increase the revenues of the old-age and survivor's insurance (OASI) by more than CHF2 billion per year. One of the measures taken to accomplish this increment is a raise in contribution rates. This is the first time OASI contributions have been raised in more than 40 years.

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As of 1 January 2020, the new contribution rate of 8.7% of an individual employee's total gross salary has replaced the previous rate of 8.4%. Since OASI contributions are borne equally by employee and employer, both parties' contributions increased by 0.15%. The total social security contributions levied on wages – which besides OASI include contributions for the risks of invalidity and unemployment, and compensation for income due to motherhood or military service or unemployment – currently amount to 12.75% (compared to 12.45% in 2019) for an annual income of up to CHF148,200. Employees with higher annual income must currently contribute a flat rate of CHF18,895.50 plus 11.55% of the amount that exceeds the threshold of CHF148,200 (since the highest insured income regarding compensations for accident risks and unemployment amounts to CHF148,200 per year).

Still No Whistle-Blowing Regulation in Switzerland

During the past few years a political discourse and, since 2015, concrete political action have emerged, aimed at introducing whistle-blowing legislation in Switzerland. A draft of a new bill prepared by the Swiss Federal Council was rejected by one chamber of the Swiss Parliament (National Council) in March 2020. One of the main arguments expressed against the draft was its lack of a special dismissal protection for whistle-blowers. With this rejection by the National Council, years of political and legislative effort have become redundant and it is expected that years will pass before a whistle-blowing bill will be introduced.

The current legal situation bears major uncertainties for employees considering informing on their employers. Employees are subject to an obligation of loyalty and secrecy towards their employer. The employee can only disclose information with-

out breaching his/her duties if there is a predominant interest in doing so. Under certain circumstances, it can be difficult to predict the result of the necessary balancing of interests to determine whether the interest to disclose indeed prevails over the employer's secrecy interests. Employees may therefore regularly refrain from disclosing internal irregularities in favour of their obligations of confidentiality and secrecy.

The situation for employees is slightly improved by the fact that both case law and doctrine consider a dismissal in response to permissible whistle-blowing to be abusive (with the consequence that, although the dismissal remains valid, the employee can assert claims for compensation equivalent to up to six monthly salaries). However, this general dismissal protection only applies if the employee in question has acted in good faith and is not himself or herself involved in the reported misadministration or misconduct. Whether a dismissal is abusive therefore depends on the individual circumstances of a specific case, and lies at the sole discretion of the competent court.

Moreover, for the time being, there are no concrete obligations for companies and employers to have a whistle-blowing policy in place. However, several voices in legal doctrine argue that setting up internal or external reporting systems for service providers in the financial industry is required – at least as an organisational measure – in order to avoid commercial criminal offences, such as corruption or money laundering. If such crimes are committed within a legal entity, and it fails to prove that it has implemented sufficient organisational measures to prevent them, the company may be prosecuted according to Swiss criminal law and, if found guilty, may be sanctioned with high fines of up to CHF5 million.

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ised employment team, which is spread across Zurich, Basel, Bern, Lausanne, Geneva and Lugano for seamless client service across offices and languages – French, Italian and German. The team currently consists of seven partners, three counsels, two managing associates, four senior associates and seven associates. Out of these, three partners, one counsel, two managing associates and seven associates deal exclusively with employment law issues.

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SWITZERLAND TRENDS AND DEVELOPMENTS

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