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Employment 2021

Switzerland
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SWITZERLAND

Law and Practice

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1. INTRODUCTION

1.1 Main Changes in the Past Year

Statutory Paternity Leave

Since 1 January 2021, all employed fathers are entitled to a statutory paternity leave of two weeks after the child's birth (to be taken in full weeks or on a day-to-day basis within the first six months). During such paternity leave, the employee is generally entitled to receive paternity allowances of 80% of the previous average income (but not more than CHF196/day).

Statutory Leave(s) to Care for Sick Family Members or Partners and for Children with Serious Health Impairments

Since 1 January 2021, employees are entitled to fully paid short-term leaves in order to take care of a family member or partner with a health impairment (and actually requiring care by the employee). Such short-term leaves may not exceed three days per incident and a maximum of ten days per year. The respective entitlement shall be independent of a potential further entitlement to continued salary payments in connection with family responsibilities based on the pre-existing provisions (see **2.5 Other Terms of Employment**).

Moreover, since 1 July 2021, working parents of a minor child whose health is seriously impaired due to an illness or accident are generally (jointly) entitled to a care leave of up to 14 weeks per incident and care allowances of 80% of the previous average income (but not more than CHF196/day) during such leave.

Statutory Minimum Standards in Connection with Employees' Cross-Border Business Trips

Since 1 November 2020, there are new statutory minimum standards in connection with cross-border business trips of employees to which the Federal Act on Work in Industry, Trade and Commerce (the Labour Act) applies (see **2.1 Status of Employee**). In short, time spent on Swiss territory for the outward and return journey must be recognised as working time to the extent that it exceeds the time usually spent on the way to and from the place of work (there is no respective rule with regard to the time an employee spends abroad, however). Moreover, the statutory minimum daily rest period of 11 consecutive hours must be granted immediately after the employee's return journey, beginning with the latter's arrival at his/her place of residence. By way of an exception to the usual requirements, no permit shall be required if a respective outward or return journey takes place during the night or on a Sunday (although other mandatory legal consequences of night or Sunday work such as wage supplements or time bonuses and substitute rest periods are not covered by this exception).

1.2 COVID-19 Crisis

Amendments to Provisions on Furlough 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 furlough compensation), with the aim of ultimately avoiding dismissals and major increases in unemployment rates.

By way of emergency legislation (of which, in the meantime, certain regulations have been transformed into ordinary laws), the Swiss Federal Council has temporarily amended the existing provisions on furlough to facilitate the process of applying for furlough compensation and to broaden the scope of employees entitled to it.

As of 1 July 2021, this includes the following measures in particular:

- until 30 September 2021, furlough compensation may be claimed in a simplified and summary procedure;

- until 30 September 2021, income resulting from an interim employment does not have to be offset against the furlough compensation;
- until 30 September 2021, employees in fixed-term employment relationships, apprentices and workers on call, amongst others, exceptionally qualify for furlough compensation (subject to additional requirements);
- until 31 December 2021, there is no prior notification period and new permits have a duration of up to six months (but not beyond 31 December 2021). There is still need for a prior notification, however; and
- until 28 February 2022, an increased maximum period of entitlement to furlough compensation of 24 months applies.

Compensation for Loss of Working Hours Due to Childcare or Quarantine

During the lockdown, 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. To combat this, the Swiss Federal Council introduced a special compensation for employees who were forced to stay at home due to the lack of third-party childcare for their children under 12 years of age. These regulations will apply until (at least) 31 December 2021.

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. The entitlement ends when the quarantine is lifted, but at the latest as soon as seven daily allowances have been paid. Employees who do not have full vaccination protection and 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 generally not eligible for the compensation (unless, at the time of departure, the country was neither on the respective list nor had it been officially announced that it would be put on the list).

The payments of these two allowances amount to 80% of the income paid out before the claim occurred but are limited to CHF196 per day.

Provisions on Protection of Employees at Special Risk

Over the course of the pandemic, various (temporary) measures to ensure special protection for employees at particular risk of contracting COVID-19 (Employees at Risk) have been implemented. The respective measures have been amended several times.

Since 26 June 2021, the following persons generally qualify as Employees at Risk:

- unvaccinated pregnant women (assuming that the vaccine protects for 12 months); and
- persons with particular diseases or genetic anomalies who cannot be vaccinated on medical grounds, unless they have already been infected and recovered (assuming that a recovery protects for six months).

Employees at Risk benefit from the following special protection.

- Within the scope of operational possibilities, the employer has to allow and enable Employees at Risk to perform their work from home. If this is not possible, the employer has to assign the Employee at Risk equivalent substitute work that can be carried out from home.
- Where an Employee at Risk's physical presence is essential, he/she shall carry out his/her regular activities or, at a last resort, equivalent substitute work in the workplace, but

only subject to particular protective requirements being met. However, if the Employee at Risk regards the personal risk of infection as still being too high despite the employer taking respective measures, for specific reasons (upon request to be confirmed by means of a medical certificate), the Employee at Risk may refuse to work in the workplace.

If it is not possible for the Employee at Risk to carry out his/her work in accordance with the above (including if the Employee at Risk legitimately refuses to work in the workplace), the employer has to furlough the employee while continuing to pay their (full) salary. In this case, however, the employer may claim the special governmental compensation to which the Employee at Risk is entitled.

Obligation/Recommendation to Work from Home

Over the course of the pandemic, various (temporary) general obligations or recommendations to work from home applied. Following an actual obligation to work from home where the nature of the activity made this possible and feasible at a reasonable cost (and a short transition period during which this was changed into a recommendation if the employer provided for a test concept), only a respective general recommendation to work from home has applied since 1 July 2021.

2. TERMS OF EMPLOYMENT

2.1 Status of Employee

Blue-Collar v 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 parents (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**).

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2.2 Contractual Relationship

Permanent v 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

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 the 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 homeworker 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 – see **2.1 Status of Employee**) in exceptional circumstances, 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 conscionably 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 (Geneva: CHF23; Jura: CHF20; Neuchâtel: CHF20; Ticino: currently CHF19 to CHF19.50) or will provide for a general hourly minimum salary in due course (Basel-Stadt: CHF21).
- 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 instalments. 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 v 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 that qualify 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 not, in principle, be replaced by monetary or other benefits during the employment. Subject to exceptional circumstances, a (financial) compensation is only possible at the end 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 the potential difference between the insurance benefits and 4/5 of the employee's compensation.
- Family responsibilities – to the extent that an employee is legally obliged to care for close relatives (ie, children, spouses and registered partners) and may not avert an absence for this purpose by suitable organisation, the employee remains entitled to his/her full compensation as in connection with other legal obligations. Moreover, and potentially in addition to that, an employee is entitled to fully paid short-term leaves of up to three days per incident and a maximum of ten days per year in order to take care of a family member or partner living in the same household with a health impairment (and actually requiring care by the employee). Eventually, working parents of a minor child whose health is seriously impaired due to an illness or accident are generally (jointly) entitled to a care leave of up to 14 weeks per incident and care allowances of 80% of the previous average income (but not more than CHF196/day) during such care leave (see **1.1 Main Changes in the Past Year**).
- 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).
- Paternity – after the birth of their child, male employees are exempt from the obligation to work for two weeks within the first six months after the child's birth. During such paternity leave, the employee is generally entitled to receive paternity allowances of 80% of the previous average income (but not more than CHF196/day - see **1.1 Main Changes in the Past Year**).
- 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). Whistle-blowing 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 Employment

During the term of employment, an employee is 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 not a 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 prevents the employee not only 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 Swiss Federal Supreme Court (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 com-

mon non-compete clauses (see **3.1 Non-competition Clauses**).

4. DATA PRIVACY LAW

4.1 General Overview

As a general principle, 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 to the extent it is necessary for the performance of the employment contract. Moreover, the general provisions of the Swiss Federal Data Protection Act (DPA) also apply to employment relationships.

The DPA stipulates a number of principles, including the principles of proportionality, transparency and purpose limitation. Subject to a number of limitations, the employee is entitled to request information from the employer regarding all available data concerning himself/herself as well as the purpose of the respective processing. In practice, such right of information is often invoked by employees who have been dismissed by their employer. However, a respective employee's request that is made solely for the purpose of obtaining evidence for subsequent civil proceedings may be considered abusive.

Monitoring and control systems designed to monitor the behaviour of employees at the workplace are prohibited. If monitoring or control systems are required for other (legitimate) reasons, they must be designed and arranged in such a way that they do not affect the employees' health and freedom of movement.

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

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.

For nationals of the United Kingdom, respective rights obtained under the TFM until the end of 2020 are principally (still) protected by way of a bilateral agreement between the United Kingdom and Switzerland. As of 1 January 2021, however, nationals of the United Kingdom qualify as Third-Country Nationals.

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 2021, the quota amounts to 8,500 permits, with an exceptional additional quota of 3,500 permits for nationals of the United Kingdom);
- 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 they will be able to integrate themselves appropriately into the local labour market and into the social environment on the basis of their professional, linguistic and social skills.

5.2 Registration Requirements

EU-27/EFTA Nationals (other than Croatian citizens) 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 the presentation of a respective employment contract and depending on the duration thereof, either a short-term residence permit L or a residence permit B (for durations of one year or more) is 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 (other than Croatian citizens) under certain circumstances; 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 and 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 the case of a positive decision, the work permit will be granted (although, for the time being, permits for nationals of the United Kingdom are exclusively granted by the cantonal authorities). 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 if 100 employees in a company with a headcount of more than 500 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 employer 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. Unless they are beneficial to the employee, 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 a particular economic sector or profession, including the ones that 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 June 2021, as many as 82 CBAs had been declared generally binding (44 on a national level and 38 on a cantonal level).

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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's 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). However, 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.

(No) Formalities to Be Observed

Issuing a valid notice of termination does not require the observance of any formalities, other than in connection with collective redundancies (see **7.1 Grounds for Termination**) or in the case of a respective contractual agreement. 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 that summary dismissal must be 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 for the dismissal to be 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 scenario, where 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 claims arising from the employment that have not yet been earned (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 parties' 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 a termination agreement 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, certain categories of employees 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 (after completion of the probation period, if any):

- employees performing Swiss compulsory military service, civil defence service or alternative civilian service – protection against terminations 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 terminations during such incapacitation, but at most for 30, 90 or 180 days (depending on the employee's years of service);
- pregnant employees and new mothers – protection against terminations during the pregnancy and for 16 weeks after delivery or during a prolonged maternity leave in connection with a hospitalisation of the newborn (young fathers do not benefit from a comparable temporal protection against terminations, however, and may only benefit from an extension of the notice period corresponding to the not yet taken days of paternity leave – see **1.1 Main Changes in the Past Year** and **2.5 Other Terms of Employment**);
- parents of a minor child with serious health impairments – protection against terminations as long as the entitlement to care leave exists, but no longer than six months from receipt of the first daily care allowance (see **1.1 Main Changes in the Past Year** and **2.5 Other Terms of Employment**); 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 or 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 in the following circumstances:

- 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 in the following circumstances:

- 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 works council or (if there is none) the employees (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 Swiss 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), 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, the 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.

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 the 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, but see **9.3 Awarding Attorney's Fees** regarding costs for professional representation).

(No) Class Action Claims

Swiss law does not provide for class action claims, but the strengthening of collective redress is a recurring and current topic in the legislative process. 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**). However, the situation looks different for arbitration agreements concluded one month after the termination of the employment: 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 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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Trends and Developments

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Paternity Leave

On 27 September 2020, the Swiss people voted in favour of the introduction of a statutory two-week paternity leave. The respective legislation entered into force on 1 January 2021.

Generally, all employed men who are the legal father of a child at the time of birth or will become such within the subsequent six months after the birth of the child are entitled to two weeks (ie, ten working days) of paternity leave. The leave can be taken all at once or separately but must be taken within six months of the child's date of birth, otherwise the entitlement ends without substitution.

During paternity leave, the employee is entitled to a daily allowance amounting to 80% of the average income earned by the employee concerned before the child's birth, which is covered by the social income compensation scheme. The current maximum allowance is CHF196 per day; therefore, the compensation is capped at the monthly salary of CHF7,350 gross. The allowance is either paid directly by the competent compensation fund to the respective employee or the employer will be compensated by the compensation fund retroactively. The employer may continue to pay the full salary (by topping up the allowance from 80% to 100% of the previous earnings or by paying a salary exceeding the cap of CHF7,350 gross) on a voluntary basis but is generally not obliged to do so.

Furthermore, according to new provisions introduced together with the regulations on paternity leave, if an employer ordinarily terminates the employment contract, the notice period is extended by the duration of the unused paternity leave days, if any, as long as the father is entitled to the statutory paternity leave. However, a protection against dismissal (as it exists for pregnant women and for mothers for 16 weeks after the birth of the child) has not been introduced for fathers-to-be or fathers on paternity leave.

New Statutory Care Leaves

In order to improve the reconciliation of employment with care duties towards relatives, the Swiss Parliament has decided on two new care leaves for employees, and respective provisions were recently introduced to the Swiss Code of Obligations (CO).

Short-term leave to care for family members with a health impairment

As of 1 January 2021, employees are entitled to short-term leaves and continued payment of salary for up to three days in order to take care of a family member or a life partner. This means that the health impairment of the following persons can trigger an entitlement to short-term care leave:

- family members in ascending or descending line (in particular children, parents or grandparents);
- spouses or registered partners;
- parents-in-law; and
- life partners living in a shared household with the employee for more than five years.

The respective health impairment must be documented by a medical certificate and must actually lead to a care dependency of the individual. The duration of the short-term leave is limited

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to the time required for caring and may in any case not exceed three days per health incident and ten days per employee and year of service.

Care leave to care for a child suffering from a severe health impairment

As of 1 July 2021, working parents of a minor child whose health is seriously impaired due to illness or an accident are jointly entitled to one care leave of up to 14 weeks (98 days) per incident. Care leave must be granted if the child's physical or mental condition has deteriorated drastically, if the course or outcome of the change is either hard to predict or permanent or if increasing impairment or even death are to be expected, and if there is an increased need for parental care that requires at least one parent to interrupt employment to care for the child. Care leave may be taken at once or may be split into separate days. If both parents are employees, they are each entitled to care leave of seven weeks and to half of the total care allowance, respectively.

During this care leave, the parent is entitled to a daily allowance, covered by the competent social insurance (income compensation insurance), amounting to 80% of the average income earned by the employee concerned before starting the care leave. However, the compensation is currently limited to a maximum of CHF196 per day, so the compensation is capped at a monthly salary of CHF7,350 gross. The allowance is either paid directly by the competent compensation fund to the employee or the employer will be compensated by the compensation fund retroactively. The employer may continue to pay the full salary (by topping up the allowance from 80% to 100% of the previous earnings or by paying a salary exceeding the cap of CHF7,350 gross) on a voluntary basis but is not obliged to do so.

Revision of Labour Act Ordinance 1

On 1 November 2020, the amendments to Ordinance 1 to the Swiss Labour Act (Labour Act Ordinance 1) came into force. In particular, the revision contains new provisions on working time regulation in the case of cross-border business trips and on compensation of work performed on Sundays or public holidays.

Definition of working time in the case of cross-border business trips

Since 1 November 2020, outbound and return journeys on Swiss territory as part of business trips abroad generally count as working time. As with domestic business travels, when determining working time, the time spent by the individual employee on his/her usual commute to the workplace is to be deducted from the time spent traveling on a business trip on Swiss territory. Despite the general prohibition on the performance of Sunday and night work (see **2.3 Working Hours** in the **Switzerland Law & Practice** chapter in this guide), respective journeys at night, on Sundays or on public holidays are permitted without the need for governmental permit. However, wage supplements or time bonuses as well as substitute rest periods are not affected by this exception and must still be paid or granted by the employer. Furthermore, the statutory minimum daily rest period of 11 hours must be granted immediately after the end of the return journey – ie, upon arrival of the employee at his/her place of residence. The Swiss Labour Act is generally limited to situations occurring within national borders and therefore the time an employee spends on a business trip on foreign territory (in particular, work performed, air travel, transfers, hotel stays, etc) remains unregulated by the Labour Act and its Ordinances.

Amended standards regarding wage supplements in the case of work on Sundays or on public holidays

The revision of the Labour Act Ordinance 1 contains clarifications regarding the wage supplements to be paid for working hours performed on Sundays and on public holidays. As a rule, only in the case of temporary Sunday work (including work on public holidays) of up to six occasions per year must the employer pay a wage supplement of 50% to the employee concerned, while for permanent Sunday work the employer owes only time compensation and compensatory rest days. In accordance with the established legal practice, the revised provision of the Labour Act Ordinance 1 now clearly states that the employer remains obliged to pay wage supplements for the first six Sundays, if during the term of a calendar year it turns out that an employee will work on more than six Sundays and thus the regulations regarding permanent Sunday work would apply.

Rights of United Kingdom Nationals in Switzerland after Brexit

Since the UK left the European Union, the Agreement on the Freedom of Movement (TFM) ceased to apply to the UK and, as of 1 January 2021, UK nationals accordingly qualify as third-country nationals in Switzerland. Under the TFM, UK citizens were able to take up employment under simplified requirements in Switzerland. As of 1 January 2021, they now must generally fulfil the stricter requirements resulting from the Swiss Foreigners and Integration Act (see **5.1 Limitations on the Use of Foreign Workers** in the **Switzerland Law & Practice** chapter of this guide).

Rights acquired under the TFM

The Services Mobility Agreement (SMA), a new bilateral agreement on rights of citizens between Switzerland and the UK, ensures that rights acquired by Swiss and UK nationals on the basis of the TFM are preserved after the termination of the TFM on 31 December 2020. The respective provisions of the SMA apply to UK nationals who exercised their rights of free movement under the TFM by 31 December 2020 at the latest, by submitting a respective application to the competent cantonal authority with the documents required for the issuance of a permit. In principle, the SMA preserves the acquired rights for lifetime. However, the rights expire irrevocably as soon as the conditions of the SMA are no longer fulfilled. This is the case, for example, in the event of the definitive deregistration of a UK national in Switzerland.

Special provisions for temporary cross-border service providers

The SMA further enables cross-border service providers from the UK who are performing work in Switzerland for no more than 90 days per calendar year to continue making use of the (online) notification procedure (see **5.2 Registration Requirements** in the **Switzerland Law & Practice** chapter of this guide). Cross-border service providers thus do not require a permit, provided they do not work in Switzerland for more than 90 days per calendar year. The limitation of 90 days per calendar year applies both per company and per posted person (employee or self-employed person) rendering services in Switzerland. However, this advantageous position compared to other third-country nationals applies only to individuals who have been admitted to the UK labour market for at least 12 months prior to rendering their services in Switzerland.

New Social Security Agreement Between Switzerland and the UK

In September 2021, the Federal Council signed the new social security agreement between Switzerland and the United Kingdom. The new social security agreement grants insured persons largely equal treatment and facilitated access to social security benefits. It avoids

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double insurance and insurance gaps for people who are affected by the social security systems of both countries. The agreement also facilitates the temporary deployment of workers in the other state. The agreement will enter into force as soon as it has been approved by the parliaments of both countries.

New Provision on Gender Representation in Boards of Directors and Executive Management Positions

To counter the persistent under-representation of women on Swiss boards of directors and in executive management positions, a gender representation provision was introduced to the Swiss Code of Obligations (CO) as of 1 January 2021 for publicly listed companies of a certain economic importance.

The new Article 734f of the CO applies to listed companies that have exceeded two of the following thresholds over two successive financial years:

- balance sheet total of CHF20 million;
- sales revenue of CHF40 million; or
- 50 full-time positions on an annual average.

The new regulation requires the respective companies to have representation of both genders on the board of directors of at least 30% and in the executive management of at least 20%. If these values are not reached, the company must indicate in the annual remuneration report the reason why genders are not represented as required, and must describe the measures being taken to increase representation of the under-represented gender. Thereby, this new regulation provides for a so-called comply-or-explain principle.

With respect to the reporting obligation in the case of non-compliance with the new minimum requirements, the Swiss Parliament has agreed generous transitional provisions, in order to give the companies concerned enough time for the necessary reorganisation. According to the respective provisions, companies that are subject to the new gender representation minimal standards must comply with the obligation to report gender representation on the board of directors at the latest five years after the new law entered into force (ie, 1 January 2026) and regarding the executive management at the latest ten years after the new regulation entered into force (ie, 1 January 2031).

Non-compliance with the new minimal standards regarding gender representation leads to the described obligation to provide a public justification in the remuneration report and, as such, may lead to negative publicity. However, non-compliant companies are not faced with any other (financial or administrative) sanctions.

Extension of the Job Reporting Obligation Due to Increased Rate of Unemployment

According to the Swiss Foreign Nationals and Integrations Act (FNIA), vacant positions in professions with particularly high unemployment rates must be reported to the regional job placement offices. This measure provides for a prioritisation of local workers (including EU-26/EFTA nationals residing in Switzerland as well as UK nationals residing in Switzerland continuing to benefit from their rights acquired under the TFM; see *Rights of United Kingdom Nationals in Switzerland after Brexit*, above) who are registered with a regional job placement office. As of 1 January 2020, the Federal Council set the triggering rate of unemployment at 5%. The Federal Department of Economics, Education and Research annually publishes a list with all professions that are subject to a reporting obligation.

While the triggering rate remained at 5% for 2021, due to the significantly higher unemploy-

ment rates in 2020 the Federal Department responsible added numerous new professions to the list of professions that are subject to a reporting obligation. Amongst others, vacancies for managers in sales and marketing, various positions in the gastronomy sector (eg, chefs or restaurant managers) and numerous trade professions (eg, roofers, welders or metal polishers) must be reported in 2021.

In principle, failure to comply with the reporting obligation may lead to both administrative and criminal sanctions for the respective employer. On the one hand, if an employer chooses a foreign national (neither a Swiss nor an EU/EFTA citizen) for a vacancy that is subject to the reporting obligation without having reported the open position to the regional job placement office, the work permit will not be granted. On the other hand, non-compliance with the reporting obligation constitutes a criminal offence and may be sanctioned with a fine of up to CHF40,000 (in the case of a wilful offence) or up to CHF20,000 (in the case of negligence).

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Walder Wyss Ltd is a dynamic presence in the market, with more than 230 legal experts across six locations in all language regions (Zurich, Geneva, Basel, Berne, Lausanne and Lugano). Clients include national and international companies, publicly held corporations and family businesses, as well as public law institutions and private clients. The firm's success is determined by its continuous growth, dedication and proximity to clients. Walder Wyss is the only Swiss law firm with a highly specialised employment team, which is spread across Zurich, Basel, Bern, Lausanne, Geneva and Lugano for seamless client service across offices and languages – German, English, French and Italian. The team currently consists of seven partners, three counsel, 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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