

Holiday and Holiday Pay (Switzerland)

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A Practice Note setting out the key issues concerning holiday and holiday pay in Switzerland. The issues considered include statutory and enhanced contractual holiday entitlement, accrual, when and how holiday is to be taken, and remuneration during holiday.

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This Note gives guidance on the law governing both statutory and contractual holiday rights in Switzerland. It considers practical and legal issues that arise, including:

- The accrual of holiday entitlement.
- How and when holiday can be taken.
- The calculation of holiday pay.
- The treatment of public and bank holidays.
- The holiday entitlement of employees while on other types of leave (such as sick leave and maternity leave).

Holiday Overview

As a general rule, there are two different types of holidays in Switzerland:

- Holidays (*vacances, Ferien, vacanze*).
- Public holidays (*jours fériés, Feiertage, giorni festivi*).

There is also paid time off.

Holidays (Vacations)

The main purpose of a holiday is to ensure that employees are able to relax away from work and that their health is protected. Therefore, holidays must be taken as time off and should not be replaced by a monetary payment during the employment relationship.

Holiday entitlement is usually fixed in individual employment contracts. However, the statutory minimum must be respected. Article 329a of the Swiss Code of Obligations (CO) stipulates that this minimum is four weeks (20 working days) per year for full-time employment or five weeks (25 working days) per year for employees up to the age of 20. Collective employment agreements (CBAs) can provide for additional entitlements.

In some sectors, such as banking, finance, and technology, it is common practice (but not mandatory) to provide an additional week of holiday, that is, five weeks' holiday in total.

If an employment agreement contains a holiday entitlement that goes beyond the statutory holiday entitlement, the extra holiday entitlement is treated in the same manner as the minimum required holiday entitlement.

Public Holiday

Swiss National Day (1 August) is a federal public holiday. It is treated as a Sunday.

The cantons can fix up to eight additional public holidays, which are also treated as Sundays.

Swiss labour law, in particular, the Employment Act (EA) and its ordinances, has specific provisions governing work on public holidays and Sundays.

Paid Time Off

The CO provides for a number of instances of paid time off. In particular, it provides for:

- **Maternity leave:** 14 weeks (extended in the event of the hospitalisation of the new-born child).
- **Paternity leave** (also applicable to the wives of mothers who have given birth to a child conceived via sperm donation): two weeks.
- **Leave to care for family members:** 10 days per year.
- **Leave to care for a child whose health is seriously impaired by illness or accident:** 14 weeks (seven weeks per parent, if both parents are employed);
- **Adoption leave:** two weeks.

In some cases, cantonal law may provide for additional paid time off (for example, the Canton of Geneva provides 16 weeks of maternity leave).

Statutory Holiday Entitlement

The CO provides a minimum annual holiday entitlement of:

- Four weeks (20 working days) for full-time employees (calculated pro rata for part-time employees).
- Five weeks (25 working days) for full-time employees under 20 years of age (calculated pro rata for part-time employees).

This annual holiday entitlement is calculated based on "each year of service" (that is, a reference period of 12 months) of the employee with the employer. If an employee has not yet completed a full year of service (or leaves partway through a service year), their holiday entitlement for that year is fixed pro rata. For instance, if an employee left after completing half a service year, they should receive half their holiday entitlement.

It is possible for the employer and employee to agree a more generous (but not lesser) holiday entitlement and some CBAs also contain more generous holiday entitlements, which supersede the statutory minimum.

Additionally, there are statutory federal and cantonal holidays, which are treated as Sundays from the perspective of both Swiss employment law (private law) and labour law (public law) (see *Public Holidays and Bank Holidays*).

Excluded Employees

Many labour provisions regarding work on public holidays and Sundays do not apply to employees who fall outside the scope of the EA, in particular, most executive-level managers.

Different employment rules may also apply to employees covered by a CBA.

Holiday Year

The holiday year (that is a year-long period on which holiday entitlement is based) is the service year of the employee (that is, running from the anniversary of the employee's start date). The CO requires that the employer provide the aforementioned minimum holiday entitlement "during each year of service".

Accrual of Statutory Holiday Entitlement

Entitlement

Annual holiday entitlement is based on a 12-month service year and is calculated on a pro rata basis when a service year is incomplete (that is, it is less than 12 months). For instance, if the employment relationship stopped after six months, the employee only should be entitled to 50% of the full annual holiday entitlement (that is, the entitlement for working an entire service year).

Employee Claims in Connection with Unused Holiday Entitlement

Unused holiday entitlement does not simply lapse at the end of the applicable service year, unused holidays are considered a claim in connection with salary under the employment agreement, therefore the employee can claim for unused holidays for up to five years after the claim falls due.

It should be noted that the moment the claim falls due is not identical to the notion of the current amount of holiday entitlement due on a pro rata basis. The Swiss Federal Supreme Court considers that a claim for holiday entitlement is deemed to have fallen due either:

- If applicable, on the date that the employment contract or employer requires holidays to be taken;
- Otherwise, the last possible day on which the holiday entitlement for that service year could be taken (that is, after the 48th week of the service year, for an employee entitled to four weeks of holidays).

Claims for unused holidays become time barred five years after falling due. If the employee shares a household with the employer (for example, live-in household staff), the five-year period only starts running after the end of the employment relationship (that is, the limitation period is suspended during the employment relationship).

Employer Claims in Connection with Excess Holidays Taken

In practice, employees may be allowed to take holiday entitlement in excess of the percentage of the service year they have worked at the point in time, especially when the employer is assuming that the employment relationship will continue. If at the

end of the employment relationship, the employee has taken more days than they are entitled to, based on the corresponding pro rata holiday entitlement, in principle, these extra days only need to be reimbursed if both:

- The end of the employment relationship can be attributed to the employee (for example, the employee is terminated following a finding of gross misconduct, or the employee resigns without fault of the employer).
- The holiday taken in excess of the accrued holiday entitlement was taken at the behest of the employee (rather than mandated or instructed by the employer).

Taking Statutory Holiday

Usually, employment contracts do not go into much detail concerning how and when an employee is to take statutory holiday, since the statutory language is favourable to the employer (see *When Statutory Holiday Is To Be Taken*). That said, some employment contracts have a general clause largely reiterating the statutory position, for example:

- The employer has the right to determine when the employee will take holidays and will normally provide three-months' notice to the employee; in exceptional situations, the notice period can be shortened (for example, to one week).
- The employer will consider the employee's wishes, if requested or presented reasonably in advance by the employee.

Some employers choose to implement more detailed rules through separate policies or in the company handbook, as these may be easier to modify at a future date.

When Statutory Holiday Is to Be Taken

From a Swiss employment law standpoint, it is the employer who determines the timing of the employee's holidays (Article 329c(2), CO), taking account of the employee's wishes, to the extent that these are compatible with the interests of the business or household (for live-in household staff). Special consideration should be given to employees with children, and they should be allowed to take their holidays during school holidays.

Employers also may have internal regulations requiring employees to take their statutory holiday entitlement within a certain amount of time (however, see *Carry Over or Pay-Out at End of Holiday Year?*), although in practice, these internal regulations may not be legally enforceable.

Moreover, at least two weeks of statutory holiday must be taken consecutively, so the employer must respect this requirement when determining the timing of statutory holidays. Not doing so may be seen as the employer failing to respect their obligations towards their employees' health. Different rules may be provided in the employment contract, so long as they are not to the detriment of the employee.

Holiday Notice Requirements

The employer must notify employees sufficiently in advance of the holidays it requires employees to take at specific times for the employee to be able to benefit from and plan their holidays. In general, this is considered at least three months in advance.

Carry Over or Pay-Out at End of Holiday Year?

Unused holiday entitlement carries over until becoming time barred (that is, five years after falling due, or five years after the end of the employment relationship if the employee shares a household with the employer) (see *Accrual of Statutory Holiday Entitlement*).

Further, in general, during the employment relationship, the holiday entitlement may not be replaced by monetary payments or other benefits (however see *Atypical workers*), so there is not a pay-out at the end of the holiday year (or service year).

However, many employers try to avoid unused holiday from accruing and have internal regulations stating that employees must take their full holiday entitlement in the service year that it becomes due, or the following service year. In practice, these internal regulations may not be legally enforceable.

Statutory Holiday Pay

What Must Be Included in Statutory Holiday Pay

Subject to the qualification below, employers must pay employees on holiday their normal full salary (that they would receive if they were working), as well as fair compensation for any lost benefits in kind. In this context, full salary refers to the base salary, the 13th salary (see *Holiday Bonus*), and any other benefits provided for under the employment agreement, as well as any bonuses that are requalified as salary.

If, while on holiday, an employee carries out paid work for a third party that harms the employer's legitimate interests, the employer can refuse to pay the salary due for the holidays concerned and can reclaim any salary already paid. The concept of harm to the employer's legitimate interests includes both work for competitors and harm to the employee's future work performance by not resting and relaxing.

Timing of Statutory Holiday Payment

This payment should be made at the same time that the employee's salary would ordinarily be paid, were they not on holiday.

Holiday Bonus

There are no mandatory rules regarding holiday bonuses. When employers pay holiday bonuses, special attention must be paid to avoid them being requalified as salary payments (to which the employee would have a right).

This risk can be reduced by stating that any holiday bonus is given on a one-time basis and paid at the absolute discretion of the employer. However, even with such wording, the holiday bonus may still be requalified as salary if, in particular, it is provided annually over a long period of time (for example, it is paid every year over ten years).

It should be noted that many employers provide a 13th salary that is paid in December. This is different to a holiday bonus. Once a 13th salary is provided for in the employment agreement, the employee has a right to this payment, and it must be paid on a pro rata basis if the employee starts or finishes their employment during the calendar year. Moreover, some CBAs require the payment of a 13th salary.

Public Holidays and Bank Holidays

Public holidays are different from the statutory or enhanced holiday entitlement provided for under an employment agreement.

Swiss National Day (1 August) is a public holiday and treated as a Sunday (Article 110(3), Swiss Constitution; Article 1(3), Ordinance on the National Day; Article 20a(1), EA). The cantons can fix up to eight other public holidays per year, which also are treated as Sundays (Article 20a(1), EA). This means that Sunday work rules apply.

In general, working on a Sunday is prohibited without a special Sunday work authorisation (from the cantonal authorities for temporary Sunday work and from the federal authorities for regular Sunday work).

Temporary Sunday work (a maximum of six Sundays per calendar year) must be compensated with a 50% salary increase for that day's work. This compensation is also due for regular Sunday work, if, initially, it was envisioned that the employee only would be engaged in temporary Sunday work (and the employee goes on to work more than six Sundays in the calendar year).

Additionally, Sunday work of up to five hours must be compensated within four weeks by a compensatory rest period, equivalent to the number of hours worked.

Where an employee has worked on a Sunday for longer than five hours, a compensatory rest period of no less than 24 hours must be granted on a normal workday. This can occur either in the week preceding or following the working Sunday and must run consecutively with the daily rest period, producing a combined rest period of 35 hours. The compensatory rest period must include a period from 6.00 am to 8.00 pm.

The Swiss Constitution and the Ordinance on the National Day also state that all employees are entitled to payment for Swiss National Day (1 August), provided it falls on a day which is normally worked. For other public holidays, there are no statutory provisions stipulating that salary must be paid. In practice:

- Employees paid on a monthly basis (full-time or part-time), typically, also receive their pay for public holidays (that is, there is no reduction in their monthly pay).
- Employees paid by the hour are only paid for these other public holidays if their individual employment contract or a CBA provides for it. This payment takes the form of a supplement to the hourly salary, which should be indicated in the employment contract and on pay slips.

Enhanced Contractual Holiday Entitlement

In certain sectors, for example, banking, finance, and technology, employers often provide a holiday entitlement of five weeks, rather than four weeks. When this is provided, the extra holiday entitlement is treated in the same manner as the statutory minimum of four weeks (for example, in regard to accrual and both when and how the holiday is to be taken).

Certain CBAs can provide for an additional holiday entitlement. In this case, the holiday entitlement provided for under the CBA takes precedence over the individual employment agreement, if the latter provides for less than the minimum holiday entitlement stipulated in the CBA.

Holiday Entitlement Increasing with Service

It is possible to provide that an employee's holiday entitlement increases with their years of service. When this is provided, it must apply to all employees occupying similar positions, to reduce the employer's risk of being seen as discriminatory.

Contractual Holiday Pay

When the employment agreement contains a holiday entitlement that goes beyond the required minimum holiday entitlement, the extra holiday entitlement is treated in the same manner as the minimum required holiday entitlement (that is, the employee is entitled to full salary, as well as fair compensation for any benefits lost in kind). See *Statutory Holiday Pay*.

Buying and Selling Holiday

There is no practice of buying and selling holidays in Switzerland.

Written Requirements

Generally, employment agreements do not need to be written, although certain clauses must take the written form (that is, signed by hand or with a qualified electronic signature).

Holiday requirements are not one of the clauses required to be in written form. There are also no specific requirements with regards to how holiday entitlement must be included in employment agreements. It is not common for employment contracts to include detailed holiday clauses as the statutory position is favourable to employers (see *Taking Statutory Holiday*). In any event, any term in an employment agreement providing for an entitlement lower than the statutory holiday entitlement is unenforceable and void.

CBAs may require that employment agreements be concluded in writing.

First Year of Employment

The regular holiday rules apply during the first year of employment, including any probation period. This means there is no minimum service requirement and holiday accrual starts from day one of employment.

Termination of Employment

Once notice (from either party) has been given to terminate the employment relationship, the employer must provide the employee with the time required to seek other employment. The precise amount of time to be provided depends on the case at hand, but generally, legal experts consider half a day per week sufficient.

In this context, despite the general principle that the employer determines when an employee takes holiday (see *When Statutory Holiday is to be Taken*), it is difficult to force an employee to take their outstanding holiday entitlement during the notice period. Nevertheless, depending on the length of the notice period and number of outstanding holidays, in some cases, it may be possible.

However, if the employee is put on garden leave, it is generally accepted that the employee may be required to take up to five days of their outstanding holiday entitlement per month of garden leave.

In practice, termination agreements are often concluded, regulating how outstanding holiday entitlement will be treated.

Otherwise, unused holiday entitlement that has not become time-barred must be paid at the end of the employment relationship (see *Accrual of Statutory Holiday Entitlement*). This payment is determined by multiplying the gross annual salary by 8.333% for four weeks of holidays, 10.638% for five weeks of holidays, 13.043% for six weeks of holiday and so on. The gross annual salary includes the base salary, the 13th salary, and any other benefits provided for under the employment agreement, as well as any bonuses that have been requalified as salary.

Atypical Workers

General Rule

In general, holidays must be taken as time off and should not be replaced by a monetary payment during the employment relationship. This general rule applies with respect to all employees, including atypical workers (for example, part-time workers, workers with a variable salary, or working on commission), without a distinction made based on the type of atypical work.

In this context, the holiday entitlement for atypical workers is calculated on a pro rata basis, based on the percentage of time they work compared to a full-time employee. Some CBAs may contain other rules.

The more complicated issue is determining the salary that atypical workers receive during their holidays, if they receive a variable salary.

In the case of employees receiving a variable salary (for example, commission, by the hour or by the piece), two calculation methods are used by the courts:

- The first is the lump-sum method, under which holiday pay entitlement is calculated on the basis of the average income earned during the reference period (that is, the last few months worked or during another appropriate period), multiplied by the percentage determined on the basis of the atypical worker's number of weeks of holiday entitlement per year. This is the usual method.
- The second is the individual calculation method, which is based on the commission that the employee would have earned if they had worked during their holidays.

In limited situations, the case law of the Swiss Federal Supreme Court and legal scholars accept that, in the case of an employee working on a commission basis, the individual may not be entitled to any salary during the holidays if either:

- The employee can group all the contracts to be concluded together before or after the holidays, so their commission would not be reduced based on having taken holidays.
- The employee's commission is calculated based on business carried out over the entire year, meaning, again, their commission should not be reduced based on having taken holidays.

Exception

In exceptional cases, rather than being provided as time off, according to the case law of the Swiss Federal Supreme Court, the employee's holiday entitlement may be included as part of their total salary (that is, the employee's salary is increased accordingly).

According to case law, three conditions must be met:

- The employee's employment must be highly irregular (that is, part-time work, subject to wide variations in the number of hours worked, multiple employers, or an employment agreement with a very short duration).
- The holiday allowance must be mentioned in the employment agreement (if there is a written agreement).

- The holiday allowance must be included separately in the payroll statements.

Holidays and Other Employment Rights

Sick Leave and Holiday Rights

Falling Ill or Being Injured on Holiday

If an employee falls ill or is injured during their holidays, generally, this must be treated as sick leave (rather than holiday), subject to the ordinary sick leave conditions (for example, the employer may request a medical certificate). The reason for this is that the purpose of the holiday entitlement is to permit the employee to relax, rather than being sick or unwell.

Reduction in Holiday

Where an employee's total sick leave exceeds one month in any given year of service, Article 329b of the CO states that their holiday allowance can be reduced based on the amount of sick leave taken by the employee during the year (reduced by one-twelfth per full month of sick leave). This does not apply in the case of certain statutory family leave (see *Family-Related Leave* below).

Family-Related Leave

Statutory family leave (maternity leave, paternity leave, carer leave, adoption leave, and so on) must be remunerated, so it should not be necessary to combine it with holiday leave.

However, with the agreement of the employer, it is possible to use holiday leave to extend the length of statutory family leave.

The reduction of holiday entitlement does not apply to employees who are absent due to statutory family leave (see *Reduction in Holiday*).

The entitlement to statutory holiday continues to accrue during a period of statutory family leave.

Religious Holidays and Discrimination Issues

Under the EA, employees are permitted to interrupt their work on religious holidays other than those declared public holidays (that is, to take time off from their work duties). However, they must notify their employer at least three working days in advance. The employer can require that these hours taken off as religious holiday be worked at another time by the employee.

Employers should also, if possible, grant employee requests to attend religious events.

Claims and Remedies

Refusal to Accommodate Holiday Requests

As mentioned above, under Article 329c(2) of the CO, it is the employer who ultimately determines when holidays are to be taken, taking account of the employee's wishes (see *When Statutory Holiday is to Be Taken*).

Case law and legal scholars accept that if the employer requires the employee to take their holidays at a certain time and fails to consider the employee's wishes (without having legitimate business grounds for not doing so), the employee may refuse to take their holidays at the time their employer has specified.

If the employer refuses an employee's holiday request without having legitimate grounds for doing so, and the employee has provided sufficient advanced notice, it may be possible for the employee to proceed to take the holiday anyway without the employee being considered to have abandoned their post or it being considered a lawful ground for immediate dismissal. However, this interpretation is not certain, and given the broad discretion given to judges, there is a significant risk of the courts not finding in the employee's favour.

Claims

Claims related to outstanding holidays are considered claims in connection with the employment agreement and are only time barred five years after becoming due (or five years after the end of the employment relationship if the employee shares a household with the employer) (see *Accrual of Statutory Holiday Entitlement*).

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