THE EMPLOYMENT LAW REVIEW

Eleventh Edition

Editor
Erika C Collins

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PREFACE

For the past decade, we have surveyed milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. When updating the book each of the past 10 years, I reread the Preface that I wrote for the first edition in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. I have been practising international employment law for more than 20 years, and I can say this holds especially true today, as the past 11 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This 11th edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see this publication grow and develop to satisfy its initial purpose: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

This 11th edition also holds a special place in my heart because it is the first that I have prepared as a shareholder of Epstein Becker & Green, PC (EBG). I joined EBG at this time in part because, in 2019, EBG established an alliance with Deloitte Legal to provide clients with comprehensive and global services relating to employment law and workforce management. The alliance brings together Deloitte Legal's global reach and the strength of its multidisciplinary business approach with EBG's United States labour and employment attorneys and workforce management experience to form a global delivery model. Through this alliance, EBG and Deloitte Legal offer comprehensive employment law and workforce management services to clients. I firmly believe that this alliance is the 'wave of the future', to be able to offer clients integrated professional services, and this notion parallels the mission and purpose of this text.

In 2020 and looking into the future, global employers face growing market complexities, from legislative changes and compliance, to technological and societal forces that are transforming the future of work. Whether solving global mobility issues, designing employee equity incentives, negotiating collective bargaining arrangements or responding to increasing public attention around harassment or equal pay issues, workforce issues can affect a company's ability to attract and retain talent, or damage its reputation and market value in an instant. These issues have created a confluence of legal and business challenges that no longer can be separated or dealt with in isolation. As a result, every company requires business advisers who can address the combined business and legal issues relating to its multinational workforce. It is my hope that this text provides legal practitioners and human resources

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professionals with some guidance, best practices and comprehensive solutions to significant workforce issues that affect a company's market position, strategy, innovation and culture.

Our most recent general interest chapter still focuses on the global implications of the #MeToo movement. The movement took a strong hold in the United States at the end of 2017, as it sought to empower victims of sexual harassment and assault to share their stories on social media so as to bring awareness to the prevalence of this behaviour in the workplace. In this chapter, we look at the movement's success in other countries and analyse how different cultures and legal landscapes affect the success of the movement (or lack thereof) in a particular jurisdiction. To that end, this chapter analyses the responses to and effects of the #MeToo movement in several nations and concludes with advice to multinational employers.

Our chapter on cross-border mergers and acquisitions continues to track the variety of employment-related issues that arise during these transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, and the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2019 in nations across the globe, and one of our general interest chapters discusses this. Many countries in Asia, Europe and South America have continued to develop their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation, and regulations on gender quotas and pay equity, to ensure that all employees, regardless of gender, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals in the workforce remain underprotected and under-represented, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

We continue to include a chapter that focuses on social media and mobile device management policies. Mobile devices and social media have a prominent role in, and impact on, both employee recruitment efforts and the interplay between an employer's interest in protecting its business and an employee's right to privacy. Because companies continue to implement bring-your-own-device programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy. Bring-your-own-device issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work, and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

Our final general interest chapter discusses the interplay between religion and employment law. Religion has a significant status in societies throughout the world, and the chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to them. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these five general interest chapters, this edition of *The Employment Law Review* includes country-specific chapters that detail the legal environment and developments of 44 jurisdictions around the world. A special thank you to the legal practitioners across the

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globe who have contributed to this volume for the first time, including Sedrak Asatryan, Janna Simonyan and Mary Serobyan (Armenia), Stefan Kühteubl and Martin Brandauer (Austria), Ignacio García, Fernando Villalobos and Soledad Cuevas (Chile), Tingting He (China), Jan Procházka and Iva Bilinská (Czech Republic), Véronique Child and Eric Guillemet (France), Guy Castegnaro, Ariane Claverie and Christophe Domingos (Luxembourg), Jack Yow (Malyasia), Charlotte Parkhill and James Warren (New Zealand), Petra Smolnikar, Romana Ulčar and Tjaša Marinček (Slovenia), Fernando Bazán López, Antonio Morales Veríssimo de Mira, Paloma Gómez López-Pintor and Andrea Sánchez Rojas (Spain) and Caron Gosling (United Kingdom). This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all our contributors and my associates, Ryan H Hutzler and Anastasia Regne, for their invaluable efforts in bringing this 11th edition to fruition.

Erika C Collins
Epstein Becker & Green
New York
February 2020

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Chapter 44

SWITZERLAND

Ueli Sommer and Simone Wetzstein[1]

I INTRODUCTION

Employment law in Switzerland is mainly based upon the following sources, listed in order of priority:

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

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

a the Federal Act on the Equal Treatment of Women and Men;
b the Federal Act on Personnel Recruitment and Hiring-out of Employees;
c the Federal Act on Information and Consultation of Workers (the Participation Act);
d the Federal Data Protection Act;
e the Federal Merger Act;
f the Federal Act on Private International Law;
g the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988 (known as the Lugano Convention);
h the Agreement on Free Movement of Persons between Switzerland and the European Union and European Free Trade Association; and
i the Federal Act on Foreign Nationals and Integration.

Generally, Swiss law-governed disputes that fall within the jurisdiction of the court of first instance cannot be heard unless there has first been an attempt at conciliation before a conciliation authority. If no agreement is reached before the conciliation authority, the conciliation authority records this fact and grants authorisation to proceed. The plaintiff is entitled to file the action in court within three months of the authorisation to proceed being granted.

1 Ueli Sommer is a partner and Simone Wetzstein is a managing associate at Walder Wyss Ltd.

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

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

II YEAR IN REVIEW

Paternity leave was a hot political topic in 2019. Currently, fathers are entitled to one day of paid paternity leave. In September 2019, the Swiss parliament suggested a paid paternity leave of two weeks. While a committee is trying to prevent this proposal, an opposing popular initiative to ultimately achieve a more extensive parental leave seems very likely. Thus, the political discussion is ongoing. Joint parental leave arrangements also are being discussed.

III SIGNIFICANT CASES

In a recent decision, the Federal Supreme Court addressed the question of which costs relating to the use of people's homes as an office must be paid by an employer to its employee,[2] a matter that has been largely underestimated in the past. In this case, although the employment contract did not include a remuneration obligation for home office use, the Court ruled in favour of the employee. The Federal Supreme Court justified its decision by stating that if the employer does not provide its employees with a suitable place of work, it must bear the costs of the necessary infrastructure. In this case, the employer had not provided the employee with a workplace and therefore had to reimburse the employee for all the costs necessarily incurred to carry out the work. It was also irrelevant that the employee would have rented the room in any case and in fact had rented it before starting to work for the employer – thus the company must bear the respective home office-related costs.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

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

2 BGE 4A_533/2018 as of 23 April 2019.

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

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

The written form is usually recommended for all individual employment contracts, particularly because some deviations from the statutory law require written form. Thereby, it is important that 'written' means a wet signature or an electronic signature process approved by the Swiss government based on the Swiss Law on Electronic Signatures.

In addition to the above elements, it is advisable to include the following:

a the term of the employment relationship;
b rules on probation and notice periods that deviate from the law;
c vacation entitlement;
d rules on continued payment of wages when ill or pregnant; and
e other specific agreements made during contractual negotiations (e.g., non-compete agreements).

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

ii Probationary periods

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

iii Establishing a presence

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

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

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

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

V RESTRICTIVE COVENANTS

Pursuant to Swiss employment law, an employee may make a commitment to an employer to refrain from any competing activity for a period after termination of their employment relationship. A post-termination non-compete clause is only binding if the employment relationship gives the employee access to customer data, manufacturing secrets or business secrets, and if the use of such knowledge could significantly damage the employer. According to the Federal Supreme Court, this is never the case when the relationship between client and employer or between client and employee is strongly personal. The non-compete clause must be made in writing and shall be reasonably limited in terms of place, time and subject, to preclude an unreasonable impairment of the employee's economic prospects. The statutory maximum duration of a post-termination non-compete clause is three years, but typically does not exceed one year. The law does not require consideration for a post-termination non-compete covenant.

A judge may limit an excessive prohibition of competition. If an employer gives consideration in return for a non-compete agreement – although this is not legally required – it is more likely that the covenant will be fully enforceable. A prohibition on competition lapses if the employer no longer has a significant interest in upholding the prohibition. As a matter of law, any non-compete clause will cease to apply if the employment is terminated by the employer, unless the employee has set a reason, or even provoked the termination.

VI WAGES

i General

Two Swiss cantons have implemented a general minimum wage into their cantonal constitutions. Neither the other cantons nor federal laws provide for the same.

However, many collective employment contracts include a minimum wage. In light of the freedom of movement of labour within the European Union, the authorities started to implement a mandatory minimum wage in areas where undercutting of market standard wages by foreign labour has become an issue (e.g., in Geneva, the government implemented a minimum wage for the retail sector).

For Swiss stock corporations listed in Switzerland or abroad, the ordinance on compensation provides for a prohibition of certain compensation payments to senior management. The prohibited payments are, *inter alia*, severance payments, sign-on bonuses and bonuses for certain M&A transactions.

ii Distinction between variable pay and discretionary bonuses

Swiss law makes an important distinction between variable pay and a gratification (a fully discretionary payment). The term 'bonus' is not regulated in employment law. Hence, a bonus either qualifies as (variable) salary or as gratification.

The Federal Supreme Court has often had to deal with bonus entitlements, in particular with pro rata entitlements in the case of terminated employment agreements. While the employee has a statutory right to receive a (variable) salary, the entitlement to a gratification

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only exists in the case of an agreement. Without any agreement it is basically at the discretion of the employer to provide a gratification. Whether the bonus is considered (variable) salary or a gratification is crucial as only in the latter case may the employer have a chance to deny a (pro rata) entitlement of an employee leaving the company.

The qualification of a payment as either salary or a gratification depends first on the wording of the employment agreement. While an entitlement would suggest (variable) salary, a possible payment in the full discretion of the employer suggests a gratification. Additionally, the communication of the employer when granting a payment is taken into account: when granting a gratification, it should always be stated that the payment was made voluntarily and at the full discretion of the employer. But even if the agreement between the parties and each bonus communication provides that the payment is not mandatory and the grant remains at the full discretion of the employer, the payment may still be qualified as salary. This is the case, for instance, if the amount of the payment exclusively depends on objective factors – for instance, if the amount of the payment can be calculated according to a certain formula. Further, the employee might have a right to the payment if the employer's reservation of the voluntary status of the bonus payments is considered rhetoric without any real meaning. Courts tend to assume this when bonus payments are made continuously for a number of years.

In addition, the Federal Supreme Court has ruled that only payments that are of a secondary nature compared with the salary itself can be considered as a gratification. In light of the Federal Supreme Court's most recent case law, this is true for employees with low incomes (i.e., below the simple median wage, which is currently 70,800 Swiss francs). For such low incomes, larger bonus payments are categorised as salary. For medium to high incomes, which are between the median wage and five times the median wage (between 70,800 Swiss francs and 354,000 Swiss francs), a bonus might only qualify as variable pay if it exceeds the level of the annual income. Whenever a very high salary is granted, a bonus will be qualified as a gratification unless the documentation indicates otherwise.

The distinction between salary and a gratification is relevant because if a bonus qualifies as (variable) salary, then the employee has a right to receive a bonus during any period of gardening leave (e.g., based on past bonus payments) and any condition that the employee may not be under notice to receive a bonus is considered void.

iii Working time

The Labour Act provides for a strict obligation for companies to maintain detailed records of time-keeping (including the start and end times of the working day and break times) of all employees being governed by the Labour Act. In principle, the Labour Act applies to all employees; only certain types of professional and very senior management personnel are exempt. Very senior management personnel are those employees who are allowed to make important decisions that can affect the structure, the course of business and the development of a business or a part of business.

A huge disparity has evolved over the past few years between this obligation and the reality of day-to-day operations in many businesses. The law provides for possibilities to simplify or even waive the obligation to record time-keeping. To be able to waive the recording of working hours, an employer must have a collective agreement in place allowing for an exemption of the time-keeping obligation. Employees to be exempted from this obligation must earn more than 120,000 Swiss francs per year and must have a high degree of autonomy

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in their work. Even for a simplified record of working hours, a collective agreement between employer and employee representation must be in place, and employees benefiting from a simplified record of hours worked must have a considerable working time autonomy.

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

a category 1 – workers employed in industrial enterprises and white-collar workers (office workers, technical staff and other salaried employees) as well as sales staff in large retail undertakings; and

b category 2 – others workers, employed mainly in the construction sector, and craftsmen, workers in commerce and sales staff in small retail undertakings.

The maximum number of hours of work is fixed at 45 hours a week for category 1 and 50 hours a week for category 2. If employees in both categories are employed in the same enterprise, the maximum of 50 hours applies to all employees. Within these limits the effective hours of work are fixed by collective agreements and individual contracts.

Work between 11pm and 6am is considered night work. With the exception of certain businesses and groups of employees (as outlined by Ordinance No. 5 to the Labour Act), night work is forbidden. However, a special permit for such work may be issued if the employer evidences a special or urgent need. In any case, the night work may not exceed nine hours in a maximum time frame of 10 hours, including breaks. If the employee provides services on only three of seven consecutive nights, the night work may amount to 10 hours in a maximum time frame of 12 hours, including breaks. Employees may be entitled to a time or salary premium when working at night.

iv Overtime and excess hours

Swiss law provides for overtime and excess hours. Overtime is addressed in Article 321c of the CO and concerns cases in which an employee works more than the number of hours stipulated in the employment contract, up to the maximum working time allowed under the Labour Act (i.e., 45 or 50 hours). Pursuant to the CO, any overtime not compensated by time off must be paid by the employer with a supplement of at least 25 per cent of the applicable wage, unless there is an agreement to the contrary in writing (i.e., a collective agreement or individual employment contract). Thus, an agreement may provide that no supplement applies or that any overtime is included in the standard wage. Generally, the second option is used in management contracts.

Excess hours relate to the hours worked in excess of the Labour Act limits of 45 or 50 hours (see Section VI.iii). The payment of a wage supplement of 25 per cent of the hourly wage is a mandatory provision from which the parties may not depart by agreement (in contrast to overtime). The Labour Act specifies that for white-collar workers and sales staff in large retail undertakings, the supplement is due only if the total excess hours performed exceed 60 hours per calendar year. Additionally, excess hours worked by a single employee may not exceed two hours a day except on a free weekday or in a case of urgency and may not, for employees with a maximum working time of 45 hours a week, exceed 170 hours a year. For employees with a maximum working time of 50 hours a week, the maximum excess hours per annum may not exceed 140 hours.

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VII FOREIGN WORKERS

Switzerland has a dual system for the admission of foreign workers. Nationals from countries within the European Union or European Free Trade Association (EFTA) benefit from the Agreement on Free Movement of Persons and are, in general, entitled to receive a work permit, which can be obtained quite easily. With regard to non-EU and non-EFTA nationals, only a limited number of management-level employees, specialists and other qualified employees are admitted from all other countries (subject to a quota as determined by the Federal Council).

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

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

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

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

VIII GLOBAL POLICIES

An employer may establish general directives and give specific instructions about the execution of work and the conduct of its employees. Furthermore, the employer must take prescribed measures to protect the life, health and integrity of its employees and in particular to take care that the employee is not subjected to sexual harassment or discrimination. Therefore, it is very common in Switzerland for companies to set up rules on accepted behaviour and the consequences in the event of non-compliance. Usually, employees must agree in writing that they will comply with the rules. There is no strict requirement, however, that employees sign such policies, but it is recommended to have evidence on file that an employee received the policy.

The purpose of the Federal Act on the Equal Treatment of Women and Men is to ensure equal treatment at work by means of a general prohibition of discrimination based on gender – including a prohibition of sexual harassment. This Act provides for sanctions if the employer does not comply.

IX PARENTAL LEAVE

By statute, mothers are entitled to maternity leave of 14 weeks. Federal statutory maternity pay amounts to 80 per cent of the remuneration received before childbirth and is capped, currently, at a maximum of 196 Swiss francs per day during the 14 weeks. Federal maternity

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pay is financed by the social security contributions of all employers and employees and administrated by a government agency. Mothers are entitled to the federal maternity pay if, during the nine months immediately prior to childbirth, she (1) was compulsorily insured during those nine months within the meaning of the Retirement and Survivors Act, (2) has been gainfully employed for at least five months during this period and (3) at the time of confinement, is either an employed or self-employed person or works in her husband's business and receives a cash wage.

In addition to the federal statutory maternity pay solution, some employers grant additional maternity pay benefits: for example, they cover the difference between federal statutory maternity pay an the employee's full salary, or pay benefits for a longer period of time, or both.

In contrast, fathers are entitled to one day of full paid paternity leave, which is paid by the employer.

There are no specific stipulations regarding entitlement to maternity or paternity leave. Further, there is no concept of paternity leave under Swiss law.

During pregnancy and 16 weeks following childbirth, employees must not be dismissed. Any termination notice issued during this period is void. Any notice served before this period starts is suspended when the period begins and then recommences after the protection period (see also Section XIII.i).

X TRANSLATION

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

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

XI EMPLOYEE REPRESENTATION

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

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

Before a works council can be established, a resolution by at least one-fifth of all employees must be passed. Once a positive decision has been made, the election of the representatives

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may take place. The number of representatives must be determined by the employer and the employees according to the size of the company, but may not be below three. The employer must inform the works council at least once a year about the impact of the course of business on the employees. Within the framework of the Participation Act, works councils may decide how to organise themselves.

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

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

XII DATA PROTECTION

i Requirements for registration

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

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

Personal data must be protected from unauthorised processing through adequate technical and organisational measures. The employee must be informed about the collecting and processing of sensitive personal data or personality profiles (see Section XI.iii), for example, in a data protection and privacy policy. An employee may at any time request access to his or her employee file.

ii Cross-border data transfers

Cross-border data transfers without the employee's consent are permitted only if adequate cross-border data protection agreements are in place and information about those agreements is given to the Federal Data Protection and Information Commissioner, or if the respective countries provide for an adequate level of data protection. With regard to the processing of data about private individuals, the Commissioner has established a list of countries that have implemented equivalent data protection legislation, which is publicly available on the internet.[3] For example, the level of protection provided for private individuals by EU Member States is deemed adequate. By contrast, the level of protection provided for the United States is not considered as being adequate. To reach an adequate level of protection, the Swiss–US Privacy Shield Framework provides a valid legal mechanism to comply with Swiss requirements when transferring personal data from Switzerland to the United States.

3 Accessed via https://www.edoeb.admin.ch/edoeb/en/home/data-protection/arbeitsbereich/transborder-data-flows.html.html.

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

iii Sensitive data

Pursuant to the Data Protection Act, personal data means all data that refers to a certain person. Sensitive personal data means all data relating to:

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

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

iv Background checks

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

XIII DISCONTINUING EMPLOYMENT

i Dismissal

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

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

a a personal characteristic of one party (e.g., race, creed, sexual orientation, age), unless this aspect is relevant to the employment relationship or significantly impairs cooperation within the enterprise;
b the other party makes use of a constitutional or contractual right; or
c where the sole purpose was to frustrate the formation of claims arising out of the employment relationship.

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

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

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

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

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

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

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

Apart from the regulations regarding mass dismissal, a company has no duty to inform any authority about a dismissal (although there are exceptions that apply in respect of apprenticeship contracts).

ii Collective dismissals

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

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

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

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

Companies normally employing 250 employees or more and making within a period of 30 days at least 30 employees redundant have to negotiate with the employees or their representatives a social plan to work as a safety net for the dismissed employees. For companies below that threshold, no obligation to issue a social plan for the dismissed employees exists. However, there can be obligations to negotiate or issue a plan based on collective agreements. In addition, any mandatory early retirement obligations set forth in the pension plan regulations of a company should be considered.

XIV TRANSFER OF BUSINESS

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

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

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

If the business transfer takes place within certain types of restructurings, the automatic transfer of employees dedicated to the transferred business does not take place. Only the employees chosen by the buyer will transfer. Also, the purchaser is – within certain types of restructurings – not jointly and severally liable with the seller for pre-transaction claims by the employees.

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

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

The employer has to provide all pertinent information to the works council or to the employees. According to case law, the employees or the works council need to be allowed at least 14 days to make their suggestions or proposals. In the case of a breach of the duty to consult, the employer could become liable for any damages incurred by the employees. Further, the government can force the involved parties to conduct the consultation process (which could delay a contemplated transfer considerably) and can fine the parties. In addition, it is argued by some scholars that any terminations that have been issued or changes that have been implemented are void.

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

a the reasons for the transfer;

b the results of the consultation process (if any are required); and

c the final legal, economic and social consequences of the transfer for the employees (including the number of dismissals and changes to the working conditions).

XV OUTLOOK

The revised Gender Equality Act will enter into force on 1 July 2020. In essence, it obliges employers with at least 100 employees to conduct an internal wage equality analysis, have it reviewed by an external body and inform the employees in writing about the results thereof. Listed companies must also publish the results of the wage equality analysis in an appendix to their annual financial statements. The first wage equality analyses must be conducted by 30 June 2021 at the latest.

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Appendix 1

ABOUT THE AUTHORS

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

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

Ueli Sommer is a member of the board of the European Employment Lawyers Association, past chair of the International Employment Law Committee of the ABA Section of International Law, former president of the board of the Australian Swiss Chamber of Commerce and Industry, and senior vice chair of the Discrimination and Equality Law Committee of the International Bar Association. He publishes regularly in legal journals and gives speeches at national and international congresses.

Ueli is recommended by *Chambers and Partners* for his employment expertise and is mentioned as a leader in his field by *The Legal 500*.

SIMONE WETZSTEIN

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Simone Wetzstein is a managing associate in Walder Wyss' employment group. She specialises in the areas of employment, social security and residence law, and also practises in contract and corporate law. She advises in contentious and non-contentious matters and appears on behalf of her clients in the Swiss courts. Simone has a particular interest and legal expertise in anti-discrimination law and matters of gender equality.

Born in 1984, Simone Wetzstein was educated at the University of Zurich and the University of Haifa, Israel (*lic iur* Zurich 2010). She graduated with an LLM from Columbia Law School in May 2017 as a Fulbright Scholar.

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