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Contents

Homburger has a multi-disciplinary employment law and executive compensation team consisting of five partners, one senior of counsel, three counsels and approximately 17 associates, co-headed by Balz Gross and Gregor Buehler. The team is particularly known for cutting-edge employee participation plans, both with regard to design, drafting and implementation, and also with regard to related litigation, securities and regulatory work, compensation plans and say-on-pay regulations. This includes related corporate work, employment agreements and termination agreements for top management, and transactional employment-related work, encompassing social security and pension plan issues, mass dismissals, social plan negotiations and other restructuring measures, litigation regarding top management (compensation, non-competes, etc) and data protection proceedings. The firm aims to find smart and efficient solutions, whether it is advising clients on transactions, representing them in court or helping them with regulatory matters – no matter how complex the case or how tight the time constraints.

Authors

Balz Patrik Gross is a partner as well as co-head of the firm's employment and executive compensation team, its arbitration team and its litigation team. He specialises in employment law and executive compensation, as well as disputes. In his employment practice, Balz focuses on employment-related investigations and top management compensation, including bonus schemes and related litigation and arbitration. He is a member of the European Employment Lawyers Association (EELA) and has published many articles relating to different aspects of employment law.

Gregor Bühler is a partner, co-head of Homburger's employment and executive compensation team and deputy head of its litigation team, as well as co-head of the IP/IT team. His specialities are employment law and executive compensation, IP/IT and litigation. Gregor is a member of the employment law committee of the International Bar Association (IBA). He is also the author of several publications relating to employment, IP, e-commerce and unfair competition law.

Irène Suter-Sieber is an associate who specialises in employment law and litigation. She is a member of the European Employment Lawyers Association (EELA) and frequently represents clients in employment disputes before the Swiss courts. She also advises clients in all areas of employment law, in particular, the structuring of agreements involving corporate group and/or transnational issues, and complex incentive plans and termination of employment relationships, including mass dismissals. In addition, she advises clients on transactional aspects of employment law, such as the transfer of undertakings and employee information and consultation.

1. Terms of Employment

1.1 Status of Employee

Blue-collar and White-collar Workers

While the distinction between blue-collar and white-collar workers has become less important in recent decades and is not part of the Swiss Code of Obligations, the Labour Act still distinguishes (although this is much criticised) between white-collar and blue-collar employees regarding working hours and extra work payment.

The maximum weekly working time of 45 hours applies to the following categories of employees:

- office staff and 'technical and other employees'. 'Technical and other employees' are those who work in an office or in office-like professions, ie, who mainly do brainwork;
- employees in 'industrial undertakings', ie, companies/undertakings with fixed installations of a permanent nature for production, processing or treatment of goods, or for production, conversion or transmission of energy. The maximum working time of 45 hours per week applies to employees in industrial undertakings, regardless of whether they qualify as white-collar or blue-collar employees; and
- sales personnel in large retail undertakings, ie, those with 50 and more employees.

For all other employees the maximum weekly working time is 50 hours. These 'other employees' therefore include those who mainly do physical work, in particular:

- handicraft;
- sales in small and medium-sized companies; and
- professionals in healthcare, hospitals and homes.

The longer maximum working time also applies to office, technical and other employees and sales personnel in large retail companies employed in the same (non-industrial) undertakings together with 'other employees' to whom a longer maximum weekly working time applies.

The distinction between these two categories of employees (those who work a maximum of 45 or 50 hours per week) has an impact on extra work pay. Extra work is the hours exceeding the maximum working hours. The Labour Act provides that an employer must pay employees a wage supplement of at least 25% for extra work. However, for office staff, 'technical and other employees' and sales personnel in large retail undertakings (maximum weekly working time of 45 hours), this rule only applies if the extra work exceeds 60 hours per calendar year.

Other Statuses

The Labour Act lists categories of workers/companies that are excluded from the scope of the Labour Act, ie, the rules on working hours and rest periods (maximum working hours, breaks, prohibition of Sunday and night work, etc) do not, in principle, apply to such professionals. Nonetheless, the basic rules for the protection of employees under the Code of Obligations remain applicable.

The legislator exempts the following employees (but not exclusively) from the protection of the Labour Act:

- employees in higher management positions (this only includes employees who are the company's decision-makers, usually the management board or extended management board);
- employees who perform a scientific activity or a self-employed artistic activity;
- travelling sales representatives;
- teachers at private schools as well as teachers, caretakers, educators and supervisors in institutions;
- employees in private households; and
- home workers (operating from home).

Moreover, the Labour Act establishes certain special protection provisions for young workers (up to 18 years of age), pregnant women and employees with family responsibilities.

The case law of the Federal Supreme Court classifies employees according to their total earnings. In principle, the more an employee earns, the less the need for protection regarding potential bonus claims (see **1.4 Compensation**).

1.2 Contractual Relationship

Indefinite and Definite Employment Contracts

An unlimited employment contract may be terminated by either party (regarding notice periods, see **6.2 Notice Periods/Severance**; regarding blocking periods, see **6.5 Protected Employees**).

A fixed-term employment contract exists if the parties agreed on a fixed period or up to a certain date without the need for termination. However, if the possibility of termination is stipulated in this type of contract, it is regarded as a combination of fixed-term and indefinite employment.

The dismissal protection regulations (regarding blocking periods see **6.5 Protected Employees**; regarding wrongful dismissal see **7.1 Wrongful Dismissal Claim**) do not apply to fixed-term employment contracts (ie, in the event of incapacity to work due to illness or accident). A fixed-term employment contract therefore expires in any case. However, parties can even terminate a fixed-term employment contract without notice for cause – see **6.3 Dismissal for (Serious) Cause (Summary Dismissal)**.

The time limit is not necessarily determined by a certain end date or contract term. It may also result from the purpose of the employment or the occurrence of a future event

(eg, "until the completion of the construction work on a construction site"). In such cases, however, the end of the employment relationship must be approximately foreseeable for both parties, to arrange for the period following the employment. The duration of the contract, however, shall not depend on one party's will (ie, it may not say "for as long as sufficient work is available").

If the parties subsequently conclude different fixed-term employment, this may constitute a circumvention of the law. Such employment relationship is considered permanent. However, there is no circumvention if such 'chain employment contracts' appear to be justified for special economic or social reasons and are in the interest of the employee (eg, stage engagement contracts, teaching assignments at universities).

Formal Requirements

An individual employment relationship requires mutual expression of intent in which the employee agrees to work in the service of the employer and the employer undertakes to pay the employee a salary. The essentialia negotii include:

- the type of work;
- the undertaking of the employer to pay a salary; and
- that the employee performs work in the service of the employer for a continued period.

However, for the employment contract to be valid and binding, it is not necessary to quantify the salary, the term of the contract or the working hours.

The employment contract is not subject to any specific formal requirements (except for an apprenticeship contract and seamen's employment contracts). An employment contract is also considered concluded if the employer accepts the work performance over a certain period and the work performance can only reasonably be expected under the circumstances in exchange for salary. Nevertheless, for the sake of legal certainty and for the protection of the employee, several individual agreements on specific terms of employment need to be in writing to become valid. These include the exclusion of monetary compensation for overtime work, derogation from statutory default rules on sick pay, modification of statutory default rules on length of probationary period and notice period, waiver of working time recording and (if the company has less than 50 employees) the agreement on simplified working time recording and the agreement on post-contractual non-compete obligations.

'In writing' means that the contract bears the signatures of all persons on whom it imposes obligations. No further formalities are required.

1.3 Working Hours

Maximum Working Hours

The Labour Act and accompanying ordinances set the rules regarding the number of working hours, the beginning and end of the working day, the provisions of breaks during working time, etc. However, the provisions on working hours and resting times under the Labour Act are not applicable to all employees and enterprises (see **1.1 Status of Employee**). Special rules on working hours and resting times apply to categories of enterprises which may face difficulties in complying with provisions of the Labour Act, such as hospitals, pharmacies, hotels, restaurants, bakeries, undertakings in the tourist, entertainment and sports industries, editorial offices of newspapers, etc. These rules are not dealt with here. The following paragraphs cover the general rules on working hours and resting times only.

'Normal working hours' are defined in individual work contracts, in the company's regulations or in collective bargaining agreements (CBAs). In most Swiss companies, normal working hours vary between 40 and 44 hours per week.

The Labour Act fixes the 'maximum working hours' (for more details, see **1.1 Status of Employee**). The Labour Act provides for exceptions, so that the employer can extend the maximum working hours (see below).

The Swiss parliament has a project to revise the law and abolish the weekly working hour maximum for highly paid executives and highly qualified expert employees.

Work performed between 6 am and 8 pm is day work within the meaning of the Labour Act; work performed between 8 pm and 11 pm is evening work. No permit is required for day and evening work. The employer may introduce evening work after consultation with the works council, or, if no such representation exists, with the employees concerned. The day and evening work of each employee, including breaks and overtime, shall lie within a period of 14 hours.

Work is to be interrupted by breaks of the following minimum duration:

- quarter of an hour if the daily working time exceeds five-and-a-half hours;
- half an hour if the daily working time exceeds seven hours; and
- one hour if the daily working time exceeds nine hours.

Employees shall be granted a daily rest period of at least 11 consecutive hours, and as an exception, once a week, eight hours. The weekly rest period is one-and-a-half days per week, which usually includes Sundays.

Night work and Sunday work (including work on public holidays) is in principle prohibited. However, the compe-

tent cantonal or federal authorities may permit night and Sunday work if it is indispensable for technical or economic reasons or if there is an urgent need. The employer shall not require employees to engage in night or Sunday work without their consent.

Subject to the rules set out above on working hours and resting times, the law permits flexible arrangements. For example, many companies provide for flexitime. Working time is split into a general schedule (block time) and an individual schedule. While employees should be present during block time, they independently organise the rest of the working time based on their needs and preferences. Thus, employees can accumulate flexitime credit and debit; at the end of an accounting period (week, month, year), however, employees must achieve their specified working time.

Part-time Contracts

Part-time work is characterised by an agreed-on working time less than the company's normal working hours. The same rules as for full-time work usually apply. Therefore, part-time employees are entitled to all statutory benefits such as holidays, sick pay, compliance with notice periods, overtime compensation if the reduced weekly working hours are exceeded, etc.

Part-time work may have repercussions on the employee's entitlement to social security. Employees who work less than eight hours per week are not insured against non-occupational accidents. Furthermore, part-time employees who earn less than CHF21,150 a year do not benefit from occupational benefits insurance. There may also be a reduction in old-age pension.

Overtime

When an employee's weekly working hours exceed the company's normal working hours, this constitutes 'overtime work'. When the weekly working hours exceed the maximum working hours as defined in the Labour Act (see **1.1 Status of Employee**), this constitutes 'extra work'.

If overtime work is required, employees are obliged to perform such overtime work to the extent that they are able and may conscionably be expected to do so. The parties may agree that the employee is compensated for overtime worked by time off in lieu of at least the same length. If overtime work is not compensated by time off, the employer shall compensate the employee by paying 125% of the normal salary. However, it may also be agreed in writing or under a standard employment contract or CBA that overtime work is not compensated at all, either by time off or extra pay.

Regarding extra work, the Labour Act imposes strict regulations. Maximum working hours shall only be exceeded in exceptional cases; in particular:

- in case of urgency or an extraordinary volume of work;
- for stocktaking, closing of accounts and effecting liquidation; or
- for the prevention or elimination of operational disruptions, insofar as the employer cannot reasonably be expected to take other measures.

Such extra work shall not exceed two hours a day and 170 hours a year (140 hours for employees with a maximum of 50 working hours/week). For extra work, the employer shall pay the employee a salary premium of at least 25%; however, for employees with a maximum of 45 working hours, this only applies to extra work that exceeds 60 hours per calendar year (see also **1.1 Status of Employee**). If, in agreement with the individual employee, extra work is compensated by time off, no extra pay is required.

1.4 Compensation

Minimum Wage

The determination of the employee's salary is primarily subject to the parties' agreement. On 18 May 2014, the Swiss people clearly voted against a new law that intended to implement a general minimum wage of CHF4,000 per month (CHF22 per hour). Cantonal law, CBAs and standard employment contracts only provide for minimum wages for specific areas or industries.

In July 2017, the Canton of Neuchâtel introduced a minimum wage of CHF20 per hour. In November 2017, the Canton of Jura was the second canton to introduce a minimum wage of CHF20. The population of the Canton of Ticino has also decided to introduce a minimum wage. The amount is currently under discussion. The Cantons of Basel and Geneva will soon decide whether to introduce a minimum wage of CHF23 per hour. In other cantons, similar popular initiatives are to be proposed.

There are CBAs (see **5.3 Collective Bargaining Agreements**) in numerous industries in which the social partners set the minimum wage. However, not all employers are prepared to negotiate with the unions. CBAs are only generally binding in about a dozen industries. In industries without a generally binding CBA, only members of employers' associations must adhere to the agreed minimum wage. In these industries, the CBA coverage ratio is low: only about two out of five employees are entitled to a minimum wage under a particular CBA. Moreover, the minimum wages agreed in the CBAs are rather low (between CHF3,200 and CHF3,900 per month). The wages effectively paid in these industries are very often above this minimum.

Where there are no CBAs, the legislator (federal government or cantons) can use so-called standard employment contracts to set minimum wages for certain industries if the wages customary in the region, profession or industry have repeatedly or abusively been undercut. At national level,

there is a standard employment contract for housekeeping, and the minimum wage is between CHF18.20 per hour for unskilled and CHF22.00 per hour for trained persons.

While under Swiss law there is no general principle of equal treatment of employees, two main exceptions apply regarding salary. Firstly, the Federal Constitution sets down the principle that men and women have the right to equal pay for work of equal value. The effect of this constitutional provision is, however, limited to wages paid in the same company. Secondly, foreigners and employees domiciled abroad working for a Swiss employer have – under the Bilateral Treaty on the Free Movement of Persons between the European Union and Switzerland of 21 June 1999 (the Treaty on Free Movement) – the right to equal treatment (including equal pay) with employees of the same employer who reside in Switzerland.

Thirteenth Month and Bonuses

The parties are free to agree on the payment of a 13th month's salary. According to a common definition, the 13th month's salary is a wage component that differs only in its due date: instead of monthly like the rest of the salary, the employer usually pays this special remuneration in November or December. It qualifies as a salary component (rather than a gratification; see below). For this reason, the 13th month's salary is due unconditionally and must be paid pro rata in the event of resignation during the year and also in the event of termination without notice. It is dependent neither on work performance nor on the course of business (unless it is a share of the business result) and it cannot be made dependent on other conditions (eg, continued employment).

While Swiss law does not define the term 'bonus' it makes a fundamental distinction between salary and gratification. On the one hand, the salary is unconditionally due (unless it is a share of the business result). It must be paid pro rata if the employee leaves the company during the year. Gratifications, on the other hand, may be conditional, in particular on continued employment. In addition, gratification can be linked to vesting, forfeiture and claw-back provisions.

After termination, dispute often arises as to whether the employer has to pay further bonuses, whether bonuses already awarded but not yet vested must be forfeited and whether the employer can even reclaim bonuses already paid (so-called claw-back). All this depends on the basic distinction of whether a bonus qualifies as salary or gratification. The distinction is often difficult and hinges on the particulars of the case.

Firstly, the distinction depends on the parties' agreement, which includes special incentive plans or bonus schemes. If the employer has made it clear that at least the amount of a (possible) bonus remains at its discretion, the bonus qualifies in principle as gratification. In some cases, depending on the particulars of the case, however, there may be a reinterpretation:

- if the amount of the bonus is clearly determined or at least objectively ascertainable (by formula), the bonus qualifies as salary and cannot be made dependent on conditions. It has, however, not yet been conclusively clarified whether this also applies if the amount of the bonus is ascertainable but the employer has reserved the right to allocate to bonus;
- additionally, the communication (or lack of communication) of the employer when granting and paying out bonuses in prior years is important. When the employer pays the bonus without reserve in the same amount for at least three consecutive years, the bonus becomes a compulsory part of the salary. In this case, employees may assume that they are entitled to future bonus payments in the same amount; and
- moreover, and irrespective of the parties' agreement that the bonus should be at the employer's discretion, a bonus only qualifies as a gratification if it is accessory (ie, as a rule of thumb, lower than the base salary). If it is above this threshold, the bonus, at least in part, is considered as salary and no longer qualifies as gratification. The criterion of accessoriness does not, however, apply in cases of very high income, ie, a total compensation of at least five times the median wage in the Swiss private sector (currently approximately CHF374,000 per year). Hence, if the employee's total annual compensation (in the relevant period, including any remuneration) exceeds this amount, the employee does not need protection and, therefore, the bonus will be regarded as a gratification, even if it is not accessory.

Government Intervention

In Switzerland, compensation, increases, etc, are in principle a matter for contract law. The exceptions to the minimum wage have already been discussed above. There are, however, three further exceptions:

Ordinance against Excessive Compensation in Listed Companies

The Ordinance against Excessive Compensation in Listed Companies (the Ordinance) applies to all Swiss joint stock companies whose shares are listed on a Swiss or foreign exchange. Furthermore, only the compensation of the members of the board of directors, the executive management and the advisory board is subject to the Ordinance.

Under the Ordinance, the shareholders' meeting of respective companies is obliged to vote annually and separately on the aggregate amount of compensation for the members of the board of directors, the executive management and the advisory board. This vote shall be binding. However, the Ordinance does not impose a cap on remuneration.

The Ordinance prohibits selected compensation arrangements, such as severance payments provided for contractually or in the articles of association, advance compensation or incentive payments for restructurings within the group. In contrast, compensation due until the termination of a contractual relationship remains permitted. Moreover, compensation for loss of entitlements with the previous employer, incentive payments for transactions outside the group, post-contractual advisory agreements, statutory severance pay and compensation at fair market value for non-competition clauses are still permitted by law. Such compensation requires, however, approval of the shareholders' meeting.

The board of directors shall annually issue a written compensation report, which shall disclose, in particular, all compensation awarded by the company, directly or indirectly, to current members of the board of directors, the executive management and the advisory board. Auditors shall then review the report and disclose it to the shareholders.

Contractual agreements that constitute an infringement of the Ordinance are void. Failure to comply with the Ordinance may trigger criminal liability with sentences up to imprisonment.

Swiss Banking Act

If a 'systematically relevant bank' gets into financial difficulties and has to receive state aid, the Swiss government can request an adjustment of the bank's remuneration packages. The term 'systematically relevant bank' includes, at present: Credit Suisse Group AG, UBS AG, Zuercher Kantonalbank, Raiffeisen, PostFinance AG. Such adjustment could include the prohibition of payment of variable remuneration in full or in part. In order to ensure enforceability of such measures, the banks are required to include a reservation in their remuneration systems whereby, in the case of state aid, claims for variable remuneration may be restricted.

FINMA circular on remuneration schemes

On 1 January 2010, the Swiss Financial Market Supervisory Authority (FINMA) enacted Circular 2010/1 on Remuneration Schemes (the Circular). A revised version of the Circular came into force on 1 July 2017. The Circular applies to banks, securities traders, financial groups and conglomerates, insurance companies and insurance groups and conglomerates that are subject to Swiss financial market supervision. In addition, the Circular is applicable to domestic and foreign subsidiaries and branches of such institutions, provided these subsidiaries and branches are mandatorily included in consolidations. The Circular is binding only for the two big banks and the largest Swiss insurance groups. For the other firms, it is not mandatory to implement the principles of the Circular, but it is recommended that the Circular be taken into account as best practice guidelines.

The Circular defines minimum standards for the design, implementation and disclosure of remuneration schemes in financial institutions.

1.5 Other Terms of Employment

Vacations and Vacation Pay

The employer shall grant the employee at least four weeks' paid holiday during each year of service and five weeks' paid holiday for employees and apprentices under the age of 20.

The employer determines the timing of holidays, taking due account of the employee's wishes to the extent that these are compatible with the interests of the employer. As a rule, at least two weeks of holiday shall be taken consecutively. The holiday entitlement for a given year of service is generally granted during that year. The party agreement often found in employment contracts according to which the holiday entitlement expires after a certain period is unenforceable. In other words, if employees cannot take leave in the qualifying year, they may carry over their holiday entitlement to the next year. This means that entitlement to vacation cumulates from one reference period to the next. When taking holidays, the employee always reduces the oldest entitlement. Employees may exercise their right until the end of the five year-period of limitation.

During the employment relationship, the parties may not agree to replace the holiday entitlement with monetary payments or other benefits. However, an exception applies if, at the end of the contract, there is not enough time to take all holidays.

Where in a given year of service employees through their own fault are prevented from working for more than a month in total, the employer may reduce their holiday entitlement by one 12th for each full month of absence. If the total absence does not exceed one month (two months for a woman in the case of pregnancy and confinement) in one year of service, the employer shall not reduce the employee's holiday entitlement. This holds true under the condition that the employee is absent from work due to personal circumstances for which they are not at fault (such as illness, accident, legal obligations, public duties or leave for youth work). In summary, the employer may generally only reduce the holiday entitlement from the second month (or third month in case of pregnancy or confinement). Only if the employee is at fault, may the reduction also bear on the first month (or first two months).

Required Leave

Absence from work due to illness, accident, legal obligations or public duties

There are circumstances which prevent an employee from working (eg, illness, accident, statutory obligations or public duties). In this case, the employer shall pay the employee's salary for a limited time, provided the employment rela-

tionship has lasted, or was concluded, for longer than three months. This includes fair compensation for lost benefits in kind.

The duration of payment during absence mainly depends on the duration of employment. During the first year of employment, the employer shall pay three weeks' salary. If the employee completes the first year, the wage will be paid for a longer time. The duration of this period, however, is not stipulated in the Code of Obligations. The courts usually apply scales (eg, Berne scale, Basel scale and Zürich scale) determining the duration of wages' payment during absence. Under these scales, the period during which a wage is paid may be as long as six months after the 20th year of employment. However, these scales are not binding.

A written agreement, standard employment contract or CBA may derogate from the above provisions provided it offers the employee at least equivalent benefit. For instance, the employee may receive a sum which is lower than the whole wage, but for a longer period. The same provision may apply if the employer bought daily benefits insurance, as the insurance benefit may replace the wage. Judicial precedents and doctrine admit that equivalence is given if the employer pays at least half of the premiums, the payment of daily allowances reaches 80% of the salary, after a waiting period of two days before payment, during 720 days, over a maximal period of 900 days.

Maternity leave

After giving birth, an employee is entitled to a leave of 14 weeks. Normally, the employee receives maternity compensation for this period from the compulsory maternity insurance, while the employer is exempt from continued payment of wages. A daily allowance of 80% of the average earned income achieved before confinement is paid. Maternity compensation is capped at CHF196 per day. Employers often supplement compensation or grant longer (paid) leave.

Leave for extracurricular youth work

During each year of service, the employer must grant employees under the age of 30 unpaid leave of up to one working week for carrying out unpaid leadership, care or advisory activities in connection with extracurricular youth work for cultural or social organisations, and for related initial and ongoing training.

Other justified leave

In addition to the above, the employer must allow the employee the customary hours and days off work and, once notice has been given to terminate the employment relationship, the time required to seek other employment. The customary hours and days off work include, in particular, family events such as marriage, the birth of a child (for fathers), visiting sick close relatives, the death of close relatives, attendance of religious events and moving house. Furthermore, on presentation of a medical certificate, the employer must grant employees with family responsibilities a leave period of up to three days to care for sick children. Additionally, the employer has to grant leave of absence for urgent doctor's appointments, visits at government offices unless an appointment outside office hours is possible, etc. However, visits to the hairdresser, sports activities or club events do not qualify as customary hours off work.

For employees paid weekly or monthly, the customary hours and days off work are fully paid unless otherwise agreed. This is not the case for employees with an hourly or piecework rate, unless the rules on absence from work due to illness, etc, apply.

Confidentiality and Non-disparagement

The employee is bound to loyally safeguard the employer's legitimate interests.

The duty of loyalty includes the employee's obligation of non-disparagement, ie, not making derogatory comments about the employer.

Moreover, the employee is obliged not to exploit or reveal confidential information obtained while in the employer's service. This duty extends to manufacturing and business secrets, but also to other confidential matters the employer wishes to keep secret. The duty of confidentiality survives the termination to the extent required to safeguard the employer's legitimate interests.

Employee Liability

Employees are liable for any loss or damage they cause to the employer, whether wilfully or by negligence. The employer has to prove the breach of contract and the damage resulting therefrom, whereas employees bear the burden of proof that it was not their fault. The facts are assessed based on the standard of care owed by the employee, which is determined by the individual employment contract, taking due account of the occupational risk, level of training and technical knowledge associated with the work, as well as the employee's aptitudes and skills which the employer was, or should have been, aware of.

Based on its assessment, the court may reduce (including to zero) the damages. The following criteria are relevant when putting a figure on the damages, as well as when considering a reduction:

- occupational risk: damage as a typical operational risk (eg, motor vehicle driver's traffic accident; broken crockery in the hotel industry);
- the employee's abilities and characteristics, which the employer knew or should have known (eg, little experience or unreliability);

- the employer's own fault (eg, incorrect deployment of the employee for a particular job; inadequate instruction or supervision in the event of unfamiliar work);
- low remuneration of the employee, in particular in relation to the responsibility to be borne by them;
- the employee's financial distress; and
- the financial circumstances of the employer.

The employer can enforce its claim for damages or offset it to a certain extent against the employee's wage claim. According to the Federal Supreme Court, the employer must assert known or apparent claims for damages at the latest by the end of the employment relationship to prevent forfeiture, ie, the employer must at least declare that claims for damages from a certain event remain reserved. While the Federal Supreme Court has not yet conclusively ruled on the statute of limitations, claims for damages likely lapse after ten (rather than five) years.

The rules on employee liability are partly mandatory, making liquidated damages or penalty clauses unenforceable to the extent that they create a liability regime that deviates from the statutory regime.

2. Restrictive Covenants

2.1 Non-competition Clauses

Validity of Non-competition Clauses

When employed, employees shall not perform any paid work for third parties in breach of their duty of loyalty, in particular if such work is in competition with their employer. The parties may also agree on post-contractual non-competition. Such a clause prohibits employees from competing with their former employer. In particular, employees must refrain from operating a business on their own account, from working for businesses and from having an interest in businesses, if such business is operating in the same field and attracts the same customers.

Post-contractual non-competition clauses are valid and enforceable if these criteria are met:

- the employee had access to the employer's customers, manufacturing or business secrets. A secret is information the employer wishes to keep from its competitors and which is not generally known to the public;
- the information obtained by the employee could seriously harm the employer, ie, the information confers economic benefit on its holder;
- the non-competition clause must be in writing, countersigned by the employee; and
- the non-competition clause shall not harm the employee's earning prospects. Therefore, such clauses shall be reasonably limited regarding their duration (generally, a term of one year is considered reasonable; in special circumstances it may exceed three years), the place where they apply and the type of operation covered.

However, if the employer terminated the employment without a valid reason or if the employee terminated the employment for a valid reason for which the employer is responsible, the non-competition clause will become invalid.

Non-competes are no longer enforceable by the end of the agreed time or if the employer no longer has a significant interest in maintaining the non-competition clause, eg, when the employer changes its field of business or if the former business secret becomes generally known.

An independent consideration in the sense of an additional payment of the employer to the employee, eg, in the form of a bonus, is not required but generally increases the chances of the non-competition clause being enforceable.

Enforcement of Non-competition Clauses

If a non-competition clause is violated, the employer may ask for financial compensation for the loss suffered. Furthermore, the parties often agree on a contractual penalty. Unless otherwise agreed in writing, employees can free themselves from the non-competition obligation by paying the contractual penalty, but they are still liable for further damages caused. If specifically agreed, the employer is entitled to request the court that the employee cease the competing activity. The courts are inclined to enforce non-competition clauses if a balance-of-interest test supports specific performance.

2.2 Non-solicitation Clauses - Enforceability/ Standards

With Reference to Employees

Due to the employee's duty of loyalty, it is prohibited to entice employees away during the term of employment.

For a time after the contract has ended, the parties may agree upon a post-contractual non-solicitation undertaking. Such provisions must be in writing and are subject to the same preconditions as non-competition clauses. Moreover, non-solicitation clauses may be terminated for the same reasons as non-competes (see **2.1 Non-competition Clauses**). Generally, the courts are reluctant to enforce such clauses, and their validity is disputed.

If a violation of the non-solicitation clause is established, however, the employee is liable for damages caused.

With Reference to Customers

If one customer is solicited, this constitutes a form of competition. Therefore, the non-solicitation of customers is subject to the restrictions described above for non-competes.

3. Data Privacy Law

3.1 General Overview

Article 328b of the Code of Obligations and the Swiss Federal Act on Data Protection contain provisions on the protection of employees' privacy. Employers may process data concerning employees only to the extent that the data relates to the employees' suitability to fulfil their jobs or if such data processing is necessary to perform employers' contractual duties, ie, the data is closely connected with the employment. Furthermore, the data processing shall be carried out in good faith and shall be proportionate: data processing is only permitted for purposes communicated to the employee at the time of collection, evident from the circumstances or provided for by law. Furthermore, the employee must be aware of any data collection and of its purpose as well as of the data processor's identity. Employees have a general right to have unlimited and unconditional access to the data collected about them. Employers must provide copies or other written extracts within 30 days. Employers are prohibited from sharing sensitive information with third parties, such as personal opinions, information on health status or other intimate matters, without good cause.

The transfer of data abroad without the employee's consent is prohibited if the transfer could seriously harm the employee's personality rights. This is especially the case if the foreign legislation does not guarantee an appropriate level of data protection.

In order to respect personal rights, employees must be informed about control measures. Means of control, such as monitoring activities (surveillance, video, internet), are permitted when required by security or proper use of business infrastructure and working time. It is not permitted to monitor an employee's behaviour. Means of control shall be codified in internal regulations that need to be communicated to employees.

Employees should refrain from using social media and other new communication technologies in an excessive manner. This is even though employers are generally not allowed to control the content of private internet use.

At the end of employment the employer has to destroy all data concerning the employee. Under limited circumstances, data may be retained, eg, until it is certain that no dispute regarding the employment relationship will arise, or the data will no longer be used for a job reference.

4. Foreign Workers

4.1 Limitations on the Use of Foreign Workers

Swiss labour law follows a dual system when granting foreigners access to the Swiss labour market. The peoples of the European Union (other than Croatia) and peoples of the European Free Trade Association (EU-27/EFTA) are generally given access to the labour market under the Treaty on Free Movement. In contrast, non-EU/EFTA nationals are subject to more restrictive regulations. EU-27/EFTA nationals need to register with the communal authorities and apply for a residence permit to live and work in Switzerland. A separate work permit is, however, not required. If such foreign employees conclude employment contracts for less than one year, they are entitled to obtain a short-term residence permit for the duration of the employment agreement (short-term residence permit L), whereas employees with employment contracts of more than one year, or of an indefinite duration, qualify for a residence permit for five years (residence permit B). Both permits may be prolonged. Employment contracts with a duration of less than three months do not require a permit, but need to be reported to the competent cantonal authority.

The Treaty on Free Movement may no longer apply to United Kingdom citizens after the withdrawal of the United Kingdom from the European Union. For the new members to the European Union, Bulgaria and Romania (EU-2), the respective regulations have applied since 1 June 2016. The Treaty on Free Movement also applies to Croatia, which joined the EU in 2013. Full free movement of the citizens of Croatia is, however, only expected to be in force as from 1 January 2024, while a special safeguard clause to restrict immigration from Croatia may remain in force until 31 December 2026. Until then, special restrictions generally apply to Croatian citizens wishing to work in Switzerland, in the sense that Swiss nationals and EU-27/EFTA nationals have priority over Croatians when obtaining a job. Thus, Croatians may only be issued a work permit (within the limitations of the quota system) if no employee can be found from Switzerland or from the EU-27/EFTA states, provided the salary and working conditions are equal to domestic standards.

Cross-border workers are generally free to work in Switzerland, provided they obtain a so-called G-permit and return to their place of residence in a foreign country at least once a week.

Non-EU-27/EFTA nationals do not fall under the Treaty on Free Movement. They are only admitted to the Swiss labour market if it is in the economic interest of Switzerland, if they are properly qualified for the job (ie, have a degree from a university or similar institution as well as several years of professional experience), if they have suitable accommodation in Switzerland and if no other Swiss or EU-27/EFTA national could be recruited for the respective job. Salary, social security contributions and the general terms of employment must be in accordance with the customary conditions in the respective region and business sector. Furthermore, a quota system applies, as only a limited number of permits is issued by the cantons every year.

4.2 Registration Requirements

EU-27/EFTA nationals must register with the communal authorities at their place of stay and they have to apply for a B- or L-residence permit before commencing their employment.

Croatian citizens and non-EU-27/EFTA nationals must first obtain a work permit. Generally, the employer files the application with the respective cantonal labour authority, which then, after approval, forwards it to the cantonal or the federal immigration authority, respectively, for it to issue the work permit. Once the work permit is issued, foreign employees must register with the authorities of the community where they plan to live and where they are allowed to start work. The detailed procedure may be canton-specific.

5. Collective Relations

5.1 Status/Role of Unions

In Switzerland, there is no unified trade unionism. The two most important unions are the Swiss Confederation of Trade Unions (*Schweizerischer Gewerkschaftsbund*) and Travail Suisse. The Swiss Confederation of Trade Unions serves as an umbrella organisation and covers 16 individual trade unions, which represent 380,000 workers. Travail Suisse covers 10 unions and represents 150,000 members. Today, only about 18% of workers belong to such unions.

Nevertheless, trade unions have great influence. The trade unions have created various institutions for the benefit of employees, such as unemployment insurance. Furthermore, the trade unions negotiate and conclude CBAs and have a political influence on legislation.

5.2 Employee Representative Bodies

According to the Act on Information and Consultation of Workers, in businesses with fewer than 50 employees, workers act as representatives. In businesses with at least 50 workers, employees may elect representatives (works councils). A fifth of the workforce (or 100 employees) may demand an election and if the majority is in support of it, elections have to take place. The works council shall include at least three employees.

The employer has to inform the works councils on all matters on which they need information to fulfil their tasks. Furthermore, the works councils have to be consulted particularly in the following areas:

- questions about security at work and health protection;
- structuring of working hours (eg, introduction of evening work);
- specific measures linked to night work;
- collective dismissals; and
- the transfer of undertakings if measures (such as dismissals, increase in working hours or wage reductions) are envisaged, etc.

The right of consultation includes the right to be heard and have a say before the employer makes its decision. If the employer does not take, or only partially takes, into account the objections of the works council, it also includes a right to a statement of reasons for the employer's decision.

The works council has a right to co-decision in the following areas:

- agreements on work regulations in industrial enterprises concerning, eg, health protection, accident prevention, workplace order, employee behaviour and administrative penalties;
- selection and change of pension fund (affiliation agreement);
- agreement on a social plan in the event of collective dismissals; and
- introduction of simplified working time recording.

5.3 Collective Bargaining Agreements

CBAs are contracts between employers and workers' associations regulating working conditions and the relationship between the parties to the CBA. On the employers' side, one employer or several employers or employers' associations and, on the employees' side, only workers' associations (trade unions) may be contracting parties. The only condition for concluding a CBA is that the workers' association has acquired legal personality.

The CBA usually regulates the conclusion, content and termination of the individual employment contract (ie, normative provisions), the rights and obligations of contracting parties (contractual provisions) and enforcement and control of the CBA.

The normative provisions of a CBA automatically become an integral and mandatory part of the individual employment contract as long as the CBA remains valid. They are directly applicable to all employees who are members of a contracting employees' association if the employer also participates in the CBA. As a rule, however, the employers involved also apply the CBA to non-organised employees.

At the request of all contracting parties, the government may declare a CBA mandatory for an entire industry or profession. If so, all employers and employees (including those who are not organised) in an industry or profession are subject to the provisions of the CBA.

6. Termination of Employment

6.1 Grounds for Termination

Cause is required to terminate a fixed-term employment relationship. Otherwise, the parties cannot terminate such contract prior to the end of the agreed term. See **6.3 Dismissal for (Serious) Cause (Summary Dismissal)** for the definition of cause.

No cause or particular reason is required to properly terminate an employment of indefinite duration. By adhering to the agreed notice period, both parties may terminate such employment for any or no reason (including for poor performance). Even if this right to terminate exists, the employer is obliged to justify the termination in writing at the employee's request.

However, a termination must not be given for abusive reasons. This may be the case if the termination is based on personality reasons (discriminatory termination), because the other party exercises a constitutional right, solely to prevent claims under the employment relationship from accruing, or because the other party asserts claims under the employment relationship and in certain other exceptional cases.

Collective Redundancies

Collective redundancies are dismissals given by employers to employees for reasons not personally related to them over a period of 30 days. Moreover, such dismissals must affect:

- at least ten employees in businesses normally employing more than 20 and less than 100 employees;
- at least 10% of the employees in businesses normally employing at least 100 but less than 300 employees; or
- at least 30 employees in businesses normally employing 300 employees or more.

If employers intend to make collective redundancies, they must provide the employee representatives or, where there are none, the employees directly with all appropriate information. This includes the reasons for the collective redundancies, the number of employees to whom notice may be given, the number of employees normally employed in the business and the period in which the employer plans to issue the notices of termination. The employer is also required to send a copy of this information to the cantonal employment office.

Before taking a decision on the collective redundancies, the employer must consult with the employee representatives or, where there are none, the employees directly. The employer is not required to involve external parties, such as labour unions, in the consultation procedure unless otherwise provided for in a CBA. The employer must at least give the employee representatives or the employees the opportunity to submit proposals on how to avoid the redundancies or how to limit their number, and how to mitigate their consequences. However, the employer is not required to implement any proposal received from the employee representatives or the employees.

The employer is required to inform the cantonal employment office about the results of the consultation. The office seeks solutions to solve the problems created by intended collective redundancies. However, it is not competent to order the employer to implement measures in connection with the collective redundancies.

If an employer normally employs at least 250 employees and intends to make at least 30 employees redundant within 30 days, the employer must enter into negotiations about a social plan. If the employer is a party to a CBA, the employer's counterparty in the negotiations is the employee associations that are members of the CBA. Otherwise, the employer must negotiate with the employee representatives or, where there are none, with the employees directly. If the parties are unable to agree on a social plan, an arbitral tribunal is appointed, which will issue a social plan by way of an arbitral award.

Notice of termination given by the employer is unlawful if the consultation process for collective redundancies has not been respected. In this case, the employer must pay compensation of up to two months' salary to each employee concerned.

6.2 Notice Periods/Severance

Required Notice Periods

Unless an employment relationship is terminated without notice for good cause, termination requires the statutory or contractual notice period to be observed. The parties may agree on the length of the notice period in the contract, subject to statutory rules on minimum length. If the parties do not provide for a notice period in the employment agreement, the statutory notice periods will apply. The notice period shall be equal for both the employer and the employee. If different notice periods are agreed on, the longer period will apply to both parties.

By virtue of law, parties may terminate an employment relationship during the first year of service by giving one month's notice, two months' notice in the second up to the ninth year of service, and three months' notice thereafter, in each case from the end of a calendar month. The parties may amend these notice periods by written individual, standard or collective employment agreement. However, a reduction to less than one month is only possible due to a CBA and only permitted during the first year of service. During the probation period, either party may terminate the agreement at any time by giving seven days' notice. The probation period is usually the first month of an employment relationship, but it may be extended to up to three months.

Severance
Upon termination, the employer must compensate the employee for any claims accrued until the end of the employment relationship. However, the employer is under no obligation to make a severance payment. Sometimes severance payments are made on a voluntary basis or to settle disputed claims arising from the terminated contract.

A provision which stipulates mandatory severance payments for employees who are more than 50 years of age and have worked for more than 20 years for the same employer, has practically become obsolete. This is because it is so unusual for employees to fulfil both criteria. Furthermore, payments made by the employer to the employee's pension plan can regularly be deducted from the severance payments and these contributions normally outweigh the severance payments.

Specific Procedures/Formalities
Swiss law only requires that the notice period is respected. Therefore, no third-party advice, consent or authorisation is required to terminate the employment relationship. However, the terminated party may raise claims arising from, or in connection with, the termination in court proceedings (for details on such claims, see **7. Employment Disputes**).

Giving written notice is only necessary if agreed. For reasons of proof, however, employers regularly give notice in writing. As the party giving notice bears the burden of proof regarding its date of receipt, employers often ask employees to confirm receipt in writing or give notice by registered letter.

Specific procedures and consultation proceedings apply in the case of collective dismissals (see **6.1 Grounds for Termination**).

6.3 Dismissal for (Serious) Cause (Summary Dismissal)
Every employment relationship may be terminated for cause with immediate effect, ie, without observing the contractual or statutory notice period. 'Cause' is any circumstance which renders it unacceptable to the party giving notice to continue the employment relationship in good faith even if only until the end of the notice period. Generally, only severe circumstances, such as committing a criminal offence against the employer or a material breach of the employment agreement, qualify as cause and the courts apply a high standard in what they accept as cause.

The terminating party needs to invoke cause immediately, ie, normally within a period of a couple of days. Otherwise, the terminating party runs the risk of forfeiting its right to terminate for cause.

Where the cause for terminating the employment relationship with immediate effect consists of a breach of contract, the defaulting party is fully liable for damages. In the absence of a breach of contract, the court determines the financial consequences of termination with immediate effect at its discretion, taking due account of all circumstances.

Where employers dismiss employees with immediate effect without cause, employees are entitled to damages in the amount they would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration. Such damages are reduced by any amounts that employees saved resulting from the termination of the employment relationship or that they earned by performing other work or would have earned had they not intentionally foregone such work.

In addition, the court may, and usually will, order the employer to pay the employee an amount of compensation determined at the court's discretion taking due account of all circumstances. Such compensation may not exceed the equivalent of six months' salary for the employee.

6.4 Termination Agreements
The parties to an employment agreement are free to terminate their employment agreement by mutual consent at any time. No form requirements apply to a termination agreement. It may even be concluded implicitly.

Releases ('garden leave') may generally be and, in certain industries, are regularly obtained in connection with termination agreements. An employer may actually put an employee on release unilaterally.

By way of garden leave, employees are released from their duty to work during the notice period. All other contractual and statutory obligations of employees (eg, duty of loyalty or not to compete) and employers (eg, duty to pay the base salary and other salary components) remain in force until the end of the employment relationship.

Under special circumstances a 'right to work' which limits the employer's right to put an employee on release may exist, in particular for jobs that require employees to work continuously to keep certain qualifications (eg, pilots, footballers, etc). In this case, the release requires the employee's consent. Otherwise, no particular statutory requirements for enforceable releases exist.

Certain situations may affect termination agreements. Firstly, if the termination agreement terminates the employment relationship as per a date, which is before the expiry of the notice period, employees may forfeit the right to receive salary until the expiry of the notice period. Secondly, by agreeing to a termination as per a particular date, employees may waive protective rights granted to them by mandatory law, such as the right to be protected from termination during certain blocking periods (for details, see **6.5 Protected Employees**). Thirdly, employees may not waive mandatory

claims arising from the employment relationship during the employment and until one month after the end of the employment.

In light of these facts, there is the risk that entering into a termination agreement may unduly disadvantage the employee's interests. As a result, courts consider a termination agreement to be enforceable only if the employee has a reasonable interest in the agreement taken as a whole. This may be the case, for example, if employees' waiver of salary or protective rights are compensated by a severance payment, or if employees wish to be released before the expiry of the notice period because they wish to start a new job.

The Swiss Federal Supreme Court has suggested in several decisions that a termination agreement, which is not in the employee's reasonable interest, may be entirely void.

6.5 Protected Employees

The employer shall not terminate the employment relationship during certain blocking periods in certain circumstances, eg, if the employee is unable to work due to illness or accident (blocking period of up to 180 days depending on the length of service), pregnancy (blocking period during pregnancy and for a period of 16 weeks following birth) or public service.

As discussed in **6.1 Grounds for Termination**, termination of employees may be abusive if based, for example, on an attribute pertaining to the employee's personality or because the employee exercises a constitutional right or asserts claims under the employment relationship. The termination is also abusive if notice is given:

- because the employee is or is not a member of an employees' organisation;
- because the employee carries out trade union activities in a lawful manner;
- while the employee is an elected employee representative and the employer does not have good reason for the termination; or
- during or within six months following a complaint of discrimination by the employee to a superior or the initiation of proceedings before a conciliation board or a court by the employee, provided the employer does not have good reason for the termination.

The courts have ruled that an employer – depending on the age and years of service of an employee – may have a more pronounced duty of care towards employees, and that a termination in violation of this duty may in exceptional cases be abusive.

For the consequences of a termination during a blocking period or an abusive termination, see **7.1 Wrongful Dismissal Claim**.

7. Employment Disputes

7.1 Wrongful Dismissal Claim

A terminated employee may claim that the termination was abusive (in circumstances under which a termination may be abusive, see **6.1 Grounds for Termination** and **6.5 Protected Employees**). An abusive termination effectively ends the employment relationship. However, the employer shall pay monetary compensation to the employee. The court determines the amount of compensation taking into account all circumstances, the maximum compensation being an amount equivalent to six months of the employee's salary. Claims for damages on other counts (eg, for breach of contract) are reserved. Employees seeking compensation for abusive termination must submit their objection to the notice of termination in writing by no later than the end of the notice period. Employees must then bring their claim for compensation to court within 180 days after the end of the employment relationship. Only in cases of gender discrimination may the court order the provisional re-employment of the employee and eventually cancel the termination.

A termination of an employment relationship with immediate effect but without cause is effective. However, employees are entitled to damages in the amount they would have earned had the employment relationship ended after the expiry of the required notice period (in the case of agreements of indefinite duration) or the term of the agreement (in the case of fixed-term agreements). In addition, the court may order the employer to pay the employee an amount of compensation determined at the court's discretion taking into account all circumstances of the case. However, such compensation must not exceed the equivalent of six months of the employee's salary.

Notice of termination given by the employer during a blocking period (for details on such blocking periods, see **6.5 Protected Employees**) is void. If notice was given prior to the commencement of a blocking period, the notice period is suspended and resumes only after the blocking period has ended. In such a scenario, the duration of the employment relationship and, to a certain extent, the employee's right to receive their salary are extended.

7.2 Anti-discrimination Issues

Swiss civil law does not recognise a general prohibition against discrimination in employment relationships or a general principle of equal treatment of employees. However, employers are under a duty to acknowledge and safeguard employees' personality rights. If an employer unjustifiably and arbitrarily behaves in a discriminatory manner towards employees, this may constitute a violation of their personal rights. In this limited scope, employees are protected against any discrimination, regardless of its basis (race, sex, pregnancy, age, nationality, religion, etc). According to the Swiss Federal Supreme Court, for an employee's personality rights to be discrimina-

torily violated, the employee must receive worse treatment than the multitude of other employees for no objective reason. Conversely, this means that an employee is not protected against (arbitrary) better treatment compared to others.

There are, however, certain more specific anti-discrimination rules:

- it is recognised that employers shall not discriminate against single employees when issuing directives or granting voluntary employee benefits, such as severance payments or voluntary bonuses;
- pursuant to the Swiss Federal Act on Gender Equality (GEA) employees shall not be discriminated against based on their sex, including their marital status, their family situation or (in the case of female employees) pregnancy;
- according to the Swiss Federal Act on Equality of Persons with a Disability the federal government as employer shall make every possible effort to provide disabled persons with the same opportunities as everybody else. However, this Act only applies to the state and state agencies ('public employers'); and
- finally, the Treaty on Free Movement (see **1.4 Compensation**) stipulates that persons covered by it may not, by reason of their nationality, be treated differently to employees originating from other contracting countries regarding working conditions, in particular as to pay or dismissal.

Burden of Proof

Pursuant to Swiss law, the party who derives a right from a fact bears the burden of proof. If employees bring a discrimination action, they have to prove it. The GEA deviates from this general rule: if the employee can furnish prima facie evidence, the burden shifts to the employer. Thus, the employer has to prove that no discrimination occurred.

Relief and Damages

Pursuant to the GEA, an employee may file a claim to:

- prohibit or end any threatening discrimination;
- order the offender to end an existing discrimination;
- declare and find that a discrimination exists and continues to have disturbing effects; or
- order payment of the pay that is owed.

If the discrimination materialises in a refusal to employ the discriminated person or in the termination of an employment relationship, this employee may claim damages, but is not entitled to re-employment. If a termination is deemed to be abusive (see **6.5 Protected Employees**), the court may order the provisional re-employment of the employee and eventually cancel the termination. If a person is not employed for a discriminatory reason, such person is entitled to compensation, which is determined in light of all circumstances and the anticipated pay. However, such compensation may not exceed a total of three months' salary.

If discrimination is also based on categories such as age or race, the party must remedy it in line with the labour law set forth in the Code of Obligations. Under these rules, employers are liable for damages resulting from violation of their duty to protect employees' personality, termination that does not respect the notice period or from unjustified termination without notice.

If an abusive termination meets the criteria for a discriminatory termination under the GEA, the more general provisions must give way to this lex specialis. Compensation based on both laws is excluded. The same applies to an unjustified termination without notice that classifies as a discriminatory termination.

8. Dispute Resolution

8.1 Judicial Procedures

Specialised Employment Forums

Specialised labour courts handle labour disputes according to cantonal procedural laws. The cantons are free to specify the competent court and its composition. If there is no labour court, an ordinary district court is competent to hear employment-related claims. The panel consists of a single judge or a panel of three.

In employment law disputes, mandatory conciliation proceedings take place before a conciliatory authority. In certain disputes based on the GEA, the conciliatory authority has to be composed of members representing both employers' and employees' organisations belonging both to the public and private sectors, and the authority must be gender balanced. Such conciliation proceedings are aimed at achieving an amicable solution. Many cases are settled at this stage.

Labour law disputes with a litigation value of less than CHF30,000 or related to discrimination pursuant to the GEA are governed by the principle that the courts, to a certain extent, have to establish the facts ex officio. Consequently, the court may consider any facts it becomes aware of and it shall ask the parties questions so that they can submit the relevant facts to the court. The aim is to achieve the objective of 'social civil proceedings' where the (economically) weaker party should be protected and proceedings accelerated.

Class Action Claims

Class actions are not provided for in Switzerland. They are considered foreign to the Swiss legal system, and any binding effect of a court decision upon a party that has not participated in the proceedings would violate such party's right to be heard.

In 2013, the Swiss Federal Council initiated discussions to revise the Civil Procedure Code to provide for better measures of collective redress.

The consultation process was completed in June 2018, allowing the cantons, municipalities, associations, etc to comment on the preliminary draft. The Federal Council will evaluate these results and subsequently submit a draft to parliament for consideration. It is still open when the draft will be discussed.

Representation in Court

In labour disputes – as in all other disputes – people can represent themselves. This also applies before the Federal Supreme Court. If one party is obviously unable to conduct the proceedings itself, however, the court can request it to appoint a representative. If the party does not comply within the time limit, the court shall appoint a representative.

Parties can decide to be represented, for instance, by a friend or another confidant. However, only lawyers can normally offer professional representation. In labour disputes, as an exception, a professionally qualified representative who is not a lawyer can also offer such representation, but only to the extent provided for by cantonal law.

8.2 Alternative Dispute Resolution

Arbitration

Labour disputes often concern financial interests. Thus, such claims may regularly be subject to arbitration under Swiss law, which holds generally true for international arbitrations with a seat in Switzerland.

Regarding domestic arbitration, however, the Federal Supreme Court issued a heavily criticised decision in 2010. Since the employee cannot validly waive certain rights until one month after the termination of the employment relationship under Swiss law, the Supreme Court held that such mandatory provisions (eg, holiday entitlements, etc) are not at the parties' disposal, and thus not arbitrable.

In April 2018 the Supreme Court confirmed its decision. The court also addressed criticism of the doctrine but saw a change in case law as unjustified. According to the Federal Supreme Court, in case of doubt it is to be assumed that the parties did not wish to split up the legal process, ie, deal with mandatory claims before state courts and with non-compulsory claims before arbitration courts.

Notwithstanding the above, the parties may agree to settle all claims by arbitration after the one-month period following the termination of the employment relationship has elapsed.

Pre-dispute Arbitration Agreements

Mediation clauses are party agreements according to which the parties agree, in the event of a dispute, to attempt mediation before litigation. In addition, according to the clauses, parties may only take legal action if a settlement is not possible within a certain period. Such mediation clauses in employment contracts play a subordinate role in Switzerland.

The enforceability of such clauses depends on whether mediation is mandatory according to the parties' will and on whether the dispute resolution mechanism is litigation or arbitration. Whereas pre-arbitration mediation clauses are generally enforceable, pre-litigation mediation clauses are valid but not enforceable.

If a party that has agreed to mediation does not co-operate, this constitutes a breach of contract and such party is liable for damages. If parties have provided for a contractual penalty, it may be enforced.

As mediation is not a prerequisite for the state procedure, the competent court can conduct the state proceedings if requested. However, a mediation clause allows each party – under the Civil Procedure Code – to ask the court for a suspension of the conciliation or court proceedings, if the previously agreed mediation has not yet taken place.

8.3 Awarding Attorney's Fees

The prevailing party can be awarded attorney's fees. The general principle in Swiss civil procedure law stipulates that the losing party has to bear all the procedural costs including attorney's fees and court costs. In special circumstances, the court may deviate from the general rule of cost allocation for attorneys' fees and court costs, eg, if an ordinary distribution seems unfair.

The calculation of the payment is based on schedules and not on the actual fees paid. Thus, the award will usually not cover all the costs incurred. If employees are entitled to legal aid, this does not exempt them from payment to employers. Also, even if the general rule provides that court costs must also be borne, for employment disputes with an amount of less than CHF 30,000, neither for the conciliation nor for the litigation proceedings will court costs be charged.

Homburger

Prime Tower
Hardstrasse 201
CH-8005 Zürich
Switzerland

Homburger

Tel: +41 43 222 1000
Fax: +41 43 222 1500
Email: lawyers@homburger.ch
Web: www.homburger.ch