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2019

Law and Practice

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Homburger (Zürich - HQ)'s multi-disciplinary employment law team consists of five partners, one senior of counsel, two counsels and approximately 14 associates, co-headed by Balz Gross and Gregor Bühler. The Employment Law Team is one of the practices of Homburger, a leading Swiss full-service business law firm. All of Homburger's 33 partners and approximately 150 lawyers and tax advisers are members of at least one expertise team. Most of our lawyers have additional legal qualifications and have studied or worked abroad. The employment law team can draw expertise from the other specialised practice teams, in particular the litigation team for employment disputes, the corporate team for top executive compensation, the M&A team for transactions, the banking and finance team for share plans and the tax team for employment-related tax and social security issues. The team is particularly known for work relating to cutting-edge employee participation plans, both with regard to the design, drafting and implementation and also with regard to related litigation, securities and regulatory work, compensation plans and say-on-pay regulations, including related corporate work, employment agreements and termination agreements for top management, transactional employment related work, including social security and pension plan issues, mass dismissals, social plan negotiations and other restructuring measures, litigation regarding top management, (compensation, non-competes, etc) and litigation with respect to data protection.

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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 has disappeared from the Swiss Code of Obligations, the Labour Act still makes a (much-criticised) distinction between white-collar and blue-collar employees with regard to 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 all employees who work in the office or in office-like professions, ie do mainly brainwork.
- Employees in "industrial undertakings". "Industrial undertakings" are companies/undertakings with fixed installations of a permanent nature for the production, processing or treatment of goods or for the 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 are white-collar or blue-collar employees.
- Sales personnel in large retail undertakings. Large companies are those with more than 50 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
- workers in the health sector, hospitals and homes.

The longer maximum working time also applies to office, technical and other employees and sales personnel in large retail undertakings 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 (45 or 50 hours maximum working time per week) has an impact on extra work pay. Extra work is the hours that the employee worked beyond the maximum working hours. The Labour Code provides that the employer must pay the 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 is only the case for extra work exceeding 60 hours per calendar year.

Other Statuses

The Labour Act defines some categories of workers/companies who 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 apply in principle to such workers. However, the basic rules for the protection of employees under the Code of Obligations also apply to these employees.

The following employees in particular (but not exclusively) are excluded from the protection of the Labour Act:

- employees in higher management positions: this term 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;
- persons in the service of churches;
- personnel of public administrations of foreign countries or international organisations residing in Switzerland;
- teachers at private schools as well as teachers, caretakers, educators and supervisors in institutions;
- employees in private households;
- home workers (operating from home);
- federal, cantonal and communal administrations (in part);
- public transport companies, maritime shipping under the Swiss flag;
- crews of Swiss airlines; and
- primary agricultural production, fishing enterprises and enterprises with predominantly horticultural plant production (partially).

Furthermore, the Labour Act establishes certain special protection provisions for the following categories of employees:

- young workers (up to 18 years of age);
- pregnant women and nursing mothers; and
- employees with family responsibilities.

Additionally to the provisions on protection of young workers under the Labour Act, the Code of Obligations provides for special rules for the contract of apprenticeship. The purpose of the contract of apprenticeship is that the employer undertakes to train the apprentice and the apprentice undertakes to work in the employer's service in order to acquire such training.

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

1.2 Contractual Relationship

Indefinite and definite employment contracts

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

A fixed-term employment contract exists if the parties to the contract agreed to it for a certain period or up to a certain date without the need for termination. However, the possibility of termination may be provided for in the contract. Then it is a combination of fixed-term and indefinite employment.

The dismissal protection regulations (regarding blocking period, see **6.5 Protected Employees**; regarding wrongful dismissal see **6.3 Dismissal for (Serious) Cause (Summary Dismissal)**) do not apply to the fixed-term employment contract (for example, in the event of incapacity to work due to illness or accident). A fixed-term employment contract therefore expires regardless of this. However, even a fixed-term employment contract can be terminated without notice for cause (see **6.3 Dismissal for (Serious) Cause (Summary Dismissal)**).

The time limit does not necessarily result from a certain end date or a certain contract term. The time limit may also result solely 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 in order for them to be able to make arrangements for the period following employment. The duration of the contract must not however, not depend on the will of only one party (eg "for as long as sufficient work is available").

If different fixed-term employment contracts are concluded in succession, this may constitute a circumvention of the law. The employment relationship is then considered permanent. However, there is no circumvention if such chain employment contracts appear justified for special economic or social reasons also 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 of employer and employee whereby the employee agrees to undertake work in the service of the employer and the employer undertakes to pay him or her a salary. The essentialia include (i) the type of work, (ii) the undertaking of the employer to pay a salary and (iii) that the employee performs work in the service of the employer for a continued period. However, for the employment contract to become valid and binding, it is not necessary to define the amount of the salary, the term of the contract or 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 reasonably only 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. This includes the exclusion of monetary compensation of overtime work, derogation from statutory default rules on sick pay, modification of statutory default rules on length of probationary period and notice period, and the agreement on post-contractual non-compete obligations.

"In writing" means that the contract bears the signatures of the employer and the employee. No further formalities are required.

1.3 Working Hours

Maximum Working Hours

The Labour Act and accompanying ordinances set the rules with regard to the number of working hours, the beginning and ending 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**). Further, special rules on working hours and resting times apply to categories of enterprises for which it is admitted that it is difficult to comply with the provisions of the Labour Act, such as hospitals, chemists' shops, 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. In most Swiss companies, normal working hours vary between 40 and 44 hours per week.

The Labour Act fixes the "maximum working hours" for workers employed in industrial enterprises and white-collar workers as well as sales staff in large retail undertakings at 45 hours a week and for other workers at 50 hours a week (see in detail **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 6am and 8pm is day work within the meaning of the Labour Act; work performed between 8pm and 11pm is evening work. No permit is required for day and evening work. Evening work may be introduced by the employer after consultation with the works council in the undertaking, or, if no such representation exists, with the employees concerned. The day and evening work of each employee, including breaks and overtime, must lie within a period of 14 hours.

Work is to be interrupted by breaks of the following minimum duration: a 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 must be granted a daily rest period of at least 11 consecutive hours, exceptionally, once a week, of 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 competent 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 the employee to engage in night or Sunday work without his or her consent.

Subject to the rules set out above on working hours and resting times, flexible arrangements are permitted. For example, many companies provide for the model of sliding working hours. Under this system, working time is split into a general schedule (block time) and an individual schedule. While the presence of the employee is expected during the block time, he or she may determine the rest of the working time independently and based on his or her needs and preferences. This means that employees can accumulate minus or plus hours; at the end of an accounting period (week, month, year), however, employees must reach their planned time. Employees therefore have (great) flexibility to organise their work according to their own needs.

Part-Time Contracts
Part-time work is where the agreed-on working time is below the company's normal working hours. Part-time work is generally subject to the same rules as full-time work. This means that 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, provided that the relevant statutory requirements are met.

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-professional accidents. Further, part-time employees who earn less than CHF21,150 a year are not covered by occupational benefits insurance. There may also be a reduction in old age pension.

Overtime
An employee's weekly working hours that exceed the company's normal working hours constitute "overtime". The weekly working hours that exceed the maximum working hours defined in the Labour Act (see **1.1 Status of Employee**) are "extra work".

If overtime is required, the employee is obliged to perform such overtime to the extent that he or she is 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 equal length. If the overtime is not compensated by time off in lieu, the employer must compensate the employee for the overtime worked by paying 125% of the normal salary. However, it may also be agreed in writing or under a standard employment contract or collective employment contract that overtime is not compensated at all, neither by time off in lieu nor extra pay.

As regards extra work, the Labour Act imposes strict regulations. Maximum working hours shall be exceeded only in exceptional cases; in particular, (i) in case of urgency or an extraordinary volume of work, (ii) for stocktaking, closing of accounts and effecting of liquidation, or (iii) for the prevention or elimination of operational disruptions, in so far as the employer cannot be reasonably expected to take other measures. Such extra work must 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 must pay the employee a salary premium of at least 25%; however, for employees with a maximum of 45 working hours, this applies only 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 in lieu, no premium must be paid.

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 (CHF22 per hour). Cantonal law, collective bargaining agreements 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.

There are collective bargaining agreements (see **5.3 Collective Bargaining Agreements**) in numerous industries in which the social partners set minimum wages. However, not all employers are prepared to negotiate with the unions. Collective bargaining agreements are only generally binding in about a dozen industries. In industries without a generally binding collective bargaining agreement, only members of employers' associations must adhere to the agreed minimum wages. In these industries, the collective bargaining agreement coverage ratio is low: only about two out of five employees are entitled to a minimum wage under a particular collective bargaining agreement. Moreover, the minimum wages agreed in the collective bargaining agreements 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 collective bargaining agreements, 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 been abusively undercut. At national level, there is a standard employment contract for housekeeping. The minimum wage is between CHF18.20 for unskilled and CHF22.00 for trained persons. The Canton of Ticino enacted a standard employment contract with mandatory minimum wages for call centres, the Canton of Valais has one for industrial maintenance and cleaning, and the Canton of Geneva has one for the cosmetics sector.

While under Swiss law there is no general principle of equal treatment of employees, two main exceptions apply with regard to salary. First, 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 the wages paid in the same company. Second, under the Agreement on the Free Movement of Persons between Switzerland and the European Union, foreigners and employees domiciled abroad working for a Swiss employer have 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 thirteenth month's salary. According to a common definition, the thirteenth-month's salary is a wage component that differs only in its due date: instead of monthly as the rest of the wage, this special remuneration is usually paid in November or December. It qualifies as a salary component (rather than a gratification; see below). For this reason, the thirteenth-month's salary is due unconditionally and must be paid pro ratain 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, nor can it be made dependent on other conditions (egcontinued employment).

While Swiss law does not define the term bonus it makes a fundamental distinction between salary and gratification. 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, can be made conditional, in particular on continued employment. In addition, vesting, forfeiture and clawback provisions are permitted for gratifications.

Following a termination, a dispute often arises between the employer and the employee over whether the employer has to pay further bonuses, whether bonuses already awarded but not yet vested have been forfeited or whether the employer can even reclaim bonuses already vested (so-called clawback). The answers to these questions depend on the basic distinction of whether a bonus qualifies as either salary or gratification. The distinction is often difficult and depends on the particulars of the case.

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

- This is the case if the amount of the bonus is clearly determined or at least objectively ascertainable (formula). This means that – even if the employer has reserved the right of discretion – the bonus qualifies as salary and cannot be made subject to conditions.
- Additionally, the communication (or failure to do so) of the employer when granting and paying out bonuses in prior years is considered 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, the employee may assume that he or she is also entitled to further bonus payments in the same amount.
- 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 deemed 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 seen as salary

and no longer as gratification. The criterion of accessoriness does, however, not 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 CHF360,000 per year). Hence, if the employee's total annual compensation (in the relevant period, including any kind of remuneration) exceeds this amount, the employee does not appear to be in need of protection and, therefore, the bonus will be considered as a gratification, even if it is not accessory.

Government Intervention

In Switzerland, compensation, increases, etc are in principle a matter for contract law. We have already discussed the exceptions to the minimum wage above. In the following we describe three further exceptions:

Ordinance Against Excessive Compensation in Listed Companies

On 3 March 2013, the Swiss people approved a popular initiative imposing restrictions on executive compensation in listed companies (the "Minder Initiative"). Subsequently, the Swiss government transposed the referendum into a more detailed and specific implementing legislation: the Ordinance against Excessive Compensation in Listed Companies (the "Ordinance"). The Ordinance entered into force on 1 January 2014. One of its main objectives is to empower shareholders vis-à-vis the executive management in say on pay.

The Ordinance applies to all Swiss joint stock companies whose shares are listed on a Swiss or foreign exchange. Further, only the compensation of the members of the board of directors, the executive management and the advisory board is subject to the Ordinance. Hence, the Ordinance applies to a small proportion of Swiss employers and only to selected employees.

One of the most important requirements of the Ordinance is the obligation of the companies to carry out a binding vote on compensation. The shareholders' meeting must 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. However, the Ordinance does not impose a cap on remuneration.

One of the main goals of the Minder Initiative was to abolish "golden parachutes" or "golden handshakes" that are made ex gratia, ie without any specific consideration or performance given by the affected officer. Accordingly, the Ordinance prohibits selected compensation arrangements. This includes severance payments provided for contractually or in the articles of association. In contrast, compensation due until the termination of a contractual relationship remains permitted. Further, the Ordinance prohibits advance compensation (eg advance salary payments); incentive payments for restructurings within the group; loans, credits and pension benefits not based on occupational pension schemes; and performance-based compensation not provided for in the articles of association as well as equity securities and conversion and option rights awards not provided for in the articles of association. Compensation for a 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 allowed. Such compensation requires, however, approval at the shareholders' meeting.

Under the Ordinance, the board of directors shall issue on an annual basis a written compensation report, which must 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. The report must be reviewed by the auditors and disclosed to the shareholders.

Contractual agreements that constitute an infringement of the Ordinance are null and void. Offences against the Ordinance are subject to criminal law sanctions going as far as imprisonment.

Swiss Banking Act

Under the Swiss Banking Act, in cases where a "systematically relevant bank" gets into financial difficulties, which result in the bank receiving state aid, the Swiss government can request an adjustment of the bank's remuneration packages. The term "systematically relevant bank" includes banks, financial groups and bank-dominated financial conglomerates whose failure would significantly harm the Swiss economy and the Swiss financial system; at present: Credit Suisse Group AG, UBS AG, Zuercher Kantonalbank, Raiffeisen, PostFinance AG. Such adjustment of the bank's remuneration packages could include the prohibition of payment of variable remuneration in whole 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"). The Circular defines minimum standards for the design, implementation and disclosure of remuneration schemes in financial institutions. On 22 September 2016, FINMA amended the Circular so as to, inter alia, release smaller institutions from some of the provisions. The amended Circular entered into force on

1 July 2017. The following considerations are based on the amended Circular.

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 implementation of the principles of the Circular is mandatory for (i) banks, securities traders, financial groups and conglomerates that are required under the applicable capital adequacy rules to maintain equity capital of at least CHF10 billion (CHF2 billion until 30 June 2017), and (ii) insurance companies, groups and conglomerates that are required to hold equity capital amounting to at least CHF15 billion in line with the risks to which they are exposed. This means that the Circular is binding only for the two big banks and the largest Swiss insurance groups. For firms that do not meet these threshold values, the implementation of the principles of the Circular is not mandatory, but it is recommended that the Circular is taken into account as best practice guidelines.

The main principles of the Circular include the following:

- the remuneration scheme of the firm must be simple, transparent, enforceable and oriented towards the long term;
- the firm's independent control functions and experts must be involved in designing and applying the remuneration scheme;
- the structure and level of remuneration must be aligned with the firm's risk policies and designed so as to enhance risk awareness;
- variable remuneration must be funded through the long-term economic performance of the firm and granted according to sustainable criteria;
- the size of the total bonus pool must depend on the long-term performance of the company; if results are poor, the total pool is to be reduced or omitted completely;
- serious violation of internal rules or external provisions by a particular employee must result in a reduction or forfeiture of variable remuneration; and
- the company must defer payment of part of the remuneration and deferred remuneration is to be designed in such a way that it takes into account the business strategy and risk policies of the company.

1.5 Other Terms of Employment

Vacations and Vacation Pay

The employer must allow the employee during each year of service at least four weeks' paid holiday 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 must 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 not enforceable. Hence, if the employee cannot take leave in the qualifying year, he or she may carry over his or her holiday entitlement to the next year. This means that entitlement to vacation cumulates itself from one reference period to the next. When taking holidays, the employee always reduces the oldest entitlement. The employee may exercise his or her right until the end of the five years' period of limitation.

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

Where in a given year of service the employee through his or her own fault is prevented from working for more than a month in total, the employer may reduce his or her holiday entitlement by one twelfth for each full month of absence. Where the total absence does not exceed one month (two months for a woman in the case of pregnancy and confinement) in a given year of service and is the result of personal circumstances for which the employee is not at fault, such as illness, accident, legal obligations, public duties or leave for youth work, the employer is not entitled to reduce the employee's holiday entitlement. This latter provision has to be interpreted in the sense that the employer may only reduce the holiday entitlement from the second month (or third month in the case of pregnancy or confinement). Only when there has been a fault of the employee 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: Where the employee is prevented from working by personal circumstances for which he or she is not at fault – such as illness, accident, statutory obligations or public duties – the employer must pay the employee's salary for a limited time, including fair compensation for lost benefits in kind, provided the employment relationship has lasted or was concluded for longer than three months. Statutory obligations and public duties include military service and civil service for conscientious objectors and such public duties as fall on members of a public authority, a communal council, a jury, a witness, etc.

The duration of payment during absence mainly depends on the duration of employment. During the first year of employ-

ment, the employer must pay three weeks' salary. After the first year of employment has been completed, the wage is paid for a longer period, but this period is not fixed in the Code of Obligations. The courts usually apply scales (e.g. Berne scale, Basle scale, Zurich scale) fixing the duration of payment of wages 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 collective employment contract may derogate from the above provisions provided it gives the employee terms of at least equivalent benefit. For instance, the employer may receive a sum which is lower than the whole wage, but for a longer period. The same provision may apply when the employer bought daily benefits insurance. The insurance benefit may replace the wage. Judicial precedents and doctrine admit that the equivalence is respected when the employer pays at least half of the premiums, the payment of daily allowances reach 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, a female employee is entitled to 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 is paid of 80% of the average earned income achieved before confinement. 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 the purpose of 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 leaves: 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; mothers benefit from maternity leave, see above), visiting sick close relatives, the death of close relatives and moving house. Further, 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, attendance of religious events, etc. However, hairdresser visits, sports activities or club events do not qualify as customary hours off work.

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

Confidentiality and Non-Disparagement
Besides his or her duty to carry out the work assigned to him or her with due care, the employee is bound loyally to safeguard the employer's legitimate interests.

The duty of loyalty includes the employee's obligation of non-disparagement, such as derogatory comments about the employer or towards work colleagues or third parties.

Another consequence of the duty of loyalty is the employee's obligation not to exploit or reveal confidential information obtained while in the employer's service, such as manufacturing or business secrets. However, the duty to keep secrets is not limited to manufacturing and business secrets. It also extends to other confidential matters in which the employer has an interest in secrecy. The employee remains bound by such duty of confidentiality even after the end of the employment relationship to the extent required to safeguard the employer's legitimate interests.

Employee Liability
The employee is liable for any loss or damage he or she causes to the employer whether wilfully or by negligence.

The employer only has to prove the breach of contract and the damage caused by it. It is then up to the employee to prove that he or she was not at fault. The fault must be assessed in accordance with 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 of which the employer was or should have been aware.

These criteria must also be taken into account in the assessment of damages. Based on such criteria, the court may reduce (including to zero) the obligation to pay compensation. The following are considered as reasons for reduction:

- Occupational risk: This refers to cases in which the damage represents a typical operational risk (e.g. motor vehicle driver's traffic accident; broken crockery in the hotel industry).

- The employee's abilities and characteristics that the employer knew or should have known (e.g. little experience or unreliability).
- 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 him or her.
- Employee's financial distress.
- 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 case law of the Federal Supreme Court, the employer must assert known or apparent claims for damages by the end of the employment relationship at the latest in order 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 clarified the question of the statute of limitations, it is to be assumed that claims for damages lapse after ten (rather than five) years.

2. Restrictive Covenants

2.1 Non-Competition Clauses

Validity of non-compete clauses

During the employment relationship the employee must not perform any paid work for third parties in breach of his or her duty of loyalty, in particular if such work is in competition with his employer. The parties may also agree on post-contractual non-competition obligations. Such a clause obliges the employee to refrain from competing against his or her employer in any matter after the termination of the employment relationship. In particular, the employee must refrain from operating a competing business on his or her own account, from working for such businesses and from having an interest in such a business, where a competing business is considered to be one operating in the same business field and which appeals to the same customers.

Post-contractual non-competition clauses are valid and enforceable if they meet the following conditions:

- The employee must have had access to the employer's customers or manufacturing or business secrets; a secret is something the employer wishes to keep from the knowledge of his competitors and only few people know of.
- The information obtained by the employee could seriously harm the employer.
- The non-competition clause must be in written form, countersigned by the employee.
- As the prohibition against competition must not harm the employee's earning prospects, such clauses must be reasonably limited with regard to their duration (it may exceed three years only in special circumstances; generally, a term of one year is considered to be reasonable), the place where they should apply and the type of operation covered.
- Additionally, 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 null and void.

The prohibition against competition terminates at 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 widely 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 that the non-competition clause may be enforced.

Enforcement of non-compete clauses

In case of a violation of the non-competition clause, the employer may ask for a financial compensation for the loss suffered. Furthermore, the parties often agree to a contractual penalty. Unless otherwise agreed upon in written form, the employee can free himself or herself from the non-competition obligation by paying the contractual penalty, but is still liable for further damages caused. If specifically agreed, the employer has the right to request the court prohibit the employee from continuing the competing activity. The courts are willing to enforce 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, a solicitation of employees during the existence of the employment contract is not allowed.

After the contract has ended, the employee may generally solicit employees of the former employer, unless the parties agreed upon a non-solicitation provision. Such provisions must be in writing and are subject to the same preconditions as the non-competition clause, ie they must be reasonably limited with regard to duration, place and type of operation, the employee must have had access to the employer's customers or manufacturing or business secrets, and the secret information obtained by the employee could seriously harm the employer. The courts are generally reluctant to accept such clauses. In addition, the same reasons as for the termination of non-competition clauses apply: the non-solicitation obligation lapses if the employer's significant interest in maintaining the non-solicitation clause has ceased.

The clause also becomes void 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.

In the case of violating the non-solicitation clause the employee is liable for damages caused.

With reference to customers
The solicitation of even a single customer is considered to be a form of competition. Therefore, the non-solicitation of customers is subject to the restrictions as described above for non-competition clauses.

3. Data Privacy Law

3.1 General Overview of Applicable Rules
The Code of Obligations in its article 328 *b* and the Swiss Federal Act on Data Protection contain provisions on employees' privacy. According to these provisions, the employer may process data concerning an employee only to the extent that the data relate to the employee's suitability to fulfil his or her job or are necessary to perform the contractual duties. Such data must have a close connection to the employment. Furthermore, the processing of data must be carried out in good faith and must be proportionate, the data may only be processed for purposes indicated to the employee at the time of collection, evident from the circumstances or provided for by law, and the employee must be aware of any data gathering and of its purpose as well as of the identity of the users of the data. Employees are in general entitled to get unlimited and unconditional access to all the data that has been collected in their regard. The employer must provide copies or similar written extracts of the respective data within 30 days. The employer must not without justifiable reasons communicate sensitive information such as personal opinions, information on health and on other intimate matters to third parties.

The transfer of data abroad without the employee's consent is not permitted if the transfer could seriously harm the personality rights of the employee concerned, which is especially the case if the foreign legislation cannot guarantee an appropriate level of protection.

Employees are to be informed about control measures. Means of control, such as monitoring activities (surveillance, video, internet), are only permitted for the purpose of security or to control the proper use of the business infrastructure and working time, but not to monitor an employee's behaviour. They must be codified in internal regulations and the latter must be communicated to the employee. The employee should refrain from using social media and other new communication technologies in an excessive manner, while the employer may generally not control the content of the employee's private use of the internet, or only within reason and under the same preconditions as the gathering of data in general.

After the employment relationship has ended, all data concerning the employee must generally be destroyed by the employer. Data may be retained under limited circumstances, eg until it is certain that no dispute regarding the employment relationship has evolved or the data will no longer be used for a job reference of the former employee.

4. Foreign Workers

4.1 Limitations on the Use of Foreign Workers
Swiss labour law follows a dual system when it comes to granting foreigners access to the Swiss labour market. Citizens of the Member States of the European Union (other than Croatia and, until June 2019, to a certain extent Romania and Bulgaria) and the European Free Trade Association (EU-27/EFTA nationals) are generally admitted to the market 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"), whereas more restrictive regulations apply to non-EU/EFTA nationals. EU-27/EFTA nationals need to register with the communal authorities and apply for a residence permit in order to live and work in Switzerland. A separate work permit is not required. If the foreign employee concludes an employment contract for less than one year he or she is entitled to obtain a short-term residence permit for the duration of the employment agreement (short-term residence permit L), whereas an employment contract of more than one year or with an indefinite duration qualifies 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.

Since 1 June 2007, citizens of Germany, France, Austria, Italy, Spain, Portugal, the UK (after the withdrawal of the UK from the EU, these regulations may, however, no longer apply to UK citizens), Ireland, Denmark, Sweden, Finland, Belgium, the Netherlands, Luxembourg, Greece, Cyprus, Malta, Norway, Iceland and Liechtenstein (EU-17 and EFTA) benefit from the full free movement of persons according to the Treaty on Free Movement. For the more recent members of the EU, ie Poland, the Czech Republic, Slovakia, Hungary, Estonia, Latvia, Lithuania and Slovenia (EU-8), the full right to free movement without any job market-related restrictions is effective as of 1 May 2011. For the newest members Bulgaria and Romania (EU-2), the respective regulations apply as of 1 June 2016, but a special safeguard clause to restrict the immigration from these countries in case of a

massive increase (more than 10% in excess of the average for the previous three years) remains in force until 31 May 2019. The Treaty on Free Movement also applies to Croatia, which joined the EU in 2013. Full free movement of citizens of Croatia is expected to be in force as from 1 January 2024, whereas a special safeguard clause to restrict the immigration from Croatia remains in force until 31 December 2023. Until then special restrictions generally apply to citizens of Croatia intending to work in Switzerland, especially that Swiss nationals and EU-27/EFTA nationals have priority in obtaining a job. Only if an employee from these countries cannot be found, and provided the salary and working conditions are equal to domestic standards, may Croatian nationals be, within the limitations of the quota system, granted a work permit.

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 abroad at least once a week.

Non-EU-27/EFTA nationals do not profit from the advantages provided by the Treaty on Free Movement. They are only admitted to the Swiss labour market if their admission serves the economic interest of the country, if they are properly qualified for the job (ie degree from a university or similar institution as well as several years of professional experience), if they have a suitable accommodation in Switzerland, and if no other Swiss or EU-27/EFTA-national employee 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 are granted by the cantons every year to non-EU-27/EFTA nationals.

4.2 Registration Requirements

An EU-27/EFTA national must register with the communal authorities at his or her place of stay and has to apply for a B- or L-residence permit before commencing his or her employment.

Croatian citizens (and, to a certain extent and only until June 2019, Romania and Bulgaria) 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 them to issue the work permit. Once the work permit is issued, the foreign employee must register with the communal authorities of the Community where he or she plans to live, and the employee is allowed to take up work in Switzerland. The procedure in detail may differ from canton to canton.

5. Collective Relations

5.1 Status of Unions

In Switzerland, the trade union movement is not unified. The two most important organisations are the Swiss Confederation of Trade Unions ("*Schweizerischer Gewerkschaftsbund*") and Travail Suisse. The Swiss Confederation of Trade Unions forms an umbrella confederation that covers 16 single trade unions and represents a total of 380,000 workers. Travail Suisse covers 11 unions and represents 150,000 members. Today only about 20% of workers are organised in unions.

Nevertheless, the influence of trade unions has been – and still is – considerable. The trade unions created many institutions for the benefit of workers, such as unemployment insurance. Further, the trade unions negotiate and conclude collective bargaining agreements and exercise political influence on legislation.

5.2 Employee Representative Bodies - Elected or Appointed

According to the Act on Information and Consultation of Workers, in enterprises with at least 50 workers, the latter may elect representatives ("works councils"). A fifth of the workforce (or 100 employees) can ask for a vote and if the majority of the voting employees support the request, elections have to take place. The election will be organised by the employer and the employees jointly. The works council shall include at least three persons.

Only a few companies have set up works councils in Switzerland. For enterprises with fewer than 50 employees, workers act as representatives.

The works council safeguards the workers' interests vis-à-vis their employer and regularly informs the employees on its activities. As a rule, works councils do not have a right of co-decision but only the right to information and consultation. The employer has to inform the works councils on all matters on which they need information to fulfil their tasks and they have to be consulted on:

- all questions about security at work and health protection;
- the organisation of working hours (eg introduction of evening work);
- specific measures linked to night work;
- collective dismissals and negotiations on a corresponding social plan;
- transfer of undertakings;
- selection and change of pension fund, etc.

The right to consultation includes the right to be heard and have a say before the employer takes a decision and to a statement of reasons for the decision if the employer does

not take or only partially takes into account the objections of the works council.

The works council has the competence to conclude contracts with the employer in two areas:

- Agreement on work regulations in industrial enterprises: the content of these can be health protection, accident prevention, workplace order, employee behaviour, administrative penalties and other provisions relating to the relationship between employer and employee.
- Introduction of simplified working time recording.

5.3 Collective Bargaining Agreements

Collective bargaining agreements ("CBAs") are contracts between employers and workers' associations regulating working conditions and the relationship between the CBA parties. On the employers' side, one employer or several employers or employers' associations and on the employees' side only workers' association(s) (trade unions) may be parties to a CBA. For the conclusion of a CBA, a sole condition must be realised on the workers' side: the workers' association must have acquired legal personality (association or co-operative society).

With regard to contents, a CBA usually includes provisions on the conclusion, content and termination of the individual employment contract (normative provisions), provisions on the rights and obligations of the CBA parties among themselves (contractual provisions) and provisions on control and enforcement of the CBA.

The normative provisions of a CBA automatically become an integral and mandatory part of the individual employment contract between an employer and an employee during the term of validity of the CBA. 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.

The subject of the normative provisions may include the following:

- wages and other compensation;
- continued payment of wages in the event of illness, maternity and military service;
- holidays;
- working time regulations; and
- extension of protection against dismissal.

At the request of all contracting parties, the government declares a CBA mandatory for the entire industry or profession. This means that its scope is extended to all employers and employees (including those who are not organised) in an industry or profession.

6. Termination of Employment

6.1 Grounds for Termination

Cause is required to terminate a fixed-term employment relationship. In the absence of cause, an employment relationship of this type cannot be terminated 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 ordinarily terminate an employment relationship of indefinite duration. By giving notice to the other party, both the employer and the employee may terminate an employment relationship of this type for any or no reason (including for poor performance).

However, notice of termination must not be given for abusive reasons. A termination may be abusive if given on account of an attribute pertaining to the other party's personality (discriminatory termination), because the other party exercises a constitutional right, solely to prevent claims under the employment relationship from accruing, because the other party asserts claims under the employment relationship and in certain other exceptional cases.

Other than in the case of collective redundancies (see below), no different procedures depending on grounds for dismissal apply.

Collective Redundancies

Collective redundancies are notices of termination given by the employer to employees of a business within 30 days of each other for reasons not pertaining personally to the employees and which affect:

- at least ten employees in a business normally employing more than 20 and fewer than 100 employees;
- at least 10% of the employees of a business normally employing at least 100 and fewer than 300 employees; or
- at least 30 employees in a business normally employing at least 300 employees.

The provisions on collective redundancies do not apply in the event of cessation of business operations by court order or in the case of collective redundancies due to bankruptcy.

An employer intending to make collective redundancies must provide the employee representatives or, where there are none, the employees directly with all appropriate information, including the reasons for the collective redundancies, the number of employees to whom notice may be given, the number of employees normally employed in the busi-

ness and the period in which the employer plans to issue the notices of termination. The employer is required to send a copy of the information given to the employee representatives or the employees, whichever is the case, 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. The employer must give the employee representatives or the employees at least the opportunity to formulate proposals on how to avoid the redundancies or limit their number and how to mitigate their consequences. However, the employer is not required to implement any proposals 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 the problems created by the intended collective redundancies but it is not competent to order the employer to implement any 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 collective bargaining agreement, the employer's counterparty in the negotiations is the employee associations that are party to the collective bargaining agreement. Otherwise, the employer must negotiate with the employee representatives or, where there are none, 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 employer has not properly conducted the consultation procedure in the context of collective redundancies. As a consequence, the employer must pay compensation of up to two months' salary to each employee affected by a termination.

6.2 Notice Periods/Severance

Required Notice Periods

Unless an employment relationship is terminated for cause with immediate effect, termination requires the statutory or contractual notice period to be observed. The parties may agree on the length of the notice period in the employment agreement, 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 must as a matter of mandatory law be equal for both the employer and the employee. If an employment agreement provides for different notice periods, the longer period will apply to both parties.

By virtue of law, the employment relationship may be terminated by giving one month's notice during the first year of service, two months' notice in the second to the ninth year of service and three months' notice thereafter, in each case as per the end of a calendar month. These notice periods may be amended by written individual, standard or collective employment agreement, but they may be reduced to less than one month only by collective employment agreement and only for 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 considered to be the first month of an employment relationship, but it may be extended to up to three months.

Severance

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

A rule on 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 become practically obsolete. The reason for this is not only that employees fulfilling both these criteria have become rare but also because payments made by the employer to the employee's pension plan can regularly be deducted from the severance payments and the statutory employer contributions to the employee's pension fund normally outweigh the amount of the severance payments.

Specific Procedures

Other than respecting the notice requirements, Swiss law does not require an internal appeal or other procedures for implementing the termination of an employment relationship. In particular, no third party advice, consent or authorisation is required to terminate the employment relationship. However, the terminated party may raise claims arising out of or in connection with the termination in regular court proceedings (for details on such claims, see **7 Employment Disputes**).

Specific procedures and consultation proceedings apply in 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 defined as 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 courts apply a high standard in accepting cause. In any case, under no circumstances may the court hold that cause is constituted by an employee being prevented from working through no fault of his or her own.

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 in a breach of contract by one of the parties, that 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 the circumstances.

Where the employer dismisses the employee with immediate effect without cause, the employee is entitled to damages in the amount he or she 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 the employee saved as a result of the termination of the employment relationship or that he or she earned by performing other work or would have earned had he or she not intentionally forgone 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 way of mutual consent at any time. No form requirements apply to a termination agreement. It may even be entered into implicitly.

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

By way of a release, the employee is released from his or her duty to work during the notice period. All other contractual and statutory obligations of the employee (eg duty of loyalty or not to compete) and the employer (eg duty to pay the base salary and other salary components) remain in place until the end of the employment relationship.

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

Termination agreements may be problematic under several aspects. First, if the termination agreement terminates the employment relationship as per a date which is before the expiry of the notice period, the employee may forfeit the right to receive salary until the expiry of the notice period. Further, by agreeing to a termination as per a particular date, the employee may waive protective rights afforded to him or her by virtue of mandatory law, such as the right to be protected from termination during certain blocking periods (for details, see **6.5 Protected Employees**). Finally, the employee may not waive mandatory claims arising out of the employment relationship during the employment and before 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 the employee's waiver of salary or protective rights is compensated by a severance payment or if the employee wishes to get out of the employment relationship before the expiry of the notice period because he or she wishes 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 null and void in its entirety.

6.5 Protected Employees

The employer must 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 given, for example, on account of 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 considered to be abusive if 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.

Courts have ruled that, depending on the age and years of service of an employee, the employer has a more pronounced duty of care towards employees and a termination in violation of this duty has in exceptional cases been considered abusive.

For the consequences of a termination during a blocking period and 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 (for circumstances under which a termination may be abusive, see **6.1 Grounds for Termination**). An abusive termination effectively ends the employment relationship. However, the employer must pay monetary compensation to the employee. The court determines the amount of compensation taking into account all circumstances, but the compensation must not exceed an amount equivalent to six months of the employee's salary. Claims for damages on other counts (eg for breach of contract) are reserved. An employee seeking compensation for abusive termination must submit his or her objection to the notice of termination in writing by no later than the end of the notice period. The employee must then bring his or her claim for compensation to court within 180 days after the end of the employment relationship. Only in gender discrimination cases 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, the employee is entitled to damages in the amount he or she 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 a 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 null and void. If notice was given prior to the commencement of a blocking period but the notice period has not yet expired at the time an event occurs which triggers 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 the employee's right to receive his or her salary are prolonged.

7.2 Anti-Discrimination Issues

Swiss law knows neither a general prohibition against discrimination in employment relationships nor a general principle of equal treatment of employees in employment relationships governed by civil law. However, the employer is under a duty to acknowledge and safeguard the employees' personality rights. Courts and legal scholars have concluded from this principle that an unjustified and arbitrary discrimination against an employee relative to other employees may violate that employee's personality rights. Within that limited scope, employees are protected against any kind of discrimination, regardless of its basis (race, sex, pregnancy, age, nationality, religion, etc). The Swiss Federal Supreme Court has held that a (discriminatory) violation of the employee's personality rights requires that the employee is treated worse than a multitude of other employees without objective reasons. This means that there is no protection against the (arbitrary) better treatment of an employee over others.

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

- It is recognised that employers must not discriminate against single employees when issuing directives or granting voluntary employee benefits, such as severance payments or voluntary bonuses.
- The Swiss Federal Act on Gender Equality ("GEA") states that employees must not be discriminated against relative to others on the basis of their sex, including on the basis of their marital status, their family situation or (in the case of female employees) pregnancy. This prohibition applies to all aspects of the employment relationship, in particular to

hiring, allocation of duties, setting of working conditions, pay, promotion and dismissal.
- The Swiss Federal Act on Equality of Persons with a Disability states that the federal government as employer takes every possible effort to afford disabled persons the same opportunities as everybody else. This Act is only applicable to the state and state agencies ('public employers'), however.
- Finally, the Treaty on Free Movement provides for equal treatment of employees who are nationals of either contracting party (ie the European Community and its Member States on the one hand and the Swiss Confederation on the other). Such persons may not, by reason of their nationality, be treated differently from employees who are nationals of the other contracting party as regards conditions of employment and working conditions, in particular as regards pay or dismissal.

Burden of Proof
Pursuant to the general rule on burden of proof under Swiss law, the burden of proving the existence of an alleged fact rests on the party who derives a right from that fact. This means that if an employee claims to have been discriminated against based on age, race or other criteria, they have to prove the discrimination. The GEA deviates from this general rule for gender-based discrimination in the sense that if the employee can furnish prima facie evidence, the burden shifts to the employer to prove that no discrimination occurred.

Relief and Damages
Pursuant to the GEA, an employee affected by discrimination may file a claim to (i) prohibit or end any threatening discrimination, (ii) order the offender to end an existing discrimination, (iii) declare and find that a discrimination exists and continues to have disturbing effects or (iv) 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, the aggrieved person has the right to claim damages but has no right to employment. In the particular case that a termination is determined to be abusive because it is given without good reason 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 (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 three monthly salaries.

If a discrimination involves other categories such as age or race, remedies are to be sought in accordance with the employment law provisions in the Code of Obligations. The latter provides for the employer's liability for damages arising out of a violation of the employer's duty to protect the employee's personality and for remedies in case of abusive termination respecting the notice period, or in case of an unjustified termination without notice.

If an abusive termination of an employment relationship fulfils the criteria of a discriminatory termination under the GEA, the latter prevails. A cumulation of both compensations is excluded. The same holds true in the case of an unjustified termination without notice fulfilling the criteria of a discriminatory termination.

8. Dispute Resolution

8.1 Judicial Procedures

Specialised Employment Forums
Labour disputes are handled by specialised labour courts in accordance with cantonal procedural laws. The cantons are free to specify the competent court and its composition. If there is no labour court installed, an ordinary district court is competent to hear employment-related claims. The panel consists of a sole 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 of the public and private sectors, and be gender equal. The aim of such conciliation proceedings is to find an amicable solution between the parties. Many cases settle at this stage.

Employment disputes with an amount in dispute below CHF30,000 or related to discriminations pursuant to the GEA are governed by the principle that the courts, to a certain extent, have to establish the facts ex officio. This means that the court may consider any facts that become known to them and that the court has a duty to ask questions to prompt the parties to state the relevant facts and adduce the necessary evidence. This is intended to ensure the goal of "social civil proceedings". The economically weaker party should be protected and proceedings accelerated.

Class Action Claims
In Switzerland, no class action claims are available. They are considered foreign to the Swiss legal system because 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.

Under the Civil Procedure Code, there are only very limited instruments by which several claimants may jointly file a

claim: eg where substantive law obliges the parties to the same legal relationship to bring an action jointly or where these parties can only be sued jointly (eg heirs), or if parties for the sake of procedural efficiency decide to file a claim jointly. In the latter case, such joint filing is only permitted if the seized court has jurisdiction to hear each individual claim and if the same type of proceedings is applicable to all claims.

In addition, an association of regional or national importance, which is mandated by its by-laws to maintain the interests of certain groups of persons, may file claims ("representative actions") in its own name for a violation of the personality rights of such groups of persons (action for injunctive or declaratory relief, action for an order to end the violation). However, such an association may not file a damages claim.

In 2013, the Swiss Federal Council initiated discussions to revise the Civil Procedure Code to provide for better measures of collective redress. In the view of the Swiss Federal Council, measures for better collective legal protection are particularly relevant in the areas of consumer protection, financial and capital market law, personality protection as well as equality and data protection law. The Federal Council wants to facilitate the assertion of claims in the event of mass damages by means of a new regulation of representative actions and the creation of a group settlement procedure.

The associations should then also be able to assert claims for damages, such as damages resulting from the sale of defective products or from antitrust violations or unfair business practices affecting a large number of persons. However, the judgment that an association will obtain only has an effect for those persons who have authorised the association to conduct proceedings (opt-in system).

As a second essential element for improving collective redress, the Federal Council's preliminary draft provides for the creation of a new group settlement procedure. A person accused of a violation of the law shall have the possibility to conclude a group settlement with an association about the consequences of this violation of the law. Subsequently, the group settlement can be approved by a court upon request and declared binding for all persons concerned, unless they declare their withdrawal (opt-out system).

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 the results of the consultation procedure and subsequently submit a draft to parliament for consideration. It has not yet been decided when the draft will be discussed.

Representation in Court

In labour disputes – as in all other disputes – the law does not require legal representation in court. Each person can thus represent himself or herself in principle. This also applies before the Federal Supreme Court. Only if one party is obviously unable to conduct the proceedings itself can the court request it to appoint a representative. If the party fails to comply within the time limit set, the court shall appoint a representative.

A party can be represented in court, eg by a friend or another person of trust. However, only lawyers are entitled to offer professional representation in principle. One exception applies to labour disputes. Here a professionally qualified representative who is not a lawyer is also entitled to offer professional representation, insofar as this is provided for under cantonal law.

8.2 Alternative Dispute Resolution

Arbitration

Labour disputes regularly qualify as claims relating to financial interests and are thus generally considered arbitrable under Swiss law, which holds generally true for international arbitrations with their seat in Switzerland.

However, with regard to domestic arbitration, the Federal Supreme Court issued a heavily criticised decision in 2010 concerning Swiss parties that had concluded an arbitration agreement for disputes arising out of an employment contract governed by Swiss law. Under Swiss law, the employee cannot validly waive certain rights until one month after the termination of the employment relationship. The Supreme Court decided that given that such mandatory provisions (eg holiday entitlements etc) were not at the parties' disposal, such rights were not arbitrable.

The Supreme Court confirmed its decision in April 2018. That is, during the employment relationship and up to one month after its end, the conclusion of an arbitration agreement with regard to mandatory claims is inadmissible. The Federal Supreme Court responded to the criticism expressed in the doctrine of law, but concluded that a change in jurisdiction was unjustified. With regard to a possible split of the legal process, the Federal Supreme Court wrote that in case of doubt it could be assumed that the parties did not want a split of the legal process, ie for mandatory claims before state courts and for non-compulsory claims before arbitration courts.

The parties may, however, agree to settle all claims in arbitration after the one-month period following the termination of the employment relationship has elapsed. In fact, employment agreements with senior managers or expats sometimes and employee participation plans frequently have arbitration clauses.

Pre-dispute arbitration agreements
Since Swiss law provides for mandatory conciliation proceedings and many cases settle at this stage, mediation clauses in employment contracts play a subordinate role.

Mediation clauses are understood to mean party agreements according to which the parties agree, in the event of a dispute, to attempt mediation before litigation. Further, according to the clauses, legal action can only be taken if a settlement is not possible within a certain period of time.

Enforceability of such clauses depends on whether they were meant to provide for mandatory mediation, and whether the dispute resolution mechanism is litigation or arbitration. Whereas pre-arbitration mediation clauses are generally enforceable, pre-litigation mediation clauses are, according to overwhelming scholarly opinion and case law on this issue, valid but not enforceable. Hence, the disputing parties can take legal action at any time. Mediation is therefore not a prerequisite for the state procedure and the competent court is not prevented from conducting the state proceedings requested.

In the absence of cooperation from an agreed mediation, however, the defaulting party is in breach of contract and therefore also liable for damages. If the parties have secured the mediation clause with a contractual penalty, this can be enforced.

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Further, under the Civil Procedure Code, based on a mediation clause, each party is free to apply for a suspension of the conciliation or court proceedings, provided that the previously agreed mediation has not yet actually taken place.

8.3 Awarding Attorney's Fees

A prevailing employer can be awarded attorney's fees based on the general principle in Swiss civil procedure law that the losing party has to bear the procedural costs including attorney's fees and court costs. The payment is calculated based on schedules and not based on actual fees paid. It would usually not cover actual costs for attorney's fees. Even if an employee is entitled to legal aid in case of a lack of sufficient financial resources and if there is a reasonable chance to succeed on the merits of the case, such legal aid does not relieve the employee from bearing the party costs of the prevailing employer.

Further, the losing party has to bear the court costs. However, in employment disputes with an amount in dispute not exceeding CHF30,000, no court costs will be charged, either for the conciliation or for the litigation proceedings.

The court may deviate from the rule of cost allocation for attorney's fees and court costs in special circumstances, eg if an ordinary distribution seems unfair.