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Switzerland: Law & Practice and Trends & Developments

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Walder Wyss Ltd

SWITZERLAND

Law and Practice

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1. Employment Terms

1.1 Employee Status

Blue-Collar v White-Collar Workers

As a matter of principle, Swiss employment law does not provide for the traditional differentiation between blue-collar and white-collar workers, but it does occasionally provide for similar differentiations. This particularly applies to the following provisions contained in the Federal Act on Work in Industry, Trade and Commerce (the "Labour Act") relating to the maximum weekly working time and minimum rest periods.

- Employees holding a higher executive position, employees performing a scientific activity and employees performing an autonomous artistic activity are entirely exempt from any maximum weekly working time and minimum rest periods.
- For ordinary employees in industrial businesses, office staff, technical and other employees (ie, employees performing predominantly intellectual work in offices or office-like jobs), including sales personnel in large retail trade companies, the maximum weekly working time is principally 45 hours.
- For all other employees, particularly those with a predominantly manual field of activity, the maximum weekly working time is 50 hours. The same applies to office staff, technical and other employees, including sales personnel in large retail trade companies, working in establishments or parts thereof that employ a majority of employees to whom this maximum weekly working time of 50 hours applies.

Other Employee Statuses

There is a whole range of other employee status categories that are subject to special protection (particularly in connection with their working conditions and terminations) due to their particular personal situation (see **1.5 Other Employment Terms** and **7.5 Protected Categories of Employee**).

1.2 Employment Contracts

Permanent v Fixed-Term Employment Contracts

There are two main types of employment contract in Swiss employment law: permanent and fixed-term employment contracts.

While permanent employment contracts are entered into for an indefinite period and may only end upon notice of termination, fixed-term employment contracts cease automatically at the end of their fixed term and may, as a matter of principle, not be terminated prematurely. The only exception to this relates to dismissals for serious cause (see **7.3 Dismissal for (Serious) Cause**).

Parties' (Limited) Freedom to Choose a Type of Employment Contract

As a matter of principle, parties are free to choose the type of employment contract that best suits their needs. They may even agree on a hybrid construct – ie, an employment contract that provides for a fixed (maximum) term but may also be terminated earlier by way of notice of termination.

In order to guarantee a minimum of employee protection, however, case law has developed limits to such freedom. Most notably, multiple consecutive fixed-term employment contracts are to be reinterpreted into one permanent employment contract if there has been no objective reason for choosing consecutive fixed-term employment contracts over one permanent employment contract (so-called "illegal chain employment contracts").

(No) Formal Requirements for Employment Contracts

An employment contract is concluded by way of mutual, corresponding declarations of intent by the employer and the employee, pursuant to which the employee undertakes to work in the service of the employer for a limited or unlimited period, and the employer undertakes to pay remuneration to the employee for such work. As a matter of principle, such agreement does not require the observation of any form and can therefore also be concluded orally or even implicitly. However, specific employment contracts such as apprenticeship contracts and contracts with temporary workers require observance of the written form (ie, the contract must be signed by all persons on whom it imposes obligations).

Formal Requirements for Specific Contractual Provisions

For reasons of legal certainty and/or employee protection, a considerable number of specific contractual provisions may only be bindingly agreed upon by observing the written form. This applies, inter alia, to:

- deviations from the statutory compensation for overtime (see **1.3 Working Hours**);
- deviations from the statutory provisions regarding continued salary payments in the case of an employee's incapacity for work (see **1.5 Other Employment Terms**);
- amendments to the statutory notice periods (see **7.2 Notice Periods**); and
- non-compete clauses (see **2.1 Non-competes**).

1.3 Working Hours

Maximum Working Time per Week/Day

Pursuant to the Labour Act (see **1.1 Employee Status**), the weekly working time may only exceed 45 or 50 hours in exceptional circumstances, and various provisions with regard to minimum rest periods (in particular mandatory minimum breaks and the general prohibition of work during the night and on Sundays/public holidays) must be observed which, inter alia, result in a maximum daily working time of 12.5 or 13 hours (depending on the calculation method). However, these principles do not apply to all categories of employees and businesses.

Part-time employees are generally subject to the same provisions as full-time employees – ie, the maximum working time is not calculated pro rata temporis.

(No) Possibility of Flexible Arrangements

The parties' freedom to deviate from the above-mentioned principles is very limited; the provisions are basically mandatory.

Overtime and Extra Hours

Swiss employment law differentiates between overtime (ie, the hours worked in excess of the contractually agreed or customary weekly working time) and extra hours (ie, the hours worked in excess of the applicable maximum weekly working time, if any).

While the employee is obliged to perform overtime if such overtime is required and to the extent that the specific employee is able and may conscionably be expected to do so (less frequently the case for part-time employees), the performance of extra hours requires the existence of exceptional circumstances, in addition to the requirements for the performance of mere overtime.

In variable working time systems, there may be a third important category of hours worked in excess of the applicable weekly working time

(ie, hours worked based on the employee's time sovereignty).

Compensation for Overtime and Extra Hours

Pursuant to statutory provisions, overtime and extra hours are principally compensated by corresponding time off (if the employee consents) or an additional salary payment including a 25% surcharge (absent such employee's consent).

While the parties may contractually exclude any compensation (whether in cash or in kind) for overtime as long as they observe the written form, compensation is mandatory with regard to extra hours. However, for office staff, technical and other employees, including sales personnel in large retail trade companies, such mandatory compensation for extra hours only applies from the 60th extra hour per calendar year.

1.4 Compensation

Minimum and Maximum Compensation

As a matter of principle, the parties are free to agree on the employee's compensation, although there are deviations from this principle.

The most practically relevant minimum compensation requirements are as follows.

- Selected cantons provide for a general hourly minimum salary (Geneva, Jura, Neuchâtel, Ticino and Basel-Stadt).
- In June 2023, two communities (Winterthur and Zurich) voted in favour of a communal hourly minimum salary.
- Various Collective Bargaining Agreements (CBAs) and so-called standard employment contracts (ie, a special kind of legislative decree) provide for minimum salaries in selected sectors.

The most practically relevant compensation cap is for Swiss stock corporations whose shares are listed on a Swiss or foreign stock exchange. They are subject to certain restrictions with regard to the compensation paid to members of the board of directors, the executive board and the advisory board, as well as to persons close to them (eg, the prohibition of severance payments contractually agreed or provided for in the company's articles of association).

Thirteenth Monthly Salary

The parties are free to agree that the salary shall be paid in 13 instead of 12 monthly instalments. Absent a different agreement, such 13th monthly salary shall become due at the end of the year. Due to its legal nature as a salary component, the payment of the 13th monthly salary may not be declared subject to conditions, and must be paid on a pro rata basis if the employment ends before its due date.

Bonus

The term "bonus" is not defined by Swiss law. Accordingly, established case law provides that, depending on the specific (bonus) agreement and the pertinent company practice, a bonus can be qualified either as a salary component or as a gratification (or as one remuneration element consisting of two independent parts).

Legal qualification as salary component or gratification

A bonus qualifies as a salary component if the payment of the bonus and its amount are not subject to the employer's discretion. This is also the case if the exact bonus amount is clearly determinable independent of any subjective assessment.

A bonus qualifies as a gratification, however, if it is a voluntary extra compensation, meaning

that the entitlement per se or at least the exact amount of the bonus is ultimately at the employer's discretion.

In addition, if an employee's total compensation is below the five-fold Swiss median salary (approximately CHF381,660 in 2020), Swiss law requires that the bonus is only of an accessory nature in order to potentially qualify as a gratification. The bonus is of an accessory nature if it is of secondary importance in relation to the employee's salary; as a rule of thumb, the bonus may not exceed 100% of the salary in order to remain accessory. Absent such accessoriness, at least part of the bonus qualifies as a salary component.

Consequences of such legal qualification

The respective legal qualification (salary component v gratification) is of great importance: to the extent that the bonus qualifies as a salary component, it may not be declared subject to conditions (such as an ongoing/not yet terminated employment, vesting, forfeiture, etc) and the employee has a mandatory (pro rata) claim. The exact opposite is true for bonuses that qualify as entirely voluntary gratifications. In the case of gratifications to which the employee is entitled in principle, they have a mandatory claim to part of the bonus (which may not be determined arbitrarily).

1.5 Other Employment Terms

Vacation

An employee is entitled to at least four weeks of fully paid vacation per year (five weeks if the employee is under the age of 20), at least two weeks of which must be taken consecutively. The timing of the employee's vacation is determined by the employer, although the employer must take due account of the employee's wishes.

The vacation entitlement is mandatory and may not, in principle, be replaced by monetary or other benefits during the employment. Subject to exceptional circumstances, (financial) compensation is only possible at the end of the employment.

Other Absences

As a general rule, the employee is only required to perform their work to the extent that this can reasonably be expected from them. However, the fact that an absence is justified does not necessarily mean that it is also paid.

The most practically relevant reasons for absence are as follows.

- Illness, accident, legal obligations, public duties and pregnancy – if an employee is prevented from working by one of these (or equivalently severe) personal circumstances without being at fault, they remain entitled to their full compensation for a limited time, depending on (and increasing with) their years of service, but only if the employment has lasted or was concluded for longer than three months. Provided that the chosen alternative solution is no less favourable to the employee, it is possible to deviate from this rule (in writing) in employment contracts, standard employment contracts or CBAs. In connection with absences whose financial consequences are already covered by compulsory insurance (eg, in connection with accidents, disability and official duties), the employer is only obliged to pay the potential difference between the insurance benefits and 80% of the employee's compensation.
- Family responsibilities – to the extent that an employee is legally obliged to care for close relatives (ie, children, spouses and registered partners) and may not avert an absence for

this purpose by suitable organisation, the employee remains entitled to their full compensation as in connection with other legal obligations. Moreover, and potentially in addition to that, an employee is entitled to fully paid short-term leaves of up to three days per incident and a maximum of ten days per year in order to take care of a family member or partner living in the same household with a health impairment (and actually requiring care by the employee). Eventually, working parents of a minor child whose health is seriously impaired due to an illness or accident are generally (jointly) entitled to a care leave of up to 14 weeks per incident and care allowances of 80% of the previous average income (but not more than CHF220/day) during such care leave.

- Maternity – female employees are exempt from the obligation to work for 14 weeks after giving birth. To the extent that the Labour Act applies (see **1.1 Employee Status**), the respective exemption is 16 weeks and the employee is even prohibited from working during the first eight weeks. During the first 14 weeks, the employee is generally entitled to receive maternity allowances of 80% of the previous average income (but not more than CHF220/day). Should the new-born require hospitalisation, said allowance entitlement may be extended up to 22 weeks in total.
- Paternity – after the birth of their child, male employees are exempt from the obligation to work for two weeks within the first six months after the child's birth. During such paternity leave, the employee is generally entitled to receive paternity allowances of 80% of the previous average income (but not more than CHF220/day).
- Adoption – working parents who take in a child under the age of four for adoption are generally (jointly) entitled to an adoption leave of two weeks within the first year after taking in the child. During such adoption leave, the employee is entitled to receive adoption allowances of 80% of the previous average income (but not more than CHF220/day).
- Customary hours and days off – the employee is entitled to the customary hours and days off for dealing with urgent personal matters (such as doctor's appointments) as well as important family matters (such as the passing away of close relatives), but only to the extent that they cannot reasonably be dealt with during the employee's spare time. In spite of the absence of a general employer's obligation to continue compensation payments during such customary time off, the latter is assumed once the parties have agreed on a monthly or weekly salary without an express exception in this regard (the opposite is true for hourly salary earners).

Cantonal law may provide for additional entitlements (see the Swiss Trends & Developments chapter in this guide).

Confidentiality and Non-disparagement

Pursuant to the statutory employee's duty of loyalty, the employee must not exploit or reveal confidential information obtained while in the employer's service, such as manufacturing or trade secrets. While the respective confidentiality obligation applies unrestrictedly during the employment, its application after the end of the employment is limited to the extent required to safeguard the employer's legitimate interests.

The same duty of loyalty also requires the employee to principally refrain from any actions that could be economically damaging to the employer, including making any derogatory statements towards third parties (regardless of their veracity). Whistle-blowing is only pro-

tected under very limited prerequisites – ie, if the employee strictly adheres to the principle of proportionality.

Employee Liability

Principle

Subject to a few special provisions, the employee is generally liable for any financial damage they cause to the employer either deliberately or by negligence. While the burden of proof for the existence of a financial damage resulting from an employee's breach of contract lies with the employer, it is the employee who must prove that they were not at fault.

The main difference compared to the usual contractual liability lies in the special standard of care and the various circumstances that can lead to a reduction or even complete elimination of the employee's liability.

Circumstances reducing or eliminating the employee's liability

Of particular importance is the employee's degree of fault: mere minor negligence (ignoring something that should have been considered on closer consideration) may result in an extensive reduction or even complete elimination of liability. Medium negligence (ignoring important rules of conduct but not downright elementary duties of caution) may at least result in a significant reduction of liability.

Other practically relevant circumstances are the occupational risk, the level of education or technical knowledge required for the work in question, and the specific characteristics of the employee of which the employer is or should be aware.

Possibility of deviations in favour of the employee

The above-mentioned statutory principles represent the maximum employee liability. Contractual deviations are only possible in favour of the employee.

2. Restrictive Covenants

2.1 Non-competes

Statutory Prohibition of Competition During Employment

During the term of employment, an employee is prohibited from competing with their employer by virtue of the statutory duty of loyalty.

Post-contractual Non-compete Clauses

Validity and enforceability

The employer may only validly agree and enforce a non-compete undertaking subject to the following prerequisites:

- the non-compete clause must be agreed in writing, and must particularly determine the time, place and scope of the non-compete undertaking;
- the employee must have gained insight into the employer's customer base or manufacturing or business secrets in the course of the employment;
- the employer must face substantial harm as a result of such insight (this is not the case if, for example, the employee's services were predominantly characterised by their personal abilities);
- the employer must have a substantial interest in the prohibition of competition (such interest particularly ceases if the employment is terminated either by the employer without the employee having given reasonable cause to

do so or by the employee after the employer has given reasonable cause to do so); and
- the enforceability of a non-compete undertaking requires appropriate limitation in terms of place, time and scope so that there is no unreasonable impediment to the employee's economic advancement. While this is not a validity requirement, agreeing on a (substantial) consideration for the employee's compliance with the non-compete clause at least significantly increases the chances of the latter's enforcement. If a court, in its free discretion, deems an agreed non-compete undertaking to be unreasonable, it will reduce the respective undertaking to a reasonable extent.

Consequences of a violation

If the employee violates a valid and enforceable non-compete clause, they become liable to pay damages to the employer. In order to free the employer from the difficult proof of financial damages resulting from such violation, the parties regularly agree on a contractual penalty. The engagement in a competing activity as such may only be prohibited if this has been expressly and unambiguously agreed upon in writing, and if this is exceptionally justified by the employer's violated or threatened interests and the employee's particularly inappropriate behaviour.

2.2 Non-solicits

Non-solicitation Clauses With Reference to Employees

The statutory duty of loyalty prevents the employee not only from competing with the employer but also from enticing away employees during the term of the employment.

Pursuant to the rather controversial case law of the Swiss Federal Supreme Court (the SFSC), however, the fact that the statutory provisions only address post-contractual competition on the supply market (but not on the demand market) shall, as a matter of principle, exclude any valid agreements on the prohibition of enticing away employees after the termination of the employment. The situation shall only be different if such actions also affect the supply market, as is the case when temporary employees are being enticed away.

Non-solicitation Clauses With Reference to Customers

Since this always involves competition, any prohibitions with regard to enticing away customers are governed by the same restrictions as common non-compete clauses (see **2.1 Non-competes**).

3. Data Privacy

3.1 Data Privacy Law and Employment

As a general principle, the employer may handle data concerning the employee only to the extent that such data concerns the employee's suitability for their job, or to the extent it is necessary for the performance of the employment contract. The general provisions of the Swiss Federal Data Protection Act (DPA) also apply to employment relationships (as of 1 September 2023 in a revised version).

The DPA stipulates a number of principles, including proportionality, transparency and limitations on purpose. It notably also provides for a right of information. Under the previous version of the DPA, this right of information was regularly invoked by employees who have been dismissed by their employer with the purpose of accessing their entire "personnel file", even though the SFSC has found that a respective employee's request that is made solely for the

purpose of obtaining evidence for subsequent civil proceedings may be considered abusive. The revised version of the DPA now explicitly clarifies that the right of information is limited to personal data as such (ie, does not extend to entire documents) and that the request for information can be denied, restricted or deferred if it is manifestly unfounded (particularly if it pursues a purpose contrary to data protection) or if is manifestly querulous. The practical impact of this remains to be seen.

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

4. Foreign Workers

4.1 Limitations on Foreign Workers

In Switzerland, a dual system exists for the admission of foreign workers to the local labour market. Nationals of Member States of the European Union and the European Free Trade Association (EU/EFTA nationals) benefit from the Treaty of Free Movement (TFM) and generally do not need to meet special requirements in order to be permitted to work in Switzerland. However, the nationals of other countries (third-country nationals) may only be granted access to the Swiss labour market as employees if they meet the strict requirements according to the Swiss Foreigners and Integration Act. As an exception to this, the rights already obtained under the TFM by nationals of the United Kingdom prior to the end of 2020 principally remain protected.

4.2 Registration Requirements for Foreign Workers

EU/EFTA nationals wanting to engage in a remunerated activity in Switzerland according to the TFM are granted a residence permit, which automatically includes a work permit. After immigration to Switzerland, they must register at the community office of the future place of residence and apply to the responsible cantonal authorities for the residence permit. Subject to the presentation of a respective employment contract and depending on the duration thereof, either a short-term residence permit L or a residence permit B (for durations of one year or more) is generally granted. Cross-border commuters who do not have their main residence in Switzerland and who return to their home country at least once per week may apply for a special cross-border permit for the duration of five years. All three permits may be extended.

Under certain circumstances, an application for a residence permit is not required of EU/EFTA nationals. In such instances, a prior online notification via the so-called notification procedure suffices (eg, in the case of a temporary employment contract with a Swiss employer with a duration of less than three months).

Third-country nationals primarily have to apply for a work permit before a residence permit will be issued. Once the employer has submitted the application for the respective employee with all necessary documents, the cantonal labour office will assess it and, if approved, forward it to the federal immigration authority where, in the case of a positive decision, the work permit will be granted. Upon further request, the residence permit (permit L or B) is issued by the cantonal migration office.

5. New Work

5.1 Mobile Work

Need for a Parties' Agreement

As a matter of principle, mobile work is subject to a parties' agreement, ie, there is neither a general employee's right to mobile work nor a general employee's obligation to mobile work. Temporary exceptions to this may apply in exceptional situations (eg, during pandemics or to accommodate specific health needs).

Equipment, Materials and Expenses

Subject to an agreement or customary practice to the contrary, work equipment and materials shall be provided by the employer. However, the parties may even agree that the employee must provide these without any compensation.

However, necessary work-related expenses (including rent, electricity, internet, etc) must be mandatorily borne by the employer. No necessity is assumed if the employee's mobile working is at their own request and a permanent and suitable workplace is available in the office.

Data Privacy and Confidentiality

Mobile work may result in the application of additional data protection laws. In addition, the employee remains bound by their statutory duty of confidentiality irrespective of their place of work (see **1.5 Other Employment Terms**).

Occupational Safety and Health

The employer is obliged to take all reasonable measures to protect the physical and mental health of all their employees, including mobile workers. Within its scope of application, this also includes compliance with the health protection, working time and rest period provisions of the Labour Act (see **1.1 Employee Status**). However, the latter only apply to activities carried out in Switzerland; for activities carried out abroad, other laws may have to be complied with.

Social Security

Employees who are subject to the TFM and are residing in another member state of the European Free Trade Association or the European Union may not carry out a substantial part of their work from their country of residence if they are subject to the Swiss social security system (see Trends & Developments).

5.2 Sabbaticals

No General Employee's Right

In principle, there is no employee's right to take a sabbatical in the sense of an unpaid special leave in addition to their statutory rights regarding hours and days off and other absences (see **1.5 Other Employment Terms**). It is only in exceptional cases that there is a legal entitlement (eg, for women who are subject to the Labour Act (see **1.1 Employee Status**) and are pregnant, breastfeeding or have recently given birth). In some cases, CBAs (see **6.3 Collective Bargaining Agreements**) or the employment contract provide for a contractual entitlement.

Parties' Agreement

As a rule, the parties are free to agree on the specific terms and conditions of a sabbatical. While there is no formal requirement to be observed, it is generally in the interest of both parties to put this in writing.

Employer's Information Obligations

In any case, the employer is obliged to provide the employee with certain information on the insurance consequences of taking a sabbatical, which depend on their specific circumstances and may be rather complex.

5.3 Other New Manifestations

Driven by the experiences made during the pandemic, there is a strong tendency in practice toward greater digitalisation and flexibility, in particular regarding the places and times in which work may be performed. This is regularly manifested by the implementation of policies regarding mobile work, desk sharing and/or flexible working structures.

However, there are rather strict limits to this flexibility, especially to the extent that the working time and rest period provisions of the Labour Act apply (see **1.3 Working Hours**), or where mobile work in general and cross-border mobile work in particular is involved (see **5.1 Mobile Work**).

6. Collective Relations

6.1 Unions

Trade unions play a marginal role in some sectors of the Swiss economy, while for other sectors such social partners are highly relevant and active.

In a nutshell, the role of trade unions is to represent employees vis-à-vis employers and to assert the interests of employees on the political stage. Traditionally, this includes the fight for better working conditions, efficient social security and higher wages. Furthermore, in Switzerland, trade unions have established self-help and social institutions, such as unemployment insurance. One of the most important tasks of trade unions is negotiating CBAs (see **6.3 Collective Bargaining Agreements**) as counterparties to employers' associations.

6.2 Employee Representative Bodies

The participation rights of employee representative bodies in Switzerland are regulated by the Federal Participation Act, according to which employees of a company with a headcount of 50 or more are entitled to constitute a works council. At the request of 20% of the employees (or if demanded by 100 employees in a company with a headcount of more than 500), a vote must be held in order to determine whether the majority of those employees casting a vote are in favour of the suggested constitution of a works council.

If a works council has been set up, management must provide it with all the information necessary to carry out its tasks properly. In particular, the employer must inform the works council at least once a year about the business performance and its effects on the employment relationships.

Swiss employment law provides for the information and consultation rights of the works council in specific events. This applies to questions of occupational safety, the process of transfer of undertakings, and collective redundancy procedures.

In rare cases, the works council even has a right of co-decision making or, in other words, a type of veto right over certain decisions made by management.

The consequences of failing to involve the works council vary. For example, the dismissal of employees in the absence of an agreement on a social plan is valid, but may be abusive (see **8.1 Wrongful Dismissal**).

6.3 Collective Bargaining Agreements

A CBA is a contract between the employer or an employers' association and an employees' association.

The normative regulations become part of the individual employment contract. Those provi-

sions are mandatory and are directly applicable to all employees who benefit from a CBA by contract or by law. Unless they are beneficial to the employee, deviating clauses in employment contracts are invalid. Very often, the participating employers also apply the CBA to non-organised employees. Furthermore, CBAs regularly contain contractual provisions that regulate the general obligations and rights of the parties to it, as well as the enforcement of the CBA.

Upon the request of a party to the CBA, the competent authorities may declare a CBA to be generally binding. The effect of this is that the CBA automatically applies to all employers and employees in a particular economic sector or profession, including the ones that do not belong to any association or are not even aware of the existence of the CBA. This procedure has a big practical impact: as of 1 June 2023, as many as 81 CBAs had been declared generally binding (45 on a national level and 36 on a cantonal level).

7. Termination

7.1 Grounds for Termination

(Limited) Freedom of Termination

Ordinary terminations of employment (ie, terminations observing the applicable notice period) do not require a particular lawful reason, although the party giving notice must state its respective reasons in writing if the other party so requests. This is not least because the principle of freedom of termination is limited by the prohibition of terminations in bad faith (so-called "abusive" terminations; see **8.1 Wrongful Dismissal**).

Collective Redundancies

Collective redundancies (ie, the dismissal of a certain minimum number of employees within 30 days and for reasons not pertaining personally to the affected employees) are subject to specific procedural requirements. An employer may not decide to carry out collective redundancies before having informed (in writing and with a copy sent to the cantonal employment office) and consulted the works council or (if there is none) the employees. In the context of such consultation, the employer must at least provide the opportunity to formulate (non-binding) proposals on how to avoid redundancies, limit their number and/or mitigate their consequences, failing which any respective dismissal would qualify as abusive (see **8.1 Wrongful Dismissal**) and entitle each employee to a compensation claim of up to two monthly salaries. The minimum duration of such consultation depends on the circumstances of the individual case; for standard cases, two weeks is a suitable point of reference.

If the employer still intends to carry out collective redundancies after such consultation, they may take this decision and issue the required notices of termination. Moreover, the employer must inform the cantonal employment office about the results of the consultation and provide it with further appropriate information in writing, with a copy sent to the works council or (if there is none) to the employees. The latter is of particular importance since individual employment relationships terminated in the course of collective redundancies may not end until at least 30 days after such notification.

Duty to Issue a Social Plan

An employer normally employing at least 250 employees and intending to make at least 30 employees redundant within 30 days for reasons not pertaining personally to the affected employees is obliged to agree on a social plan with the works council or, in its absence, the employees – ie, an agreement setting out measures to

avoid redundancies, to reduce their number and to mitigate their consequences. If no agreement can be reached, however, the social plan will eventually be issued by an arbitral tribunal.

7.2 Notice Periods

Notice Periods

Required observance of notice periods

Unless the employer or the employee claims that there is good cause for a dismissal for serious cause, terminating a permanent employment contract always requires the observance of a notice period.

Statutory notice periods

Pursuant to the statutory provisions, the following notice periods apply:

- during the probation period (by default the first month of an employment), the employment may be terminated at any time by giving seven days' notice; and
- after completion of the probation period, if any, the employment may be terminated at one month's notice during the first year of service, at two months' notice between the second and the ninth year of service and at three months' notice thereafter, with all such notice to expire at the end of a calendar month.

Possible deviations from the statutory notice periods

Both the probation period and the notice periods (including their effective date) may be amended by written agreement, standard employment contract or CBA, subject to the following restrictions:

- while it is possible to exclude any probation period, the probation period may not be extended beyond three months;
- the notice period may not be less than one month (unless agreed within a CBA and for the first year of service only); and
- the notice periods must principally be the same for both parties (unless the employer has already given notice for economic reasons or at least expressed such an intention). If the parties nevertheless agree on unequal notice periods, the longer period is applicable to both parties.

Severance

Pursuant to the statutory provisions, the employer is only required to pay the employee compensation during the notice period. While the employer may not unilaterally move the termination date forward by providing a payment in lieu of the notice period, they may put the employee on garden leave during such period (possibly offsetting at least part of the employee's vacation and overtime balance and a replacement income), unless the employee exceptionally claims a legitimate interest in effectively rendering their work (eg, professional athletes and surgeons). However, subject to the respective prohibition with regard to Swiss stock corporations whose shares are listed on a Swiss or foreign stock exchange (see **1.4 Compensation**), providing for severance payments in employment contracts or CBAs is perfectly possible.

(No) Formalities to Be Observed

Issuing a valid notice of termination does not require the observance of any formalities, other than in connection with collective redundancies (see **7.1 Grounds for Termination**) or in the case of a respective contractual agreement (eg, a written form requirement provided by an individual employment contract). For evidentiary purposes, however, it is most recommendable to issue notices of termination in such a way that the fact and date of receipt can be proven.

7.3 Dismissal for (Serious) Cause

Dismissal for Serious Cause

Either party may at all times terminate an employment with immediate effect. While the law declares that dismissal for serious cause must be subject to the existence of good cause, even dismissal for serious cause without good cause results in an immediate termination of the employment. The (non-)existence of good cause therefore only determines the further legal consequences of dismissal for serious cause. Nevertheless, the party declaring dismissal for serious cause must state its respective reasons in writing if the other party so requests.

Good Cause

Good cause is assumed if the party declaring dismissal for serious cause may not reasonably be expected to continue the employment until the expiry of the applicable notice period or the agreed fixed term. While the competent court has a large margin of discretion when assessing this requirement and will consider all circumstances of the particular case, it is well established that good cause may only be affirmed in exceptional and particularly severe cases. Also, in order not to forfeit the right to dismissal for serious cause, it is necessary for the dismissal to be declared within a few days (usually two to three working days) of becoming aware of the relevant (good) cause.

Consequences of Dismissal for Serious Cause

As already explained, a dismissal for serious cause results in the immediate termination of the employment.

In the most practically relevant scenario, where the employer issues dismissal for serious cause due to an employee's (alleged) breach of contract, the following applies:

- if the employer exceptionally succeeds in proving good cause, the employee loses any claims arising from the employment that have not yet been earned (in particular future salary payments) and becomes liable to pay damages to the employer; or
- if the employer fails in proving good cause, the employee is entitled to what they would have earned if the employment had been terminated observing the applicable notice period or by expiry of an agreed fixed term (minus any savings and a replacement income resulting therefrom) and to an additional penalty payment of up to six month's salary.

(No) Formalities to Be Observed

With regard to the (absence of) formalities to be observed, the explanations in connection with ordinary terminations (see **7.2 Notice Periods**) principally apply mutatis mutandis. The only (rather theoretical) difference is that dismissal for serious cause may not even be declared subject to the observation of contractually agreed formalities.

7.4 Termination Agreements

Permissibility and Requirements

Swiss employment law principally allows for the conclusion of termination agreements, but there are strict limits on the parties' freedom of contract. Most importantly, termination agreements may not be concluded in order to circumvent statutory provisions protecting employees' interests (in particular, mandatory provisions in connection with incapacities for work due to illness or accident – see **7.5 Protected Categories of Employee**), but must rather constitute actual settlements in which the employer also makes concessions. In most cases, one of the very purposes for concluding a termination agreement is to obtain clarity with regard to the termina-

tion date by excluding any prolongation of the employment in connection with an employee's incapacity for work, so the parties regularly agree on an additional "voluntary" employer's payment to compensate the employee for such concession. Another popular motive for such additional employer's payment is to compensate for the impending consequences of an abusive termination (see **8.1 Wrongful Dismissal**).

Reflection Period

Pursuant to (controversial) case law, the conclusion of a termination agreement initiated by the employer requires the employee to be granted a sufficient reflection period. There are no other specific procedures or formalities to be observed when concluding termination agreements.

Consequences of Non-compliance

As non-compliance with the "actual settlement" or reflection period requirements may lead to the entire termination agreement being declared null and void, strictly adhering to these requirements is of the utmost importance in order to actually obtain the legal certainty envisaged in connection with the conclusion of termination agreements.

7.5 Protected Categories of Employee

Temporal and Substantive Protection against Dismissal

Notwithstanding the governing principle of freedom of termination, Swiss employment law provides for both temporal and substantive protection against dismissal. In this context, certain categories of employees benefit from stronger protection than others.

Categories Benefiting from Specific Temporal Protection

In particular, the following categories of employees benefit from specific temporal protection against dismissal (after completion of the probation period, if any):

- employees performing Swiss compulsory military service, civil defence service or alternative civilian service – protection against terminations during such performance and potentially during a certain period before and after;
- employees being (partially) incapacitated for work due to illness or accident through no fault – protection against terminations during such incapacitation, but at most for 30, 90 or 180 days (depending on the employee's years of service);
- pregnant employees and new mothers – protection against terminations during the pregnancy and for 16 weeks after delivery or during a prolonged maternity leave in connection with a hospitalisation of the newborn (new fathers do not benefit from a comparable temporal protection against terminations, however, and may only benefit from an extension of the notice period corresponding to the not yet taken days of paternity leave – see **1.5 Other Employment Terms**); and
- parents of a minor child with serious health impairments – protection against terminations as long as the entitlement to care leave exists, but no longer than six months from receipt of the first daily care allowance (see **1.5 Other Employment Terms**).

Generally, each of these circumstances triggers separate "proscribed periods", although an exception to this principle applies for incapacities for work arising from one and the same medical condition (relapses in particular).

Any notice of termination given during such proscribed periods is considered void and must

be re-issued after the expiry of the proscribed period in order to become effective.

Where notice of termination has been given prior to the commencement of a proscribed period, said notice remains effective. In this case, however, the notice period is temporarily suspended and does not resume until the expiry of the proscribed period. Finally, the prolonged employment is further extended until the next usual end date (ie, generally the next end-of-month, unless agreed otherwise) to ensure consistency with the usual job change dates.

Categories Benefiting from Specific Substantive Protection

The following categories of employees benefit from specific substantive protection against dismissal.

- Employees performing non-voluntary legal obligations, members of a trade union and employees performing trade union activities (in a lawful manner) and members of the works council or elected members of a body linked to the business – protection against terminations due to such status.
- Older employees with many years of service – this category may, under certain circumstances (in particular the employee's position), benefit from an increased employer's duty of care so that the employer must timely inform and consult the employee regarding an intended termination, grant the employee a last chance and also evaluate possibilities to continue the employment before effectively giving notice.

Any termination due to such status or in violation of an employer's increased duty of care would be considered abusive (see **8.1 Wrongful Dismissal**).

8. Disputes

8.1 Wrongful Dismissal

Grounds for Wrongful ("Abusive") Termination Claims

Despite the principle of freedom of termination, terminations can be considered abusive when issued in bad faith (see **7.1 Grounds for Termination**). This general criterion is specified in a non-exhaustive legal enumeration of circumstances.

A notice of termination is considered abusive when it is given by either party in the following circumstances:

- on account of an attribute pertaining to the person of the other party, unless such attribute relates to the employment or substantially impairs co-operation within the business;
- because the other party exercises a constitutional right, unless the exercise of such right violates an obligation arising from the employment or substantially impairs co-operation within the business;
- solely in order to prevent claims under the employment from accruing to the other party;
- because the other party asserts claims under the employment in good faith; or
- because the other party is performing a non-voluntary legal obligation.

A notice of termination given by the employer is considered abusive when it is given in the following circumstances:

- because the employee is or is not a member of a trade union or because they carry out trade union activities in a lawful manner;
- while the employee is an elected employee representative on the works council or on a body linked to the business and the employer

cannot cite just cause to terminate the employment; or
- in the context of collective redundancies, without having consulted the works council or (if there is none) the employees.

Consequences of Abusive Terminations

Even an abusive termination remains valid and there is, in principle, no claim to continued employment (see **8.2 Anti-discrimination** for an exception to this principle). However, the terminated party is entitled to a compensation payment of up to six monthly salaries (two monthly salaries in connection with collective redundancies – see **7.1 Grounds for Termination**). The exact amount of compensation is to be determined considering all circumstances of the particular case (such as the seriousness of the terminating party's misconduct).

Procedural Requirements

In order to avoid the forfeiture of such compensation claim, the party receiving notice must submit a written objection against the termination before the expiry of the notice period, and must bring the claim before the courts within 180 days of the end of the employment.

8.2 Anti-discrimination

General Principles

Anti-discrimination issues are generally raised in connection with abusive termination claims (see **8.1 Wrongful Dismissal**). In such cases, it is the terminated party that must prove the existence of the circumstances leading to the abusiveness of the termination.

Specific Provisions Regarding Gender Discrimination

Federal Act on Gender Equality

The Federal Act on Gender Equality (GEA) provides for specific protection against both direct and indirect discrimination on the basis of gender in all areas of working life, not least by providing for a special burden of proof and additional damages/relief.

Burden of proof

The GEA provides for a lowered burden of proof for the employee. In connection with the allocation of duties, the setting of work conditions, pay, basic and continuing education and training, promotion and termination (but not in connection with a discriminatory refusal of employment and sexual harassment), discrimination is presumed if the employee can at least substantiate this with prima facie evidence.

Applicable damages/relief

Under the GEA, an employee may challenge a termination if it takes place without reasonable cause following an employee's internal complaint of discrimination based on gender or an employee's initiation of respective proceedings before a conciliation board or a court (so-called revenge dismissal). However, according to an express GEA provision, the employee may also opt against continuing the employment and claim a compensation payment for abusive termination.

The GEA also provides for a whole range of remedies against gender discrimination beyond the field of terminations of employment. In particular, an employee may claim the (retrospective and future) elimination of a discriminatory pay gap. In the case of discrimination by way of sexual harassment, the employee may, inter alia, claim a compensation payment of up to six monthly average salaries in Switzerland, unless the employer proves that they took measures that have been proven in practice to be necessary and adequate to prevent against sexual har-

assment and which they could reasonably have been expected to take.

In the case of a discriminatory refusal of employment, the employee may claim a compensation payment of up to three monthly salaries.

8.3 Digitalisation

While international arbitration proceedings have been highly digitalised for quite some time, the same cannot be said about ordinary civil proceedings. For example, there is still no legal basis for conducting hearings before ordinary civil courts by means of videoconferencing which is why they are only permissible if all parties involved agree. While the expansion of digitalisation in the context of ordinary civil proceedings is a topic of several current legislative processes, their outcome is still unclear.

9. Dispute Resolution

9.1 Litigation

Specialised Employment Forums

As a matter of principle, employment disputes between private parties are adjudicated by the ordinary judicial instances. Many cantons have established specialised employment courts for this purpose.

Special provisions apply for employment disputes where the amount in dispute is less than CHF30,000, or for disputes that are based on the GEA (see **8.2 Anti-discrimination**). In these cases, the court generally establishes the facts ex officio and the respective proceedings are characterised by their simplicity and effectiveness in terms of time and costs (there are no court fees, for example, but, subject to further cantonal exemptions, there are costs for professional representation).

(No) Class Action Claims

Swiss law does not provide for class action claims, but the strengthening of collective redress is a current topic in the legislative process. Also, as the law stands, the court may already decide to order the joinder of separately filed claims.

Representations in Court

Generally, only lawyers are allowed to act as professional representatives in court proceedings. Cantonal law may provide for exceptions from this principle, however, particularly in connection with employment law disputes.

9.2 Alternative Dispute Resolution

Domestic Arbitration

While the topic of the domestic arbitrability of employment disputes is intensely debated in Swiss doctrine, the SFSC has recently confirmed that an employee's claims against their employer are not arbitrable if they arise from mandatory provisions of the law or a CBA. However, the situation looks different for arbitration agreements concluded one month after the termination of the employment: from this point in time, the parties may conclude an arbitration agreement with regard to any and all claims arising from the employment.

International Arbitration

In international arbitration, employment disputes shall principally be arbitrable without any specific restrictions.

9.3 Costs

In most cases, the general rule applies that procedural costs (court fees and costs for professional representation, if any) are allocated in proportion to the outcome of the case (ratio of prevailing and losing; see **9.1 Litigation** for the

potential absence of court fees and costs for professional representation in some cases).

Moreover, it is important to note that the potentially reimbursed costs for professional representation do not correspond to the actual costs incurred but are determined based on cantonal tariffs, mainly depending on the amount in dispute and hardly ever matching the effective costs. Subject to a respective (standard) agreement to this effect, any difference must be borne by the client.

Trends and Developments

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Walder Wyss Ltd

Walder Wyss Ltd is a dynamic presence in the market, with more than 260 legal experts across six locations in all language regions (Zurich, Geneva, Basel, Berne, Lausanne and Lugano). Clients include national and international companies, publicly held corporations and family businesses, as well as public law institutions and private clients. The firm's success is determined by its continuous growth, dedication and proximity to clients. Walder Wyss is the only Swiss law firm with a highly specialised employment team, which is spread across Zurich, Basel, Bern, Lausanne, Geneva and Lugano for seamless client service across offices and languages – German, English, French and Italian. The team currently consists of six partners and 23 counsel/managing associates/associates who deal with employment law issues exclusively.

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Introduction of New Minimum Wages

In light of two recent public initiatives, the cities of Zurich and Winterthur are the first Swiss municipalities to introduce mandatory minimum hourly wages for employees working within their respective jurisdictional limits. The minimum hourly wage in Zurich amounts to CHF23.90 gross per hour and Winterthur's equivalent is set at CHF23.00 gross per hour. While it currently remains unclear when the new minimum wages will be enacted in each city, both will likely include exceptions for internships of up to 12 months that are educational nature and apprenticeships, among others.

Once the minimum wages in Zurich and Winterthur have entered into force, they will complement the existing set of publicly mandated general minimum wages the cantons of Neuchâtel (currently at CHF20.77 gross per hour), Jura (currently at CHF20.60 gross per hour), Ticino (currently at CHF19.00 gross per hour), Basel-City (currently at CHF21.45 gross per hour) and Geneva (currently at CHF24.00 gross per hour) have already introduced in previous years.

It is important to note that these aforementioned minimum wages may increase each year, depending on inflation, as measured by consumer price indexes.

Although there are currently no other minimum wages applying to all industry sectors alike, employers should be aware that certain sectors, such as construction, commerce and gastronomy, may be subject to specific minimum wages through collective bargaining agreements and/or governmental decrees.

Extended Paid Parental Leave for Employees Based in Geneva, but not in Berne

On 18 June 2023, the people of Geneva voted to further extend parental leave for employees working within their canton. Although maternity leave in Geneva had previously already exceeded the federally mandated paid maternity leave of 14 weeks by an additional two weeks (ie, 16 weeks of paid maternity leave in total), parents in Geneva will soon profit from a total of 24 weeks of paid parental leave.

Under the new parental leave system, the eight additional weeks can be split between the two parents. However, at least six weeks thereof are reserved for the person not receiving maternity leave allowances (ie, fathers, adoptive parents or same sex partners). As a result, fathers in Geneva may profit from at least six and a maximum of eight weeks of paternity leave, instead of the two weeks of paternity leave in Switzerland's other cantons.

Coincidentally, the people of Berne voted against a similar initiative on the same date, which would have also extended the existing parental leave to a total of 24 weeks. In contrast to the one in Geneva, however, the Bernese proposal would have allowed parents to each profit from six weeks of paid parental leave and to freely divide the remaining twelve weeks of paid parental leave between them.

Adoption Leave and Increase of the Statutory Maximum Amounts for Maternity and Paternity Allowances

On 1 January 2023, a statutory entitlement to two weeks' compensated adoption leave entered into force. In terms of content and financing, the respective entitlement to adoption leave is very similar to the entitlement to paternity leave. In principle, the entitlement to adoption leave

is limited to working individuals or couples who take in a child under the age of four for adoption. Adoption leave has to be taken during the first year after the adoption of the child and can be taken in days (ten, with two additional daily allowances per five days compensated) or weeks (two).

Adoption leave recipients are entitled to a total of 14 daily allowances, irrespective of whether they take their leave in days or weeks. The statutory adoption leave allowance is capped at CHF220 per day. The same is true with regard to the statutory maternity and paternity leave allowances.

Prior to 2023, the daily allowances for both paternity and maternity leave had been capped at CHF196 per day.

It is important to note that adoption leave has to be granted in addition to an employee's yearly vacation, meaning that employers are not allowed to deduct any adoption leave taken by an employee from their yearly vacation entitlement.

Extension of the Flexible Application of the Social Security Subordination Rules

For more than ten years, Switzerland had been coordinating the applicability of its social security system with countries of the European Union (EU) and European Free Trade Association (EFTA). This approach aimed at facilitating the coordination of the applicability of different national social security systems for people working in more than one country and was based on the principle of "substantial activity". Following this principle, if a person worked more than 25% in their respective home country in the EU or EFTA, the home country's social security system was generally applicable, including to the person's economic activities in Switzerland. If, on the other hand, a person worked less than 25% from their own home country, the employee was fully subject to the Swiss social security system.

Up until the Covid-19 pandemic, this system was generally upheld by Switzerland, the EU and EFTA. However, due to the restrictions in connection with the Covid-19 pandemic, certain countries (including Switzerland) agreed to a more flexible application of these subordination rules until 30 June 2023. In practice, this meant that the before-mentioned limits were mostly disregarded and employees were allowed to work more than 25% of their working time from their home country in the EU/EFTA without triggering a change in the applicability of the Swiss social security system.

In light of the expiration of the aforementioned agreement, Switzerland and a number of EU/EFTA countries concluded a framework agreement with effect as of 1 July 2023.

Currently these countries include Switzerland, Austria, Belgium, Croatia, Czech Republic, Finland, France, Germany, Liechtenstein, Luxembourg, Malta, Norway, Poland, Portugal, Spain, Sweden, the Netherlands and the Slovak Republic. From a Swiss perspective, the absence of its neighbour Italy from this list is most notable.

Subject to this framework agreement, and upon a respective request, cross-border workers may perform up to 49.9% of their work remotely in their home country without triggering a change from the Swiss social security system to their home country's social security system. The framework agreement defines work from home as any activity that could be carried out from any location while relying on a digital connection (eg, by means of a mobile phone or computer) with the employer's work environment and/or its

clients. The framework agreement will initially be limited to five years but will generally renew itself automatically if no measures to the contrary are being taken by the signatory countries.

Entry into Force of the New Swiss Data Protection Act

On 1 September 2023, the new (ie, revised) Swiss Data Protection Act and its accompanying Ordinance have entered into force, which has implications for the processing of data in connection with employment relationships. In particular, employers have to provide their (former) employees and persons applying for a job with a privacy notice. In particular, such notices have to detail how and for what purpose the employer is processing the employees' or applicants' data, which data is being processed, who is responsible for the processing of data, how long the data is being stored, who may access the data and how data security is ensured.

If an employer disregards the new provisions (eg, by failing to provide its employees and applicants with a privacy notice), its officers, directors and/or persons responsible for data protection may be charged with a misdemeanour and personally face a fine of up to CHF250,000.

Flexibilisation of Working Time and Rest Period Regulations for Selected Businesses

On 1 July 2023, amendments to Ordinance 2 of the Federal Act on Work in Industry, Trade and Commerce (the "Labour Act") entered into force, allowing for a certain degree of flexibility with regard to the application of the Labour Act's working time and rest period provisions for information and communication technology companies on the one hand and for service companies in the areas of auditing, fiduciary services and tax consultancy on the other hand.

While the Swiss Labour Act generally requires an employee's working time (including overtime) and breaks therefrom to be within a time window of 14 hours, said time window can be extended to 17 hours for adult employees in the information and communication technology industry under certain circumstances.

Adult employees working in auditing, fiduciary services and tax consultancy may work up to 63 instead of the otherwise mandatory 45 hour weekly maximum working time for white collar employees if they conclude a written agreement with their employer in regard to an annual working hour model and meet the following criteria in particular:

- they have a great degree of autonomy in their work and in setting their own working hours;
- they function as a supervisor or as a specialist in their respective fields;
- they receive gross annual income of more than CHF120,000 (per 100% stint) or hold a qualification equivalent to a bachelor's degree or degree at level 6 of the National Qualifications Framework;
- an average of 45 working hours per week is not exceeded; and
- the working time in excess of the maximum annual working time does not exceed 170 hours.

Although the Labour Act generally prohibits Sunday work (with the exception of certain specific industries such as, but not limited to, airports and hospitals), adult employees working in auditing, fiduciary services and tax consultancy are allowed to work a maximum of nine Sundays per year for up to five hours each without their employer having to apply for a governmental Sunday work permit.

Definition of the Term "Business" in the Context of Collective Redundancy

The applicability of the Swiss collective redundancy regulations is largely dependent on the question of whether the thresholds of affected employees per individual business are met or not. As a result, the definition of what constitutes a "business" in this context is of the utmost importance.

Up until a recent decision by the Swiss Federal Supreme Court, legal scholars were divided on the question whether branches of the same legal entity within a close geographical vicinity should be regarded as separate businesses or whether they should count as one and the same business in the context of collective redundancy.

However, in the wake of the closure of several postal offices by the Swiss Postal Service, the Swiss Federal Supreme Court was tasked with finally deciding this hitherto controversial question. In its ruling dated 18 June 2023, it found that each postal office is to be considered as a separate business, irrespective of its possible geographical vicinity to other postal offices and defined the term "business" in the context of collective redundancies as an organised structure equipped with human, material and immaterial resources that enables it to achieve its work objectives and that enjoys a certain autonomy, which, however, does not have to be of a financial, economic, administrative or legal nature.

Reform of the Swiss Retirement System

On 25 September 2022, the Swiss people and cantons approved the so called "AHV 21 reform", pursuant to which the ordinary retirement age for women (previously 64 years) will be gradually aligned with the ordinary retirement age for men (already 65 years), starting on 1 January 2024. Said alignment will be completed by the end of the year 2027, ensuring that a uniform retirement age of 65 years for both women and men will apply as of the year 2028.

Women of the so-called transitional generation will profit from compensation measures. These include a surcharge pension if they retire at their reference age, which in turn depends on their year of birth, or a lower pension reduction for women opting to retire earlier than their reference age.

Furthermore, the AHV 21 reform also includes measures to allow for more flexibility with regard to people entering retirement. Under the new rules, both men and women between the ages of 63 and 70 may decide whether they want to retire partially or fully.

In order to mitigate the consequences of the current shortage of skilled workers, the AHV 21 reform also sets incentives for gainful employment beyond the age of 65.

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