THE EMPLOYMENT LAW REVIEW

Ninth Edition

Editor
Erika C Collins

THE LAWREVIEWS

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NINTH EDITION

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PREFACE

Every winter we survey milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. At that time, I read the Preface that I wrote for the first edition back in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. This continues to hold true today, and this ninth edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see *The Employment Law Review* grow and develop over the past eight years to satisfy the initial purpose of this text: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

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

Global diversity and inclusion initiatives remained a significant issue in 2017 in nations across the globe, and this is the topic of the second general interest chapter. In 2017, many countries in Asia and Europe, as well as South America, enhanced their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation as well as gender quotas and pay equity regulation to ensure that all employees, regardless of gender, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals remain under-protected and under-represented in the workforce, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

The third general interest chapter focuses on another ever-increasing employment law trend in which companies revise, or consider revising, social media and mobile device management policies. Mobile devices and social media have a prominent role in and impact on both employee recruitment efforts and the interplay between an employer's interest in protecting its business and an employee's right to privacy. Because companies continue to implement 'bring-your-own-device' programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy.

Bring-your-own-device issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

In 2015, we introduced the fourth and newest general interest chapter, which discusses the interplay between religion and employment law. In 2017, we saw several new, interesting and impactful cases that further illustrate the widespread and constantly changing global norms and values concerning religion in the workplace. Religion has a significant status in societies throughout the world, and this chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to such beliefs. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these four general interest chapters, this ninth edition of *The Employment Law Review* includes 46 country-specific chapters that detail the legal environment and developments of certain international jurisdictions. This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all of our contributors and my associate, Marissa Mastroianni, for her invaluable efforts to bring this edition to fruition.

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February 2018

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Erika Collins is a partner in the labour and employment law department and co-head of the international labour and employment law group of Proskauer Rose, resident in the New York office. Ms Collins advises and counsels multinational public and private companies on a wide range of cross-border employment and human resources matters throughout the Americas, Europe, Africa and Asia.

Ms Collins represents US and non-US employers in all aspects of company growth and restructuring, from office openings, executive hires and workforce expansions to company downsizing, employment terminations, mass lay-offs and office closures. She advises clients on preparing competitive employment packages and agreements, such as separation, expatriate and consulting agreements, that are compliant with local laws, as well as on payroll, benefits and vacation issues. Ms Collins regularly conducts multi-country audits of employment laws and practices in order to provide advice to clients regarding compliance with data privacy, fixed term contracts, outsourcing, and working time and leave regulations among numerous other issues.

Additionally, Ms Collins advises employers on sexual harassment and other misconduct allegations, as well as cross-border investigations. She also is experienced in conducting due

diligence on international subsidiaries and advising on applicable business transfer laws and employee transition issues in cross-border M&A transactions.

Ms Collins is the editor of *The Employment Law Review*, which covers employment laws in 46 countries. In addition to authoring numerous articles on international employment topics, Ms Collins is a regular speaker at the International Bar Association and the American Bar Association. Topics on which she has written and spoken recently include: cross-border transfers of executives; global mobility issues for multinationals; employment issues in cross-border M&A transactions; the landscape of issues in international employment law; global diversity programmes; the intersection of EU privacy and anti-discrimination laws; and cross-border investigations.

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Chapter 43

SWITZERLAND

Ueli Sommer[1]

I INTRODUCTION

The employment law in Switzerland is mainly based upon the following sources, set out in order of their priority:

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

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

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

In Switzerland disputes that fall within the jurisdiction of the court of first instance cannot be heard unless there has first been an attempt at conciliation before a conciliation authority. However, in financial disputes with an amount in dispute of at least 100,000 Swiss francs, the parties may mutually agree to waive any attempt at conciliation. If no agreement is reached before the conciliation authority, the conciliation authority records this fact and grants authorisation to proceed. The plaintiff is entitled to file the action in court within three months of authorisation to proceed being granted. Claims arising from an employment

1 Ueli Sommer is a partner at Walder Wyss Ltd.

relationship must be filed with a district court. Some cantons have established specialised employment courts. Appeals from the district courts are submitted to the cantonal court and subsequently to the Federal Supreme Court.

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

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

II YEAR IN REVIEW

In 2017, the parliament finally enacted a new law to implement the initiative against mass immigration, but substantially amended it to be in compliance with the bilateral treaties with the EU. Based on the new law, employers in regions with an unemployment rate above average will have to announce vacant positions to the unemployment office and interview candidates proposed by the unemployment office. However, employers are not forced to employ the proposed candidates.

III SIGNIFICANT CASES

The Federal Supreme Court ruled that a cantonal general minimal wage does not conflict with federal law as long as the level of the minimal salary is relatively low and has the general aim of reducing poverty. However, any minimum wage that is excessively high would breach the constitutional principle of free trade. The level of 20 Swiss francs per hour is within this limit. At the time of writing, two cantons (Neuchâtel and Jura) have implemented generally binding minimal wages.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

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

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

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

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

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

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

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

ii Probationary periods

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

iii Establishing a presence

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

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

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

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

V RESTRICTIVE COVENANTS

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

A judge may limit an excessive prohibition of competition. If an employer gives consideration in return for a non-compete agreement – although this is not legally required – it is more likely that the covenant will be fully enforceable. A prohibition on competition lapses if the employer no longer has a significant interest in upholding the prohibition. Furthermore, it also lapses if the employer terminates the employment relationship without justification.

VI WAGES

i General

Until recently, Switzerland did not have a minimum wage written into law. However, as outlined in Section III, two cantons have now implemented general minimum wages into their cantonal constitutions.

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

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

ii Distinction between variable pay and discretionary bonuses

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

The Federal Supreme Court has often had to deal with bonus entitlements, in particular with *pro rata* entitlements in the case of terminated employment agreements. Whereas the employee has a statutory right to receive a (variable) salary, the entitlement to gratification only exists in the case of an agreement. Without any agreement it is basically at the discretion of the employer to provide gratification. Whether the bonus is considered (variable) salary or gratification is crucial as only in the latter case may the employer have a chance to deny a (*pro rata*) entitlement of an employee leaving the company.

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

In addition, the Federal Supreme Court rules that only payments that are of a secondary nature compared with the salary itself can be considered as a gratification. Larger bonus payments are therefore categorised as salary. By developing this case law, the Federal Supreme Court ruled in 2013 that if the salary exceeds the Swiss median salary by five times (currently this means 354,000 Swiss francs) so that an employee has covered the standard costs of living and has excess, the secondary importance of the bonus is no longer a criterion in assessing whether that bonus will be considered gratification or salary. According to the opinion of the Federal Supreme Court, whenever a 'very high salary' will be granted, a bonus will be qualified as gratification unless the bonus documentation indicates otherwise.

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

iii Working time

The Labour Act provides for a strict obligation of companies to maintain detailed time-keeping records (including the start and ending times of the working day and break times) of nearly all their employees. A huge disparity has evolved over the past few years between this obligation and the reality of day-to-day operations in many businesses. After lengthy negotiations with social partners, the Swiss Federal Council enacted two new articles that are supposed to simplify the time-recording obligation, which entered into force on 1 January 2016. According to these two articles, employees who meet certain requirements will no longer be required to record their hours or, if still required to do so, can keep track of these in a simplified form. In order to make use of the two new articles, companies must meet very high requirements; for example, employers are required to have a collective agreement in place allowing for an exemption and a full exemption even requires a salary in excess of 120,000 Swiss francs per year.

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

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

b other workers, mainly workers in the construction sector and craftsmen, workers in commerce, as well as sales staff in small retail undertakings.

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

Work between 11pm and 6am is considered night work. As a rule, night work is forbidden. However, a special permit for such work may be issued if the employer evidences a special or urgent need. In any case the night work may not exceed nine hours in a maximum time frame of 10 hours, including breaks. If the employee provides services on only three of seven consecutive nights, the night work may amount to 10 hours in a maximum time frame of 12 hours, including breaks. Employees may be entitled to a time or salary premium when working at night.

The Labour Act applies to all employees. Only certain types of professional and very senior management personnel are exempt. Very senior management personnel are those employees who are allowed to make important decisions that can affect the structure, the course of business and the development of a business or a part of business.

iv Overtime

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

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

VII FOREIGN WORKERS

Switzerland has a dual system for the admission of foreign workers. Nationals from EU or EFTA countries benefit from the Agreement on Free Movement of Persons and, in general, do not need a work permit if residence is taken in Switzerland, subject to certain restrictions and exceptions for nationals from Bulgaria and Romania. With regard to non-EU and non-EFTA nationals, only a limited number of management-level employees, specialists and other qualified employees are admitted from all other countries (subject to a quota as determined by the Federal Council).

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

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

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

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

VIII GLOBAL POLICIES

The employer may establish general directives and give specific instructions about the execution of work and the conduct of employees in the company. Furthermore, the employer must take prescribed measures to protect the life, health and integrity of the employees and in particular to take care that the employee is not subject to sexual harassment or discrimination. Therefore, it is very common in Switzerland to set up rules on accepted behaviour and the consequences in case of non-compliance. Usually, employees must accept that they will comply with the rules in writing. There is no strict requirement, however, that employees sign such policies, but it is recommended to have evidence on file that an employee received the policy. Further, the employer must ensure that employees understand the language in which policies are written and that the current version of the rules are easily accessible (e.g., on the company intranet).

The purpose of the Federal Act on the Equal Treatment of Women and Men (ETA) is to ensure equal treatment at work by means of a general prohibition of discrimination based on gender – including a prohibition of sexual harassment. The ETA provides for sanctions in case of non-compliance of the employer.

IX TRANSLATION

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

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

X EMPLOYEE REPRESENTATION

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

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

The establishment of a works council must be passed by a resolution of at least one-fifth of all employees. Once a positive decision has been made, the election of the representatives may take place. The number of representatives must be determined by the employer and the employees according to the size of the company but may not be below three. The employer must inform the works council at least once a year about the impact of the course of business on the employees. Within the framework of the Participation Act the works councils may decide how to organise themselves.

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

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

XI DATA PROTECTION

i Requirements for registration

Private persons must register their database if they regularly process sensitive personal data or personality profiles, or if they regularly disclose or transfer personal data to third parties. However, because the employers must collect certain data of the employees pursuant to social security laws, tax law and also the Code of Obligations (e.g., with regard to the data

required to issue a reference letter), they are exempted from the duty to register. If, however, companies collect additional data that, by law, does not need to be collected, there could be a duty to register.

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

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

ii Cross-border data transfers

Cross-border data transfers without the employee's consent are permitted if adequate cross-border data protection agreements are in place and information about such agreements is given to the Federal Data Protection and Information Commissioner or if the respective countries provide for an adequate level of data protection. With regard to the processing of data of private individuals, the Commissioner has established a list of countries that have implemented equivalent data protection legislation, which is publicly available on the internet.[2] For example, the level of protection provided for private individuals by EU countries is deemed adequate. In the aftermath of the European Court of Justice decision dated 6 October 2015[3] declaring the European Commission's Safe Harbour decision[4] to be invalid, neither US federal law nor the laws of any US state are considered to provide for an adequate level of data protection from a Swiss point of view. However, on 12 January 2017, the Swiss Federal Council approved the Swiss–US Privacy Shield Framework as a valid legal mechanism to comply with Swiss requirements when transferring personal data from Switzerland to the United States.

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

iii Sensitive data

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

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

2 www.edoeb.admin.ch/themen/00794/00827/index.html?lang=en.
3 C-362/14.
4 2000/520/EC.

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

iv Background checks

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

XII DISCONTINUING EMPLOYMENT

i Dismissal

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

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

a personal characteristic of one party (e.g., race, creed, sexual orientation, age), unless they are relevant to the employment relationship or significantly impair the cooperation within the enterprise;

b the other party makes use of a constitutional or contractual right; or

c where the sole purpose was to frustrate the formation of claims arising out of the employment relationship.

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

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

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

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

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

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

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

Apart from the regulations regarding mass dismissal the company has no duty to inform any authority about a dismissal (exceptions apply in regard to apprenticeship contracts).

ii Collective dismissals

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

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

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

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

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

XIII TRANSFER OF BUSINESS

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

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

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

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

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

If any redundancies, terminations or changes in the working conditions are planned in connection with a business transfer, the works council, if any, or otherwise the employees need to be consulted in due time before the decision to make employees redundant is made or the changes in the working conditions implemented. This consultation process is also necessary if the employees will be dismissed or the changes implemented after the transfer (by the new employer), because such dismissals and changes would be seen as a result of the transfer of the business if implemented within the first few months of the transfer. It

is very important to note that the consultation process needs to be conducted before any decisions in regard to any measures are made. The employer needs to give the works council or the employees at least the possibility to make suggestions on how to avoid any measures, specifically on how to limit the number of dismissals.

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

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

a the reasons for the transfer;
b the results of the consultation process (if any required); and
c the final legal, economic and social consequences of the transfer for the employees (including the number of dismissals; changes in the working conditions).

XIV OUTLOOK

The legislative process for a new data protection law commenced some time ago. The federal council published a draft of this law on 15 September 2017. It is expected that the draft will be discussed and amended significantly during the legislative process.

Appendix 1

ABOUT THE AUTHORS

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

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Ueli Sommer currently serves as board member of the European Employment Lawyers Association and a senior vice chair of the Discrimination Committee of the IBA. Further, he publishes regularly in legal journals and gives speeches at national and international congresses. Ueli Sommer is recommended by *Chambers and Partners* for his employment expertise and is mentioned as leading in his field by *Practical Law*.

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