Chambers AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Employment 2022

Definitive global law guides offering comparative analysis from top-ranked lawyers

Switzerland: Law & Practice
and
Switzerland: Trends & Developments

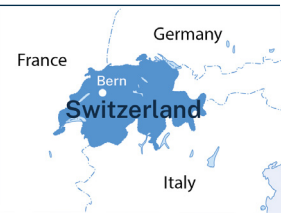
Philippe Nordmann, Irène Suter-Sieber, Jonas Knechtli and Gustaf Heintz
Walder Wyss Ltd

practiceguides.chambers.com

SWITZERLAND

Law and Practice

Contributed by:
Philippe Nordmann, Irène Suter-Sieber, Jonas Knechtli and Gustaf Heintz
Walder Wyss Ltd see p.21



Contents

1. Introduction

1.1 Main Changes in the Past Year

Phasing Out of All Statutory COVID-19-specific Protection Measures

After some back and forth (including a return to mandatory working from home at the end of 2021), all statutory COVID-19-specific protection measures were abolished as of 1 April 2022. However, this does not change the fact that employers remain obliged to ensure the protection of the health of their employees in the workplace according to general principles. Employers have relatively broad discretion in selecting the respective appropriate measures, however.

Attenuation of the Substantive Protection Against Dismissal for Older Employees With Many Years of Service

In a decision of 2 June 2021, the Swiss Federal Supreme Court (the SFSC) clarified that not all older employees with a substantial number of years of service may benefit from an increased employer's duty of care and substantive protection against dismissal; this depends on an overall assessment of the circumstances of the individual case and, in particular, on the employee's position within the company. Therefore, employees with considerable decision-making powers, high levels of responsibility and high salaries may regularly not benefit from an increased substantive protection against dismissal in the sense of an employer's duty to timely inform and consult the employee regarding an intended termination, giving them a last chance to improve, and to evaluate possibilities to continue the employment before effectively giving notice (see **7.5 Protected Employees**).

New Hourly Minimum Salary in the Canton of Basel-Stadt

Since 1 July 2022, the canton of Basel-Stadt (as the first canton in the German-speaking part of Switzerland; see **2.4 Compensation**) provides for a general hourly minimum salary of CHF21 gross (plus holiday pay) for employees usually performing their work in the canton of Basel-Stadt. However, various categories of employees may not benefit from this minimum salary (eg, interns).

Harmonisation of Working, Driving and Rest Times for Professional Chauffeurs With EU Legislation

At its meeting on 17 November 2021, the Swiss Federal Council decided to amend the so-called "Chauffeur Ordinance" with the aim of harmonising the working, driving and rest times for professional chauffeurs with EU legislation. Most of the respective new provisions entered into force on 1 January 2022.

Revision of Provisions on Working Hours and Rest Periods

Effective 1 April 2022, various provisions on working hours and rest periods regulated in the Ordinances to the Federal Act on Work in Industry, Trade and Commerce (the Labour Act; see **2.1 Status of Employee** and **2.3 Working Hours**) have been revised. The main objective of this was to simplify the respective legal framework and align it with current practice. For example, the responsibilities and requirements for the approval of work during the night and on Sundays/public holidays were amended and harmonised between the cantons.

New Social Security Agreement Between Switzerland and the United Kingdom

On 9 September 2021, Switzerland and the United Kingdom agreed on a new social security agreement, which shall ensure the long-term co-ordination between the two states' social security systems following the United Kingdom's exit from the EU. The agreement largely corresponds to the co-ordination of social security systems in the new trade and co-operation agreement between the EU and the United Kingdom, and

is based on the principles of EU co-ordination law, which also apply in relation to Switzerland based on the Treaty of Free Movement (TFM). The agreement has been provisionally applied since 1 November 2021 but has not yet been ratified.

Full Free Movement Rights for Croatian Nationals and Service Providers
Since 1 January 2022, Croatian nationals and service providers benefit from the full free movement rights provided for in the TFM – ie, the same rights as other EU and EFTA nationals and service providers (see **5. Foreign Workers**).

2. Terms of Employment

2.1 Status of Employee

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 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 (see **2.3 Working 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 (see **2.3 Working Hours**).

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. This applies, inter alia, to:

- pregnant women and young parents (see **2.5 Other Terms of Employment** and **7.5 Protected Employees**);
- employees with family responsibilities (see **2.5 Other Terms of Employment** and **7.5 Protected Employees**); and
- older employees with a substantial number of years of service (see **1.1 Main Changes in the Past Year** and **7.5 Protected Employees**).

2.2 Contractual Relationship

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 summary dismissals (see **7.3 Dismissal for (Serious) Cause (Summary Dismissal)**).

Parties' (Limited) Freedom to Choose Their 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 (eg, if the employer accepts the performance of work over a certain period of time and if said performance, under the circumstances, can only be expected in return for remuneration). 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 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 **2.3 Working Hours**);
- deviations from the statutory provisions regarding continued salary payments in the case of an employee's incapacity for work (see **2.5 Other Terms of Employment**);
- amendments to the statutory notice periods (see **7.2 Notice Periods/Severance**);
- non-compete clauses (see **3.1 Non-competition Clauses**); and
- selected provisions in homeworker contracts.

2.3 Working Hours

Maximum Working Time per Week/Day

Pursuant to the Labour Act, the weekly working time may only exceed 45 or 50 hours (the applicable maximum depends on the employee category – see **2.1 Status of Employee**) 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 (see **2.1 Status of Employee**). 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 an employee works in excess of the contractually agreed or customary weekly working time) and extra hours (ie, the hours an employee works in excess of the applicable maximum weekly working time, if any – see **2.1 Status of Employee**).

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.

Compensation for Overtime and Extra Hours
Pursuant to the 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 (and often do) contractually exclude any compensation (whether in cash or in kind) for overtime as long as they observe the written form (see **2.2 Contractual Relationship**), 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.

2.4 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 the following general hourly minimum salary:
  (a) Geneva: CHF23.27;
  (b) Jura: CHF20;
  (c) Neuchâtel: generally CHF20.08;
  (d) Ticino: CHF19 to CHF19.50; and
  (e) Basel-Stadt: CHF21 (see **1.1 Main Changes in the Past Year**).
- Various collective bargaining agreements (CBAs – see **6.3 Collective Bargaining Agreements**) 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, which must comply with the Ordinance against Excessive Remunerations in Listed Stock Corporations – this provides for restrictions with regard to the compensation paid to members of the board of directors, the executive board and the advisory board (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 employee's 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 condi-

tions, 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 (eg, by way of a formula) 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 the utmost 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, the employee has a mandatory claim to part of the bonus (which may not be determined arbitrarily).

2.5 Other Terms of Employment

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 they must take due account of the employee's wishes.

The employee's 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, the employee remains entitled to their full compensation for a limited

time, depending on (and increasing with) the employee's 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 (see **6.3 Collective Bargaining Agreements**). 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 CHF196/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 **2.1 Status of Employee**), 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 CHF196/day).
- 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 CHF196/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 and searching for a new job during the notice period) 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 – as in most cases – agreed on a monthly or weekly salary without an express exception in this regard. The opposite principle is true for hourly salary earners, however.

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 protected under very limited prerequisites – ie, if the employee strictly adheres to the principle of proportionality (eg, by placing an internal complaint before informing the competent authorities, and informing the competent authorities before going public).

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 the employee's liability. Medium negligence (ignoring important rules of conduct but not downright elementary duties of caution) may at least result in a significant reduction of such 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.

3. Restrictive Covenants

3.1 Non-competition Clauses

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 by the employer without the employee having given the employer reasonable cause

to do so or by the employee after the employer has given the employee 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 rather 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.

3.2 Non-solicitation Clauses – Enforceability/Standards

Non-solicitation Clauses with Reference to Employees

The statutory duty of loyalty prevents the employee not only from competing with the employer (see **3.1 Non-competition Clauses**) but also from enticing away employees during the term of the employment.

Pursuant to the rather controversial case law of 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 **3.1 Non-competition Clauses**).

4. Data Privacy Law

4.1 General Overview

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.

The DPA stipulates a number of principles, including proportionality, transparency and purpose limitation. Subject to a number of limitations, the employee is entitled to request information from the employer regarding all available data concerning themselves as well as the purpose of the respective processing. In practice, such right of information is often invoked by employees who have been dismissed by their employer. However, a respective employee's request that is made solely for the purpose of obtaining evidence for subsequent civil proceedings may be considered abusive.

Monitoring and control systems designed to monitor the behaviour of employees at the workplace are 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.

The legal remedies against violations of data protection and personality rights (eg, claims for the omission of illegal data processing or disclosure to third parties or claims for damages, which are regularly difficult to substantiate) are rather weak.

5. Foreign Workers

5.1 Limitations on the Use of Foreign Workers

In Switzerland, a dual system exists for the admission of foreign workers to the local labour market. While nationals of Member States of the European Union and the European Free Trade Association (EU/EFTA nationals) benefit from the TFM and generally do not need to meet special requirements in order to be permitted to work in Switzerland, the access of nationals of other countries (third-country nationals) is severely restricted.

For nationals of the United Kingdom, respective rights obtained under the TFM until the end of 2020 are principally still protected by way of a bilateral agreement between the United Kingdom and Switzerland. As of 1 January 2021, however, nationals of the United Kingdom qualify as third-country nationals.

According to the Swiss Foreigners and Integration Act, third-country nationals may be granted access to the Swiss labour market as employees if:

- their performance of work in Switzerland is in the economic interests of Switzerland;
- their future employer has submitted a corresponding application;
- the quotas for work permits for third-country nationals have not yet been exhausted (quotas are defined annually – for 2022, the quota amounts to 8,500 permits, with an exceptional additional quota of 3,500 permits for nationals of the United Kingdom);
- the future employer substantiates that it was unable to find a person suitable for the job in Switzerland or within the EU/EFTA area;
- the terms and conditions of the employment contract are equivalent to the conditions customary in the specific area, for the specific profession and sector; and
- the applicant will occupy an executive position or is a specialist or an otherwise especially qualified person. Qualified workers are primarily persons with a university degree, special technical training and several years of professional experience. In addition, applicants have to be able to persuade the authorities that they will be able to integrate themselves appropriately into the local labour market and into the social environment on the basis of their professional, linguistic and social skills.

5.2 Registration Requirements

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 prolonged.

No application for a residence permit is required for EU/EFTA nationals under certain circumstances; a prior online notification via the so-called notification procedure suffices. This applies in the case of:

- a temporary employment contract with a Swiss employer with a duration of less than three months;
- immigration to Switzerland for assignment(s) of a foreign employer for a maximum of 90 days per year; or
- a self-employed service provider performing work in Switzerland for a maximum of 90 days per year.

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 (although, for the time being, permits for nationals of the United Kingdom are exclusively granted by the cantonal authorities). Upon further request, the residence permit (permit L or B) is issued by the cantonal migration office.

6. Collective Relations

6.1 Status/Role of Unions

In Switzerland, less than one third of employees are unionised. Trade unions play a marginal role in some sectors, 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 the negotiating of CBAs (see **6.3 Collective Bargaining Agreements**) as counterparties to the employers' associations.

6.2 Employee Representative Bodies

The participation rights of employee representative bodies in Switzerland are regulated in 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, the 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 the following rare cases, the works council has a right of co-decision or, in other words, a type of veto right:

- in the agreement on a social plan in connection with upcoming collective redundancies;
- in decisions concerning an affiliation to an occupational pension scheme or the termination of such an affiliation contract; and
- in the implementation of simplified working time recording.

The consequence of failing to involve the works council in the above-mentioned cases vary: the dismissal of employees despite the absence of an agreement on a social plan is valid, but may be abusive (see **8.1 Wrongful Dismissal Claims**). According to recent case law, the termination of an affiliation contract without the consent of the works council/employees is null and void.

6.3 Collective Bargaining Agreements

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

The normative regulations become part of the individual employment contract. Those provisions 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 2022, as many as 82 CBAs had been declared generally binding (44 on a national level and 38 on a cantonal level).

7. Termination of Employment

7.1 Grounds for Termination

(Limited) Freedom of Termination

Unlike summary dismissals (see **7.3 Dismissal for (Serious) Cause (Summary Dismissal)**), 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 **7.5 Protected Employees** and **8.1 Wrongful Dismissal Claims**).

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 Claims**) 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 (see **6.2 Employee Representative Bodies**). If no agreement can be reached, however, the social plan will eventually be issued by an arbitral tribunal.

7.2 Notice Periods/Severance

Notice Periods

Required observance of notice periods

Unless the employer or the employee claims that there is good cause for a summary dismissal (see **7.3 Dismissal for (Serious) Cause (Summary Dismissal)**), 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

Subject to the following restrictions, both the probation period and the notice periods (including their effective date) may be amended by written agreement, standard employment contract or CBA (see **6.3 Collective Bargaining Agreements**):

- while it is perfectly 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 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, it 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 contained in the Ordinance against Excessive Remunerations in Listed Stock Corporations (see **2.4 Compensation**), providing for severance payments in employment contracts or CBAs (see **6.3 Collective Bargaining Agreements**) 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 contractual written form requirement). 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 (Summary Dismissal)

Summary Dismissal

Either party may at all times terminate an employment with immediate effect. While the law declares that summary dismissal must be subject to the existence of good cause, even summary dismissal 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 summary dismissal. Nevertheless, as in connection with ordinary terminations (see **7.1 Grounds for Termination**), the party declaring summary dismissal must state its respective reasons in writing if the other party so requests.

Good Cause

Good cause is assumed if the party declaring summary dismissal 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, particularly severe cases. Also, in order not to forfeit the right to summary dismissal, 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 Summary Dismissal

As already explained, any summary dismissal results in the immediate termination of the employment.

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

- if the employer succeeds in proving good cause (which is rather difficult), 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 monthly salaries.

(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/ Severance**) principally apply mutatis mutandis. The only (rather theoretical) difference is that summary dismissal 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 Employees**), 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 termination 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 Claims**).

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 Employees

Temporal and Substantive Protection against Dismissal

Notwithstanding the governing principle of freedom of termination (see **7.1 Grounds for Termination**), Swiss employment law provides for both temporal and substantive protection against dismissal (see also **8.1 Wrongful Dismissal Claims**). 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 – see **7.2 Notice Periods/ Severance**):

- 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 **2.5 Other Terms of Employment**);
- 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 **2.5 Other Terms of Employment**); and
- employees participating with the employer's consent in an overseas aid project ordered by the competent federal authority – protection against terminations during such participation.

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, unless agreed otherwise, the prolonged employment is further extended until the next end-of-month 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 (see **8.1 Wrongful Dismissal Claims**):

- employees performing non-voluntary legal obligations – protection against terminations due to such status;
- members of a trade union and employees performing trade union activities (in a lawful manner) – protection against terminations due to such status;
- members of the works council (see **6.2 Employee Representative Bodies**) or elected members of a body linked to the business – protection against terminations due to such status; and
- older employees with many years of service (see **1.1 Main Changes in the Past Year**) – this category generally benefits 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 the employer's increased duty of care would be considered abusive (see **8.1 Wrongful Dismissal Claims**).

8. Employment Disputes

8.1 Wrongful Dismissal Claims

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 leading to a termination's abusiveness.

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 (see **7.5 Protected Employees**).

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 (see **7.5 Protected Employees**);
- while the employee is an elected employee representative on the works council (see **6.2 Employee Representative Bodies**) or on a body linked to the business and the employer cannot cite just cause to terminate the employment (see **7.5 Protected Employees**); or
- in the context of collective redundancies, without having consulted the works council or (if there is none) the employees (see **7.1 Grounds for Termination**).

Consequences of Abusive Terminations

Even an abusive termination remains valid and there is, in principle, no claim to continued employment (although see **8.2 Anti-discrimination Issues** 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 Issues

General Principles

Anti-discrimination issues are generally raised in connection with abusive termination claims (see **8.1 Wrongful Dismissal Claims**). In this context, 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 Swiss Federal Act on Gender Equality (the GEA) provides for specific protection against both direct and indirect discrimination on the basis of sex in all areas of working life (ie, not limited to terminations of employment), 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 – 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 good cause following an employee's internal complaint of discrimination based on sex 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 it took measures that have been proven in practice to be necessary and adequate to prevent against sexual harassment and which it 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.

9. Dispute Resolution

9.1 Judicial Procedures

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 Issues**). 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 see **9.3 Awarding Attorney's Fees** regarding 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 recurring and 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 (see **6.3 Collective Bargaining Agreements**). 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 Awarding Attorney's Fees

In most cantons/cases, the general rule applies that procedural costs (court fees and costs for professional representation) are allocated in proportion to the outcome of the case (ratio of prevailing and losing; see **9.1 Judicial Procedures** for the absence of court fees in cases with an amount in dispute below CHF30,000). A few cantons do not even grant the reimbursement of costs for professional representation in employment disputes with amounts below CHF30,000.

Moreover, it is important to note that the 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, any difference must be borne by the client.

Walder Wyss Ltd is a dynamic presence in the market, with more than 250 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 four partners and 15 counsel/managing associates/associates who deal with employment law issues exclusively.

Authors

Philippe Nordmann is a partner and co-head of the employment law team at Walder Wyss. He advises companies and executive employees on all aspects of employment law (the drafting of employment contracts and employee regulations, setting up compensation schemes, support concerning dismissals and plant closures, negotiations regarding collective bargaining agreements, assignments of employees, staff leasing, work permits, competition clauses, etc). He also has substantial experience in litigation. Philippe has been vice-president of the Personnel Appeals Commission of the canton of Basel-Stadt since 2016.

Irène Suter-Sieber is an employment law partner and a member of the management board (hiring partner) at Walder Wyss, and a Certified Specialist SBA Employment Law. She has extensive experience in representing clients in court in employment law-related civil proceedings. Irène advises Swiss and international companies on all aspects of employment law, particularly the drafting of employment contracts, personnel regulations and employee participation programmes, executive compensation matters, the enforcement of restrictive covenants, terminations, restructurings such as transfers of undertakings and collective redundancies, international employee transfers and personnel lease, as well as employment-related internal investigations, social security and data protection issues.

Jonas Knechtli is a managing associate in the employment law and litigation teams at Walder Wyss. He advises domestic and international clients on contentious and non-contentious employment law matters in general, and in connection with bonus schemes, restrictive covenants and employee terminations (including collective redundancies) in particular. In this context, he also represents parties in court on a regular basis. Jonas is a member of the Basel and Swiss Bar Associations, and has co-authored several legal publications in the area of employment law.

Gustaf Heintz is an associate in the employment law team at Walder Wyss and represents clients in employment law-related domestic civil and administrative proceedings. He advises domestic and international clients on employment law-related matters in general, and on staff leasing, employee termination, work authorisations and contract and policy drafting in particular. Gustaf has co-authored legal publications related to employment and civil procedure law, and is a member of the Zurich and Swiss Bar Associations.

Walder Wyss Ltd

Seefeldstrasse 123
P.O. Box
8034 Zurich
Switzerland

Tel: +41 58 658 14 50
Fax: +41 58 658 59 59
Email: philippe.nordmann@walderwyss.com
Web: www.walderwyss.com

Trends and Developments

Contributed by:
Philippe Nordmann, Irène Suter-Sieber, Jonas Knechtli and Gustaf Heintz
Walder Wyss Ltd see p.26

Special Migration Law Status for Ukraine Refugees

On 11 March 2022, the Swiss Federal Council decided to grant refugees from Ukraine so-called "protection status S". This status applies to all persons seeking refuge from the war in Ukraine and is not limited to Ukraine nationals only: non-Ukraine nationals who lived in Ukraine before the war but had to flee because of it may also profit from this status if they cannot safely return to their country of origin. However, persons who have been granted protection by an EU Member State do not profit from status S.

Protection status S means that refugees will quickly receive the right to stay and work without having to go through an ordinary (and time-consuming) asylum procedure. The right to stay is initially limited to one year but can be extended. Status S largely corresponds to the solution adopted by the EU Member States and allows the refugees to be joined by family members.

Protection status S does include the right to work independently or as an employee, but individuals profiting from it must register with their local Swiss migration office and request a work permit and/or prior approval to change their employer.

Enforceability of Vaccine Requirements Set by Employers

On 26 April 2022, the Federal Administrative Court confirmed the termination of the employment contracts of four professional soldiers who had been required to get vaccinated and refused to do so.

As members of the Special Forces Command, their main task was to carry out missions of increased difficulty during extremely dangerous situations, both domestic and abroad. As a result, they were subject to an increased risk of infection, which is why the Chief Surgeon of the Swiss Armed Forces ordered that they get vaccinated against COVID-19 in order to ensure immediate availability for deployment.

In refusing the vaccination, the Special Forces Command risked being unable to use these soldiers in both short and long-term deployments abroad. Since such deployments constituted a major part of these soldiers' duties, the court found that their dismissals were sufficiently reasoned and confirmed the validity of the terminations. While these rulings established that a public sector employer may require its employees to vaccinate themselves against COVID-19 under certain circumstances, it is expected that they will also serve as precedents for similar situations in the private sector.

Updated Registration Requirements for Occupations with High Unemployment Rates

Swiss migration law requires that vacant positions in professions with particularly high unemployment rates (at least 5%) must be reported to the regional job placement office, with the aim of prioritising local workers.

The relevant list is updated in the fourth quarter every year and applies from 1 January to 31 December of the subsequent year. Due to the ongoing above-average unemployment rate in professions worst hit by the pandemic, additional professions are now subject to the report-

ing requirement. The newly added occupations include salespersons in retail shops, graphic and multimedia designers, painters and related professions, as well as travel agents.

Revised Data Protection Act Will Enter Into Force in 2023

In the wake of the enactment of the EU's General Data Protection Regulation (GDPR) in 2018, Switzerland revised its Federal Data Protection Act (FADP). Although the revised FADP was adopted by Swiss parliament on 25 September 2020, its entry into force has been pushed back several times. On 3 March 2022, the Federal Office of Justice finally communicated that the revised FADP will enter into force on 1 September 2023.

With the aim of facilitating data protection compliance for Swiss companies, some of which already fall within the scope of the GDPR, the revised FADP mostly follows the GDPR's approach but retains a Swiss finish.

The main changes employers should be aware of include heightened transparency requirements regarding the processing of data of job applicants and employees. Furthermore, the revised FADP states that data access requests may be denied if they are manifestly unfounded, particularly in cases where they pursue a purpose other than data protection.

New Case Law Regarding the Gig Economy

Several Swiss civil courts have recently ruled that gig economy workers qualify as employees rather than as independent contractors. In particular, in a case relating to Uber Eats, the Swiss Federal Tribunal found that there was a clear relationship of subordination since Uber Eats could observe the workers' movements through geolocation tracking, reduce their pay in cases where it deemed the route to be less than optimal and exclude workers from the platform in case of a sub-standard rating. The court further held that the workers' choice of when and where to work and to accept work from third parties while connected to the platform did not stand in the way of the contractual relationship being qualified as employment.

However, the Swiss Federal Tribunal approved Uber Eats' appeal since it disagreed with the cantonal court's qualification of the relationship between Uber Eats, the workers and the restaurants as staff leasing.

In a social security law decision that has been appealed to the Swiss Federal Uniformity (Swiss Federal Supreme Court) by Uber, the Zurich Social Insurance Court ruled that Uber drivers were to be considered employees of Uber and not independent contractors. As a consequence, Uber was ordered to pay social security contributions and provide statutory accident insurance for its drivers. If the Federal Supreme Court confirms this decision, it would have far-reaching consequences for the gig economy in Switzerland. The decision is currently widely anticipated.

Facilitated Admission to the Swiss Labour Market for Foreign Nationals with a Swiss University Degree

The Federal Council announced that it wants to create new legal conditions to reduce red tape so that non-EU/EFTA nationals who hold master's or doctoral degrees from a Swiss university in areas with a shortage of skilled workers can remain in Switzerland and pursue gainful employment. If the gainful employment of such persons is of high scientific or economic interest, the Federal Council has proposed they should be exempt from the otherwise applicable annual maximum numbers for residence permits.

While this proposed change in migration law is currently under review in the so-called consultation process, it has been met with support from a broad political spectrum. However, it remains

unclear if and when such a change might enter into force.

Working Remotely From Abroad

Due to the lifting of COVID-19-related restrictions, the flexible application of the EU social security subordination rules under the Treaty of Free Movement between Switzerland and the EU (TFM) and under the EFTA Convention was initially set to expire on 30 June 2022. Under this flexible application, an employee continued to be subject to the Swiss social security system even if they performed their activity in the form of teleworking in their country of residence abroad (EU/EFTA). According to this practice, social security co-ordination therefore remained unchanged, regardless of the extent to which the employee carried out the activity in their country of residence.

On 14 June 2022, the members of the EU Administrative Commission for the co-ordination of national social security systems agreed to further extend this flexible application of the subordination rules during a transitional period until 31 December 2022. The flexible application of the subordination rules will also be extended accordingly under the TFM and the EFTA Convention, and will thus apply to Switzerland.

While there is a general consensus that subordination rules should allow a certain amount of remote work to be conducted in the country of residence past 31 December 2022 without resulting in a change of the social security co-ordination, the concrete implementation of such a potential new regime still remains unclear and is subject to negotiations.

Compensation for Loss of Earnings During Maternity Leave

In a recent decision, the Swiss Federal Tribunal clarified that the entitlement to maternity compensation ends prematurely if a mother resumes her gainful employment early, and that such an entitlement does not revive at a later stage if she stops working. In particular, the court rejected the argument that maternity compensation should be claimable on a daily or weekly basis (analogous to paternity compensation) after the mother has completed her recovery period.

While the court stated that fathers were awarded more flexibility than mothers in this regard, it highlighted that the legislator had designed the mother's entitlement to be more comprehensive with the aim of giving mothers the time they need to care for their newborns during a continuous time period. The court also found that the maternity compensation mechanism did not result in discrimination against mothers.

Calculation of Furlough Compensation

Due to the COVID-19 pandemic, many companies that saw their business activities and revenues drop dramatically depended on furlough compensation in order to avoid large lay-offs. Under Swiss law, such furlough compensation normally also entails payments for vacation and public holidays but it is generally subject to a rather extensive application process. In order to ensure a quick and unbureaucratic payment, the Federal Council introduced a summary procedure for compensation claims resulting from the pandemic. As a result, the Swiss State Secretariat for Economic Affairs (SECO) provided respective forms for the companies to fill out. However, these forms excluded the option to apply for payments for vacation and public holidays during the summary procedure for employees on monthly wages.

The Swiss Federal Uniformity (Swiss Federal Supreme Court) upheld the ruling of the lower court, which had deemed the described calculation of furlough compensation for employees on monthly wages unlawful. In the meantime, SECO provided a technical solution with which the companies concerned can easily assert their claims for furlough compensation for vacation and public holidays of their employees.

Walder Wyss Ltd is a dynamic presence in the market, with more than 250 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 four partners and 15 counsel/managing associates/associates who deal with employment law issues exclusively.

Authors

Philippe Nordmann is a partner and co-head of the employment law team at Walder Wyss. He advises companies and executive employees on all aspects of employment law (the drafting of employment contracts and employee regulations, setting up compensation schemes, support concerning dismissals and plant closures, negotiations regarding collective bargaining agreements, assignments of employees, staff leasing, work permits, competition clauses, etc). He also has substantial experience in litigation. Philippe has been vice-president of the Personnel Appeals Commission of the canton of Basel-Stadt since 2016.

Irène Suter-Sieber is an employment law partner and a member of the management board (hiring partner) at Walder Wyss, and a Certified Specialist SBA Employment Law. She has extensive experience in representing clients in court in employment law-related civil proceedings. Irène advises Swiss and international companies on all aspects of employment law, particularly the drafting of employment contracts, personnel regulations and employee participation programmes, executive compensation matters, the enforcement of restrictive covenants, terminations, restructurings such as transfers of undertakings and collective redundancies, international employee transfers and personnel lease, as well as employment-related internal investigations, social security and data protection issues.

Contributed by: Philippe Nordmann, Irène Suter-Sieber, Jonas Knechtli and Gustaf Heintz, **Walder Wyss Ltd**

Jonas Knechtli is a managing associate in the employment law and litigation teams at Walder Wyss. He advises domestic and international clients on contentious and non-contentious employment law matters in general, and in connection with bonus schemes, restrictive covenants and employee terminations (including collective redundancies) in particular. In this context, he also represents parties in court on a regular basis. Jonas is a member of the Basel and Swiss Bar Associations, and has co-authored several legal publications in the area of employment law.

Gustaf Heintz is an associate in the employment law team at Walder Wyss and represents clients in employment law-related domestic civil and administrative proceedings. He advises domestic and international clients on employment law-related matters in general, and on staff leasing, employee termination, work authorisations and contract and policy drafting in particular. Gustaf has co-authored legal publications related to employment and civil procedure law, and is a member of the Zurich and Swiss Bar Associations.

Walder Wyss Ltd

Seefeldstrasse 123
P.O. Box
8034 Zurich
Switzerland

Tel: +41 58 658 14 50
Fax: +41 58 658 59 59
Email: philippe.nordmann@walderwyss.com
Web: www.walderwyss.com

walderwyss

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com