THE EMPLOYMENT LAW REVIEW

Fourteenth Edition

Editor
Erika C Collins

THE LAWREVIEWS

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This article was first published in February 2023
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Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.thelawreviews.co.uk

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ISBN 978-1-80449-150-8

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOKATFIRMAET SCHJØDT AS

ALC ADVOGADOS

AL DOSERI LAW

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CANTERBURY LAW LIMITED

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PREFACE

For each of the past 13 years, we have surveyed milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. Every year when I update this book, I reread the Preface that I wrote for the first edition 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. I have been practising international employment law for more than 25 years, and I can say this holds especially true today, as the past 14 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This 14th 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 this publication grow and develop to satisfy its initial purpose: 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.

Speaking of changes, we have now been living with covid-19 for more than three years. In 2020, we entered a new world controlled and dictated by a novel coronavirus, one that spread at a rapid pace and required immense government intervention. The ways in which governments responded (or failed to respond) shed light on how different cultures and societies view, balance and respect government regulation, protection of workers and employee privacy. Employment practitioners around the globe have been thinking about and anticipating the future of work for over a decade. But with the onslaught of covid-19, the future of work was foisted upon us. Covid-19 has expedited the next decade of technological advancement and employer–employee relations, causing entire industries and workplaces to change in real time and not over the course of years.

Unsurprisingly, this year's text would not be complete without another global survey of covid-19 that summarises some of the significant legislative and legal issues that the pandemic has presented to employers and employees. The updated chapter highlights how international governments and employers continued to respond to the pandemic during the course of 2022, from shutdowns and closures to remote working and workplaces reopening. Employers around the globe have needed to be nimble to deal with the constantly changing environment.

The other general interest, cross-border chapters have all been updated. The #MeToo movement continues to affect global workforces. The movement took a strong hold in the United States at the end of 2017, as it sought to empower victims of sexual harassment and assault to share their stories on social media so as to bring awareness to the prevalence of this behaviour in the workplace. In this chapter, we look at the movement's success in other

countries and analyse how different cultures and legal landscapes affect the success of the movement (or lack thereof) in a particular jurisdiction. To that end, this chapter analyses the responses to and effects of the #MeToo movement in several nations and concludes with advice to multinational employers.

The chapter on cross-border mergers and acquisitions (M&A) continues to track the variety of employment-related issues that arise during these transactions. The covid-19 pandemic initially caused significant challenges to M&A. Deal activity slowed substantially in 2020, negotiations crumbled and closings were delayed. Although uncertainty remains about when M&A activity will return to pre-pandemic levels, it appears that businesses and financial sponsors once again have begun to pursue transactions. Parties already have begun to re-engage on transactions previously put on hold and potential sellers appear willing to consider offers that provide a full valuation. The content of due diligence may change because the security of supply chains, possible crisis-related special termination rights in key contracts and other issues that were considered low-risk in times of economic growth now may become more important. This chapter, and 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 2022 for multinational employers across the globe. Many countries in Asia, Europe and South America have continued to develop their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation, and regulations on gender quotas and pay equity, 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 in the workforce remain under-protected and under-represented, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

We continue to include a chapter that focuses on 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. Particularly in the time of covid-19 and remote working, 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.

Our final general interest chapter discusses the interplay between religion and employment law. Religion has a significant status in societies throughout the world, and the chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to them. 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 the six general interest chapters, this edition of *The Employment Law Review* includes country-specific chapters that detail the legal environment and developments of 37 jurisdictions around the world.

Covid-19 aside, in 2023, and looking into the future, global employers continue to face growing market complexities, from legislative changes and compliance challenges, to technological and societal forces that are transforming the future of work. Whether solving global mobility issues, designing employee equity incentives, addressing social media issues, negotiating collective bargaining agreements or responding to increasing public attention on harassment or equal pay issues, workforce issues can affect a company's ability to attract and retain talent, or damage its reputation and market value in an instant. These issues have created a confluence of legal and business challenges that can no longer be separated or dealt with in isolation. As a result, every company requires business advisers who can address the combined business and legal issues relating to its multinational workforce. It is my hope that this text provides legal practitioners and human resources professionals with some guidance, best practices and comprehensive solutions to significant workforce issues that affect a company's market position, strategy, innovation and culture.

A special thank you to the legal practitioners across the globe who have contributed to this volume for the first time, as well as those who have been contributing since the first year. This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all our contributors and my Faegre Drinker associates, Xinyi Chen, Katherine Gordon, Caroline Guensberg, Konstantina Kloufetos, Zoey Twyford, Brooke Razor and Charlotte Marshall, counsel Emma Vennesson, and my law partners, Alex Denny, Nicole Truso and Claire Zhao, for their invaluable efforts in bringing this 14th edition to fruition.

Erika C Collins
Faegre Drinker Biddle & Reath LLP
New York
February 2023

Chapter 40

SWITZERLAND

Simone Wetzstein[1]

I INTRODUCTION

Swiss employment law is somewhat liberal and tends to be perceived – in contrast to the surrounding European countries – as employer-friendly. The employment law itself is based on several legal sources:

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 that regulate work, health and safety conditions;
d civil law, in particular the Swiss Code of Obligations (CO);
e collective bargaining agreements, if applicable;
f individual employment agreements; and
g usage, custom, doctrine and case law.

In addition to these legal sources, the following sources are also of great importance for 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 Act on Data Protection (FADP – a completely revised FADP is expected to come into force in September 2023);
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 (known as 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 Foreign Nationals and Integration.

In general, for a Swiss law-governed dispute to be heard by the employment court of first instance, an attempt at conciliation must first have been made. If no settlement in the

1 Simone Wetzstein is a partner at Walder Wyss Ltd.

conciliation hearing is reached, the conciliation authority will permit the continuation of the procedure and the plaintiff is authorised to file a lawsuit with the competent court within three months.

If the employment-related amount in dispute is below 30,000 Swiss francs or if the matter in dispute concerns the Federal Act on the Equal Treatment of Women and Men, the parties do not have to pay any court fees, and the burden of proof is facilitated (simplified procedure). This means that the court will investigate the facts of the case *ex officio* by giving appropriate guidance to the parties so that they provide all relevant information and evidence, also as regards facts that have only been vaguely presented.

Except for the courts, federal, cantonal and communal authorities generally have little influence over individual employment contracts.

Nevertheless, these authorities may have a more important role in granting work or residency permits for employees, as well as notifying them of a collective dismissal or issuing a permit to work at night or on Sundays.

II YEAR IN REVIEW

On 25 September 2022, the Swiss electorate approved the reform to stabilise old-age and survivors insurance. The reform intends to introduce a uniform retirement age of 65 for men and women: with the reform, the retirement age for women will be gradually increased from 64 to 65 but will not be fully equalised until 2028. However, the changes are not expected to come into force until 1 January 2024.

Further, the Federal Council took on the matter of the death of a parent following the birth of a newborn. At a meeting at the end of October 2022, the Federal Council set forth the proposal of the National Council's Committee for Social Security and Health and voted in favour of a total of 16 weeks of leave for the surviving parent. However, this proposal is yet to be approved by the parliament.

III SIGNIFICANT CASES

The Federal Supreme Court ruled in a recent decision, which is intended for publication, that a parliamentarian loses her entitlement to maternity compensation if she attends parliamentary and commission meetings during the period of maternity leave.[2] The Court held that, according to Article 16d, Paragraph 3 of the Federal Act on Compensation for Loss of Earnings for Persons on Military Service or Maternity Leave, the entitlement to maternity compensation ends prematurely when the mother resumes her gainful employment. Article 25 of the Ordinance to the Loss of Earnings Compensation Act determines that this legal consequence applies independent of the percentage of employment. Therefore, part-time work taken up early also corresponds to gainful employment and ends the entitlement to maternity compensation. According to the Court, this is compatible with federal law. Furthermore, the Court rejected the complainant's argument that maternity compensation should be able to be claimed on a daily or weekly basis after the mother's six-week recovery period, similar to paternity compensation. According to the Federal Supreme Court, this does not constitute discrimination.

2 BGE 9C_469/2021 of 8 March 2022.

In another recent decision, the Federal Supreme Court dealt with the question of whether childcare allowances paid as fringe benefits by an employer to its employees must be considered as family allowances, which would exempt them from social security obligations.[3] The Court initially stated that not every benefit of a social nature is considered a family allowance. Family allowances are household allowances, which are fixed benefits independent of income that are the same for all eligible employees. This was not so in this specific case; the allowance amount related to the employee's income.

Furthermore, there is a rule–exception relationship, whereby the rule is that social security contributions are due on all forms of income and the exception is that contributions are not due on family allowances, making it necessary to clearly define which benefits are considered 'family allowances'. In the absence of a legal basis, the Court ruled that childcare allowances cannot be considered as family allowances. According to the Court, childcare allowances paid by employers to employees are therefore subject to social security contributions.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The mandatory, partially mandatory and optional elements of an individual employment contract are outlined in Article 319 et seq. of the CO. Under Swiss law, there is no period within which an employment contract must be concluded. With a few exceptions, such as apprenticeship contracts, which must be in writing, an individual employment contract may be made in writing, verbally or even implicitly. If the parties wish to deviate from the rules of the CO, they must agree on certain provisions in writing (e.g., notice periods, probation period, non-compete undertaking or transfer of intellectual property). If stipulated in applicable collective bargaining agreements, this requirement also applies to deviations from collective bargaining agreements.

For a fixed-term employment contract with a duration of more than one month or an employment relationship for an unlimited period, Article 330b of the CO states that, within one month of the beginning of the employment relationship, the employer must provide the employee with certain information in writing:

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

It is recommended that all individual employment contracts are concluded in writing. This will ensure that the written form requirement for deviations from statutory law is met. In this case, 'written' means either a wet ink or qualified electronic signature of both parties. A qualified electronic signature must be approved by the Swiss government based on the Swiss Law on Electronic Signatures to be valid; a simple DocuSign signature will not meet the statutory requirement of a written employment agreement.

3 BGE 9C_466/2021 of 17 October 2022.

It is advisable to also include the following points in employment contracts:

a the term of the employment relationship;
b rules on probation and notice periods that deviate from the law;
c annual leave entitlement;
d rules on continued payment of wages during sick leave or maternity leave; and
e other specific agreements made during contractual negotiations (for example, non-compete agreements).

If the terms and conditions of an employment agreement are to be changed, this can be done by mutual agreement, by concluding an amendment agreement or by issuing a formal notice of change.

ii Probationary periods

Under Swiss law, a probationary period is only stipulated for an employment relationship with an unlimited period and not for a fixed-term employment relationship. Nevertheless, it is also possible for the parties to agree on a probationary period in a fixed-term employment relationship. For this to be valid, it is important to conclude it in writing (*pro memoria* wet-ink or qualified electronic signature). In an unlimited employment relationship, the first month is considered a probationary period. A deviating regulation can be made by a written mutual agreement, whereby the probationary period can be cancelled, shortened or extended up to a maximum of three months. During the probationary period, a termination of the employment relationship with seven days' notice is possible. In the event of the employee's incapacity to work during the probationary period (e.g., because of illness), the probation period will be extended for the duration of the employee's effective inability to work.

iii Establishing a presence

It is possible for a foreign company to carry out work in Switzerland without having a Swiss company or branch: an employment agreement could be concluded between the foreign company and the Switzerland-based employee directly (however, and depending on the employee's nationality and their place of work, this might lead to immigration or social security issues) or the employee could be hired through a licensed Swiss staff leasing agency. It might also be possible to work with Switzerland-based freelancers if they do not qualify as actual employees of the foreign company. However, this could have substantial consequences for the employer (e.g., lack of insurance cover).

Depending on the work performed and on the form of organisation, a permanent establishment (PE) for tax purposes may be created by a Switzerland-based worker. If a company establishes a PE in Switzerland, it becomes subject to Swiss taxation. The risk of creating a PE increases the more a worker creates the impression of being part of an entrepreneurial organisation, which is particularly enforced through offices acting on behalf of, or in the name of, the company.

Typically, the Swiss social security regime is applicable to the foreign company and its Swiss employees. Accordingly, the company or the employees themselves must register with all social security organisations. The company is required to put in place a pension scheme and to pay social security contributions for its employees. For employees without a permanent residence permit, the withholding of income tax applies.

V RESTRICTIVE COVENANTS

Parties to an employment contract may agree on a post-contractual non-compete clause, which must be included in the employment contract in writing to be valid. This clause prohibits the employee from competing with a former employer. For the non-compete clause to be valid, it must – as a first requirement, and always considering the individual case – be sufficiently limited in terms of time, place and subject matter. In most cases, employment courts tend to consider durations of more than 12 months as being excessive, even though the statutory permissible duration is three years.

As a further prerequisite for a post-contractual non-compete clause to be binding, access to sensitive data is required; the employee must either have access to costumer data or to manufacturing or business secrets. However, access alone is not enough. There must also be the possibility of harming the employer through the use of this knowledge. According to case law, post-contractual non-compete clauses would be invalid if a relationship between the customer and the employee or employer is of a personal nature. This is particularly the case when it comes to lawyers or doctors. Swiss employment law does not provide for a mandatory compensation for a post-contractual non-compete clause to be valid.

The prohibition of post-contractual competition may become invalid for two reasons: (1) if the employer has no more interest in maintaining it; and (2) if the employer terminates the employment relationship without the employee having given a justified cause for doing so.

If a court considers a validly agreed post-contractual non-compete clause as being excessive, the clause might be reduced to what the court considers as being proportionate. To make a non-competition clause as enforceable as possible, it is (highly) advisable in practice to include penalty payments for violations.

VI WAGES

i General

In Switzerland, the principle of freedom of contract applies according to Article 19 of the CO. Therefore, the contractual salary amount can generally be freely agreed upon. Some regions, however – especially border areas – have taken measures against the undercutting of market standard wages, which is a result of the freedom of movement of labour within the European Union. Therefore, five cantonal constitutions – though not the federal law – do provide for a minimum wage. Furthermore, many collective bargaining agreements state a minimum wage.

Since 2014, the Federal Ordinance against Excessive Compensation in Public Corporations has prohibited Swiss stock companies listed either in Switzerland or abroad from paying certain amounts or types of compensation to senior management members and to related persons. Prohibited payments include, inter alia, sign-on bonuses, bonuses for certain merger and acquisition transactions and allocations of shares without a basis in the respective company's articles of association. Salaries, general bonuses, benefits and services, etc., must be declared in a report. The aim of this Ordinance is to limit the top management's direct or indirect income. As of 1 January 2023, these provisions form part of the CO.

ii Distinction between variable pay and discretionary bonuses

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).

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 (e.g., 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 five times the Swiss median salary (approximately 381,660 Swiss francs in 2020), Swiss law requires that the bonus is only of an accessory nature to potentially qualify as a gratification. The bonus is of an accessory nature only if it is of secondary importance to the employee's overall remuneration; as a rule of thumb, the bonus may not exceed 100 per cent of the salary to be considered as accessory. In the absence of this accessory nature, at least part of the bonus qualifies as a salary component.

The respective legal qualification (salary component versus 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 or not yet terminated employment, vesting, forfeiture) 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, but the employer has reserved the right to determine the amount at its discretion, the employee has a mandatory claim to part of the bonus (which may not, however, be determined arbitrarily).

When it comes to a bonus payment, it must always be determined whether the bonus is legally to be qualified as either a gratification or a variable part of the salary: a gratification is a discretionary payment and there is no actual legal entitlement to it. On the other hand, employees have a statutory right to receive their agreed (variable) salary. As the qualification of bonuses must be determined on a case-by-case basis and is crucial for the employee's (possible) entitlement, the Federal Supreme Court often deals with disputes in this regard. Pro rata entitlements in dissolved employment relationships are regularly the subject of legal proceedings.

iii Working time

Regulations regarding working time can be found in the Labour Act, which is applicable to most employees. However, a few exceptions are made. The Act does not apply to professional personnel or senior managers who make decisions on the course, structure and development of the business.

The Labour Act stipulates a strict obligation to record employees' working time, including the start, end and break times during a working day. In practice, however, there have been deviations in many businesses from this statutory obligation in recent years. It is possible to legally waive or simplify the requirement for time recording. A waiver is only permitted if the concerned employees earn more than 120,000 Swiss francs per year and they have a high degree of independence in their work, especially regarding their working time. In addition, an exemption to the time-keeping obligation requires a collective agreement.

To ensure the health of employees, a maximum number of working hours per week must be respected. In this regard, the Labour Act distinguishes between two categories of employees: category 1 includes employees of industrial enterprises, white-collar employees such as office workers, technical staff and employees in large retail companies; and category 2 includes all other workers, particularly employees in the construction sector, workers in commerce and sales staff in small retail undertakings. The maximum working time of the two categories of employees differ. While the maximum working time for category 1 employees is 45 hours per week, the maximum for category 2 employees is 50 hours. An exception is made if employees of both categories work together in the same company. In this case, the maximum working time is 50 hours per week for all employees. The Labour Act does not regulate the effective hours an employee must work per week. This is regulated in collective bargaining agreements and individual employment contracts.

In Switzerland, night work (i.e., work between 11pm and 6am) is generally forbidden. Only certain businesses and specific groups of employees (as outlined by Ordinance No. 2 to the Labour Act) are permitted to work at night. Otherwise, a special permit is required. A permit for night work may be granted if either a particular or urgent need is presented. It is strictly forbidden to exceed nine hours of work at night (10 hours including breaks). A different rule applies if the employee only performs night work on three out of seven consecutive nights. In this case, they are allowed to work for 10 hours (12 hours including breaks), subject to further requirements outlined in Ordinance No. 1 to the Labour Act. It is possible to agree on special compensation for night work, which can be of a temporal or monetary nature.

iv Overtime and excess hours

Under Swiss law, additional working hours are either considered overtime or excess hours. Overtime hours are regulated in Article 321c of the CO. These are hours worked by an employee in excess of the hours stipulated in their employment contract. If these additional hours exceed the maximum of 45 or 50 working hours allowed under the Labour Act, they are considered excess hours.

The compensation for additional working hours differs depending on whether they are overtime or excess hours. According to the CO, overtime hours must be compensated by corresponding time off. If no time off can be granted, the employee must receive a payment with a supplement of at least 25 per cent of their usual salary. This extra payment must also be granted for excess hours according to the Labour Act. However, a different agreement may be made for overtime hours either in a collective agreement or in a written individual employment contract. It can be agreed that no supplement is granted or even that it is already included in the salary, which is generally the case in management contracts. On the other hand, the additional payment for excess hours is mandatory and no deviating agreement can be made.

However, the supplement for white-collar employees and employees in large retail companies is due only if they work more than 60 excess hours per year. For those employees, it is also forbidden to work more than two excess hours per day. The maximum excess hours worked by a category 1 employee is 170 hours per year, whereas the maximum for category 2 employees is 140 hours per year.

VII FOREIGN WORKERS

For the admission of foreign workers, a dual system is applicable in Switzerland. A distinction is made between citizens of the European Union or the European Free Trade Association (EFTA) on one hand and third-party citizens on the other. Switzerland, the countries within the European Union and those within the EFTA are parties to the Agreement on Free Movement of Persons. Most of the citizens under this agreement are entitled to receive a work permit in Switzerland without fulfilling any additional requirements. Citizens of a non-EU or non-EFTA country are only granted a permit restrictively. Work permits are only granted to management-level employees, specialists or other qualified employees of third countries, and these are issued on a limited basis.

Employees (of an employer based in the EU or EFTA) that are required to temporarily work in Switzerland may benefit from the simplified notification procedure, which allows service providers based in the EU or EFTA to locate their employees in Switzerland for up to 90 working days per calendar year. If these employees do not possess EU or EFTA citizenship, they must have been duly admitted to the EU or EFTA labour market for at least 12 months beforehand to qualify for the procedure. Each notification generally needs to be made at least eight days in advance of the permit being required, and employers making use of the notification procedure must adhere to the standard working conditions in Switzerland, which include the required minimum wages.

There is no restriction on the number of foreign workers that each business can employ, and the employer is not required to maintain a list of foreign employees. All foreign workers who are residing in Switzerland but do not have a permit for permanent residency are subject to tax at source. The same working conditions must be applied to foreign workers as to their Swiss colleagues.

According to the Federal Act on Private International Law, the law that is applicable to employment relationships with foreign workers is that of the nation in which the employee typically performs their tasks. The parties may, however, agree that either the law of the nation in which the employee permanently resides or the law of the nation in which the employer is headquartered shall be applicable. As a result, it is possible that an employment relationship between a foreign employee and foreign employer in Switzerland is governed by foreign law. However, and as far as applicable, Swiss social security obligations must be observed.

VIII GLOBAL POLICIES

General guidelines and concrete directives regarding the work performance and the behaviour of employees can be issued by the employer. The protection of the life, health and integrity of employees must be ensured by the employer by means of prescribed measures. Specifically, the employer must ensure that employees are not sexually harassed or discriminated against. In Switzerland, it is therefore common for companies to have rules for accepted conduct and the consequences of non-compliance. Although employees are not obliged to sign these guidelines, it is standard practice for them to commit to the rules in written form. At a minimum, the employer should have proof that employees have been handed the policy.

The Federal Act on the Equal Treatment of Women and Men aims to guarantee equal treatment at the workplace through a general prohibition of discrimination on the basis of gender, which includes sexual harassment. Any discrimination leading to refusal of employment or dismissal is also prohibited and sanctioned by this law.

IX PARENTAL LEAVE

The law grants mothers maternity leave of 14 weeks. During this period, they receive the federal statutory maternity compensation, which covers 80 per cent of the salary received before the birth (currently up to 220 Swiss francs per day). A mother qualifies for the federal maternity allowance under the following conditions: (1) she was insured on a compulsory basis in accordance with the Retirement and Survivors Act for the nine months preceding the birth; (2) she was employed for a minimum of five months during this period; and (3) at the time of childbirth, she is employed or self-employed or works in her husband's business and receives a cash wage. The federal maternity benefit is administered by a state agency, while the financing is provided by all employers and employees through their social security contributions.

In the event of the hospitalisation of a newborn child, maternity leave may be extended by the extended period of payment of the statutory maternity allowance, which is capped at eight weeks. If a newborn child is hospitalised for a longer period, a woman may request that the entitlement to maternity allowance does not begin until the child returns home.

In addition to statutory maternity pay, some employees receive additional benefits from their employers. These can be, for example, the payment of the difference between the statutory maternity pay and the full wage, or the payment of maternity pay for a longer period than the legal period, or both. Workers are protected from dismissal throughout their pregnancy and for 16 weeks after childbirth. As a result, if a notice of termination is given within this period, it is considered void. Should the notice of termination have been given before the beginning of this period, the notice period is suspended and continues to run again at the end of the protected period (see also Section XIII.i).

Paternity leave for fathers is two weeks. During this time, fathers receive a compensation of 80 per cent of their average income before the child's birth, up to 220 Swiss francs per day. Generally, the same principles apply to paternity leave as to maternity leave and the same government agency is responsible for the funding of both maternity paternity pay. Unlike maternity leave, the CO contains no provisions for protection against dismissal during paternity leave. The employer can therefore also issue a notice of termination during paternity leave.

Parents may individually take up to three days' paid time off to look after an ill child if there is no alternative for suitable childcare.

Moreover, if an employee is entitled to carer's pay because their child's health has been seriously impaired by illness or accident, they are entitled to 14 weeks carer's leave, which must be taken within a period of 18 months from the day for which the first daily carer's allowance is claimed (by either of the parents). Carer's leave may be split between parents and may be taken in full weeks or on a day-to-day basis. Parents on care leave are entitled to statutory pay, which lasts for 14 weeks and is paid at 80 per cent of the last salary but is capped at 220 Swiss francs per day. The entitlement to these daily payments ends 18 months from the day for which the first daily carer's payment has been claimed (by either of the parents).

X TRANSLATION

In general, no specific language is prescribed for employment documents. The only requirement is that employees understand the terms and conditions of the employment, otherwise there may be enforcement difficulties. A translation of all employment conditions into a local language is therefore recommended. This is especially relevant for the most important documents, such as employment contracts and general employment conditions.

No formalities need to be observed for the translation. The determining language in the case of a conflict between the languages should, however, be clearly defined. In addition, if only foreign documents are available for a court dispute, a formal translation by a qualified translator may be required. However, if a document is already translated when it is drawn up, this is not necessary.

XI EMPLOYEE REPRESENTATION

If a company has more than 50 employees, the employees are entitled to elect a works council according to the Participation Act. However, it is not the case that all companies with more than 50 employees have a works council.

A resolution of at least one-fifth of all employees is required to constitute a works council. The election of representatives is possible as soon as the employees decide to establish a works council in a vote, whereby a certain quorum (20 per cent or at least 100 employees, depending on the size of the enterprise) must be met for the vote to take place. The number of representatives is fixed by the employer and the employees in view of the size of the enterprise. At a minimum, however, there must be three representatives. The employer must inform the works council at least once a year about how the course of business will affect employees. The works council is responsible for its own organisation, in accordance with the Participation Act.

All information concerning matters within the duties of the works council must be communicated to the works council representatives. In addition, their opinion must be heard on the following matters:

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

If no works council is in place, these rights are shared by all the employees.

Apart from the Participation Act, the law provides no specific rights for works councils; however, some collective agreements do stipulate these rights.

XII DATA PROTECTION

i Requirements for processing

The FADP stipulates that both the acquisition of personal data and its processing must be carried out lawfully and in good faith. Moreover, personal data may only be processed for a specific purpose, which must be indicated; obvious in the circumstances; or prescribed by

law. With regard to employment law, the scope of protection is broader because, according to Article 328b of the CO, only data related to the aptitude of the employee or that is necessary for the performance of services may be processed.

The employer must inform the employee (for example, by means of a data protection and privacy policy) about the collection and processing of sensitive personal data or personality profiles (see Section XII.iii). In addition, the employee must be granted access to their file at any time. The employer is responsible for implementing appropriate technical and organisational measures to protect personal data from unauthorised processing.

ii Cross-border data transfers

The FADP restricts transfers to countries without adequate protection. Only if adequate and appropriate cross-border data protection agreements exist, and information about these agreements is regularly given to the Federal Data Protection and Information Commissioner (FDPIC), or if the respective countries provide an adequate and appropriate level of data protection, are cross-border data transfers without the employee's consent admissible. Transfers are permitted based on safeguards, which include the standard contractual clauses, if the exporter and the importer agree on an addendum to account for specifics under Swiss law. The exporter must carry out a transfer impact assessment before commencing a transfer to a recipient in an unsafe country.

The FDPIC has established a public list of states that implement and apply equivalent data protection legislation for individuals' data.[4] An adequate level of data protection is assumed, for instance, within EU Member States. On the other hand, the data protection level provided by the United States is not deemed adequate. However, the Swiss–US Privacy Shield Framework provides a valid legal method to comply with Swiss requirements on cross-border data transfers and processing.

The processing of individuals' personal data may, under certain conditions, be assigned to third parties: if there is an agreement or if this possibility is provided for by law; if the data processing is generally allowed for the assignor itself; and if it is not proscribed by a statutory or contractual duty of confidentiality.

iii Sensitive data

The revised FADP only applies to personal data of individuals. The data of legal entities, such as corporations, are no longer protected by the new FADP. Stronger legal protection is, however, provided for sensitive personal data. The list of sensitive personal data has been expanded under the revised FADP and relates to:

a religious, philosophical, political or trade union-related views or activities;
b health, the 'intimate sphere' of the person or racial origin;
c genetic data;
d biometric data that unequivocally identifies a natural person;
e administrative or criminal proceedings and sanctions; and
f social security measures.

4 www.edoeb.admin.ch/dam/edoeb/en/dokumente/2017/01/staatenliste.pdf.download.pdf/list_of_countriesinfrench.pdf.

Financial data is not sensitive personal data under the FADP. Switzerland's banking secrecy law, however, protects the confidentiality of the existence of banking relationships, the identity of banks' customers and any other information related to banking relationships.

For sensitive personal data, more stringent requirements apply to the consent of the data subjects to the processing of their sensitive personal data (if consent is required by law). If extensive processing of particularly sensitive personal data is planned, there may be a requirement for private data controllers to carry out a data protection impact assessment in advance.

iv Background checks

Employers may not conduct background checks or assign background checks to third parties without the explicit consent of job candidates. If the explicit consent is given by the candidate, a background check is restricted to information that strictly concerns the candidate's fulfilment of the requirements of the respective job (respect of the candidate's right to privacy). In particular, questions or checks on the candidate's health must be limited to whether they are fit to fulfil the job's requirements. Further checks regarding any potential future illnesses or risks for diseases are firmly prohibited.

v Electronic signatures

Electronic signatures are permissible in Switzerland and are regulated by the Federal Act on Certification Services in relation to Electronic Signatures (ESigA) and its Ordinance. The CO also prescribes certain rules on electronic signatures. According to Article 14, Paragraph 2 *bis* of the CO, only a qualified electronic signature based on a qualified certification, issued by a recognised provider of certification services and with an authenticated time stamp within the meaning of the ESigA, is equivalent to a handwritten signature.

As outlined above, employment agreements entered into under Swiss law should, as a general principle (because typical employment contract regulations require the written form to be validly agreed upon), be concluded in writing (meaning either wet ink signatures or qualified electronic signatures of both employee and employer). Practice shows that only a few companies make use of qualified electronic signatures, mainly because the process of obtaining these is quite complicated.

Following the pandemic, the use of electronic signatures is on the rise. However, most do not meet the statutory requirements of a qualified electronic signature. This is particularly important in the employment context, as it leaves plenty of employers with invalid clauses in employment contracts – especially concerning non-compete undertakings or overtime rules.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Under Swiss law, any employment contract concluded for an indefinite period of time may be unilaterally terminated by both employer and employee, subject to the contractual or, if no contractual notice period was agreed, statutory notice periods for any reason (ordinary termination). The parties may not reduce notice periods to less than one month, subject to any further restrictions as set forth in collective bargaining agreements (if applicable).

Termination notice needs to be physically received before the notice period can begin. This means that the termination notice needs to be received by the employee before the end

of a month, so that the notice period can start on the first day of the following month. If the notice is not received before the end of the month, the notice period would start the month following receipt of the notice.

In principle, no reason to terminate an employment agreement is required; however, employees have a statutory right to be informed in writing of the reasons for termination, upon their request. Swiss statutory law provides for protection against termination by notice for both employers and employees, distinguishing between abusive and untimely notice of termination.

The law defines certain grounds based on which terminations are considered abusive[5] and triggers indemnity remedies of up to six monthly wages. Nevertheless, an abusive termination remains valid.

Termination might be considered abusive, particularly if it is based on the following grounds (non-exhaustive list):

a because of a personal characteristic of the other party (e.g., gender, race, age) (generally described as discrimination), unless that trait is severely impairing the employment relationship; or

b because an employee asserts claims arising from the employment relationship in good faith (generally described as retaliation).

If a contracting party has a 'significant cause', it may terminate the contract at any time without prior notice (extraordinary termination). If an employer terminates an employment relationship with immediate effect without a significant cause, compensation is owed to the employee by the employer and a penalty of up to six months' remuneration may also be claimed.

By law, an employee is only entitled to severance if they have at least 20 years of service with the employer and are, at the same time, at least 50 years of age. The severance is then between two and eight months' compensation. However, the employer can deduct statutory pension contributions paid during the employment from this amount, so, in practice, the statutory severance is typically zero.

The parties to an employment agreement may agree on the (immediate) termination of the agreement at any time and conclude a respective termination agreement. Swiss case law only accepts 'fair' termination agreements (i.e., termination agreements that do not circumvent mandatory legal provisions and in which the employee is not requested to waive any of their claims resulting from mandatory statutory rules). Accordingly, a termination agreement must include benefits for both employer and the employee. Otherwise, the judge may declare the termination agreement as null and void.

Generally speaking, there are no categories of employees that are protected from employment termination; however, based on social policy, the employer must observe certain waiting periods during which a termination notice cannot validly be served. Waiting periods apply in the following special situations:

a during compulsory military or civil defence service or Red Cross service lasting more than 11 days, and during a period of four weeks before beginning and after the end of service;

5 Article 336, Swiss Code of Obligations.

b in the case of full or part-time absence from work due to illness or accident, as long as the employee is not at fault for the illness or accident, for the following periods:
- in the first year of employment: up to 30 days;
- from the second to the fifth year of employment: up to 90 days; and
- from the sixth year of employment: up to 180 days;

c during foreign-aid service in which the employee participates with the consent of the employer, and where the competent federal authorities have ordered the service;

d during pregnancy and for 16 weeks following the birth of the baby; and

e during the employee's entitlement to carer's leave for a child whose health is seriously impaired by illness or accident, but for no longer than six months from the day on which the employee's entitlement arises.[6]

Any notice given by the employer during any of the above periods is void. Any notice given prior to the respective period is effective, but once the special situation has occurred and for the period it lasts, the notice period is suspended and only continues after the end of the waiting period.

In general, an employee who is dismissed by ordinary termination may be released from the performance of their work duties (garden leave) at any time. The employer is obliged to continue paying the employee's wage until expiry of the ordinary notice period but may set-off any income generated by the employee during garden leave, if applicable (i.e., if the employee was allowed to start a new job).

A company has no obligation to inform authorities about a termination of an employment relationship (except for apprenticeship contracts, if certain thresholds are reached, and mass dismissals).

ii Mass dismissals

Article 335d of the CO sets out rules regarding mass dismissals and defines these as notices of termination in companies 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 a business normally employing more than 20 and fewer than 100 employees;

b at least 10 per cent of all employees in a business normally employing at least 100 and fewer than 300 employees; and

c at least 30 employees in a business normally employing at least 300 employees.

If mass dismissals are anticipated by a company, an employer is obliged to inform and consult the company's works council or the employees as a collective as well as to inform the cantonal labour office.

If the employer does not comply with the procedural rules as set out in the CO, mass dismissals are considered abusive termination of employment relationships and may lead to claims for damages, additional remunerations or even (at least in the opinion of some scholars), as a worst-case scenario, terminations being void and reinstatement being ordered.

Furthermore, according to the CO, companies normally employing at least 250 employees and intending to make at least 30 employees redundant within 30 days for

6 id., Article 336c.

reasons unrelated to the person of the affected employees must hold negotiations with the employees to prepare a social plan that serves as a safety net for the dismissed employees.[7] If a company does not reach that threshold, no obligation to negotiate nor issue a social plan applies. However, applicable collective bargaining agreements may provide for an obligation to negotiate and issue a social plan. Additionally, any compulsory early retirement obligations as stipulated in the pension plan regulations of a company must be complied with.

XIV TRANSFER OF BUSINESS

The Swiss law applicable to the transfer of undertakings is, in principle, similar to the provisions set out in Council Directive 2001/23/EC of 12 March 2001. According to Article 333 of the CO, the employment relationship and all attendant rights and obligations are transferred from the employer to a third party if the employer transfers the company or a part thereof to a third party, unless the employee refuses to transfer. If an employee refuses to transfer, the employment relationship is terminated upon expiry of the statutory notice period, irrespective of whether longer or shorter contractual notice periods apply. This only applies if the transfer does not take place as part of a restructuring. Furthermore, Article 333 is also applicable if only a single business unit of the company is transferred, if the business unit maintains its structure and organisation after the transfer and in cases of outsourcing or resourcing. Regarding outsourcing or resourcing, the application of the provisions on the transfer of undertakings depends on how they are structured, namely the services that are outsourced or resourced, the assets transferred and the organisation of the provision of the services before and after the outsourcing or resourcing.

If a transaction is considered a (partial) business undertaking, the existing employment relationships at the time of the transfer of the undertaking (including those for which a notice period is ongoing at the time of transfer) are automatically transferred to the acquirer, including all rights and obligations as of the date of the transfer.

The current and the future employer are jointly and severally liable for any employees' claims that have become due before the transfer of undertakings or that will become due up until the date on which the employment relationship could have been terminated validly.

Concerning restructurings, the transfer of employees dedicated to the transferred company is not automatic. Only employees chosen by the acquirer will be transferred. Furthermore, the acquirer is not typically jointly and severally liable with the seller for pre-transaction claims by employees.

If a collective bargaining agreement applies to any transferred employment relationship, the new employer is obliged to comply with this for one year unless the collective bargaining agreement expires earlier or is terminated by notice.

If the employer plans any redundancies, terminations or changes to working conditions in relation to a business transfer, the works council (or the employees as a collective, if there is no representative) must be consulted in advance before a decision about redundancies is made or the changes in working conditions are implemented. Consultation in advance is also deemed necessary if the dismissals or the changes in working conditions will occur after the transfer (on behalf of the new employer), as these dismissals and changes would be regarded as the result of the transfer of undertakings if performed within the first few months after

7 id., Article 335i.

the transfer. The employer must give the works council or the employees as a collective the possibility to make suggestions on how to avoid any measures, in particular on how to limit the number of redundancies.

The employer must provide all relevant information to the works council or to the employees as a collective. Swiss case law holds that employee representatives must be allowed at least 14 days to make their suggestions or proposals on the proposed changes. A breach of the duty to consult may lead to the employer becoming liable for any damage incurred by the employees. Moreover, the government may force the concerned parties to conduct a consultation process and may fine parties in the case of a breach of their duties. Additionally, some legal scholars argue that any termination issued during this time or any changes that were already implemented are void.

After consultation or if no consultation is required immediately, the works council or the employees as a collective must be informed in advance of the transfer of undertakings of the following:

a the reasons for the transfer;
b the results of the consultation process (if applicable); and
c the final legal, economic and social consequences of the transfer of undertakings for employees (including the number of redundancies and changes to working conditions).

XV OUTLOOK

The revised FADP and its implementing ordinances were confirmed by the Federal Council to enter into force on 1 September 2023. Therefore, all data privacy documents need to be reviewed and updated.

A new provision on adoption leave has been introduced, and this entered into force on 1 January 2023: employees who adopt a child under the age of four are entitled to two weeks' adoption leave, which must be taken within the first year of adoption. The adoption allowance under the Income Compensation Allowance amounts to 80 per cent of the average earned income, up to 220 Swiss francs per day. If both parents are employed, they can divide the two weeks' leave between them at their own discretion as long as they are not on leave at the same time. However, there is no entitlement to income compensation allowance in the case of adoption of a stepchild.

Appendix 1

ABOUT THE AUTHORS

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Simone Wetzstein is a partner and co-head of Walder Wyss' employment group. She specialises in the areas of employment, social security and residence law, and also practises in contract and corporate law. She advises in contentious and non-contentious matters and appears on behalf of her clients in the Swiss courts. Simone has a particular interest and legal expertise in anti-discrimination law and matters of gender equality.

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ISBN 978-1-80449-150-8