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RECHTSANWÄLTE

EMPLOYMENT LAW OVERVIEW

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I. GENERAL OVERVIEW

1. INTRODUCTION

The legal regime governing employment relationships in Switzerland is generally more liberal and favorable towards the employer than in many other countries. This is partly because labor unions are somehow less influential in Switzerland compared to, for example, labor unions in European Union countries, but also because the unemployment rate traditionally has been and remains relatively low in Switzerland.

According to the principle of freedom of contract, the parties of an employment agreement are free to agree on the content and terms of their agreement to an extent that is substantially greater than in most other European jurisdictions. Swiss employment law, however, does contain some basic mandatory provisions. Most important are mandatory provisions aiming to protect the safety and the health of the employee. Public labor protection regulations cover, among other things, working hours and breaks, special protection for young employees, pregnant women and breastfeeding mothers, work-related injury insurance and industrial accident prevention.

For issues relating to employment law, the provisions of the employment contract should be the first point of reference, taking into account mandatory statutory provisions. If the employment contract is silent on a certain issue, then the statutory provisions apply.

2. KEY POINTS

- Switzerland has a dual system for the admission of foreign workers (preferential treatment of EU/EFTA nationals).
- Every employee has the right to decide whether to join a trade union or not. The unions are financed through the contributions of their members.
- Basically, the Swiss employer is fully liable for social security contributions in respect of his employees.
- Where the employer transfers a business or a part of a business to a third party, the employment relationship and all attendant rights and obligations pass to the acquirer as of the day of the transfer, unless the employee refuses to transfer.
- In principle, no cause to terminate an employment relationship is required.

3. LEGAL FRAMEWORK

- Swiss Code of Obligations (CO), Articles 319 to 362, SR 220 [Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht),SR 220]
- Swiss Federal Act on Employment in Trade and Industry, SR 822.11 [Bundesgesetz über die Arbeit in Industrie, Gewerbe und Handel, SR 822.11]
- Swiss Federal Act on Old-Age and Survivors' Insurance, SR 831.10 [Bundesgesetz über die Alters- und Hinterlassenenversicherung, SR 831.10]
- Swiss Federal Act on Disability Insurance, SR 831.20 [Bundesgesetz über die Invalidenversicherung, SR 831.20]
- Swiss Federal Act on Occupational Pension Plans, SR 831.40 [Bundesgesetz über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge, SR 831.40]

- Swiss Federal Act on Accident Insurance, SR 832.20 [Bundesgesetz über die Unfallversicherung, SR 832.20]
- Swiss Federal Act on the Compulsory Unemployment Insurance and the Insolvency Compensation, SR 837.0 [Bundesgesetz über die obligatorische Arbeitslosenversicherung und die Insolvenzentschädigung, SR 837.0]
- Swiss Federal Act on Health Insurance, SR 832.10 [Bundesgesetz über die Krankenversicherung, SR 832.10]
- Swiss Federal Act on Gender Equality, SR 151.1 [Bundesgesetz über die Gleichstellung von Frau und Mann, SR 151.1]
- Swiss Federal Act on Employee Information and Participation in Operations, SR 822.14 [Bundesgesetz über die Information und Mitsprache der Arbeitnehmerinnen und Arbeitnehmer in den Betrieben, SR 822.14]
- Swiss Federal Act on Protection from Passive Smoking, SR 818.31 [Bundesgesetz zum Schutz vor Passivrauchen, SR 818.31]
- Swiss Federal Act on Employment Exchange and Personnel Leasing, SR 823.11 [Bundesgesetz über die Arbeitsvermittlung und den Personalverleih, SR 823.11]
- Swiss Federal Act on Employees Sent to Switzerland, SR 823.20 [Bundesgesetz über die minimalen Arbeits- und Lohnbedingungen für in die Schweiz entsandten
- Arbeitnehmerinnen und Arbeitnehmer und flankierende Massnahmen, SR 823.20]

4. NEW DEVELOPMENTS

IMPLEMENTATION OF THE POPULAR INITIATIVE "STOP MASS IMMIGRATION"

From 1 July 2018, vacancies in occupations with an unemployment rate of 8 per cent or more (threshold) must be reported to the Regional Employment Centres. On 1 January 2020, the threshold will fall to 5 per cent.

The only criterion for making types of profession subject to the obligation to register is the unemployment rate in a particular type of profession. The rates are calculated for the whole of Switzerland, and on the basis of the average over twelve months in occupational categories in accordance with the Swiss Occupational Nomenclature.

The list of the professions concerned is published and valid for the period from 1 January to 31 December of the current year. The list will be updated in the fourth quarter of each year.

Employers are therefore obliged to notify the Regional Employment Centres (REOs) of all vacancies in occupations where the unemployment rate reaches or exceeds the threshold. The REOs must inform employers within three working days whether suitable files have been notified. The employers invite suitable job seekers to an interview or to an aptitude test, and inform the REOs whether they are being employed.

The positions subject to registration are subject to a publication ban of five working days. This begins on the working day after the confirmation has been sent that the job has been entered into the ALV information system by the REOs, irrespective of whether the REOs can send suitable dossiers to the reporting employers.

This gives job seekers a head start on the job market, which they can use to apply for vacancies quickly and on their own initiative. For this reason, the information lead cannot be shortened if the REOs do not find suitable dossiers.

Vacancies however, do not have to be reported if:

- jobs within a company, a group of companies, or if a group of companies are filled by persons who have been employed for at least 6 months; this also applies to apprentices who are hired following the apprenticeship;
- the employment lasts a maximum of 14 calendar days; and
- if persons are employed, who are related, or related by marriage or registered partnership, to authorised signatories in the company, or who are related, or related by marriage, or registered partnership in a straight line, or to the first degree in the lateral line.

II. PRE-EMPLOYMENT CONSIDERATIONS

1. RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

In order to employ staff in Switzerland, it is not necessary to set up your own company in Switzerland. Employees can be employed directly by a foreign company. As a general rule, the employer may handle data concerning the employee only to the extent that such data concerns the employee's suitability for this job or are necessary for the performance of the employment contract. This also applies to pre-employment screening and hiring practices. Consequently, to give some examples, it is permitted to ask the candidate for an excerpt from the criminal register to the extent that the position in question justifies asking (e.g, for positions requiring higher trustworthiness).

Medical checks may be requested only to the extent that this is justified by the work involved (e.g. dealing with heavy workloads or dangerous jobs where physical fitness is a requirement). Drug screening is justified only to the extent that it is required due to the work involved (e.g. for truck drivers or dangerous jobs where physical fitness is required). Credit checks are generally not permissible unless the position in question justifies such a check (eg, bankers, accountants or lawyers). Employers cannot screen a candidate's social media accounts. However, professional sites such as LinkedIn and Xing may be screened. Employers may contact references given in an applicant's CV or job application.

III. EMPLOYMENT CONTRACTS

1. MINIMUM REQUIREMENTS

A. MATERIAL REQUIREMENTS

Under Swiss law, an employment contract is a contract whereby the employee is obliged to perform work in the employer's service for either a fixed or an indefinite period of time, and the employer is obliged to pay salary either based on time periods or based on the work performed. As compared to other contracts involving the rendering of personal services, the most distinctive feature of the employment contract is that the employee's personal and organizational dependence reflects a relationship of legal subordination, i.e. the employee is not free to choose the time, place or type of work he or she will perform. By contrast, for example, contracts for legal services concluded between attorneys and their clients typically lack such legal subordination and, accordingly, do not qualify as employment contracts. Consequently, different statutory rules will apply.

B. FORMAL REQUIREMENTS

Except for a few special agreements - such as the apprenticeship contract, the employment contract with a commercial traveler or the employment contract between a commercial staff supplier and an employee (which all require written form) - an employment contract is not subject to any specific form and may even be agreed verbally or by implication. Certain contractual provisions are, however, only valid if agreed in writing (e.g. restrictive covenants, exclusion of compensation for overtime, notice periods differing from statutory law, etc.).Moreover, Switzerland has implemented European Union Directive No. 533/91.

Consequently, where the employment contract has been concluded for an indefinite duration or for longer than one month, within one month of the beginning of the employment relationship, the employer must inform the employee in writing of:

- the names of the contracting parties;
- the date of the beginning of the employment relationship;
- the employee's function;
- the salary and any additional benefits;
- the length of the working week

2. FIXED-TERM / OPEN-ENDED CONTRACTS

The parties are free to enter into an unlimited or a fixed-term contract. The sequence of several fixed-term contracts between the same parties may, however, be regarded as circumvention of the employee's protection against dismissal (if there is no objective reason for such sequence). In this case, the employment contract is considered to be unlimited.

3. TRIAL PERIOD

During the trial period, either party may terminate the contract at any time by giving seven days' notice; the trial period is, by statutory law, considered to be the first month of an employment relationship. However, the probation period may not exceed three months. Where the period that would normally constitute the probation period is interrupted by illness, accident or performance of a non-voluntary legal obligation, the probation period is extended accordingly. During the trial period, the statutory rules on termination at an inopportune juncture (pregnancy, illness, accident, military service, et al.) do not apply.

4. NOTICE PERIOD

A. ORDINARY TERMINATION

Any employment contract concluded for an indefinite period of time may be unilaterally terminated by both employer and employee, subject to statutory notice periods ranging from one to three months, depending upon the length of service (during the trial period of a maximum of three months, the employment relationship may be terminated with a notice period of seven days). These notice periods may generally be altered by mutual consent, provided that they are the same for both employer and employee.

B. EXTRAORDINARY TERMINATION

Both employers and employees have a right to terminate the employment contract immediately and without notice for cause, regardless of whether or not the contract was concluded for an indefinite period of time and regardless of any statutory notice periods, which would apply to an ordinary termination. By statute, there is cause if the terminating party cannot reasonably be expected to continue the employment relationship, but ultimately, determination of just cause is left to the courts to decide. As a general rule, the case law is quite strict and only severe breaches of the employee's duties (e.g. criminal acts against the employer, but never the mere underperformance of an employee) are considered to be just cause.

IV. WORKING CONDITIONS

1. MINIMUM WORKING CONDITIONS

In Switzerland, the most important conditions of an employment contract are provided by statutory law and by the applicable collective agreement (if any). In particular, collective agreements set the terms and conditions of employment, which include, amongst others: categories and related job descriptions; duties and obligations; minimum wages; job retention rights during absences due to illness; salary increases due to length of service; termination, resignation, criteria for calculation of the severance pay; night work; maternity leave; and holidays.

2. SALARY

Salary is usually paid at the end of the calendar month deducting all applicable social security contributions and withholding taxes (if any). Swiss law explicitly provides that the salary paid to employees must be stated in a pay slip.

3. MAXIMUM WORKING WEEK

In the majority of Swiss companies, the normal weekly working hours under an employment contract of a collective bargaining agreement are between 40 and 44 hours. The legal maximum weekly working hours are 45 for industrial workers, office, technical and other employees including salespersons in large retail stores; for all other commercial enterprises, the legal maximum weekly working hours are 50. The difference between the normal weekly working hours and the maximum weekly working hours is important for distinguishing between overtime and excess working hours.

4. OVERTIME

Overtime is defined as hours worked in excess of the normal weekly working hours. An employee is obliged to work more than the normal working hours to the extent that the employee can in good faith be reasonably expected to do so. By statutory law, overtime must be compensated with an additional premium of 25%. It is, however, permissible to agree in writing that overtime work will not be compensated with an additional premium or even not compensated at all. It is also possible, subject to the employee's consent, for overtime to be compensated by time off of at least equivalent duration. Contracts with management-level employees usually completely waive their right for overtime, either by payment or time off.

Excess working hours are the hours worked in excess of the legal maximum weekly working hours. To safeguard the employee's health, the Federal Labor Act prohibits more than two hours per day of excess working hours; in a calendar year, an employee may not work more than 170 excess working hours (where the weekly maximum is 45 hours) or 140 excess working hours (where the weekly maximum is 50 hours). Excess working hours must always be compensated by an additional premium of 25%, unless the employee consents to take an equivalent amount of time as compensation within a given time period.

5. HEALTH AND SAFETY IN THE WORKPLACE

A. EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

The Swiss legislative framework for safety and health at work is not based on European Legislation. As Switzerland has not joined the European Economic Area (EEA), it is not obliged to adopt EU laws. Although Switzerland has set its own policies on occupational safety and health, these basically comply with the EU legislation. Differences do exist e.g. non-reporting of occupational accidents in Switzerland.

Occupational health and safety in Switzerland is primarily based on two laws: the Labour Act (Arbeitsgesetz ArG, 1964) and the Accident Insurance Act (Bundesgesetz über die Unfallversicherung UVG, 1981). The Labour Act stipulates "The employer shall take all measures necessary to maintain and improve health protection and to ensure the physical and mental health of workers".

The Accident Insurance Act contains provisions on the compensation and prevention of accidents and occupational diseases. It regulates compulsory accident insurance (Compulsory Accident Insurance Regulation - UVV), accident prevention and the prevention of occupational diseases (Accident Prevention Regulation - VUV).

B. COMPLAINT PROCEDURES

Complaints about non-compliance with health and safety regulations can be submitted to the employer itself and, if this does not help, to the cantonal labour inspectorate. In the case of collective labour agreements, it is also possible to bring complaints to the attention of the contractually agreed complaint office or directly to the trade union concluding the agreement.

C. PROTECTION FROM RETALIATION

An employee who asserts rights from the employment relationship in good faith may not be dismissed for this reason. If he is nevertheless dismissed, the dismissal is valid, but the employer must pay a penalty of up to 6 months' salary.

V. ANTI-DISCRIMINATION LAWS

Pursuant to Swiss employment law, employers are generally prohibited from discriminating against employees based upon an employee's "personality trait" which has been interpreted to include the employee's age, religion, race, disability and political affiliation. International agreements between the European Union and Switzerland also expressly prohibit discrimination by a Swiss employer against an employee based upon an employee's nationality and require that the employee be treated the same with respect to working conditions and compensation as Swiss nationals.

There is broader and specific statutory protection provided by the Swiss Gender Equality Act, which strictly prohibits both direct and indirect discrimination based upon an employee's gender in both the private and public sector. Employers are not permitted to treat employees less favorably based upon the employee's marital status, pregnancy or familial status with respect to all conditions of employment including hiring, compensation, working conditions, promotions, demotions, benefits and termination of employment. The law also expressly requires equal pay for equal work and equal professional development opportunities regardless of gender.

The Swiss Gender Equality Act and the Federal Act on Equal Treatment of Women and Men also expressly prohibit sexual harassment of employees. Sexual harassment is defined to include threats, the promising of job-related advantages or coercive acts to obtain favors of a sexual nature. Swiss employers by law are required to take all reasonable steps to prevent sexual harassment.

The Federal Disabled Equality Act only directly protects employees of the federal government; hence, disabled persons are protected within the framework of the general protection of their rights of personality. There is, however, an increased protection in connection with building laws.

An employee can commence a legal action in a Swiss court of proper jurisdiction against an employer alleging discrimination or harassment based upon both statutory law and the employee's employment contract and seek an order prohibiting further discrimination, compensatory and emotional distress damages and/or a declaratory judgment. The Swiss Gender Equality Act also provides specific remedies to employees for gender discrimination and sexual harassment including reinstatement, up to six months' salary, and in the case of discrimination relevant to unequal pay, the difference in compensation, which resulted from the discrimination.

VI. SOCIAL MEDIA AND DATA PRIVACY

In principle, the employer can restrict the use of the Internet and social media during working hours.

To the extent that the employment falls under the Labour Act, monitoring mechanisms are not permitted if they are directed at the employee's behaviour. However, they may be permitted if they pursue other aims, for example, security or controlling the proper use of the work infrastructure and working time. Monitoring mechanisms need to be codified in internal regulations and the latter communicated to the employees.

In general, an employer will only be able to monitor peripheral data (such as the point in time of the communications or interactions, their length, and the involved connections). Monitoring the actual content of communications requires outstanding interests, which the employer will not be easily able to show. As regards telephone communications, they are in principle protected by criminal law.

An employer may control social media in the workplace if it is necessary for the performance of the employment contract and further is proportionate. Under these conditions, an employer may block social media completely. In contrast, it is rather unlikely that an employer is able to show a legitimate interest in controlling an employee's use of social media outside the workplace. However, this may for instance hold true for ideological enterprises.

If an employee disparages or even defames the employer or illegally discloses business secrets through the authorised or unauthorised use of social media, or through entries in publicly accessible blogs or assessment platforms, this can justify sanctions up to termination without notice. In addition, the employer can have such entries deleted or banned by court order and, if necessary, take criminal action against the employee.

VII. AUTHORISATIONS FOR FOREIGN EMPLOYEES

REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

In order to employ staff in Switzerland, it is not necessary to set up your own company in Switzerland. Employees can be employed directly by a foreign company. So far, Switzerland has a dual system for the admission of foreign workers. Nationals from EC or EFTA countries benefit from the Agreement on Free Movement of Persons and, in general, do not need a work permit if residence is taken in Switzerland, subject to certain restrictions and exceptions for nationals from the new EC countries. This situation may change since the Swiss voters recently backed proposals to reintroduce immigration quotas with the European Union. In regard to non-EC and non-EFTA nationals, only a limited number of management-level employees, specialists and other qualified employees are admitted from all other countries (subject to a quota as determined by the Federal Council). If non-EC or non-EFTA nationals (without residence in Switzerland) work in Switzerland temporarily for more than eight days for a non-Swiss company, such employees must be reported to the authorities in advance, even if no work or residence permit is required.

VIII. TERMINATION OF EMPLOYMENT CONTRACTS

1. GROUNDS FOR TERMINATION

As a principle, both parties to an employment contract may terminate the employment agreement at any time, subject to either the statutory or contractual notice period; without the need to fulfill any statutory grounds for termination. The party issuing the termination must however provide a written explanation of the termination upon the other party's request. Employees are, however, protected against abusive dismissal. Such abuse exists, for example, if notice of termination is given because the employee raises a bona fide claim arising out of the employment agreement, because the employee exercises a constitutional right, because notice is only given to prevent the coming into existence of a claim arising out of the contract, or because notice is given for a reason that is inherent to the personality of the other party (gender, race, origin, nationality, age, etc.). An abusive dismissal will be effective, but the employee is entitled to compensation. In addition, the employer shall not give notice of termination during protected periods. Such protection against dismissal exists while the employee is on military or civil service or a foreign aid project, or while the employee is totally or partially incapacitated to work because of sickness or accident (the latter protection period is limited to 30 to 180 days, depending on years of service). In addition, protection against dismissal exists during pregnancy and for a period of 16 weeks following birth. A notice of termination given during such a protected period is null and void.

2. COLLECTIVE DISMISSALS

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

- at least 10 employees in companies usually employing more than 20 and fewer than 100 persons;
- at least 10% of all employees in companies usually employing more than 100 and fewer than 300 persons; and
- at least 30 employees in companies usually employing more than 300 persons.

Before a collective dismissal, the employer must inform or consult with the works council (if any) or the employees. Employers must also inform the cantonal labor office of every planned collective dismissal. Non-compliance with the procedural rules by the employer constitutes abusive termination of the affected employment, which may lead to the payment of damages and additional remunerations, and in the case of substantial non-compliance, the terminations can be found void and reinstatement ordered.

The employer must hold negotiations with the employees with the aim of preparing a social plan if the employer:

- normally employs at least 250 employees; and
- intends to make at least 30 employees redundant within 30 days for reasons that have no
- connection with such persons.

3. INDIVIDUAL DISMISSALS

Employees have to be given notice of termination of their employment. The length of the notice period is agreed in the employment contract, subject to statutory rules on minimum length and equality of the notice periods for notice to be given by employer, and employee. An employment relationship can be terminated with immediate effect for cause.

A. IS SEVERANCE PAY REQUIRED?

There are no statutory severance payment obligations. An obligation may, however, be provided by a collective agreement or by a social plan in case of collective redundancy.

4. SEPARATION AGREEMENTS

The termination of an employment relationship does not require a separation agreement. A separation agreement may, however, be advisable in order to amicably settle all mutual claims relating to the employment. Although the parties are free to terminate employment by mutual consent as per any day, separation agreement are considered valid by the Federal Supreme Court only if the terms of the agreement do not favor the employer without reasonable justification. Consequently, if the initiative for the termination of employment is taken by the employer, it is advisable to not only consider the notice period, but 1-2 months on top of the notice period (as the employee waives her/his protection rights in case of illness, accident or pregnancy).

It is noteworthy that the employee may not waive claims arising from mandatory provisions of law or the mandatory provisions of a collective employment contract by signing a separation agreement. A clause in separation agreement stating that the employee waives any and all accrued vacation entitlements may, therefore, be void.

A separation agreement usually provides the following content:

- Termination date
- Financial arrangements
- Garden leave (if any)
- Communication arrangements (internal/external)
- Work reference
- Restrictive covenants (if any)
- Full and final waiver clause

A. DOES THE AGE OF THE EMPLOYEE MAKE A DIFFERENCE?

In the case of the separation of employees who are about to soon retire, it may be appropriate to make interim payments in order not to reduce the pension. However, such an obligation does not exist by law.

5. REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

A wrongful termination must be challenged by the employee before expiration of the notice period by written communication to the employer. After the last day of employment, the employee has a 180 day deadline to submit a request for a conciliation hearing with the competent magistrate. If no settlement can be reached before the magistrate, the claiming party has a 3-month period to submit the claim to the court of 1st instance. The employee can claim up to 6 months' salary as indemnification in case of a wrongful or discriminatory termination.

6. WHISTLEBLOWER LAWS

Swiss labour law still lacks explicit labour law protection for whistleblowers despite political advances and government efforts. De lege lata, an employee must first turn to the employer's internal departments to uncover grievances. Only if they do not react can the authorities or the public be informed. However, there is still no effective protection against dismissal. A dismissal as a result of a permissible disclosure of grievances would be abusive, but valid. The employer could be sanctioned by penalty of payment up to a maximum of 6 monthly salaries.

IX. RESTRICTIVE COVENANTS

1. TYPES OF RESTRICTIVE COVENANTS

A. NON-COMPETE CLAUSES

According to Article 340 et al. of the Code of Obligations (CO), an employee may enter into an obligation towards the employer to refrain from any competitive activity after termination of the employment relationship. A post-termination noncompetition clause is binding only if the employment relationship gives the employee access to customer data, manufacturing secrets, or business secrets, and if the use of such knowledge could significantly damage the employer.

The noncompetition clause has to be in written form (noncompetition clauses in general employment conditions are therefore not enforceable) and must be reasonably limited in terms of geographic market, time, and products/services in order to preclude an unreasonable impairment of the employee's economic prospects.

The maximum duration of a post-termination noncompetition clause is three years. A judge may limit an excessive prohibition against competition, whereas due consideration to the employer's contribution, if any, must be given. A prohibition of competition lapses if the employer no longer has a significant interest in upholding the prohibition. Courts have a tendency to limit agreed prohibitions with regard to subject (products, services), place (market), and time, particularly if they are drafted as "catch-all" clauses. Hence, it is very important to draft a non-compete in a way that protects the employer's legitimate business interests, but at the same time allows the employee to continue a career in the market. Generally, a non-competition clause should cover only the main products or services for which the employee was responsible and only the main geographic markets in which such products and services were sold. Furthermore, a non-competition period should be only as long as the employer needs to reestablish a customer relationship with a successor of the exiting employee.

The law does not require a consideration for the post-termination noncompetition covenant. However, courts are generally more reluctant to restrict agreed prohibitions where the employee receives consideration. In the event of a termination of employment by an employer, no non-competition covenant is possible unless the employer had a legitimate reason to dismiss the employee. Hence, general reasons, such as an economic reason, are not sufficient. It is really necessary that an employee has breached an obligation under the employment agreement.

B. NON-SOLICITATION OF CUSTOMERS

Generally speaking, it is very difficult to prohibit an employee from soliciting any clients and customers of an employer because in most cases the damage potential is not high enough. However, a non-solicitation of clients covenant is often valid (i) if the employee had access either to them or to their customer data or (ii) if such clients were clients/customers for products and services for which the employee was responsible.

Such a non-solicitation covenant is valid even for customers and clients that were prior customers or clients of the employee when he or she joined the employer, because they become—from a legal perspective—clients and customers of the employer. However, case law makes a very difficult distinction with regard to the reasons why customers and clients do business with enterprises or organisations. If a client or customer does

business with an employer solely because of very specific knowledge or specific capabilities of an individual employee (e.g., lawyers, doctors), then a non-solicitation covenant can be void. However, it is open whether such capabilities are actually sufficient with regard to relationship managers in private banks. At least for clients that were already with the relationship manager prior to the employment, there is some supporting case law that would prohibit the employer from restricting employees from taking along such clients when they leave.

C. NON-SOLICITATION OF EMPLOYEES

During employment, the duty of loyalty does not allow employees to solicit employees. For the time after employment, the question arises whether non-solicitation covenants are subject to the same restrictions as noncompetition covenants. If this were the case, as argued by some scholars, restrictions would in most cases not be enforceable, because there is no direct competition on the end market for the products and services of the employer. For instance, case law does not allow a restriction on working for a supplier or on soliciting suppliers, because this is not deemed competition with the products of the employer, which, in principle, supports this argument.

However, the majority of scholars are of the opinion that non-solicitation covenants regarding employees are not subject to the same restrictions as general post-contractual noncompetition covenants because such covenants do not restrict employees in their professional development. This position is also supported by case law. However, the restrictions have to be adequate to protect the employers' legitimate interests because excessive covenants would constitute a breach of employees' personal rights. Considering this, an employee can be prohibited from soliciting other employees. However, it seems doubtful whether anything other than active solicitation can be prohibited. Entering into employment contracts with people who apply for employment in response to public job advertisements in most cases cannot be prohibited. Furthermore, it is doubtful whether restrictions with regard to employees who did not have direct contact with the former employee can be imposed at all.

2. ENFORCEMENT OF RESTRICTIVE COVENANTS—PROCESS AND REMEDIES

Without including such a specific enforcement clause, the employer can claim only damages, but not compliance with the noncompetition covenant. In practice, the burden of proof for damages requires real factual evidence of damage, which makes it very difficult for an employer to claim damages. Hence, without an agreed penalty, a noncompetition undertaking is rather toothless. Consequently, it is very important to define an adequate penalty for breach, and the courts tend to reduce stipulated penalties. Penalties are quite often based on the duration of non-compliance, for example, on a daily, weekly, or monthly basis. Further, the remedy of specific performance requires an express written agreement.

3. USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave is a term that refers to an employer requiring an employee who has given notice or has been terminated to depart the workplace while continuing to pay the employee during the applicable notice period. Generally, employers are obligated to let employees work unless (i) there is a clear agreement to the contrary in their employment agreements, or (ii) there are exceptional circumstances, which justify a temporary release from duties (such as a reasonable suspicion about substantial breach of loyalty duties including acts of crime against the employer). Hence, a full release from duties during employment can constitute a breach of obligation by the employer. Once notice of termination of employment has been issued, case law permits release from duties (garden leave), subject to the employee's personal rights. There is much dispute about what duties remain in force during garden leave. However, it is generally accepted that the duty of loyalty continues to apply to an employee on garden leave. If the employer does not state otherwise in the notification of garden leave, the employee is entitled to start a new job (subject to non-competition covenants).

During garden leave, employees retain all contractual entitlements to remuneration, including pension entitlements. Hence, the base salary and variable salary must be paid. The calculation of variable salary during garden leave is quite often difficult, due to the lack of provisions in employment agreements or compensation programs. For instance, an employee may be entitled to on-target variable pay. However, if the employee was always over target in the past, he or she may be entitled to be paid on the basis of past performance.

The only exception to the above rules is a fully discretionary bonus to which there is no entitlement during garden leave. Under Swiss employment law, it is disputed whether new income generated by an employee during garden leave results in a reduction of the compensation to be paid by the employer, particularly if the employee did not agree to the garden leave. Consequently, it is very important for the employer to set out the conditions applicable to the garden leave (including salary reduction) when issuing the notification of garden leave. Without the agreement of the employee, it is not possible to make payments subject to compliance with a noncompetition or non-solicitation covenant.

X. TRANSFER OF UNDERTAKINGS

1. EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

Swiss law applicable to transfer of undertakings is quite similar to the provisions laid out in the European Union Council Directive 2001/23 of March 12, 2001. Pursuant to Article 333 of the Code of Obligations, the employment relationship is transferred from the employer to a third party, if the employer transfers the enterprise or a part thereof to such third party. Art. 333 CO is also applicable if a single business unit of the enterprise is transferred. However, it is required that the business unit maintains its structure and organisation after the transfer, although it is not required that any assets are transferred together with the employment relationship.

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

If any redundancies, terminations or changes in the working conditions are planned in connection with a business transfer, the works council, if any, or otherwise the employees, must be consulted in due time, prior to the decision that employees are made redundant or the changes in the working conditions implemented. This consultation process is also necessary if the employees will be dismissed or the changes implemented after the transfer (by the new employer), because such dismissal and changes would be seen as a result of the transfer of business if implemented within the first few months after the transfer. It is important to note that the consultation process needs to be conducted before any decisions in regard to any measures are made. The employer needs to give the works council or the employees at least the possibility to make suggestions on how to avoid any measures, specifically on how to limit the number of dismissals.

2. REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The current employer and the new employer are jointly and severally liable for any employee's claim that have become due prior the transfer, and that will later become due until the date upon which the employment relationship could have validly been terminated. If a collective employment contract applies to any employment relationship transfer, the new employer would need to comply with it for one year, unless the collective employment contract expires earlier or is terminated by notice.

XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

1. BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Switzerland has for many decades enjoyed relative stability in labour relations, with most conflicts being resolved amicably. The basis of the "labour accord" dates back to 1937, when the trade unions and employers in the metalworking industry signed an agreement to regulate the conduct of disputes. On the one hand, the unions undertook not to use strikes as a weapon to settle grievances, while on the other, the employers agreed to accept arbitration to resolve wage claims. As a result, strikes are rare, although occasionally workers may stop work for a few hours as part of a campaign. Lengthy strikes are even more unusual, although not entirely unknown.

Every employee has the right to decide whether to join a trade union or not. The unions are financed through the contributions of their members.

In 2014 there were about 741'000 Swiss employee members of trade unions. This represents 18% of the Swiss working population and is below the average in the European Union. Despite this relatively low number, trade unions play an important role in some business sectors, which are fully regulated by collective agreements, including construction and gastronomy.

Trade unions have the right to organize and proclaim industrial actions such as strikes, but only if negotiations with the employers' side have failed and only in case these actions are proportionate.

The Swiss Federation of Trade Unions (Gewerkschaftsbund / Union syndicale suisse) is the umbrella body for 16 trade unions in the areas of industry and construction, and is Switzerland's largest employees' organisation. A second umbrella grouping is Travail Suisse, with 13 member organisations.

The Swiss Employers Association is the umbrella body of about 80 regional and branch employers' organisations. With its headquarters in Zurich, it was founded in 1908 as the Central Association of Employers' Organisations.

The Swiss Employers' Association has close ties with the Swiss Business Federation (economiesuisse). The two, along with the Swiss Association of Small and Medium-Sized Enterprises, are the country's leading economic bodies. Under the Swiss constitution, all three are invited to give their opinions during the consultation procedure on federal issues.

2. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

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

- Security at work and health protection;
- Collective dismissals;
- Affiliation to an occupational pension fund and termination of the affiliation agreement; and
- Transfer of undertakings.

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

Within the framework of the Participation Act, the works councils may decide how to organise themselves. Apart from the Participation Act, the law sets out no special rights for works councils within the company, but such rights are recognised by some collective agreements.

XII. EMPLOYEE BENEFITS

1. SOCIAL SECURITY

The Swiss social security system includes the following schemes:

- Old-age and survivors' insurance ("Alters- und Hinterbliebenenversicherung, AHV")
- Disability insurance ("Invalidenversicherung, IVG")
- Military income loss insurance ("Erwerbsersatzordnung")
- Unemployment insurance ("Arbeitslosenversicherung, ALV")
- Occupational benefit plan ("Berufliche Vorsorge, BVG")
- Accident insurance ("Unfallversicherung, UVG")
- Sickness insurance ("Krankenversicherung, KVG")
- Family allowances ("Familienzulagen")

Basically, the Swiss employer is fully liable to social security contributions in respect of its employees. This system, however, only applies to resident employers and non-resident enterprises having a permanent establishment in Switzerland. The contributions are borne fifty-fifty by both employer and employees. However, the employer contributes insurance premiums for occupational accidents and diseases. He can deduct insurance premiums for non-occupational accidents (as well as the employee's share for pension, sickness and unemployment insurance) from the employees' salary. The rates are, in general, based on the gross salary.

2. HEALTHCARE AND INSURANCES

The mandatory Accident Insurance (UVG) contributes to the costs of medical treatment and gives financial support after accidents and occupational diseases. All employees occupied in Switzerland are covered. Employees who work for a minimum of eight hours per week are insured not only against occupational accidents and occupational diseases, but also against non-occupational accidents.

Sickness allowance insurance compensates for loss of salary due to incapacity for work caused by illness or pregnancy. Employers are obliged to continue paying salary to the employee in question for a certain amount of time. The daily allowance benefits insurance relieves the employer from the beginning of the statutory salary payment. The duration of the statutory salary payment depends on the employee's years of service. Adherence to a daily sickness allowance insurance is, however, not mandatory.

All employees in Switzerland who have not yet reached the legal retirement age must be covered by unemployment insurance, subject to certain conditions.

To be eligible for unemployment benefits, the employee must meet the following conditions:

- In the two years before becoming unemployed and registering with the employment office she or he must have held, for at least 12 months, a job requiring the payment of unemployment insurance contributions.
- She or he must remain at the disposal of the employment office and must at the same time actively seek work on your own behalf.
- If the employee has left his/her previous employment without an acceptable reason the entitlement to unemployment benefits may be suspended for a certain period of time.

If you become involuntarily unemployed, you are entitled to 70 per cent of the average earnings paid into your unemployment insurance in the previous six months. If you have a child or your daily allowance falls below a predetermined minimum, you are entitled to 80 per cent of the average earnings in the last six months.

The unemployment benefit is allocated as a daily allowance covering five days per week. Entitlement

begins after a waiting period of five days of proven unemployment. Unemployment benefits allows up to 400 daily allowances to be received in a two-year period. Employees over 55 and having made unemployment insurance contributions for at least 18 months are permitted up to 520 daily allowances in the same period.

3. REQUIRED LEAVE

A. HOLIDAYS AND ANNUAL LEAVE

The minimum paid annual holiday entitlement in Switzerland for all employees is four weeks. Young employees up to the age of 20 are entitled to five weeks of holidays per year. Vacation must be used and cannot be compensated by payment; compensation of vacation by payment is admissible only at the end of an employment relationship. For the duration of their holidays, employees are entitled to the same pay as if they were working. Part-time employees and employees paid on an hourly basis are entitled to pro-rata holiday time.

In addition, and depending on the canton in which they work, employees enjoy between five and fifteen public holidays per year. Whenever a public holiday falls on a work-free day, employees are not entitled to a substitute day off. A public holiday is not deducted from the vacation entitlement whenever it falls within the vacation of an employee.

B. MATERNITY / PATERNITY LEAVE

Maternity leave lasts 98 days (or 14 weeks) from the day it starts. Both full-time and part- time employees are entitled to maternity leave. Women who return to work earlier lose their entitlement to compensation. Mothers are paid 80% of their wages in the form of a daily allowance up to the maximum of CHF 196 per day. Cantonal provisions, staff rules and collective labour agreements may provide additional solutions. Women must not work during the first eight weeks after the birth.

4. PENSIONS: MANDATORY AND TYPICALLY PROVIDED

The Swiss pension system rests on three pillars: the Federal Old-age, Survivors' and Invalidity Insurance (1st pillar), the occupational pension scheme (2nd pillar) and private pension schemes (3rd pillar).

The first pillar provides old age pensions as well as benefits for widowers and orphans. The ordinary age of retirement is 65 years for men, 64 for women. It can be anticipated or postponed, with financial consequences. It is an PAYGO system, financed by contributions from employees and employers (4.2% of the employee's income each) and shall cover the basic living expenses.

The occupational pension scheme (2nd pillar) shall, together with the Old-age, Survivors' and Invalidity Insurance, enable the insured person to maintain his or her previous lifestyle in an appropriate manner. It is a funded pension plan. It is compulsory for employees and is financed by both employees and employers. The sum of the contributions of the employer should be at least equal to the sum of the contributions of his employees. The second pillar offers old age pensions. The pension funds also provide benefits in case of invalidity and benefits to survivors in case of premature death. Under certain conditions, the second pillar can be used before retirement to buy a principal home or to start an independent activity.

The third pillar consists of private pension schemes provided by the private sector. It is optional and financed entirely by the individual.

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