

# Switzerland

## Introduction

Compared to the laws of most European countries, Swiss employment law is quite liberal, particularly in relation to terminations of employment contracts. Apart from gender discrimination and sexual harassment, Swiss law does not require an employer to treat all its employees the same under similar conditions. Only a discrimination of a single or a small group of employees might be prohibited if it amounts to a violation of such person's personality.

Currently, the main statutes of employment law in Switzerland are the following:

- The Swiss Code of Obligations;
- The Federal Labour Statute;
- The Federal Act on Equal Treatment of Women and Men; and
- The Federal Statute on the Information and Consultation of Employees in the enterprises.

The Swiss Code of Obligations contains Switzerland's labour relationship rules. It consists of discretionary provisions, mandatory provisions and semi-mandatory provisions. Discretionary provisions do not apply if the parties have adopted other terms in the individual employment contract. Semi-mandatory provisions may be waived only by contractual terms that place the employee in a more favourable position than the statutory ones. Mandatory provisions are compulsory for the parties, so that they cannot be waived by mutual agreement.

The Federal Labour Statute consists mainly of provisions specifying the measures to be taken to guarantee the health and safety of the employees working in industrial and commercial enterprises, the working hours, the time of rest periods, the protection of women and young people and internal regulations.

The Federal Act on Equal Treatment of Women and Men prohibits gender discrimination in all public and private employment relationships.

The court system differs from Canton to Canton. The uniform application of Swiss labour law throughout Switzerland is secured by the Swiss Federal Supreme Court to which all labour law issues with an amount in dispute in excess of CHF 15,000 as well as questions of fundamental interest can be applied to.

## **Terminations**

### **Restrictions On Employers**

Swiss law prohibits employers from terminating employment relationships, provided the employment lasted for more than three months or is entered into for a fixed term of more than three months, during the following periods:

- During the employee's performance of compulsory Swiss military service, civil defence service, military women's service or Red Cross service and, in case such service lasts more than 11 days, during the four weeks prior to and after the service;
- During periods in which the employee is prevented from performing work fully or partially by no fault of his or her own due to illness or accident for up to 30 days in the first year of service, for up to 90 days as of the second year of service until and including the fifth year of service, and for up to 180 days as of the sixth year of service;
- During pregnancy and during the 16 weeks following the lying-in of an employee; and
- During the employee's participation, with the agreement of the employer, at a foreign aid service assignment abroad ordered by the competent federal authority.

A notice given during one of the forbidden periods is void. However, if the notice is given prior to the beginning of such period and if the notice period has not expired prior to the start of such forbidden period, the running of the notice period is only suspended and continues once the forbidden period has expired.

The terminating party does not have to indicate any reason for terminating the employment relationship. Upon request of the other party, however, the party giving notice has to provide the reasons for the termination in writing. The refusal

to provide such a reason does not affect the validity of the termination, but can trigger adverse procedural consequences and is a hint of an abusive termination, which is punished under Swiss law.

The law considers a termination of employment to be abusive in the following, non-exhaustive cases:

- If the notice of termination results from a personality trait of the other party, unless that trait relates to the employment relationship or significantly impairs cooperation within the enterprise;
- If the notice of termination is given because the other party exercises a constitutional right, unless the exercise of such right violates a duty arising out of the employment relationship or significantly impairs cooperation within the enterprise;
- If the notice of termination is given solely to frustrate claims of the other party arising out of the employment relationship (e.g., an entitlement to a bonus under the existing employment contract);
- If the notice of termination is given because the other party asserts, in good faith, claims arising out of the employment relationship (even if such claims have no ground); or
- If the notice of termination is given because the other party performs compulsory military service, civil defence service, military woman's service or Red Cross service, or is subject to a legal duty not voluntarily assumed.

The notice of termination given by the employer is also abusive if it is given:

- Because the employee belongs or does not belong to a union or because the employee lawfully exercises a union activity;
- During a period in which the employee is an elected employee representative in a company institution or in an enterprise affiliated thereto unless the employer can prove that the termination was based on justified reasons;
- In connection with a collective dismissal without prior consultation with the employees' representative body or, if there is none, the employees; or

- If such termination contradicts the employer's own behaviour (e.g., if the employer set the employee on a performance improvement plan until the end of September but in June already terminates the employee for poor performance).

An abusive termination is valid. The party that abusively gave notice must, however, pay an indemnity to the other party. The amount of the indemnity is determined by the judge based on the circumstances of the case, but cannot exceed six months' wages. If the consultation proceeding in connection with a collective dismissal has not been observed, the indemnity may not exceed two months' wages of the dismissed employees. In order to assert a claim for indemnity, the terminated party has to file a written objection against the termination with the party who gave notice of termination no later than by the end of the ordinary notice period and file the claim with the competent court within 180 days of the termination date.

## **Notice Provisions/Consequences Of A Failure To Provide The Required Notice**

Swiss law distinguishes between employment contracts entered into for a fixed term and employment contracts entered into for an indefinite term. A fixed term employment ends without notice of termination at the end of the fixed term. No notice can, in principle, be given during such term. The only exception is a termination without notice for cause or if the parties had explicitly agreed on notice periods despite the fixed term.

Both the employer and the employee may terminate an employment relationship at any time without notice for cause. This applies to employment for a fixed term as well as employment for an indefinite term.

Cause is considered by law to be any circumstance under which the terminating party cannot in good faith be expected to continue the employment relationship until the end of its term or by respecting the ordinary notice period. The employee's poor performance almost never constitutes cause, and prevention from performing work through no fault of his or her own, in particular due to illness, never constitutes cause. The Swiss courts are very reluctant to accept a cause justifying a termination without notice. Depending on the seriousness of the reason, a prior formal admonition by which the employer explicitly threatens to terminate the employment without notice is required before termination without notice can be given.

In any event, the party who wants to terminate the employment relationship without notice has to do so as soon as it becomes aware of the reasons justifying the immediate termination. As a general rule, no more than two to three days may elapse between the knowledge of the valid reason and the termination of the employment relationship.

In case of an unjustified dismissal without notice, the dismissal with immediate effect remains valid. The employee, however, has grounds for a claim for compensation representing what he or she would have earned until the expiration of the fixed employment term or, in the case of an employment relationship for an indefinite term, what the employee would have earned if the relationship had been terminated with due observation of the notice period. From this amount, the salary which the employee earned from other work or that he or she intentionally failed to earn, as well as the costs saved because of the termination of the employment relationship, have to be deducted. Furthermore, the employer has to pay an indemnity to the employee. If the parties do not agree on the amount of such indemnity, it will be fixed by the judge, taking into account all circumstances of the particular case, but it may not exceed the employee's wage for six months.

Employment contracts concluded for an indefinite term may be terminated by either party by giving notice. The parties are, in principle, free to fix the notice period in writing. However, once the probationary period has ended, the notice period may not be shorter than one month. During the probationary period, which by statutory law is one month but can be extended by written agreement up to three months, the parties are free to agree upon any notice period. Notice periods cannot differ for the employer and the employee. If an employment agreement provides otherwise, the longer notice period applies to both parties.

If the parties have not agreed on notice periods in writing, the agreement can be terminated during the probationary period at any time by respecting a notice period of seven days. Once the probationary period has ended, the employment can be terminated in the first year by respecting a notice period of one month; in the second year and up to and including the ninth year of service, by respecting a notice period of two months; and thereafter by respecting a notice period of three months, always to the end of a calendar month. The notice period begins on the date on which the terminated party receives the notice rather than the date on which the notice letter was dispatched.

## **Termination Indemnities**

The employer is free to renounce on the employee's performance of the notice period. Even if the employer does so, the full salary due during the notice period has to be paid. If the employee is entitled to commissions or other variable salary components, they have to be calculated and paid as if the employee had continued to work during the entire notice period. If the employee assumes a new job during the notice period, the salary earned at such a new job can be deducted provided that the employer reserved the right to do so. It should be noted that even if the employer renounces on the employee's performance of the notice period, the employment relationship continues until the end of the notice period and the employer pays the employee's full salary during such period.

According to statutory law, severance pay is only due if, upon termination of the employment relationship, the employee is at least 50 years old and if, furthermore, he or she has been employed with the same employer for at least 20 years. The amount of severance pay may be fixed by written agreement or collective bargaining agreement, but has to equal at least the employee's wages for two months. If the amount of the severance pay is not fixed by agreement, the court may fix the amount in its discretion taking into account all the relevant circumstances. The severance pay fixed by the court may, however, not exceed an amount equal to the employee's wages for eight months.

The court may reduce or deny a severance pay if the employment relationship was terminated by the employee without a valid reason or by the employer without notice for cause, or if the payment of the severance would cause hardship to the employer. The severance pay will be reduced by the amount of the benefits that the employee receives from a personnel welfare institution to the extent these benefits have been funded by the employer, or based on the employer's allowances. Because the employer is required, since 1985, to pay contributions to a personnel welfare institution, the statutory obligation on severance pay is, in most cases, not relevant. Quite often collective bargaining agreements provide for severance pay under lower conditions. Severance pay is also commonly provided for in employment contracts with top executives or in individual separation agreements.

## **Law On Separation Agreements, Waivers, And Releases**

The Swiss Code of Obligations explicitly lists the rights that the employee cannot waive during the term of the employment contract and one month after its termination.

In particular, the employee cannot, in principle, waive in advance the protection Swiss law grants in case of pregnancy and illness. Therefore, separation agreements are valid under Swiss law only if the employee receives at least what he or she would have received had the employment been terminated by observing the ordinary notice period or if they constitute an actual settlement agreement by which the parties mutually waive some of their rights. These requirements are less strict where the separation agreement was concluded on the initiative of the employee.

## **Litigation Considerations**

Under Swiss law the party that asserts a claim based on a certain factual situation must prove such situation. This means that an employer that terminated the employment without notice has to prove that a cause exists. If, for example, the employer only assumes that an employee engaged in an illicit behaviour but is not able to prove such fact, a termination given without notice for cause due to such suspicion will not be considered justified.

Due to the fact that a termination is only valid at the time when the other party received the notice, the terminating party must prove when the other party received the notice. Unless the employment contract requires a specific form, it is advisable to hand out the notice of termination to the employee and have the employee countersign a duplicate thereof or to send the notice to the employee well before the end of the month by registered mail with return receipt requested.

## **Discrimination**

### **Laws On Employment Discrimination, Including Maternity Leave Rights, Equal Pay Issues, Child Labour**

Swiss law does not have a comprehensive non-discrimination rule. In particular, an employer is free to decide whom to employ and whom to dismiss. There are only two exceptions to this rule. The first and most important exception is the principle that the employer may not discriminate against either sex. This includes a prohibition to discriminate against a person based on his or her marital status or family situation, or based on pregnancy. In particular, the employer cannot base its decision whom to employ or whom to terminate on such criteria. The law also prohibits indirect gender discrimination, i.e., measures that are not directly linked to the gender but which affect the employees of one gender more than those of the other gender. In

practice, the unequal treatment of full-time and part-time workers often amounts to gender discrimination because women are still more likely to work part-time than men. The non-discrimination principle also requires that men and women receive equal pay for equal work and that their employment conditions are equal. This includes, in particular, equal professional development and career opportunities.

The second exception to the principle of freedom to terminate relates to elected employee representatives, who cannot be terminated without valid reason. In case of a restructuring the employer is, however, free to decide which employee to terminate, and the elected employee representative does not benefit from an enhanced protection from being terminated in such a case. Swiss law only prohibits the discrimination of a single or a small group of employees if such discrimination amounts to the employer's neglecting the employee's personality, and the latter discrimination is, thus, only exceptionally accepted.

Pregnant employees can, upon simple notification, refrain from work at any time. Absences due to pregnancy are treated the very same way as absences due to sickness or military service. During the first eight weeks after the birth of her child, the employee must not work. She has the right to extend her maternity leave for another eight weeks and for as long as she is breastfeeding her child. The employee is entitled to a maternity pay equal to 80%, paid by the state-run insurance of her last average monthly salary but presently capped at CHF 196 per calendar day. This maternity pay starts at the date of birth of the child and terminates at the time the employee resumes work or 14 weeks after the birth of the child, whichever is earlier.

Children below the age of 15 must, in principle, not be employed. There are certain exceptions for children who are 13 and 14 years old. Employees who are younger than 16 years old may not work after 8 p.m., and employees who are younger than 18 years old may not work after 10 p.m. Employees who are younger than 18 years old must not work more than nine hours per day, including any overtime work.

## **Employee Remedies For Employment Discrimination**

The law presumes gender discrimination where the person alleging a discriminatory act brings *prima facie* evidence of the existence of such gender discrimination. Persons whose job application was rejected and who feel discriminated against can request that the potential employer state in writing the reasons for this rejection. The explanation helps the applicant to assess whether gender discrimination exists.

## Potential Employer Liability For Employment Discrimination

The sanctions in case of a violation of the obligation to treat both genders equally depend on the particular situation in which such gender discrimination takes place.

If an employer denies a job to an applicant due to gender discrimination, the employer has to compensate the applicant. However, the total compensation to be paid to all applicants who applied for one job may not exceed three months salaries for the job.

The sanctions are more severe if an *existing* employee is discriminated against based on his or her gender. If such person is dismissed because of gender discrimination, the dismissed employee may not only ask for a compensation of up to a maximum of six months salaries but also seek reinstatement if the employee was, without valid reason, terminated during an internal complaint or a court proceeding relating to gender discrimination or within six months after the end of such proceeding. This constitutes an exception to the principle under Swiss law that even an unjustified summary dismissal or an unfair dismissal is valid and simply entails compensation payments. Furthermore, an employee who does not receive equal pay for equal work can claim the difference and is only barred from doing so by the five-year statute of limitations, which applies to all claims arising out of the employment relationship.

## Practical Advice To Employees On Avoiding Employment Discrimination Problems

If an employer pays different salaries to men and women it has to justify such difference. If the difference is due to the present situation on the labour market, the salaries have to be adjusted over a relatively short period of time. In addition, the Swiss Federal Supreme Court required the employer, in a case where a man was hired at a higher salary than a female employee in a similar position, to submit evidence of the market conditions which allegedly required the employer to pay a higher salary to get the employee sign the employment contract.

Employers should be particularly attentive to indirect gender discrimination and should, in particular, thoroughly assess whether a different treatment of part-time workers does not amount to indirect gender discrimination.

## **Sexual Harassment**

### **Laws On Sexual Harassment**

Under the Federal Act on Equal Treatment of Women and Men, sexual harassment is considered to be a form of gender discrimination. The Act explicitly states that threatening an employee, promising advantages to an employee or coercing an employee to submit to a sexual conduct is sexual harassment. The employer is required to take all necessary and adequate measures to prevent gender discrimination.

### **Employee Remedies For Sexual Harassment/Potential Employer Liability For Sexual Harassment**

A victim of a sexual harassment may sue the employer if the employer cannot prove that it took all the measures that are necessary and adequate to avoid any sexual harassment. In addition, an indemnity of up to six times the average monthly salary paid throughout Switzerland for this kind of jobs is due. So far, only a few court decisions exist with respect to sexual harassment, and they have almost exclusively been made in connection with a termination of the harassed employee. Such terminations are considered to be abusive by the courts, which then fix a maximum compensation in favour of the harassed employees. The indemnity which is due for sexual harassment and the indemnity for abusive termination can be cumulatively awarded, and the labour court of Zurich awarded the maximum amounts in a case where two waitresses who complained about sexual harassment by their superior were terminated because of such (well founded) complaint.

### **Practical Advice To Employers On Avoiding Sexual Harassment Problems**

Employers in Switzerland should make their employees aware that they do not tolerate any form of sexual harassment and that any form of sexual harassment will be punished. The adoption of a policy to avoid sexual harassment and of compliance procedures is, therefore, highly recommended. Such policy should also set out the procedures that employees can initiate if they consider themselves to be victims of a sexual harassment.