Individual Employee Termination (Switzerland)

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A Practice Note addressing the legal and practical issues that arise when terminating the employment of individuals in Switzerland.

This Note considers the reasons enabling lawful individual employee terminations as well as what constitutes an unlawful termination. It also addresses the best practices to minimise the risk of legal challenges.

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There are several important legal issues to consider when an employer or employee is seeking to terminate employment in Switzerland. These include whether the termination is unilateral or by mutual agreement, the termination payments which may be owed to the employee, and when a termination is unlawful.

This Note sets out the key details on these topics and explains which laws underpin them.

Terminations in Switzerland

The most important types of terminations of individual employees are:

- Unilateral terminations, given by notice of termination.
- Mutual terminations, agreed in a termination agreement.
- Mass dismissals.

Unilateral Notice of Termination

The Swiss Code of Obligations (SCO) regulates the right (of employers and employees) to give unilateral notice of termination. There are two types of statutory notice of termination:

- Ordinary notice of termination, where the applicable notice period is respected and no particular reasons are required (see *Notice and No Requirement of Particular Reasons*).
- Extraordinary notice of termination, where the applicable notice period is not respected and "good cause" in the sense of the law is required (see *Extraordinary Termination: Requirement of Good Cause*).

Mutual Termination Agreement

Instead of, or after, giving unilateral notice of termination, the employer and the employee can enter into a mutual termination agreement to terminate their employment relationship by mutual consent. Pursuant to case law, termination agreements are subject to specific requirements, which are determined on a case-by-case basis (see *Termination Agreements*).

Mass Dismissal

Mass dismissals are individual notices of termination given by the employer within a period of 30 days that do not pertain personally to the employees and affect:

- At least ten employees, in a business normally employing more than 20 and fewer than 100 employees.

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- Ten percent of the workforce, in a business employing between 100 to 300 employees.
- At least 30 employees in businesses employing more than 300 employees.

(Article 335d, SCO.)

For a mass dismissal, employers give individual notices of termination and must adhere to both:

- General legal regulations applicable to terminations.
- A special procedure for mass dismissals, prescribed by statutory law (Article 335f, SCO; see *Special Procedure for Mass Dismissals*).

Requirements for Lawful Terminations

Notice and No Requirement of Particular Reasons

Unless otherwise agreed, the following statutory ordinary notice periods and end dates apply after the probationary period:

- During the first year of employment: one month to the end of the calendar month.
- Between the second and ninth year of employment: two months to the end of the second calendar month.
- After the ninth year of employment: three months to the end of the third calendar month.

(Article 335c (1), SCO.)

The statutory requirements around giving notice are relatively relaxed in Switzerland compared to other European jurisdictions. As a matter of principle, if the applicable contractual or statutory notice period is observed, both the employer and the employee can unilaterally terminate an indefinite term contract without providing a particular reason (Article 335, SCO). See also *Practice Note, Notice of Termination (Switzerland)*.

Certain restrictions can apply, for example, there is statutory protection against abusive or untimely terminations (see *Unlawful Terminations*). It is quite common for employees to raise complaints or claims of an abusive or untimely termination, however, such disputes are often resolved or settled out of court.

A fixed-term contract ends automatically at the end of the term, without notice (Article 334, SCO). Neither party can unilaterally terminate it by ordinary notice of termination, unless the parties have explicitly agreed that unilateral notice of termination can be given prior to the expiry of the term of the contract. In practice, this is agreed quite often.

Extraordinary Termination: Requirement of Good Cause

Both the employer and the employee can terminate a fixed-term or indefinite term contract at any time by giving extraordinary notice of termination, with immediate effect. In this event, the contractual or statutory notice period is not observed, provided there is good cause (Article 337, SCO).

The requirements to be met are high, so an extraordinary termination is an exceptional step taken only in an emergency situation. The requirements to be met are:

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- Good cause: Good cause is any circumstance rendering the continuation of the employment relationship, in good faith, unconscionable (for example, the commission of a criminal offence or the employee competing with the employer). The misconduct must destroy or seriously disrupt the mutual trust forming the basis of the employment relationship.
- An unambiguous and immediate reaction by the terminating party, within two to three business days of their becoming aware of the facts constituting good cause (but in any case, not more than one week).

The court determines, at its discretion, whether good cause exists, based on the circumstances of the individual case, interpreting the term restrictively. Employee challenges to an extraordinary termination for good cause are common. In the majority of these disputes, the termination for cause has not been upheld. Due to the high litigation risk, it is advisable to seek legal advice before giving extraordinary notice of termination.

Special Procedure for Mass Dismissals

Employers who are planning a mass dismissal (see *Mass Dismissal*) must follow the special procedure prescribed by statute (Article 335f, SCO). The steps they must follow are:

- The employer must give the employees' representative body or, if there is none, the employees, the opportunity to formulate proposals on how to avoid the intended redundancies or limit their number and how to mitigate their consequences.
- The employer must furnish the employees' representative body or, if there is none, the employees, with all appropriate information and must forward a copy of the information stipulated to the cantonal employment office. The information to be provided by the employer is:
    - the reasons for the mass dismissal;
    - the number of employees the employer intends to provide with an individual notice of termination;
    - the number of employees normally employed in the business; and
    - the period in which the employer intends to issue the notices of termination.

Once the consultation process is complete, the employer must review the suggestions carefully and notify the competent cantonal authorities and the employees' representative body or, if there is none, the employees, in writing of the outcome of the consultation process and provide all necessary information on the planned dismissals. This notification is crucial as terminations become effective, at the earliest, 30 days after the notification to the competent cantonal authorities.

It is common for employers, and sometimes mandatory for them, to put in place a social plan, which sets out the measures to avoid redundancies or to reduce their numbers and mitigate their effects (Article 335h, SCO). These can include:

- Severance payments.
- Garden leave.
- Outplacements.
- Early retirement.

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A social plan is mandatory if, collectively:

- The employer normally employs at least 250 employees.
- The employer intends to make at least 30 employees redundant within 30 days.
- The reasons for the redundancies have no connection with the people being made redundant.

(Article 335h, SCO.)

Unilateral Terminations

Business Reasons

According to case law, business reasons, meaning reasons not related to the employee's behavior or performance, are, as a matter of principle, permissible grounds for an ordinary termination of the employment relationship (see *Notice and No Requirement of Particular Reasons*). Business reasons do not, however, allow employers to terminate the employment relationship by giving extraordinary notice of termination for good cause (see *Extraordinary Termination: Requirement of Good Cause*).

Business reasons can include:

- Economic reasons, such as a full or partial closing of operations due to a lack of profitability.
- Restructuring reasons, such as a reorganisation due to an outsourcing of specific roles or technological changes.

In case of terminations for business reasons, the litigation risks for employers are usually manageable. If employers envisage dismissing a larger number of employees or dismissing employees in the context of a business transfer, they should be particularly careful to ensure compliance with the legal requirements. In particular, whether:

- The statutory threshold of a mass dismissal is reached and therefore the special procedure is required by law (see *Mass Dismissal*; see *Special Procedure for Mass Dismissals*).
- The terminations could be considered abusive. By law, if the employer transfers a business to a third party, the employment relationship and all attendant rights and obligations pass to the acquirer on the day of the transfer (Article 333(1), SCO). Case law has established that if an employer issues a notice of termination purely to circumvent the automatic transfer of the employees to the acquirer (as their new employer), this is likely to be considered abusive (see *Protection Against Abusive Termination*).

Performance/Capability Reasons

If an employee does not meet the employer's reasonable expectations regarding their performance or capabilities, the ordinary notice of termination given by the employer is not, in principle, considered abusive (see *Notice and No Requirement of Particular Reasons*). In this respect, it is important that employers have written documentation of:

- Communications regarding job expectations and requirements.

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- The employee's failure to meet such expectations (for example, yearly performance evaluations, year-end performance discussions, or warning letters).

Employers are also advised to be careful when drafting any work certificate or reference letter, as employees often use such documents in litigation to show that the performance related reasons are not accurate.

Poor work performance does usually not meet the (very strict) requirements of an extraordinary termination for good cause (see *Extraordinary Termination: Requirement of Good Cause*). However, good cause can arise in exceptional circumstances, for example, in case of an employee's complete professional failure or if the poor performance is due to the employee's gross negligence.

Misconduct Reasons

Misconduct is a permissible ground for termination of the employment relationship. In principle, prior to terminating an employee, it is not necessary for:

- The misconduct to be specifically prohibited by workplace rules.
- A formal investigation to be initiated prior to termination.

However, if the misconduct is based only on an allegation by another employee or a third party, then, before a notice of termination is issued, employers are well advised to:

- Investigate the allegation in detail.
- Give the employee an opportunity to be heard.

Depending on the circumstances, serious misconduct can be sufficient to establish good cause and therefore justify an extraordinary termination with immediate effect (see *Extraordinary Termination: Requirement of Good Cause*).

According to the Swiss Federal Supreme Court, good cause requires particularly serious misconduct, while for minor or average misconduct, good cause can only be deemed if the misconduct occurs repeatedly despite prior warnings.

Whether the breach of the employee's duty reaches the required severity depends on the circumstances of the individual case, in particular on the position and responsibility of the employee and on the nature and duration of the employment relationship. Executive employees, such as management, are subject to a stricter standard due to their special position of trust and responsibility.

Examples of good cause include:

- If the employee commits a criminal act to the detriment of the employer (for example, misappropriation, embezzlement, fraud, or money laundering).
- If the employee commits a criminal act against a third party that has a direct impact on the employment relationship, for example, if the criminal act causes serious damage to the employer's reputation.
- If the employee behaves in an unacceptable manner towards colleagues (for example, sexual harassment, serious threats, or mobbing).

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In case of doubt, employers should observe the notice period in order to avoid the risks of an unjustified extraordinary termination (see *Unjustified Extraordinary Termination*).

Mutual Termination

A mutual termination agreement is a permissible option to terminate an employment relationship, including during any period in which a unilateral notice of termination is not allowed. A mutual termination or settlement agreement can also be executed after one party has issued a notice of termination and, in pratice, this is often done to settle all claims arising from the employment realtionship and its termination (see *Termination Agreements*).

Resignation

Resignations are part of the framework of permissible grounds for termination of employment. Resigning employees are generally required to observe applicable notice periods, although exceptions can apply, for example if the employer becomes insolvent (see *Extraordinary Termination: Requirement of Good Cause*). In the event of an employer's insolvency, the employee can terminate the employment relationship with immediate effect, unless the employee is furnished with security for their claims (for example, for their salary entitlements) within an appropriate period (Article 337a, SCO).

Swiss law does not provide for the concept of constructive dismissal, that is, where an employee's resignation is forced by the employer's conduct. However, if the employee terminates the employment relationship for a reasonable cause attributable to the employer, any agreed post-contractual non-compete covenants are extinguished by law (Article 340c (2), SCO).

Probationary Period

Length of Probationary Period

The first month of employment is considered a probationary period by law (Article 335b(1), SCO). By written individual agreement, standard employment agreement, or collective bargaining agreement (CBA), the probationary period can be extended for up to three months in total, which is common in Switzerland. It is also possible to shorten the probationary period or waive the probationary period entirely (Article 335b(2), SCO).

According to case law and predominant legal doctrine, the statutory presumption of a probationary period only applies to indefinite term contracts. With respect to fixed-term contracts, the parties have to specifically agree on a probationary period. For evidentiary purposes, it is advisable to agree the terms of any probationary period in writing.

Termination During Probationary Period

During the probationary period, either party can terminate the contract at any time by giving seven days' notice (Article 335b(1), SCO). By written individual agreement, standard employment agreement or CBA, the statutory seven days' notice period can be extended, shortened or completely waived (Article 335b(2), SCO). However, the notice periods must be mutual for both parties (Article 335a(1), SCO).

The employer's legal exposure is usually limited with respect to terminations during the probationary period. This is because the statutory protection against untimely termination does not apply to notices given during the probationary period (see *Protection Against Untimely Termination*). Although the statutory protection against abusive termination does, as a matter of principle, apply to notices given during the probationary period (see *Protection Against Abusive Termination*), it is rare for employees to challenge terminations given during the probationary period in court.

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Unlawful Terminations

Protection Against Untimely Termination

After expiry of the probationary period, employees benefit from a statutory protection against untimely ordinary notices of termination during certain prescribed periods:

- During their pregnancy and for the 16 weeks following the child's birth.
- While the employee is fully or partially prevented from working due to illness or accident, for up to:
    - 30 days per incident in the first year of service;
    - 90 days per incident in the second to fifth years of service; and
    - 180 days per incident in the sixth and subsequent years of service.
- During the period they are entitled to take carer's leave because their child's health has been seriously impaired by illness or accident, but for no longer than six months after the carer's leave entitlement begins.
- While they are performing compulsory military or civil defence service, and in addition, if the service lasts more than 11 days, for the four weeks preceding and following the service.
- When they are participating, with the employer's consent, in an overseas aid project ordered by the competent federal authority. This protection lasts for the duration of the project.

  (Article 336c(1), SCO)

The statutory protection depends on whether the employer's notice of termination is given during the prescribed period (that is, any of the protected periods listed above) or whether the prescribed period is triggered during the notice period. If notice is given by the employer:

- During any prescribed period, it is null and void (Article 336c(2), SCO).
- Prior to the commencement of any prescribed period, but the notice period has not yet expired at that time, the notice period is suspended and does not resume until the prescribed period has ended (Article 336c(2), SCO).

  Where a specific end date (usually the end of the month) has been set for termination of the employment relationship and such end date does not coincide with the expiry of the resumed notice period, the employment is extended until the next applicable end date (Article 336c(3), SCO). Therefore, even a short inability to work usually leads to a further extension of the employment for a month.

Protection Against Abusive Termination

While there is no need for a reason or a "cause" to be given when issuing a notice of termination, termination cannot be abusive. The law considers dismissals to be abusive if notice is given due to:

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- An attribute pertaining to the employee's personality, such as:
    - disease;
    - race;
    - gender;
    - age;
    - religion; or
    - sexual orientation.

- The employee's exercise of a constitutional right, such as exercising a political right or pursuing religious activities.
- A claim accruing under the employment relationship and notice is given purely to prevent it. For example, a notice would be abusive if it was given shortly before an employee is due to receive a seniority gift or a bonus and notice was exclusively given to prevent the employee from receiving the gift or bonus.
- The employee's assertion of claims under the employment relationship in good faith.
- The employee's performance of compulsory military or civil defence services.
- The employee being, or refusing to become, a member of an employee association, or the employee lawfully pursuing a union activity.
- A mass dismissal, and the notice is given without observing the special consultation procedure (see *Special Procedure for Mass Dismissals*).

  (Article 336, SCO.)

Case law has established specific requirements, which must be observed to prevent a termination from being considered abusive:

- With respect to employees of advanced age (usually, at least 55 years old) and with a long period of service, the employer must inform the employee about the intended termination and give the employee an opportunity to be heard. This is because employers have an increased duty of care towards such employees and are obliged to look for solutions that enable the employment relationship to be maintained.
- Usually, before a notice of termination is given in the context of a conflict, employers are obliged to take reasonable measures to resolve such conflict, for example, by having discussions with the employees or involving an external mediator.
- A notice of termination can also be abusive if it is linked to:
    - an unreasonable deterioration in the employee's working conditions, which is not necessary for organizational or economic reasons; and
    - the deterioration in working conditions are implemented without observing the applicable notice of termination.

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If a termination is considered abusive, the notice of termination remains effective, which means that employees cannot request that their employment is continued. However, employees can be entitled to a penalty payment of up to six months' salary (Article 336a, SCO).

Protection In Case of Gender Discrimination and Sexual Harassment

Pursuant to the Swiss Gender Equality Act (GEA), gender discrimination and sexual harassment are explicitly prohibited. Employees who have suffered gender discrimination or sexual harassment can:

- File an internal discrimination complaint with their employer.
- Initiate proceedings before a special conciliation authority.
- File an action before court.

If an employer serves notice of termination during such proceedings or in the six months thereafter, without good reason, the affected employee can challenge the termination and request either:

- A provisional reinstatement for the duration of the proceedings.
- A penalty payment of up to six months' salary.

  (Article 10, GEA.)

If the court upholds the employee's challenge of the termination on the merits, the notice of termination is cancelled and the employment relationship continues as if no notice of termination by the employer had been served.

Unjustified Extraordinary Termination

In case of an unjustified extraordinary termination, the employment is terminated with immediate effect (see *Extraordinary Termination: Requirement of Good Cause*). However, the employee can sue the employer for both:

- Damages for the amount the employee would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration (such as salary, benefits, vacation, and so on).
- A penalty payment in the amount of up to six months' salary.

  (Article 337c, SCO.)

Procedures

Except for mass dismissals, (see *Special Procedure for Mass Dismissals*) or when employers are a party to a CBA, federal and cantonal authorities or employees' representative bodies are not involved in any special process prior to terminating an employment relationship.

As a matter of principle, employers do not have to observe special communication, consultation and approval processes and requirements for an individual employee termination. However, if the redundancies or a business closure affect at least ten employees, the employer is required by statutory law to notify the competent cantonal employment office (Article 29, Federal

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Law on Employment Service; Article 53, Ordinance on Employment Service). In case of a mass dismissal, certain notification obligations also apply (see *Special Procedure for Mass Dismissals*).

Notice

The notice of termination needs to be clear and unequivocal and is usually very short. Stating the reason for termination is not required for the notice of termination to be effective, and it is usually best not to state any reasons in a written notice communication.

Unless otherwise agreed, the notice of termination is not subject to special form requirements. The intent to terminate the employment can, for example, be expressed orally, by e-mail or SMS (text message), or by unambiguous implied conduct.

If the employment agreement or a CBA specify that a notice of termination must be served in writing, a handwritten signature (or a qualified electronic signature, fulfilling the specific requirements of the law, which needs to be assessed in each individual case) is required for the notice of termination to be valid (Article 16 (1), SCO).

A notice of termination only becomes effective upon its receipt by the terminated party. The terminated party does not have to accept or acknowledge receipt of the notice of termination for it to be valid.

The party giving notice of termination bears the burden of proof for the notice of termination and its timely receipt by the terminated party, so, in practice, it is generally recommended that a notice of termination be given in writing.

From an employment law perspective, it is crucial that the notice of termination is issued by an authorised representative of the employer, for example, someone who has representation rights deriving from their position as a corporate body, a procuration or a power of attorney. Which specific persons fulfil this requirement must be assessed based on the circumstances of the case.

From a corporate law perspective, with respect to employees that are part of the employer's management body, the termination of employment and the associated withdrawal of rights as a management body generally require the board of directors' prior approval.

See also *Practice Note, Notice of Termination (Switzerland)*.

Termination Payments

Contractual Entitlements

On the last day of the employment relationship, all claims arising from it fall due by law (Article 339(1), SCO); certain exceptions can apply for bonus payments. By the end of the employment, the employer is therefore obliged to pay any contractual entitlements arising from it, including:

- Unused vacation.
- Pro rata 13th monthly salary (if any).
- Compensation for any additional working hours performed (if not waived in the employment agreement).

Bonus claims must be assessed based on the contractual agreements in each case and a determination made on whether a bonus is owed (on a pro rata basis) or not.

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Additional Severance Payments

In principle, employees are not entitled to any severance payments upon termination of their employment. However, severance payments are often paid when entering into a mutual termination agreement as a concession by the employer (see *Mutual Termination*).

In addition, when an employment relationship with an employee of at least 50 years of age comes to an end after 20 years or more of service, the employer must pay the employee a severance allowance of up to eight months' salary (Articles 339b and 339c, SCO). In practice, this compulsory severance allowance is of very little significance as pension fund benefits can be deducted from the severance allowance (Article 339d, SCO).

Payments In Case of Unlawful Terminations

In case of unlawful terminations, the employer may be required to make further payments to the employee (see *Unlawful Terminations*).

Last Day of Employment

The last day of employment depends on whether the notice of termination was given by observing the notice period or not. If the notice of termination is issued:

- With immediate effect, the employment ends on the day the terminated party receives the notice of termination.
- By observing the notice period, the employment relationship ends after expiry of the notice period, subject to a potential prolongation of the employment due to illness, accident, pregnancy and so on.

  Unlike many jurisdictions, notice periods in Switzerland do not run from the receipt of the notice of termination. Rather, according to the practice of the Swiss Federal Supreme Court, the notice period is calculated backwards from the applicable end date, which is usually the end of the month if not agreed otherwise. For example, if the applicable notice period is three months to the end of a month and the notice is served on 15 August, the notice period runs from 1 September to 30 November.

Rights and Obligations

There are various rights and obligations tied to the last day of employment, for example:

- Subject to certain limited exceptions, all claims arising from the employment relationship fall due on the last day of the employment relationship (Article 339(1), SCO).
- Employees seeking compensation for abusive or discriminatory termination must:
  - submit a written objection to their employer no later than by the last day of the employment relationship; and
  - bring their claim for compensation before the courts within 180 days after the last day of the employment relationship (Article 336b, SCO; Article 9, GEA).

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- No later than by the last day of the employment relationship, employees must return all property of the employer in their possession (Article 339a, SCO).

Termination Agreements

A written separation or termination agreement is not required by law but in practice, they are usually the most reliable and practical solution to mitigate the risk of legal disputes (see *Mutual Termination*).

In particular, separation and termination agreements are frequently seen in the realm of terminations due to reorganizations, where terminated employees tend to be offered special severance packages, such as severance payments, garden leave, outplacements, or early retirement.

The most common difficulty faced by employers when terminating an employment relationship is the statutory extension of the notice period if the employee is prevented from working during the notice period, for example, due to an accident, illness or pregnancy (Article 336c, SCO; see *Protection Against Untimely Termination*). The employer can mitigate this risk by entering into a mutual termination agreement with the employee, which is often done after the employer has served a notice of termination, and which allows the parties to agree on a mutually binding termination date.

Employment contracts often have a provision that any amendments must be made in writing; the mutual termination agreement should therefore be signed by both parties. Even if the employment contract does not contain such a clause, executing a mutual termination agreement in writing is recommended for evidentiary purposes.

A mutual termination agreement must constitute a real compromise between the parties. Both parties have to make reciprocal concessions, which usually means that employers must:

- Grant employees what they are legally and contractually entitled to until the end date of employment (respecting the applicable notice period).
- Compensate employees for any waived rights (See *Unlawful Terminations*).

If these requirements are not met, employees can (subsequently) argue that they were under pressure from the employer to conclude a termination agreement and a court might consider the agreement to be void. In practice, it is very rare for mutual termination agreements to lead to disputes later on, especially if both parties have consulted with a lawyer before entering into the agreement.

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