Notice of Termination (Switzerland)

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A Practice Note considering the obligations on the employer and the employee when providing notice of termination of employment in Switzerland, including the required length of notice and how to provide notice.

Introduction

In Switzerland, notice is usually required for an employer or employee to lawfully terminate employment. This can be provided for in the employment contract as well as under statute.

This Note explains the key legal issues to consider when either party seeks to terminate employment on notice. These include the length of notice required by law or contract, how either party must serve notice, and the consequences for failing to provide notice. It also outlines when an employer may place an employee on garden leave.

See also *Practice Note, Individual Employee Termination (Switzerland)*.

Statutory and Contractual Notice of Termination

Statutory Notice

The Swiss Code of Obligations regulates the employers' and the employees' right to give notice of termination. There are two different types of statutory notices of termination:

- Ordinary notice of termination respecting the applicable notice period.
- Extraordinary notice of termination for good cause without respecting the applicable notice period.

In principle, both types of notices do not need to be expressly agreed in the contract.

Ordinary Notice

The statutory requirements to give ordinary notice of termination are liberal compared to other European jurisdictions. As a matter of principle, unless agreed otherwise, both the employer and the employee may unilaterally terminate the employment contract concluded for an indefinite period without particular reasons by respecting the applicable contractual or statutory notice period (Article 335, *Swiss Code of Obligations* (SCO)). Certain restrictions may apply, for example, due to the statutory protection against abusive or untimely termination (see *Protection Against Abusive Termination* and *Protection Against Untimely Termination*).

Extraordinary Notice

Swiss law provides for an extraordinary notice of termination without respecting the applicable notice period. Either party may terminate a fixed-term or indefinite term contract at any time by giving extraordinary notice of termination with immediate effect for good cause (Articles 337 to ??, SCO). This right is mandatory and cannot be restricted.

Because the requirements are high, an extraordinary termination is an exceptional step in an emergency only. For an extraordinary termination to be justified, the following requirements must be met:

- Good cause: Good cause is any circumstance rendering the continuation of the employment relationship in good faith unconscionable (for example, criminal offences or entering into competition with the employer). The misconduct must destroy or seriously disrupt the mutual trust forming the basis of the employment relationship.
- The employer must take unambiguous and immediate reaction within two to three workdays (but in any case, not more than one week).

The court determines whether there is good cause at its discretion and based on the circumstances of the individual case, interpreting the term restrictively. Therefore, it is likely that an employee challenges an extraordinary termination in court. In most disputes in which a party relies on good cause, the court does not uphold any termination for cause.

In case of an unjustified extraordinary termination, the employment is terminated with immediate effect. However, the employee may sue the employer for:

- Damages for the amount the employee earns if the employment relationship ends after the required notice period or on expiry of its agreed duration (salary, benefits, vacation, and so on).
- A penalty payment for an amount of up to six-months' salary.

(Article 337c, SCO.)

Contractual Notice

Because the rights and duties to give notice of termination are set out in statutory law, the employment contract does not have to provide for a specific right to terminate the employment or for specific notice periods or end dates. However, in an employment contract, the parties may, for example, limit the right to give ordinary notice of termination for a certain period (see *Waiver of Right to Give Notice*) or may agree on specific notice periods, end dates, or form requirements.

Payment in Lieu of Notice (PILON)

A party serving notice may not unilaterally decide to make a payment in lieu of notice. The general concept of payment in lieu of notice (PILON) as known in other jurisdictions does not exist in Switzerland.

Notifications

In principle, the employer is not required to notify any federal and cantonal authorities on the notice of termination served to an employee. However, in case of a dismissal of a larger number of employees, certain notification obligations apply.

Mass Dismissals

According to statutory law, mass dismissals are termination notices 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.
- Ten percent of the workforce in a business employing between 100 and 300 employees.
- At least 30 employees in businesses employing more than 300 employees

(Article 335d, SCO).

The employer intending to conduct a mass dismissal must consult with the employees' representative body or, if there is none, the employees. It must also comply with certain information and consultation obligations (Article 335f, SCO). The employer must also inform the competent cantonal employment office about the information given to the employees and the results of the consultation with the employees. This notification is crucial as terminations become effective 30 days after the cantonal employment office is notified, at the earliest (Article 335g, SCO).

Dismissal of a Larger Number of Employees

If the requirements of a mass dismissal are not met, the employer must notify the competent cantonal employment office if the redundancies or a business closure affect at least ten employees (Article 29, Swiss Federal Law on Employment Service; Article 53, Ordinance on Employment Service). Where the regional labor market requires it, the cantons may extend the notification obligation to redundancies affecting at least six employees.

Length of Notice Period

Ordinary Notice Period

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.)

These notice periods and end dates may be amended by a:

- Written individual agreement.
- Standard employment agreement.
- Collective bargaining agreement (CBA).

However, the notice periods may be reduced to less than one month only by a CBA and only for the first year of service (Article 335c (2), SCO). In practice, contractually agreed notice periods usually vary between two to three months or, for executive employees, between three to six months.

The notice periods must always have the same duration for both the employer and the employee. If the agreement states otherwise, the longer notice period is applicable to both parties (Article 335a (1), SCO).

During the probationary period, the law provides for a shorter notice period of seven days (see *Notice During Probationary Period*).

Extraordinary Notice Period

Either party can also terminate a fixed-term or indefinite term contract at any time by giving extraordinary notice of termination with immediate effect, provided there is good cause (Article 337 to ??, SCO; see *Extraordinary Notice*).

Notice Exceeds Requirements

Notice periods represent minimum periods. Therefore, the party giving notice may extend the period at its own discretion by giving notice of termination with effect to an end date that goes beyond the applicable contractual or statutory notice period. For example, an employer may serve a notice of termination on 15 August to be effective as of 31 December, although the employment contract provides for a three months' notice period. This is usually in the interests of the terminated party so that they have more time to take the required organisational measures, particularly to find a new job or a replacement.

If the terminated party does not want to accept this longer notice period, it may, as a matter of principle, issue a counter-notice to an earlier end date (see *Counter-Notice*). For example, an employee having received a notice of termination on 15 August to be effective as of 31 December, although the employment contract provides for a three months' notice period, may serve a counter-notice on 20 August effective as of 30 November.

When Notice is Not Required

A fixed-term contract automatically ends on its expiry date (Article 334 (1), SCO). Notice of termination is therefore not required. However, the parties can expressly agree that any party may terminate the employment during the term by ordinary notice of termination (observing the contractual or statutory notice period).

Waiver of Right to Give Notice

The parties may waive or limit their right to give and receive ordinary notice of termination, for example by entering into:

- A fixed-term contract, which ends automatically at the end of the term without notice and which cannot be unilaterally terminated by ordinary termination unless expressly agreed otherwise.
- A contract with a minimum term, which provides for a minimum term, during which any ordinary termination is excluded.

Both parties can also agree to terminate their employment relationship by mutual consent (see *Mutual Termination Agreements*).

However, the parties' statutory right to give extraordinary notice of termination with immediate effect for good cause cannot be waived or restricted (see *Extraordinary Notice*).

Failure to Provide Required Notice

If a party issues a notice of termination that does not adhere to the applicable notice period, courts usually reinterpret this notice of termination to be valid to the next possible end date. Therefore, both parties must comply with their duties until the next possible end date. For example, if an employee receives a notice of termination dated 31 August on 1 September effective

as of 30 November, although the employment contract provides for a three months' notice period to the end of a month, the employment relationship ends on 31 December. Exceptions may apply if there are clear indications that the notice of termination was intended to be an extraordinary notice of termination for good cause (see *Extraordinary Notice*).

To mitigate any risks of a tacit waiver of any rights, the terminated party should object to any notice of termination not respecting the applicable notice period in due time.

If any of the parties fails to fulfil its duties under the employment contract until the actual end date, the other party may sue the other party:

- Seeking that they honor the obligations under the contract.
- For damages.

Alternatively, if both parties wish to end their contractual relationship at an earlier end date, the parties can enter into a mutual termination agreement (see *Mutual Termination Agreements*).

Notice During Probationary Period

The first month of employment is considered a probationary period (Article 335b, SCO). The probationary period may be extended to up to three months by:

- Written individual agreement.
- Standard employment agreement.
- CBA.

The parties can also shorten or waive the probationary period in full.

According to case law and the predominant legal doctrine, the rules on probationary period only apply to indefinite term contracts. In fixed-term contracts, a probationary period only applies if agreed by the parties.

During the probationary period, either party may terminate the contract at any time by giving seven days' notice (Article 335b, SCO). This period can be extended, shortened, or even completely waived by:

- Written individual agreement.
- Standard employment agreement.
- CBA.

The notice periods must be mutual for both parties.

Service and Form of Notice

Employer Authority to Serve Notice

The notice of termination must be issued by an authorised representative of the employer. The representation rights can derive from:

- The person's position as corporate body.
- A proxy.
- A power of attorney.

The specific persons that fulfil these requirements must be assessed based on the circumstances of the case.

Form Requirements

The termination is a declaration of intent which must be received by the other party. Unless otherwise agreed, the notice of termination is not subject to special form requirements. The intent to terminate employment can, for example, be expressed orally, by e-mail, SMS, or by unambiguous implied conduct.

The employment agreement or a CBA may specify that a notice of termination needs to be served in writing. In these cases, a handwritten signature, or a qualified electronic signature within the meaning of the law is required. If written form is agreed for the termination, it is presumed that the notice of termination is only valid if given in writing (Article 16 (1), SCO).

The party giving notice of termination bears the burden of proof to show the notice of termination was timely received by the terminated party. Therefore, in practice, it is common and recommended to give notice of termination in writing.

Additional Formalities

The notice of termination must be clear and unequivocal. It should, therefore, not include any conditions or reservations.

Stating the reason for termination is not required for the notice of termination to be effective, and it is recommended not to state any reasons in the notice letter.

The employer must state the reasons for the termination in writing only if the employee specifically requests it (Article 335 (2) and Article 337 (1), SCO). The reasons for termination should be carefully drafted as employees usually use it to challenge the termination. To mitigate potential litigation risks, employers often seek legal advice on the written reasons for termination.

CBAs may provide for specific rules and procedures regarding the termination of employment contracts, derogating from statutory law to a certain extent. For example, certain CBAs stipulate that the employer must hear the employee before any dismissal.

Service and Receipt of Notice

A notice of termination only becomes effective on 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. However, for evidentiary purposes, it is common and recommended to serve the notice of termination in a way that allows for proof of timely receipt by the recipient.

If notice of termination is given by registered letter and the recipient cannot be found or if the letter is addressed to a P.O. Box address, the date of receipt is controversial. Courts usually tend to presume that a registered letter is considered received when the letter is available for collection at the post office and its collection can be reasonably expected, which is generally on the day following the unsuccessful delivery attempt. However, it is advisable to send the written notice of termination by

registered letter about ten days before the end of the month, as the notice period is considered valid even if the letter is not collected within the postal collection period.

Special exceptions may apply in case of known absences of the employee (for example, vacations, holidays, military service, and treatment in a hospital). In these cases, it should be carefully assessed how the terminating party can ensure the timely receipt of the notice of termination.

Start of Notice and the End of Employment

Contrary to what one may expect, the notice period does not simply start to run with the receipt of the notice of termination. According to the practice of the Swiss Federal Supreme Court, the notice period is instead 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.

The employment relationship ends after expiry of the notice period, subject to a potential extension of the employment due to illness, pregnancy, and so on (see *Protection Against Untimely Termination*).

Since 1 January 2021, with the introduction of a paid paternity leave of 14 days, if the employer terminates the employment relationship before the employee uses the full entitlement to paternity leave, the notice period is extended by the remaining days of paternity leave (Article 335c (1), SCO).

When Notice Cannot be Given

Protection Against Untimely Termination

After the probationary period expires, employees benefit from a statutory protection against untimely ordinary notice of termination during the following waiting periods:

- Pregnant employees: during the pregnancy and 16 weeks following the child's birth.
- Employees fully or partially prevented from working due to illness or accident: for up to 30 days per incident in the first year of service, for up to 90 days per incident in the second to fifth years of service and for up to 180 days per incident in the sixth and later years of service.
- Employees entitled to carer's leave because their child's health has been seriously impaired by illness or accident: for the duration of carer's leave (of up to 14 weeks), but for no longer than six months from the beginning of the carer's leave entitlement.
- Employees performing compulsory military or civil defence service (if the service lasts more than 11 days): for the duration of the service, as well as the four weeks preceding and following the service.
- Employees participating with the employer's consent in an overseas aid project ordered by the competent federal authority: for the duration of the project.

(Article 336c, SCO.)

The protection depends on whether notice was given during the waiting period or whether the waiting period is triggered during the notice period. Accordingly:

- Notice given by the employer during any waiting period is null and void.
- If this notice was given before the waiting period started, but the notice period has not yet expired at that time, it is suspended and does not resume until the waiting period ends. Where a specific end date (usually the end of the month) has been set for termination of the employment relationship and the 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, SCO). Therefore, even a short inability to work usually extends the duration of the employment by a month.

Protection Against Abusive Termination

While there is no need for a reason or a cause to give notice of termination, this termination cannot be abusive, for example termination notice given due to the employee's personal characteristics or the employee's assertion of claims arising out of the employment relationship (Article 336, SCO).

Further, the Swiss Federal Supreme Court has increased the protection against dismissal for employees of advanced age and with many years of service. According to the Swiss Federal Supreme Court, the employer has an increased duty of care towards these employees. Accordingly, the employer must:

- Inform the employee about the intended termination.
- Give the employee a possibility to be heard.
- Look for solutions that enable the employment relationship to be maintained.

The Swiss Federal Supreme Court has not implemented specific rules concerning the employee's age and years of services, and the case law of the cantonal (labor) courts is rather inconsistent.

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

Protection In Case of Gender Discrimination and Sexual Harassment

According to the *Federal Act on Gender Equality* (GEA), gender discrimination is explicitly prohibited in relation to recruiting, work assignments, working conditions, salary payments, education, as well as promotions and dismissals. Any form of sexual harassment is also prohibited.

Employees suffering gender discrimination or sexual harassment can:

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

If an employer serves notice of termination during the proceedings or six months after their completion, without good reasons, the affected employee can challenge the termination (Article 10, GEA). The affected party can either request:

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

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

Withdrawing Notice and Counter-Notice

Withdrawal

The notice of termination becomes effective and irrevocable from the moment the terminated party receives it and it cannot be unilaterally withdrawn. If both parties wish to continue their employment relationship despite its termination, they both must agree that the notice of termination is withdrawn.

The same applies to any reduction or extension of the notice period, which also requires both parties' consent (see *Mutual Termination Agreements*). An exception applies in case of an extraordinary notice of termination (with immediate effect) (see *Counter-Notice*).

Counter-Notice

If one party issues an ordinary notice of termination respecting the applicable notice period, the terminated party may serve a counter-notice of termination if it is effective as of an earlier end date. This may for example be the case in the following scenarios:

- If one party issues a notice of termination observing a longer notice period than applicable under the contract or by law, the terminated party may later issue a counter-notice of termination observing the applicable contractual or statutory notice period (see *Notice Exceeds Requirements*).
- If one party issues a notice of termination respecting the applicable notice period, the terminated party can later issue an extraordinary notice of termination (with immediate effect), provided there is good cause (see *Extraordinary Notice*).

In practice, it is rather uncommon that a terminated party issues a counter-notice. Issuing a counter-notice with immediate effect for good cause is especially risky because the threshold to show good cause is even higher in these situations. If the parties wish to terminate their employment before expiry of the notice period, they usually mutually agree on an earlier end date (see *Mutual Termination Agreements*).

Pay During Notice

During the notice period, the employment contract remains in full force and effect. Therefore, both the employer and the employee must abide by their contractual and statutory duties, in particular as follows:

- Employers must pay the employees the salary, grant them all contractual benefits and continue to be bound by their duty of care.
- Employees must perform their work and continue to be bound by their duty of confidentiality, care, and loyalty, which includes the duty not to compete with the employer.

Once notice of termination has been served, the employee is entitled to time off work to seek other employment (Article 329 (3), SCO). The law does not specify how much time needs to be granted or whether the time off needs to be paid. In practice, unless agreed otherwise, it is common that employers grant their employees up to half a day per week paid time off, if the employee needs this time, for example, to attend job interviews.

Garden Leave and Releasing the Employee from Duty to Work

Employers can unilaterally release employees from their duty to work during part or the entirety of the notice period (so-called garden leave). This right does not need to be reserved in the employment contract. Depending on the circumstances of the case, employees may also be temporarily released from their duty to work before notice of termination has been served, for example during an internal investigation.

In practice, garden leave is particularly common in the financial sector or if the employee is part of the senior management. However, for certain specific categories of employees, garden leave may be prohibited. This may be the case for employees needing to work continuously to maintain their professional skills, such as athletes or surgeons.

During garden leave, besides the employee's duty to work, the employment contract remains in full force and effect:

- Employers remain bound by their duty of care, to pay the salary and to grant all contractual benefits (for example, special expense allowances and private use of the company car) to the extent they are not directly related to the employees' work performance.
- Employees remain bound by their duty of confidentiality, care, and loyalty, which includes the duty not to compete with the employer.

According to case law, untaken vacation days may be deemed compensated by the garden leave. Courts often apply the one-third rule, meaning that one third of the period of garden leave can be used for the compensation of the remaining vacation balance. However, to what extent untaken vacation days may be deemed compensated by the garden leave must always be assessed based on the specific circumstances of the case.

The parties are advised to regulate the terms of any garden leave in a unilateral release letter or, alternatively, subject to the employee's consent, in a separate written garden leave agreement. In the letter or agreement, the following topics may be addressed:

- The employee's obligations to return all the employer's property.
- The compensation of vacation entitlements.
- The obligations and consequences should the employee wish to start a new employment during garden leave.

Mutual Termination Agreements

Any deviation from the applicable notice period requires both parties' consent. Entering into a separate mutual termination agreement typically results in the employees waiving certain mandatory rights pertaining to the employment relationship, in particular their right to be protected against untimely or abusive termination (see *Protection Against Abusive Termination*; *Protection Against Untimely Termination*) and to receive their salary during a certain period of time if they are prevented from working, for example due to illness or an accident.

Therefore, according to case law, 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 as if the applicable notice period was observed, plus compensation for any waived rights.

If these requirements are not met, employees may argue that the employer put pressure on them to conclude the termination agreement and a court may consider the agreement void. However, it is rare that mutual termination agreements lead to disputes later on, especially if both parties have consulted with a lawyer before entering into the agreement or if the termination agreement is mainly entered into due the employee's desire to start a new job during the notice period.

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