

# Fixed-Term Contracts (Switzerland)

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Employees can be employed on open-ended contracts or fixed term contracts. This Practice Note sets out the key issues concerning fixed or definite-term employment contracts in Switzerland.

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An employer may want to employ an individual under a fixed or definite-term employment contract (FTC). However, there may be limitations and restrictions on when an FTC is permitted, what constitutes an FTC, and the duration of an FTC. Consequently, other arrangements may be more appropriate for the parties.

This Note examines the key considerations when employing an individual on an FTC in Switzerland.

## What is an FTC?

### Definitions

According to Swiss law, an FTC is an employment contract that ends automatically on expiry of its term without notice (Article 334 (1), *Swiss Code of Obligations* (SCO)). Therefore, if any kind of notice is required to terminate the employment on expiry of its term, this contract does not qualify as an FTC.

### Types of FTC

In practice, in regard to FTCs the following distinctions are important:

#### Standard FTC

The key elements of a standard FTC are the following:

- It ends automatically at the end of the term without notice.
- It cannot be unilaterally terminated by ordinary notice of termination (observing the contractual or statutory notice period).

(Article 334, SCO.)

In practice, this type of contract is usually only used for short FTCs. However, for some special employment relationships, standard FTCs are required by law, such as in the case of an apprenticeship contract (Article 344a (2), SCO).

#### Contract with Maximum Term

An employment contract with a maximum term provides the following:

- It ends automatically at the end of the term without notice.
- During the term, either party may terminate it by ordinary notice of termination (observing the contractual or statutory notice period).

A contract with a maximum term is a combination of the characteristics of an FTC and an indefinite term contract. This means that depending on when and how the employment ends the contract is treated as an FTC or an indefinite term contract:

- If the contract ends automatically at the end of the term without notice, it is an FTC.
- If ordinary notice of termination is given before the expiry of the term, it is treated as an indefinite term contract to which the statutory termination rules apply, in particular the special protection provisions on untimely and abusive termination (see *Employee Rights on Termination of the FTC*).

In practice, this type of contract is quite common, as the option for ordinary notice of termination reduces the risk of the employer being bound to employ the employee for a specific period.

This type of FTC is not provided for in statutory law. It must be specifically agreed between the parties and the contract must expressly provide for early termination on notice.

### **Contract with Minimum Term**

An FTC must be distinguished from other employment contracts that do not automatically end on expiry of the term, such as the employment contract with a minimum term, which constitutes a special type of indefinite term contract.

A contract with a minimum term is defined as an employment contract that provides for a minimum term during which any ordinary notice of termination (that is, observing the contractual or statutory notice period) is not permitted. On completion of the minimum term, the contract continues as an employment contract with an indefinite term.

## **Advantages and Disadvantages of an FTC**

While indefinite term contracts are predominant in practice, particularly for white-collar employees, FTCs also have a wide field of application.

When deciding on whether an employment contract should be an FTC or an indefinite term contract, various legal and practical consequences need to be taken into consideration. As a rule of thumb, short FTCs tend to be more advantageous for employers, whereby longer FTCs tend to be more advantageous for employees.

From the employer's perspective, an FTC may be advantageous for the following reasons:

- It may ensure planning reliability: There is certainty that the employment relationship ends on expiry of a certain term (for example, despite the employee's inability to work or pregnancy) (see *Employee Rights on Termination of the FTC*).
- It may reduce litigation risks: On expiry of the term, no notice of termination is required and the statutory provisions on dismissal protection do not apply (see *Employee Rights on Termination of the FTC*).

Employers mainly choose a short FTC if there is a specific need for an employee's services for a predefined period, for example for a specific work task, for a short-term project, or to bridge a temporary need for additional personnel. The employer is usually not advised to enter into an FTC for a long period of time with no option for earlier ordinary termination (see *Types of FTC*).

Under a classic FTC, if the employee's performance deteriorates, the employer has no option to terminate the employment by giving ordinary notice of termination.

From an employee's perspective, a long FTC may be advantageous because it offers a high degree of job security, provided there is no option for earlier ordinary termination (see *Types of FTC*). Therefore, apprenticeship contracts are structured as standard FTCs by law (Article 344a (2), SCO).

## When is an FTC Permitted?

In principle, an employer is free to use an FTC when it sees fit.

The parties may even agree on a combination of an FTC and an indefinite term contract. That is, the employment contract provides for a fixed term but may also be terminated before expiry by ordinary notice of termination (see *Contract with Maximum Term*).

However, for some special employment relationships, the law requires a standard FTC, such as in the case of an apprenticeship contract (Article 344a (2), SCO).

There are also certain restrictions regarding the conclusion or renewal of several FTCs with the same employee (see *Restrictions Regarding Consecutive FTCs (Chain Contracts)*).

## FTC Employee and Indefinite Term Employees: Key Differences

### Limited Statutory Differences

In principle, FTC employees benefit from the same statutory protection rights as indefinite term employees. However, the statutory provisions on dismissal protection do not apply when an FTC employee's employment terminates due to the expiry of the term (see *Employee Rights on Termination of the FTC*).

Beyond the mandatory statutory protection rights, the parties have considerable freedom to negotiate the specific terms of employment.

### Fair Treatment of FTC Employees

An FTC employee enjoys the same protection under Swiss law as all other employees because the employer is obligated to protect the employee's personality (for example, including, the employee's health and reputation) (Article 328, SCO). However, difference in treatment is possible if they respect mandatory laws and are not discriminatory.

## FTC Employee and Independent Contractors: Key Differences

The most distinctive element of the employment contract is that the employee has a subordinate relationship with the employer when it comes to:

- The nature and timing of the work to be carried out.
- The means or resources required to perform the work.

An independent contractor provides services to a principal (that is, a client) without being part of the principal's organisation and without being subordinated to the principal's instructions. An independent contractor typically enters into a mandate agreement with the principal subject to different statutory rules (that is, not employment laws).

Under Swiss employment and social security law, FTC (and indefinite term) employees benefit from higher protection than independent contractors, such as statutory sick pay, minimum vacation entitlements, and social security contributions (to be shared between employer and employee).

The qualification of the contractual relationship is made on a case-by-case basis, considering all the factual circumstances. In cases of doubt, employers are advised to enter an FTC or an indefinite term employment contract.

## FTC Employee and Agency Workers: Key Differences

Agency workers are part of a tripartite contractual arrangement:

- Agency workers enter an FTC or indefinite term employment contract with the agency company paying the salary and social security contributions.
- The agency company makes an agency worker's services available to another company by transferring to the company substantial rights to give the agency worker instructions, in particular, the nature and timing of the work to be carried out or the means or resources required.

The concept of agency work is subject to special statutory regulations regarding the following:

- Agency companies must be in possession of a special license.
- The employment contract between the agency company and the agency worker must be in writing (meaning it must be executed with either handwritten signatures or qualified electronic signatures within the meaning of Swiss law) and must comply with certain minimum standards. However, the parties may agree on shorter notice periods.

When hiring an FTC employee, the hiring entity assumes the role and obligation of an employer, which is not the case with an agency worker.

## Requirements of an FTC

### Rule: No Written Form Requirement

Except where the law provides otherwise (see *Exception: Written Form Requirement*), an employment contract is not subject to any specific form requirement. It may also be concluded orally or even implicitly (Article 320, SCO).

Regarding the term of an FTC, there is no statutory requirement to agree on unequivocal and explicit language stating the start and end date of employment in an FTC. The fixed term may also result tacitly from the purpose of the work performed by the employee (for example, employment during a two-week festival, employment for a specific project).

The parties can make the expiry of the contract dependent on a future event (for example, the end of the summer season). However, the duration of the contract must be both:

- Objectively determined or determinable.
- Not dependent on the will or sole sphere of influence of one of the parties.

In reality and in practice, to avoid any confusion it is strongly recommended to state the start date and end date or event of the fixed term in the FTC.

### **Exception: Written Form Requirement**

Some specific employment contracts need to be in writing (for example, the apprenticeship contracts and contracts with agency workers), which means that the contract must be signed by all parties it imposes obligations on.

Swiss law also stipulates that certain contractual provisions are only valid if agreed in writing (for example, regulations on post-termination of employment non-compete obligations or any waiver of compensation for overtime hours).

The written form requirement means that the parties must sign the agreement by either handwritten signatures or qualified electronic signatures within the meaning of Swiss law.

## **Duration and Renewal of FTCs**

### **Duration**

#### **Restrictions regarding the Duration in General**

Except for executive management members of listed Swiss companies (see *Maximum Duration for Executive Management Members of Listed Swiss Companies*), the maximum duration of an FTC without the option to terminate early on notice is ten years. An FTC concluded for more than ten years without the option for ordinary notice of termination may be terminated at any time after the expiry of the ten-year period by either party by giving six-months' notice to the end of a month (Article 334 (3), SCO). Therefore, the permissible duration of an FTC without the option of early termination is limited to ten and half years (that is, ten years plus the six-months' notice). However, it is highly unusual for an FTC to be concluded for such a long period of time.

#### **Maximum Duration for Executive Management Members of Listed Swiss Companies**

Regarding listed Swiss companies, the maximum duration of an FTC for executive management members is limited to one year. This is stipulated in the Federal Ordinance against Excessive Compensation in Listed Companies, which is transferred to the Swiss Code of Obligations as part of the Swiss Corporate Law Reform (effective 1 January 2023).

#### **Consequences of Short FTCs**

If FTC employees are prevented from working by personal circumstances for which they are not at fault, such as illness, accident, legal obligations or public duties, the employer is only obliged to pay continued salary payments (potentially for the period up to the expiry of the FTC) if the FTC was concluded for more than three months (Article 324a, SCO). Therefore, short FTCs are usually under more extensive scrutiny, in particular if more than one short FTC is concluded with the same employee without any objective reasons (see *Restrictions Regarding Consecutive FTCs (Chain Contracts)*).

### **Renewal**

### **Tacit Continuation of FTCs**

By statutory law, if an FTC is tacitly continued beyond its end date (that is, the FTC employee continues to work beyond the expiry of the fixed term), two statutory legal presumptions apply:

- The FTC is continued on its existing terms (save for it no longer being an FTC, see below), which means no new employment contract is concluded. Therefore, for continuous employment purposes the employment is considered to have commenced from the start of the FTC (which may have an impact on the employee's statutory rights).
- The FTC transforms into an indefinite term contract subject to the provisions on ordinary termination and protection against dismissal.

(Article 334 (2), SCO.)

Both presumptions can be rebutted, for example by showing that the parties agreed on a new FTC or extended the FTC for a specific period of time.

### **Restrictions Regarding Consecutive FTCs (Chain Contracts)**

To prevent any unlawful circumvention of an employee's statutory protection against dismissal or statutory social benefits, case law has developed restrictions to the parties' freedom to conclude multiple consecutive FTCs with the same employee and more or less the same content (chain employment contracts).

If there are no objective reasons for entering into consecutive FTCs instead of one indefinite term contract, the FTCs are treated as a single indefinite term contract with a minimum duration (see *Contract with Minimum Term*) until the last FTC should have ended. This requalification may even apply in case of occasional or regular interruptions between the different FTCs.

When assessing whether there are objective reasons for entering into consecutive FTCs, courts take into account the specific circumstances, in particular:

- The content and duration of the individual FTCs.
- The reason and duration of any interruptions between the individual FTCs.
- The employer's potential intention to circumvent provisions on dismissal protections or claims that depend on a minimum duration of the employment relationship.

For example, the following reasons are usually recognised as objective reasons for entering consecutive FTCs:

- Seasonal employment, for example in winter sports areas.
- Employment of artists in production-related stage engagements.
- Employment of professional athletes.
- Teachers with regard to semester or school year employment.
- Assumption of a new function by the employee.
- Employment to bridge a vacancy of sick employees of uncertain duration.

A part of legal doctrine and some case laws suggest two successive FTCs are not likely to be subject to scrutiny. However, parties are advised to assess the use of successive FTCs on a case-by-case basis because Swiss courts may take a stricter view.

## Exceeding Limits on Duration and Failing to Confirm Non-Renewal

There are certain rules that apply if parties exceed the agreed duration of the FTC (see *Tacit Continuation of FTCs*) or if an FTC was concluded for more than ten years without any option for ordinary termination (see *Restrictions regarding the Duration in General*).

Case law has further established certain limitations on successive FTCs (see *Restrictions Regarding Consecutive FTCs (Chain Contracts)*).

Under Swiss law, an FTC terminates on the expiry of its term without any notice. In fact, any contract that provides for a requirement to issue notice of non-renewal likely qualifies as an indefinite term contract and not an FTC (see *Definitions*).

## What to Consider When Terminating Employment Under an FTC

### Notice

#### Overview of Termination of FTCs

An FTC terminates automatically when the contract expires without the need for prior notice of termination (Article 334 (1), SCO) (see *Definitions*).

However, an FTC may be terminated by notice of termination as follows:

- If expressly agreed between the parties, by ordinary notice of termination during the term (see *Ordinary Notice of Termination*).
- If expressly agreed, by notice of termination during the probation period (see *Notice of Termination During Probation Period*).
- By extraordinary notice of termination for good cause (see *Extraordinary Notice of Termination for Good Cause*).
- By notice of termination after ten years of contract (see *Restrictions regarding the Duration in General*).
- By mutual agreement (see *Mutual Termination Agreement*).

#### Ordinary Notice of Termination

Without any specific agreement to the opposite, the FTC cannot be unilaterally terminated by ordinary notice of termination observing the contractual or statutory notice period (see *Standard FTC*).

However, the parties may expressly agree that either party may terminate the FTC before expiry of the term by giving the contractual or statutory notice period, and if this notice is not given the contract terminates automatically on expiry of the term (see *Contract with Maximum Term*).

If the FTC provides for early termination but does not state specific notice periods, the following statutory notice periods apply to any early termination:

- During the first year of employment: one month to the end of a calendar month (that is, the remainder of the month when the notice is given and the following month).
- Between the second and ninth year of employment: two months to the end of a calendar month (that is, the remainder of the month when the notice is given and the following two months).
- For ten years or more of employment: three months to the end of a calendar month (that is, the remainder of the month when the notice is given and the following three months).

(Article 335c (1), SCO.)

These notice periods may be amended by a written individual agreement (signed by either handwritten signatures or qualified electronic signatures within the meaning of Swiss law), or a standard or collective employment contract. However, the notice period may only be reduced to less than one month (that is, less than the remainder of the month and the following month) by collective employment contract and for the first year of service (Article 335c (2), SCO).

Notice periods must always have the same duration for both the employer and the employee (Article 335a (1), SCO). In practice, contractually agreed notice periods usually vary between two to three months or, for executive employees, between three to six months.

#### **Notice of Termination During Probation Period**

Swiss law considers the first month of indefinite term employment to be a probation period, during which either party may terminate the contract at any time by giving seven days' notice (Article 335b (1), SCO).

Different terms may be envisaged by an individual written agreement (signed by either handwritten signatures or qualified electronic signatures within the meaning of Swiss law), a standard employment contract or a collective employment contract; however, the probation period cannot exceed three months (Article 335b (2), SCO).

According to case law and the predominant legal doctrine, the statutory presumption of a probation period only applies to indefinite term contracts.

However, the parties to an FTC can agree to have a probation period and, where applicable, this term should be included in the FTC.

#### **Extraordinary Notice of Termination for Good Cause**

Either party may terminate an FTC (or indefinite term contract) at any time by giving extraordinary notice of termination with immediate effect for good cause (Article 337, SCO). The parties do not need to expressly reserve this right in the contract.

The requirements to terminate for good cause are high and, therefore, an extraordinary termination for good cause without notice is an exceptional step in an emergency situation only.

The following requirements need to 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 be objectively capable of destroying or seriously disrupting the mutual trust that forms the basis of the employment



relationship. The Swiss Federal Supreme Court also demands that the misconduct actually led to this disruption of trust. The court does not hold that there is good cause when employees are prevented from working due to no fault of their own.

- Unambiguous and immediate reaction from the affected party within two to three workdays (but in any case not more than one week).

The court determines at its discretion and based on the circumstances of the individual case whether there is good cause, interpreting the term narrowly. Therefore, it is likely that an employee challenges an extraordinary termination in court. In most disputes where a party relies on good cause, the court denies the party's justification for the extraordinary termination.

According to case law, the threshold may, however, be slightly reduced regarding FTCs that continue for a longer period without any option for ordinary notice of termination.

## Employee Rights on Termination of the FTC

### Automatic Termination on Expiry without Notice

An FTC ends automatically at the end of the term without a need for notice of termination. The only condition that must be fulfilled is for parties to make the end of the term sufficiently clear. In contrast to indefinite term employees, FTC employees do not benefit from special protection if they are, for example, pregnant or prevented from working by illness or accident at the end date, and the employment still terminates on the expiry of the fixed term.

### Protection Against Untimely Notice of Termination

If the parties have explicitly agreed that either party may terminate the FTC during the term by ordinary notice of termination (see *Contract with Maximum Term*), and the FTC is being terminated during the term by ordinary notice of termination, the FTC employee benefits from the same mandatory protection rights against untimely termination as indefinite term employees. This mandatory protection applies, for example, during the following waiting periods:

- While the employee due to no fault of their own is partially or entirely prevented from working by illness or accident for up to:
  - 30 calendar days in the first year of service;
  - 90 calendar days in the second to fifth years of service; and
  - 180 calendar days in the sixth and later years of service.
- During the pregnancy of an employee and 16 weeks following birth.

(Article 336c, SCO).

Any ordinary notice of termination given by the employer during any waiting period is null and void (Article 336c, SCO).

Where this notice was given before these waiting periods started, but the notice period has not yet expired at that time, it is suspended and does not resume until the waiting period has ended. Where a specific end point (usually the end of the month) has been set for termination of the employment relationship and that end point does not coincide with the expiry of the resumed notice period, the latter is extended until the next applicable end point (Article 336c, SCO).

The statutory waiting periods do not apply to notices of termination during the probation period (if the FTC expressly includes a probation period) or extraordinary termination with immediate effect for good cause (see *What to Consider When Terminating Employment Under an FTC*).

### **Protection Against Abusive Notice of Termination**

If the parties have explicitly agreed that either party may terminate the FTC by ordinary notice of termination (see *Contract with Maximum Term*) and the FTC is being terminated during the term by ordinary notice of termination, the FTC employee benefits from the same mandatory protection rights against abusive termination as indefinite term employees.

While there is no need for a reason or a cause to give ordinary notice of termination, this termination cannot be abusive, for example termination due to the employee's personal characteristics or the employee's assertion of claims arising out of the employment relationship. In these cases, the notice of termination remains effective, but the employee may be entitled to a penalty payment of up to six months' salary (Article 336, SCO).

### **Unjustified Extraordinary Termination**

In an unjustified extraordinary termination for alleged good cause (see *Extraordinary Notice of Termination for Good Cause*), the employment is terminated with immediate effect. However, an FTC employee (like indefinite term employees) may sue the employer for:

- Damages in the amount the employee earns had the employment relationship ended on expiry of its agreed duration (salary, benefits, and vacation).
- A penalty payment of up to six-months' salary.

(Article 336c, SCO.)

### **Mutual Termination Agreement**

Under Swiss law, an FTC cannot be terminated unilaterally by the employer by paying the employee a severance in lieu of respecting the agreed terms. However, the parties can enter into a mutual termination agreement to terminate the FTC before the end of term.

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 of the term, plus compensation for any waived rights. Employees may otherwise argue that the employer put pressure on them to conclude the termination agreement and a court may consider the agreement to be void.

Regarding FTCs, some courts tend to apply particularly high requirements for mutual termination agreements. However, in practice, it is rare that mutual termination agreements lead to disputes later on.

## **Redundancy (Lay-off) or Re-organisation**

### **Limited Options to Terminate FTC Employees due to Re-organisations**

The employer can only terminate FTC employees before the expiry of the term for the reason of a reorganisation by entering into a mutual termination agreement (see *Mutual Termination Agreement*). However, if the parties have explicitly agreed on

the option for ordinary notice of termination, the employer may also unilaterally terminate the FTC by giving that notice of termination (see *Contract with Maximum Term*).

### Mass Dismissals

The rules on mass dismissals only apply to notice of terminations given within a 30 days' period for reasons not pertaining personally to the employee (Article 335d, SCO). Therefore, the termination of an FTC due to the expiry of its term, without notice, does not count towards any mass dismissal threshold.

### Severance Pay

In principle, employees are not entitled to any severance payments on termination of their employment agreement. For example, severance pay is not due to an employee on the expiry of an FTC.

However, severance payments are often paid as part of a mutual termination agreement as a concession by the employer (see *Mutual Termination Agreement*).

Although unlikely to be applicable to an employee employed under an FTC, for completeness, Swiss law also requires the employer to pay a severance allowance of up to eight months' salary when an employment relationship with an employee of at least 50 years of age ends after 20 years or more of service (Articles 339b and 339c, SCO). In practice, this compulsory severance allowance is of little significance because pension fund payments can be deducted from the severance allowance (Article 339d, SCO).

### Practical Tips When Entering into FTCs

To avoid any disputes and to mitigate any risk of ambiguity, FTCs should unambiguously regulate the following in a written agreement (signed by either handwritten signatures or qualified electronic signatures within the meaning of Swiss law):

- The end date of the contract (that is, its automatic termination without notice).
- Whether, during the term, ordinary notice of termination is possible, and if so, the duration of the notice period and the effective date (see *Ordinary Notice of Termination*).
- Whether a probation period applies to the FTC and if so, the duration of the probation period and the notice period (see *Notice of Termination During Probation Period*).

Parties should also consider the following regarding FTCs:

- Avoid entering long FTCs without providing an option for earlier ordinary notice of termination to prevent unnecessary costs and ongoing employment (see *Types of FTC*).
- Avoid obligations to issue notice to end the contract on expiry of the term (for example, notice of termination or notice of non-renewal). This helps avoid any requalification into an indefinite term contract.
- Assess any impact employing an employee on an FTC may have on separate regulations and entitlements, such as bonus plans or shareholders' agreements, which often base specific consequences and rights on the fact that notice of termination is served by either the employer or the employee (for example, call options, forfeiture of rights).
- Avoid any tacit continuation of an FTC and instead explicitly regulate the extension or renewal of an FTC, either in the FTC or by a separate agreement (see *Tacit Continuation of FTCs*).

- Do not enter into multiple consecutive FTCs with the same employee, to avoid any requalification into an indefinite term contract (see *Restrictions Regarding Consecutive FTCs (Chain Contracts)*). It is recommended that employers should instead enter an indefinite term contract with a short notice period.

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