

# Employment Law in Switzerland: Part II

Insights

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This article is the second in a series which provides an introduction to the key elements of employment law in Switzerland. Although Swiss employment law is rather liberal in character when compared to employment laws of other nations, there are some limitations on the employer and requirements that each employer doing business in Switzerland should be aware of. This article will provide an introduction to the laws applicable to employment terminations including required notice provisions, reasons for terminating the employment relationship that are considered lawful and unlawful and potential liability for the employer who fails to comply with Swiss law.

## I. Notice Provisions

If the employment relationship is governed by a fixed term contract, the relationship will automatically terminate on the date specified in the employment contract without notice required by either the employer or employee. However, if the employment relationship is not governed by a fixed term contract, the employer or employee can terminate the contract at any time as long as the terminating party complies with mandatory notice provisions. Minimum notice provisions are governed by the employment contract or collective bargaining agreement. If there is no formal contract between the parties, the required notice is then governed by Article 335 of the Swiss Code of Obligations ("the Code"). Pursuant to the Code, the following amount of notice is required by law:

- 7 days during the probationary period (usually the first month of employment but not more than the first three months of employment);
- 1 month during the first year of employment;
- 2 months for the 2nd to 9th year of employment; and
- 3 months for the 10th year of service and thereafter.

## II. Prohibited Reasons for Terminations

Pursuant to Article 336(c) of the Code, a Swiss employer is not permitted to terminate a fixed term contract or employment that lasted for more than three months, even if it provided notice, in the following circumstances:

- If an employee is pregnant or for the period of 16 weeks following her pregnancy;
- If an employee is not able to work due to illness or accident for a period of up to 30 days during the first year of employment, 90 days during the second year of employment and for up to 180

days for the sixth year of employment and thereafter; or

- If an employee is serving in the Swiss military, civil defense service, women's military service or Red Cross.

In Switzerland, the terminating party is not required to provide a reason for terminating the employment relationship. However, if the non-terminating party requests the reason for the termination, the terminating party must then provide the reason in writing. Pursuant to Articles 335 and 336 of the Code, the following specific reasons for terminating the employment relationship are considered "unfair" or "abusive" under Swiss law:

- Termination based upon the employee's participation in a union;
- Termination during a period of time when the employee is acting as an elected employee representative unless the employer can prove that the reason for the termination was lawful;
- Termination based upon a personality trait unless the trait relates to the employment relationship;
- Termination in retaliation for an employee's exercise of a constitutional right unless the exercise of such right violates a duty of the employment relationship;
- Termination used to avoid the employer's obligation to provide the employee with a bonus or other compensation required by the employment contract; and
- Termination related to a collective dismissal without prior consultation with the employee's representative body or the employee.

Although abusive terminations will not void the termination or result in the reinstatement of the employee, the employer will be required to pay an indemnity to the employee in an amount which is determined by a judge on a case by case basis, but which cannot exceed six months' salary. An employee who wishes to assert that a termination was abusive must file a written objection with the employer by the end of the notice period and also with a court of competent jurisdiction within 180 days of the termination date.

### **III. For Cause Terminations**

Pursuant to Article 337 (1) of the Code, in the case of a fixed term contract, the only time an employer can terminate a contract prior to the expiration of the term of employment is "for good cause" or if the parties had agreed on notice provisions applicable to the fixed term. Employers can also terminate an employee for cause if the relationship is for an indefinite term. "For cause" under Swiss law is defined as any circumstance where the terminating party cannot in good faith continue the employment relationship until the end of the term or by abiding by the required notice provisions. Employers should be aware that poor performance does not typically qualify as a for cause reason. Some examples of good cause are if an employee commits a criminal act or commits a serious breach of his duty of loyalty to the employer. When terminating an employment relationship for cause, an employer is recommended to advise the employee in writing of the reason for the termination for evidentiary purposes.

If an employee is terminated without notice and without good cause, the termination is deemed unjustified and the employee can recover damages and compensation pursuant to Art. 337 of the Code. However, Swiss courts will not typically order that the employee be reinstated.

Navigating Swiss law when handling employee terminations can be complex and, when in doubt, employers should consult with counsel in order to ensure compliance with the Code and avoid potential liability.