Employment Law in Europe

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SUMMARY TABLE

SWITZERLAND

Rights	Yes/No	Explanatory Notes
CONTRACTS OF EMPLOYMENT		
Minimum notice	YES	Indefinite term contracts terminable on notice periods between seven days and three months
Terms:		
Express	YES	
Implied	YES	
Incorporated	YES	
REMUNERATION		
Minimum wage regulation	NO	
Further rights and obligations:		
Right to paid holiday	YES	Four weeks paid holiday
Right to sick pay	YES	Salary payable by employer for limited period of time
WORKING TIME		
Regulation of hours per day/ working week	YES	45/50 hours per week depending on type of employment
Regulation of night work	YES	Generally prohibited with limited exceptions
Right to rest periods	YES	Minimum breaks depending on daily working hours
EQUAL OPPORTUNITIES		
Discrimination protection:		
Individuality	YES	Broader anti discrimination law not limited to eg race or gender. Dismissals are considered 'abusive'
TERMINATION OF EMPLOYMENT		
Right not to be dismissed in breach of contract	YES	
Statutory rights on termination	YES	
COLLECTIVE DISMISSALS		
Statutory definition	YES	Between 10–30 employees depending on size of organisation
Right to consultation:		
Collective	YES	A dismissal in breach is considered abusive
YOUNG WORKERS		
Protection of children and young persons at work	YES	Generally no employment of children under age of 15
MATERNITY RIGHTS		
Right to maternity leave	YES	Compulsory leave of eight weeks after childbirth (subject to limited exception). Dismissal prohibited for 16 weeks after childbirth
Maternity pay (during leave)	NO	Despite legislative proposals no public maternity insurance at present
Protection from dismissal	YES	No dismissal whilst pregnant and for 16 weeks after childbirth
Health and safety protection	YES	
Right to parental leave	NO	
Right to time off for dependants	NO	
TRANSFERS OF BUSINESSES		
Right to protection on transfer	YES	
Transfer of employment obligations	YES	
Right to information and consultation	YES	Employer's representative body must be informed and consulted about transfer
Right not to be dismissed	YES	Dismissal considered abusive unless employer informs and consults
COLLECTIVE RIGHTS		
European works councils	YES/NO	No implementation of EC Directive but legislation provides for informing and consulting employees with participation rights for employees
Right to take industrial action	YES	Industrial action is lawful under certain circumstances
EMPLOYMENT DISPUTES		
Civil court jurisdiction	YES	
Statutory body	YES	Employment Tribunals in half of the Cantons
WHISTLEBLOWING		
Protection from dismissal/ detriment	NO	No specific legislation but general principles of loyalty and confidentiality apply
DATA PROTECTION		
Protection	YES	
HUMAN RIGHTS ACT		
Statutory protection of human rights		
Public authority	YES	European Convention applies
Private organisations	NO	But convention taken into consideration by courts and tribunals

Examples of express terms

S1.2.6

- *Summary dismissal*. As will be further explained (see paras **S6.3.7** ff) the employer has the right to terminate the employment contract summarily for cause, ie for 'valid reasons'. Sometimes, it may be difficult to establish whether specific behaviour qualifies as a valid reason for immediate termination. Therefore, employment contracts sometimes expressly define what type of behaviour is considered a valid reason justifying summary dismissal.
- *Intellectual property rights*. By statute, inventions belong to the employer if the employee was hired to invent.[1] However, if the employee was not hired to invent, but still creates an invention while performing his or her employment activity, the invention does not belong to the employer by statute. Therefore, employment contracts may contain express provisions reserving the employer's right to acquire such inventions.
- *Confidentiality*. It is an implied term that an employee must not breach his duty of confidentiality, but an employment contract may set out express terms defining the subject matter of such confidentiality.
- *Non-competition clauses*. Within their discretion, the parties may agree on a post-termination restrictive covenant prohibiting any competitive activity by the former employee within a certain geographic area during a certain time period.[2] Such a clause is often agreed upon if an employee has access to sensitive data, trade secrets, or business confidential information.
- *Foreign employees*. If a residence or work permit is required with respect to a foreign employee, the employment contract must contain a clause stating that it is concluded only under the express condition that the necessary permits will be granted.

1 See art 332 para 1 CO. Note that for industrial designs and models as well as copyrights, other rules apply.
2 See art 340 CO.

Statutory default rules (implied terms)

S1.2.7 In the event that the parties to an employment contract do not incorporate an express term on a certain issue, statutory default rules may apply. Because these rules apply to every employment contract in the absence of an express term to the contrary, the statutory default rules are essentially implied terms. For example, the employee has implied duties of loyalty, confidentiality and due care regardless of whether or not these duties are expressly agreed upon in the individual employment contract. The same is true for the employer's implied duties, such as the duty to care for the employee's health and safety.

Standard employment contracts

S1.2.8 'Standard employment contracts' are similar to statutory default rules, but are limited to certain types of employment contracts. They are not collective agreements, but governmental decrees establishing provisions concerning the conclusion, content and termination of individual types of

employment relationships.[1] Like statutory default rules, the provisions of standard employment contracts apply directly to the relevant employment relationships, unless the parties have agreed otherwise. In terms of formalities, it should be noted that standard employment contracts may provide that agreements deviating from some of its specific provisions are required to be in writing in order to be valid.[2]

1 See art 359 para 1 CO.
2 See art 360 CO.

Mandatory statutory rules

S1.2.9 There are certain mandatory statutory terms which automatically apply to every employment contract under the Swiss Code of Obligations. The Code breaks these terms into two categories: those which cannot be altered to the detriment of either party,[1] and those which cannot be altered to the detriment of the employee only.[2]

1 See art 361 CO.
2 See art 362 CO.

Incorporated terms

S1.2.10 In order to facilitate the administration of the workforce, companies may wish to use standard employment conditions or employee manuals or other pre-formulated terms and conditions. If the employee does not actually sign – ie specifically agree to - these standard agreements, they only apply if they were properly incorporated into the individual contract, which may be done by reference. The mere existence of such employment conditions or manuals is not sufficient to make them legally binding.

S1.2.11 There are instances in which such standard terms and conditions are not binding *despite* the fact that they were incorporated into the individual contract. Aside from the obvious requirement that such standard conditions must be lawful in order to be valid, the parties may agree upon a provision in their contract which contradicts provisions in the standard employment conditions or employee manuals to which their contract refers. In such cases, the contract overrides the standard conditions. Furthermore, if a party did not have the opportunity of reviewing the content of the standard conditions prior to agreeing to a contract which incorporates the standard conditions by reference (as opposed to an incorporation by recitation of provisions), a Swiss court is likely to find that the conditions are not binding. Moreover, the conditions are not binding if they are incorporated by reference and the clause at issue is unusual in that a party did not know about the clause and did not have a reason to expect its inclusion, either because the clause is not typical in such a contract or because the clause was 'hidden' in the fine print of the document.

Judicial amendments

S1.2.12 If the individual employment contract is silent on a certain issue in dispute, and if there is no applicable statutory or customary law, the court may 'amend' the contract based on what the parties would have reasonably agreed upon, had they included an express term governing the

dispute. In the case of 'typical' contracts, however, the court may 'amend' the contract based on a rule it would create if it were the legislature, ie based on a rule that is sufficiently broad to be applicable to any 'typical' contract as opposed to just the one at issue.[1]

[1] See art 1 para 2 of the Swiss Civil Code (CC) (*Schweizerisches Zivilgesetzbuch vom 10 Dezember 1907* [SR 210]).

1.3 Variation of Contract

S1.3.1 According to a general principle of the Swiss law of contracts, the terms of a contract may not be changed unilaterally. Alterations to contractual terms require mutual consent, unless a right to modify is provided for in the contract itself within the limits of the law. Therefore, if one party wishes to change the terms of the employment contract, the existing contract must be terminated and the terms of the new contract have to be negotiated anew. If one party nevertheless 'changes' the terms of the contract unilaterally, and the other party does not object to such change, but continues to perform the contract according to the new terms, then that party may be deemed to have consented to the new contract with the new terms.

1.4 Remedies

A EMPLOYEE'S REMEDIES

S1.4.1 In terms of remedies available to employees, Swiss law distinguishes between a breach of the employer's principal duty to pay the salary and breaches of secondary duties.

If the employer refuses to pay the salary agreed upon, the employee has three options:

- the employee may refuse to work and still be entitled to payment for the period during which he or she refused to work in response to the employer's failure to pay the salary for work already performed;[1]
- the employee may enforce the salary claim by instituting debt collection proceedings or by suing the employer in court for specific performance and damages;
- in cases of repeated and persistent refusals to pay, the employee may terminate the employment immediately and without notice. This is possible even when the employer's failure to pay is due to insolvency, unless the employee is given security for the salary claim within an adequate period of time.[2]

[1] See art 324 CO by analogy.
[2] See art 337a CO.

S1.4.2 If the employer breaches his duty of assistance rooted in the principle of good faith,[1] which includes, inter alia, the safeguarding of the employee's right of individuality and protection against third party breaches,

ie by customers, co-workers and supervisors, the employee has the following options:

- The employee may refuse to work.
- The employee may sue for specific performance and for compensation of monetary damages.[2]
- The employee may terminate the employment contract, but will generally have to comply with the notice period requirements applicable to ordinary termination.
- In the event that the employer discriminates against the employee due to gender, the employee is entitled to further remedies based on the Swiss Gender Equality Act (see paras **S5.2.1** ff).

[1] See art 2 para 1 CC.
[2] See art 97 CO.

B EMPLOYER'S REMEDIES

S1.4.3 The employee's principal duty is to perform personally the work contractually undertaken, and it is implied that the employee has to do so by observing a certain standard of care. Furthermore, the employee owes the employer the duty to safeguard loyally the employer's legitimate interests. As far as the employer's remedies for breach of any such duty is concerned, Swiss law distinguishes between a breach of the principal duty to work and breaches of secondary duties. In any event, however, the employee is liable, according to the general rules governing contracts, for any damages caused by a breach of any of these duties.

If the employee does not perform his duty to work at all, the employer has the following remedies:

- The employer may refuse to pay the salary agreed upon.[1]
- The employer may sue for specific performance, but he or she may generally not obtain injunctive relief preventing the employee from working for another employer.
- The employer may sue for monetary damages, which may be set off against the employee's salary claim; further, the employer is entitled to a general compensation equal to one quarter of the wage for one month, if the employee, without a valid reason, does not appear at the workplace, or if he or she leaves without notice.[2]
- Regardless of any monetary claims, the employer may terminate the employment relationship without notice.

[1] See art 82 CO.
[2] See art 337d para 1 CO.

S1.4.4
If the employee performs work, but breaches the duty of care or the duty of loyalty or any other duties arising out of the employment relationship, the employer may not withhold wages or require the employee to work for free in order to make up for the employee's breach of the duty of care.

However, the employer has the following options:

- The employer may sue for monetary damages caused by the employee. He or she may set off such a damages claim against the employee's salary claim, but only if the employee is at fault, as clauses stipulating liability irrespective of the employee's fault are null and void.[1] It should be noted that the standard of care applied to employees is lower than the general standard of care, because one factor to be considered is the employee's abilities and qualities about which the employer knew or should have known.[2]
- The employer may also terminate the employment contract within the ordinary notice periods. In the absence of intent, a breach of the duty of care is generally no reason for immediate termination without notice. However, the employer may enforce the duty of loyalty by obtaining a court order prohibiting the employee from causing further damage to the employer.
- Under certain circumstances and within specified limits, the employer may also use disciplinary measures, especially warnings.

1 See art 362 CO.
2 See art 321e para 2 CO.

2 REMUNERATION

2.1 Background

S2.1.1 The amount of the salary owed to the employee by the employer depends on the individual contract or the applicable collective employment contract, if any.

2.2 Legal Regulation of Remuneration

S2.2.1 Generally, there is no statutory minimum wage in Switzerland. However, because individual contractual provisions may deviate from collective employment contracts, provided that such deviation is in favour of the employee, the wages contained in collective employment contracts may be considered the minimum wage.

2.3 Deductions from Wages

S2.3.1 If an individual employment contract does not provide for a specific salary, the customary salary is owed to the employee.[1] The employer is obliged to deduct social security contributions from the employee's salary. Income taxes are not withheld by the employer, unless the employee is a foreigner, in which case the employer is, under certain conditions, obliged to withhold source taxes.

1 See art 322 para 1 CO.

2.4 Itemised Pay Statement

S2.4.1 An employee is entitled to receive a written wage statement[1] but the statute does not set out any details about what format the statement must have.

1 See art 323b para 1 CO.

2.5 Wage Protection

S2.5.1 Because the monthly salary is often the only source of an employee's income, Swiss law provides rules aimed at protecting the employee to ensure that the employee is free to dispose of his or her salary upon payment. For instance, the employee shall be given a written wage statement, and the salary shall be paid in legal tender, unless otherwise agreed upon or customary.[1] Furthermore, it is only possible for the employer to set off his or her counterclaims against wage claims – if at all – to the extent that any wage claim is subject to attachment in an official debt collection proceeding, ie to the extent the wage is not unconditionally necessary for the employee and his or her family.[2] Moreover, agreements as to the use of wages in the employer's interest are null and void,[3] and so are the assignment and pledge of future wage claims to secure liabilities other than support and alimony obligations arising under family law.[4]

1 See art 323b para 1 CO.
2 See art 323b para 2 CO; art 93 of the Federal Act on Debt Collection and Bankruptcy (*Bundesgesetz vom 11. April 1889 über Schuldbetreibung und Konkurs* [SR 281.1]); note, however, that the employer may set off claims for *wilful* damages without limit.
3 See art 323b para 2 CO.
4 See art 325 CO; note, however, that the exception for alimony obligations does not apply to future employee benefits, which may not be assigned or pledged at all before they are due (art 331b CO).

3 FURTHER RIGHTS AND OBLIGATIONS

3.1 Holiday Entitlement

S3.1.1 Employers are obliged to grant to each employee at least four weeks of paid annual leave in each year of service, and at least five weeks in the case of juvenile employees until completion of their twentieth year of age.[1] The employer may generally reduce the holiday by one-twelfth for each full month that the employee is prevented from working if the absence is because of a fault of the employee,[2] eg because the employee was driving while intoxicated and caused a car accident preventing him or her from working. As a rule, at least two weeks of holiday shall be granted consecutively in the course of the respective year of service. The employer determines the time of holiday, taking into consideration the employee's wishes to the extent these are compatible with the interests of the enterprise.[3]

1 See art 329a CO.
2 See art 329b CO.
3 See art 329c CO.

S3.1.2 Because it is paid annual leave, the employer is obliged to pay to the employee the full wages otherwise due. In order not to defeat the purpose of the holidays, the employee may not forfeit his time off and take pay or other benefits instead during the employment relationship. By the same token, the employer may refuse to pay the holiday wage and ask for a refund of any payments already made, if the employee performs work for a third party for payment during his holiday.[1]

[1] See art 329d CO.

S3.1.3 The remedies available to the employee for the enforcement of the holiday claim are the same as for any breach of secondary duties by the employer (see para S1.4.2).

3.2 Sick Pay

S3.2.1 If the employee is unable to perform the work contractually undertaken due to illness, the employer generally is still obliged to pay the salary for a limited period of time, provided that the employment relationship has existed for more than three months, or that the agreed upon term was more than three months.[1]

[1] See art 324a CO.

Holiday: summary

- 20 days paid leave per annum
- reduction by 1/12th for each month of absence due to employee's fault
- at least two weeks consecutive leave
- no payment in lieu

4 WORKING TIME

4.1 Background

S4.1.1 The Swiss Labour Act[1] (LA) and the corresponding Federal Council Ordinances are the most important source of regulations governing working hours,[2] although they also include rules governing young workers, and provisions on health and safety in the workplace and on the protection of women. Generally, the Swiss Labour Act applies to public and private enterprises; and an 'enterprise' exists whenever an employer permanently or temporarily employs one or more employees. However, there are numerous exemptions. For instance, the federal, state and local governments are generally not subject to the Labour Act,[3] and neither are employees in management or teachers in private schools.[4] Therefore, the applicability of the Labour Act and its provisions has to be determined on a case-by-case basis.

[1] *Bundesgesetz vom 13 März 1964 über die Arbeit in Industrie, Gewerbe und Handel* [SR 822.11].

[2] Other sources include the Swiss Working Hours Act (*Bundesgesetz über die Arbeit in Unternehmen des öffentlichen Verkehrs* [SR 822.21]), which regulates the working time of public transportation personnel.
[3] See art 2 para 1(a) LA.
[4] See art 3(d) LA.

4.2 Legislative Control

S4.2.1 As a general rule, the maximum weekly working hours for employees subject to the Swiss Labour Act is 50 hours. However, for employees in industrial enterprises and for office personnel, technical personnel and sales personnel in large retail enterprises, the maximum workweek is 45 hours.[1] There are also limits on daily working hours, in that work may not begin before 5:00 in summer and 6:00 in winter and may not continue past 20:00.[2]

[1] See art 9 LA in connection with the Federal Council Ordinance of 26 November, 1975 (*Verordnung zum Arbeitsgesetz über die Herabsetzung der wöchentlichen Höchstarbeitszeit für einzelne Gruppen von Betrieben und Arbeitnehmern* [SR 822.110]).
[2] See art 10 para 1 LA.

S4.2.2 While temporary overtime work is allowed under certain circumstances, it may not exceed two hours a day and a total of 220 hours a year, unless the maximum weekly working time is 45 hours, in which case overtime may not exceed a total of 260 hours a year. A permit is required to order overtime work in excess of 60 hours a year, or 90 hours a year if the weekly maximum working time is 45 hours.[1] In any event, the employer is generally obliged to pay at least 25% extra for overtime work unless it is compensated by extra holiday.[2]

[1] See art 12 LA.
[2] See art 13 LA.

4.3 Opting Out

S4.3.1 Whenever the Labour Act applies to a particular employer and the employer is not exempt, the employer may not opt out of the regulations. However, it should be noted that any of the above limits on working hours may be deviated from under certain conditions and upon issuance of an according permit by the competent federal government agency. Furthermore, a Federal Council Ordinance issued based on the Labour Act provides for various exceptions to the rules mentioned above. For instance, the maximum workweek of 50 hours is, inter alia, not applicable to hospitals, pharmacies, small restaurants, and petrol stations.[1]

[1] See Federal Council Ordinance of 14 January 1966 (*Verordnung II zum Bundesgesetz über die Arbeit in Industrie, Gewerbe und Handel* [SR 822.112]).

4.4 Night Workers

S4.4.1 As a general rule, night-time work is prohibited. Night-time is defined as the period between 20:00 and 5:00 in summer, and between 20:00 and 6:00 in winter.[1] However, there are exceptions to this rule.

Temporary night work may be allowed by the competent Cantonal Office, if an urgent need for such work is proven. However, it may not exceed nine hours within 24 hours and must be carried out within 10 consecutive hours, including rest periods. Even if allowed, the employer may only select employees who consent to night work. The employer must increase wages paid by at least 25% for night work.[2]

[1] See art 16 LA.
[2] See art 17 LA.

4.5 Rest Periods

S4.5.1 Under the Swiss Labour Act, employees are entitled to certain minimum breaks, which may not be traded in for monetary compensation or other benefits, except at the end of the employment relationship.[1] The length of the rest periods depends on the total daily working hours.[2]

Length of rest periods

- If the daily working hours are more than five and a half hours, the minimum rest period is 15 minutes;
- If the daily working hours are more than seven hours, the minimum rest period is 30 minutes;
- If the daily working hours are more than nine hours, the minimum rest period is 60 minutes.

[1] See art 22 LA.
[2] See art 15 LA.

S4.5.2 Furthermore, if the working week is spread over more than five days, the employees are entitled to have half a day off per week.[1] Additionally, employees are generally prohibited from working on Sundays,[2] but there are exceptions. Occasional work on Sundays may be allowed by the competent Cantonal Office, if an urgent need for such work is proven. However, even in such cases, the employer may only select employees who consent to work on Sundays. For Sunday work, the employer must increase wages paid by at least 50%.[3]

[1] See art 21 LA.
[2] See art 18 LA.
[3] See art 19 LA.

4.6 Paid Annual Leave

S4.6.1 This subject is covered in paras **S3.1.1–S3.1.3**.

4.7 Remedies

S4.7.1 As far as the enforcement of the Swiss Labour Act is concerned, there are two different mechanisms:

(a) To the extent that the Labour Act imposes a public law obligation on employers and employees which could be part of an individual employment contract, each party is entitled to enforce such obligation as if the obligation were part of the individual employment contract.[1]
(b) In addition to such private action, the Swiss Labour Act is enforced by the cantonal administrative authorities under the supervision of the Federal Council.[2] These government authorities may use general administrative law measures to achieve compliance with the Labour Act on the part of employers and employees.

Additionally, wilful breaches of certain provisions of the Labour Act may give rise to criminal liability.

[1] See art 342 para 2 CO.
[2] See arts 41 and 42 LA.

Working time: summary

- 50 hours maximum working week (45 hours for industry, office, technical and sales personnel in retail)
- no working before 5:00 summer/6:00 winter and after 20:00
- temporary overtime up to 2 hours per day (220 hours per annum)
- overtime paid at 25% extra or holiday in lieu
- no opt-out unless permit obtained
- night-time (20:00–5:00/6:00) working prohibited – unless urgent need
- minimum statutory rest breaks

5 EQUAL OPPORTUNITIES

5.1 Background

S5.1.1 Under Swiss law, the principle of equal treatment in employment matters is based on the employer's statutory obligation to respect and protect the employee's individuality.[1] As a prohibition of arbitrary treatment of individual employees, this obligation entails a prohibition of less favourable treatment of a certain employee in relation to other employees in comparable positions, unless such different treatment is specifically agreed upon in the individual employment contract. Furthermore, discriminatory dismissals are generally considered abusive (for consequences of abusive termination by notice, see paras **S6.3.2–S6.3.4**). In comparison to the law of other jurisdictions, Swiss law provides a broader anti-discrimination law, because it is not limited to certain criteria such as race or gender. However, for the same reasons, Swiss law is also less specific than the law of other countries. Swiss law offers very specific statutory rules relating to gender discrimination and, to a lesser extent, the right to equal pay for equal work.

[1] See art 328 CO.

5.2 Gender Discrimination

A OBJECTIVE

S5.2.1 The Swiss Gender Equality Act[1] (GEA) is based on the constitutional mandate requiring the legislature to ensure both de facto and de jure gender equality.[2] In other words, the legislature is not only required to eliminate laws which unjustifiably discriminate between the genders but also to ensure that the laws are effective in promoting day-to-day equality in real life situations. In line with this objective, the GEA applies to all employment relationships, regardless of whether the employer is the government or a private entity.[3]

1 *Bundesgesetz vom 24 März 1995 über die Gleichstellung von Frau und Mann* [SR 151].
2 See art 8 para 3 cl 2 Const; art 1 GEA.
3 See art 2 GEA.

B PROHIBITION AGAINST GENDER DISCRIMINATION

S5.2.2 Less favourable treatment of employees on account of marital status, family situation, or pregnancy qualifies as gender discrimination and is therefore prohibited.[1] Sexual harassment – which includes but is not limited to threats, the promising of advantages, coercive acts or the exercise of pressure in order to obtain favours of a sexual nature – constitutes gender discrimination.[2] However, employers are expressly allowed to discriminate against employees based on gender, if such discrimination consists of reasonable measures whose objective is to achieve equality in fact.[3]

1 See art 3 para 1 GEA.
2 See art 4 GEA.
3 See art 3 para 3 GEA.

C REMEDIES

S5.2.3 In addition to statutory or contractual claims for damages or emotional distress according to the general rules,[1] victims of unlawful gender discrimination have, at their option, the following additional remedies:[2]

- application for a court order prohibiting the imminent discriminating actions;
- application for a court order to eliminate the effects of existing discrimination;
- application for a declaratory judgment in case of persistence of the negative effects of the discrimination;
- application for a court order to pay the salary owed to the employee.

These general remedies are modified in the case of sexual harassment and if the discriminatory behaviour relates to hiring or dismissal: see paras **S5.2.4–S5.2.5**.

1 See art 5 para 5 GEA.
2 See art 5 para 1 GEA.

S5.2.4 If the discrimination consists of sexual harassment, the employee has an additional remedy. The judge or the competent administrative agency

may oblige the employer to pay an indemnity a maximum amount of six months' salary, provided that the employer fails to prove that it took necessary and reasonable steps to prevent sexual harassment from happening in the first place.[1]

3 See art 5 para 3 GEA.

S5.2.5 If, however, the discriminatory behaviour relates to hiring or dismissal in the context of a private employment contract, the above remedies are replaced by a claim for a payment which will be determined by the judge according to the circumstances based on the potential or actual salary.[1] The maximum amount of such payment is three months' salary for discriminatory hiring, and six months' salary for discriminatory dismissal.[2]

1 See art 5 para 2 GEA.
2 See art 5 para 4 GEA.

S5.2.6 As far as the employer's vicarious liability is concerned, Swiss law requires the employer to make sure that there will be no sexual harassment at the workplace and that the victims of sexual harassment will not suffer additional inconveniences. A violation of this duty constitutes breach of contract.[1]

1 See art 328 para 1 CO.

D PROCEDURAL SIMPLIFICATIONS

S5.2.7 In order to facilitate the enforcement of claims based on gender discrimination, the GEA provides two particular procedural devices:

- first, employees benefit from a presumption of discrimination in the context of distribution of tasks, working conditions, salary structure, continuing education, promotion, and dismissal, if the employee is able to show the probability of such discrimination;[1]
- second, certain organisations may, in their own name, file an action for declaratory judgment that specific discrimination exists, if it can be foreseen that the outcome of such action will affect a large number of employment relationships.[2]

1 See art 6 GEA.
2 See art 7 GEA.

5.3 Disability Discrimination

S5.3.1 There are no specific statutory rules regarding disability discrimination, so the general rules against discrimination apply (see para **S5.1.1**). It should be noted, however, that the new Swiss Constitution[1] explicitly calls for legislation aiming at eliminating disadvantages affecting the disabled.[2]

1 *Schweizerische Bundesverfassung vom 18 April 1999* [SR 101].
2 See art 8 para 4 Const.

5.4 Enforcement and Remedies in Discrimination Cases

S5.4.1 Except for gender discrimination (see paras **S5.2.1–S5.2.7**), Swiss law does not set out any particular remedies for discrimination cases, so the general rules regarding the employer's breach of contract apply (see paras **S5.1.1** and **S1.4.1–S1.4.4**).

5.5 Equal Pay for Equal Work

S5.5.1 The Swiss Constitution provides for equal protection under the law and specifically emphasises the applicability of this principle between men and women.[1] However, as constitutional rights, they are rights to be asserted against the Government and do not directly apply between private parties. Nevertheless, there is an exception regarding the right to equal pay for equal work for men and women, which is directly applicable in the context of private employment contracts by virtue of constitutional law.[2]

1 See art 8 Const.
2 See art 8 para 3 cl 3 Const.

S5.5.2 Similar provisions exist with respect to home workers and foreigners. Home workers, ie industrial workers who perform their work at home, are entitled to equal pay compared to industrial workers who perform their work at the employer's place of business.[1] As far as foreigners are concerned, the competent government agency is required to review the terms of employment between a Swiss employer and a foreign employee prior to issuing a work permit. As a condition precedent for such permit, the foreigner must be granted equal pay compared to that of Swiss employees.[2]

1 See art 4 para 1 of the Home Workers Act (*Bundesgesetz vom 20 März 1981 über die Heimarbeit* [SR 822.31]).
2 See art 16 para 2 of the Federal Statute on the Temporary and Permanent Residence of Foreigners (*Bundesgesetz vom 26. März 1931 über Aufenthalt und Niederlassung der Ausländer* [SR 142.20]); art 9 of the Ordinance on the Limitation of Employed Foreigners (*Verordnung über die Begrenzung der Zahl der erwerbstätigen Ausländer* [SR 823.21]).

6 TERMINATION OF EMPLOYMENT

6.1 Background

S6.1.1 Because Switzerland is a civil law country,[1] there is no distinction between statutory and common law protection against unfair dismissal. The law governing the termination of employment contracts encompasses unfair dismissal claims. Therefore, the following overview covers the law of termination in general.

1 In civil law countries such as Switzerland, the primary source of law are the codes and statutes as opposed to judicial precedent, which Swiss courts are not generally bound to follow as a matter of law, even though they regularly do so as a factual matter. Accordingly, judicial decisions are not viewed as an independent source of law (as in common law countries such as the UK and the USA), but rather as a clarification of what is already contained in the statute. As a result, there is no need to distinguish between statutory law and case law or common law.

6.2 General Methods of Termination

S6.2.1 Employment contracts may be terminated by mutual consent,[1] by expiry of a fixed term,[2] by death of the employee,[3] or by unilateral notice of termination.

1 See art 115 CO by analogy.
2 See art 334 para 1 CO.
3 See art 338 para 1 CO. Note, however, that the death of the employer does not automatically terminate the employment agreement: see art 338a CO.

S6.2.2 Because there are numerous mandatory provisions governing notices of termination which might be circumvented by using other methods of termination, Swiss law provides rules aimed at defeating any such attempts of circumvention. For instance, if a contract is terminated by mutual consent, a mandatory provision prevents the employee from waiving any claims resulting from mandatory statutory rules or from mandatory rules contained in collective employment contracts for one month after termination of the employment relationship.[1] Furthermore, in the event of automatic termination of the contract due to expiry of a fixed term, Swiss courts may read the fixed-term contract as a contract concluded for an indefinite period of time, if there was no genuine reason for using a contract for a fixed term other than the circumvention of mandatory statutory rules governing the termination of indefinite contracts.

1 See art 341 para 1 CO.

6.3 Notice of Termination

A GENERAL PRINCIPLES

S6.3.1 Unless stipulated otherwise, notice of termination need not be in writing and need not state any reasons for termination in order to be effective. However, the reasons for termination must be provided in writing upon request by the other party.[1] Upon receipt, the notice of termination becomes irrevocable. Under Swiss law, notices of termination always cover the entire agreement, ie individual provisions alone may not be terminated. There are two different types of notices of termination: ordinary termination with notice and extraordinary termination for cause without notice.

1 See art 335 para 2 CO; art 337 para 1 CO.

B ORDINARY TERMINATION WITH NOTICE

General rules

S6.3.2 Any employment contract concluded for an indefinite period of time[1] may be unilaterally terminated for any reason by both employer and employee,[2] subject to statutory notice periods ranging from seven days to three months, depending upon the nature and length of service.[3] These notice periods may generally be altered by mutual consent,[4] provided that that they are the same for both employer and employee.[5] Swiss statutory law provides protection from termination by notice for both employer and employee,

distinguishing between abusive and untimely notice of termination. Unless the law provides otherwise, it is the employee who has to show that the notice of termination was abusive or untimely.[6]

1 Note that employment contracts concluded for a definite period of time may not be terminated unilaterally, unless the relationship has lasted for over ten years. If so, each party may terminate the relationship with a mandatory notice period of six months effective at the end of a month: see art 334 para 3 CO.
2 See art 335 para 1 CO.
3 See art 335b para 1 CO, art 335c para 1 CO.
4 However, after expiry of the probationary period, the notice periods may be reduced to less than one month only by collective employment contract and only for the first year of service. See art 335c para 2 CO.
5 See art 335a para 1 CO.
6 See art 8 CC.

Protection against abusive termination

S6.3.3 With the exception of the last three reasons, which apply to terminations by employers only, termination of the employment contract by either party is considered abusive if given for one of the following reasons:[1]

- personal characteristics of one party (eg race, creed, sexual orientation, age, criminal record), unless they are relevant to the employment relationship or significantly impair co-operation within the enterprise;
- where the other party exercises a constitutional right, unless the exercise of such right breaches a duty of the employment relationship or significantly impairs co-operation within the enterprise;
- where the sole purpose was to frustrate the formation of claims arising out of the employment relationship;
- where the other party asserts, in good faith, claims arising out of the employment relationship;
- where the other party performs compulsory Swiss military service, civil defence service, military women's service, or Red Cross service, or another compulsory statutory duty (eg jury duty);
- where the employee belongs or does not belong to an employee association, or because of a lawful exercise of union activities;
- during the period the employee is an elected employee representative in a company institution or in an enterprise affiliated with it, and, if the employer cannot prove that he had a justifiable reason for the termination;
- in connection with a collective dismissal without prior consultation with the employees' representative body or, if there is none, the employees.

1 See art 336 CO.

S6.3.4 The party which abusively terminated the employment relationship is legally bound to pay an indemnity not to exceed the employee's wages for six months,[1] above and beyond any claims for damages based on other legal grounds.[2] In order to preserve the claim for indemnity, the party whose contract was abusively terminated must object to the termination in writing no later than the end of the regular notice period. If such objection was validly made and if the parties cannot agree on a continuation of the employment relationship, the claim for indemnity may be asserted in court

within 180 days after the end of the employment relationship, otherwise the claim will be forfeited.[3]

1 Note, that if the termination was in connection with a mass dismissal, the indemnity may not exceed the employee's wages for two months: see art 336a para 3 CO.
2 See art 336a CO.
3 See art 336b CO.

Protection against untimely termination

S6.3.5 Termination of the employment relationship after the expiration of the probationary period, if any, is considered untimely, if it was made by the employer – and under certain conditions also by the employee[1] – during the following periods of time:[2]

- during compulsory Swiss military service, civil defence service, military women's service or Red Cross service lasting more than 11 days, and during four weeks before and after the end of service;
- during the period that the employee is prevented from performing his work fully or partially through no fault of his or her own due to illness or accident for 30 days in the first year of service, for 90 days as of the second year of service until and including the fifth year of service, and for 180 days as of the sixth year of service;
- during pregnancy and 16 weeks after the employee has given birth;
- during foreign aid service in which the employee participates with the employer's consent, and where such service has been ordered by the competent federal authority.

1 See art 336d CO.
2 See art 336c CO; art 336d CO.

S6.3.6 Any untimely notice of termination is null and void. In order not to defeat the purpose of the protective periods, the termination notice must be renewed after the expiry of such periods.[1]

1 See art 336c para 2 CO.

> Abusive dismissal – statutory reasons → indemnity up to six months wages and damages
> Untimely dismissal – statutory reasons → dismissal null and void.

C EXTRAORDINARY TERMINATION FOR CAUSE WITHOUT NOTICE

General rules

S6.3.7 Both employer and employee have a right to terminate the employment contract immediately and without notice for cause, no matter whether or not the contract was concluded for an indefinite period of time and regardless of any statutory notice periods which would apply in the case of an ordinary termination. By statute, there is cause if the terminating party cannot reasonably be expected to continue the employment relationship,

but ultimately, determination of just cause is left to the court to decide.[1] The consequences of extraordinary termination depend on whether the termination was justified, ie whether or not there was cause.

[1] See art 337 CO.

Consequences of justified extraordinary terminations

S6.3.8 If the extraordinary termination was justified, because it was for cause, the court will determine the financial consequences of such termination, taking into account all relevant circumstances. Only if the cause consisted of a party's breach of contract, is that party required by law to provide full compensation for damages arising from the termination of the employment relationship.[1]

[1] See art 337b CO.

Consequences of unjustified extraordinary terminations

S6.3.9 If the employer dismisses the employee without notice and without cause, the employee is entitled to compensation for the sum which he would have earned if the employment relationship had been terminated in compliance with the applicable notice period or until the expiration of the fixed agreement period.[1] Furthermore, the court, in its discretion and taking into account all circumstances, may oblige the employer to pay an indemnity to the employee, which may not exceed the employee's wage for six months.[2]

[1] See art 337c para 1 CO.
[2] See art 337c para 3 CO.

S6.3.10 Similarly, if the employee terminates the employment relationship without notice and without cause, the employer is entitled to a general compensation equal to one quarter of the wage for one month and compensation for further damages. However, the court may reduce such compensation in its discretion, if no damage was caused, or if the actual damages were less than the general compensation. In order to avoid forfeiture of the claim for compensation, the employer must bring a legal action or institute formal debt collection proceedings within 30 days of the employee's failure to appear at or departure from the workplace.[1]

[1] See art 337d CO.

S6.3.11 In summary, while there may be a claim for an indemnity payment in cases of unjustified termination without notice, the legal relationship between employer and employee remains terminated despite the unlawful termination. In other words, there are no rights to reinstatement or re-engagement as provided for in other countries.

6.4 Redundancy and Collective Dismissals – Background

S6.4.1 Swiss law has special rules regarding collective dismissals. Collective dismissals are deemed to be notices of termination in enterprises given by the employer within 30 days for reasons unrelated to the person of the employee and which affect:[1]

- at least 10 employees in enterprises usually employing more than 20 and less than 100 persons;
- at least 10% of all employees in enterprises usually employing more than 100 and less than 300 persons; or
- at least 30 employees in enterprises usually employing at least 300 employees.

[1] See art 335d CO.

6.5 Collective Redundancies – Consultation

S6.5.1 An employer planning a collective dismissal must first consult with the employees' representative body or, if there is none, with the employees, and provide them with the opportunity to make suggestions on how to avoid the dismissals or to limit the number of dismissals and to alleviate their consequences. The employer is obliged to provide all pertinent information to the employees' representative body and to the Cantonal Labour Office. In any case, the employer must inform them in writing on the following issues:[1]

- the reasons for the collective dismissal;
- the number of employees to be dismissed;
- the number of persons usually employed;
- the time period within which the notification of the dismissals is to be given.

[1] See art 335f CO.

6.6 Termination in the Context of Collective Dismissals

S6.6.1 If an employer terminates the employment relationship with an individual employee by notice as part of a collective dismissal, the employment relationship ends 30 days after notification of the planned collective dismissal to the Cantonal Labour Office, unless the termination becomes effective at a later time in accordance with contractual or legal provisions.[1]

[1] See art 335g CO.

S6.6.2 Individual notices of termination are considered abusive by statute, if such notice was given in the context of a collective dismissal and if the employer breached the consultation obligation (as to which see para **S6.5.1**).[1]

[1] See art 336 para 2 lit c CO.

7 YOUNG WORKERS

7.1 General Obligations

S7.1.1 The Swiss Labour Act prohibits the employment of children under the age of 15, but there are certain narrowly-tailored exceptions for children over 13.[1] Young workers, defined as employees who have not yet completed their nineteenth year of age and apprentices who have not yet

completed their twentieth year of age,[2] enjoy a right to particular assistance and care by the employer.[3] Furthermore, they benefit from a limitation of the maximum working hours to nine hours a day, and the work has to be performed within a time frame of twelve hours. Young workers may not be selected for night work or Sunday work, and if they are under the age of 16, they are not eligible for overtime work.[4]

1 See art 30 LA.
2 See art 29 LA.
3 See art 32 LA.
4 See art 31 LA.

8 MATERNITY AND PARENTAL RIGHTS

8.1 Background

S8.1.1 Presently, there are no paternity rights in employment matters under Swiss law. However, the particular situation of pregnant and breastfeeding women is recognised, even though maternity rights are not neatly organised into one single statute. Instead, to the extent they are available, such rights are incorporated into the general law of employment contracts and may have to be inferred from general principles.

8.2 General Rights

S8.2.1 Pregnant women may only work if they consent to work, and they may not be required to work more than the ordinary period of daily work. They are entitled to leave work or stay home based on a simple notification.[1]

1 See art 35 LA.

S8.2.2 Women may not work during the eight weeks after delivery, but the employer may, upon request by the employee, shorten this period by two weeks, if the employee's ability to work is proven by a medical certificate. Even after the expiry of the eight-week period, breastfeeding mothers may only work if they consent to such work.[1]

1 See art 35 LA.

S8.2.3 While the employer may be allowed to reduce the employee's holiday entitlement if the employee is prevented through his or her fault from working for more than one month in total, such reduction is not allowed if the employee is prevented from working for up to two months due to her pregnancy.[1]

1 See art 329b CO.

8.3 Protection from Dismissal

S8.3.1 An employer's termination of the employment relationship during the pregnancy of the employee or 16 weeks after delivery is considered untimely.[1]

1 See art 336c lit c CO.

S8.3.2 Discrimination based on pregnancy is prohibited in all employment relationships, including hiring.[1]

1 See art 3 GEA.

8.4 Health and Safety

S8.4.1 As in the case of any other employee, the employer must pay due regard to the pregnant woman's health. The law provides that this includes the taking of measures:

- necessary according to experience,
- applicable according to the current state of technology, and
- adequate according to the circumstances of the enterprise,

to the extent that the employer may reasonably be expected to do so, considering the individual employment relationship and the nature of the work to be performed.[1]

1 See art 328 CO.

8.5 Maternity Pay

S8.5.1 If the employee is unable to perform her work due to pregnancy, the employer is still obliged to pay the salary for a limited period of time, provided that the employment relationship has existed for more than three months, or that the agreed-upon term of employment was more than three months.[1]

1 See art 324a CO.

S8.5.2 In terms of maternity benefits, it should be noted that despite the fact that the Swiss Constitution[1] contains a provision calling for maternity insurance, ie public insurance covering the loss of wages in case of pregnancy, so far the attempts made by the Swiss legislature to pass such legislation have failed. As a result, there is no public maternity insurance in Switzerland at the time of writing.

1 See art 116 para 3 Const.

8.6 Additional Rights to Time Off

S8.6.1 Unlike English law, Swiss law does not contain any statutory basis entitling an employee to take time off to care for dependants, but it may be granted by the employer in practice, particularly in cases of emergency.

Maternity rights: summary

- pregnant women only work if they consent to do so
- compulsory maternity leave for eight weeks after birth
- no dismissal during pregnancy and 16 weeks after birth
- no parental rights

9 BUSINESS TRANSFERS

9.1 Background

S9.1.1 As a general rule, if the employer transfers a business or part thereof to a third party, the employment relationship is transferred to the acquiring party, including all rights and obligations as of the date of transfer, unless the employee declines the transfer. If a collective employment contract applies to the transferred employment relationship, the acquiring party is obliged to comply with it for one year, unless it expires earlier or is terminated by notice. Other than in the context of such a business transfer, the employer is not entitled to transfer individual rights under an employment contract to a third party, unless otherwise agreed upon or evident under the circumstances.[1]

[1] See art 333 CO.

9.2 Identifying a Relevant Transfer

S9.2.1 Two requirements must be met in order for a transfer of a business to be subject to the rules governing business transfers:

a) a transfer of a business requires the retention of the 'economic identity' of the business prior to the transfer and the business thereafter; and
b) the transfer must be based on a contract, not based on a statute.

Therefore, business transfers in connection with mergers, transfer of shares of a company, or change of the legal form of a company do not qualify as transfers of business in the legal sense.

9.3 Effects of the Transfer

S9.3.1 If the employee refuses to transfer his contract, the employment relationship is terminated upon expiry of the *statutory* term of notice, as opposed to a potentially deviating *contractual* term of notice. The acquiring party and the employee are legally bound to perform their contractual duties until that termination date. Furthermore, the previous employer and the acquiring party are jointly and severally liable for an employee's claims which have become due prior to the transfer, and those which later will become due until the date upon which the employment relationship could have validly been terminated by contract, or is terminated at the refusal of the transfer by the employee.[1]

[1] See art 333 CO.

9.4 Duty to Inform and Consult

S9.4.1 Prior to the transfer, the employees or their representative body must be informed about the reason for the transfer, and about the legal, economic and social consequences of the transfer for the employees. If the transfer will result in measures affecting the employees, the employees' representative body must be consulted in time prior to a decision on these measures.[1] Unless the employer complies with these duties to inform and to

consult, any dismissal based on the transfer of business is deemed abusive (see paras S6.3.3–S6.3.4).[2]

[1] See art 333a CO.
[2] See art 336 para 2 lit c CO.

10 COLLECTIVE RIGHTS

10.1 Collective Bargaining Agreements

S10.1.1 Swiss law provides rules on 'collective employment contracts', which are contracts whereby employers, or associations thereof, and labour unions jointly establish provisions concerning the conclusion, content and termination of the individual employment relationships of the participating employers and employees.[1]

[1] See art 356 para 1 CO.

S10.1.2 In terms of the legal effects of collective employment contracts, Swiss law distinguishes between provisions resulting in purely contractual rights between the parties to the contract and provisions which are equivalent to statutory rules despite their contractual origin. The latter are mandatory in that they directly apply to the participating employers and employees and in that they may not be changed to the detriment of the employee, unless otherwise provided for by the collective employment contract itself.[1]

[1] See art 357 CO.

S10.1.3 It should be noted that collective employment contracts are limited to participating employers and employees, and are generally not binding on outsiders. However, upon request by all parties to the collective employment contract, the government may, under certain circumstances, extend the applicability of the contract to outsiders within the same industry or profession,[1] thereby providing the contract with the legal authority of a statute.

[1] See art 1 of the Federal Act on the Extension of the Applicability of Collective Employment Contracts (*Bundesgesetz vom 28 September 1956 über die Allgemeinverbindlicherklärung von Gesamtarbeitsverträgen* [SR 221.215.311]).

10.2 Works Councils

S10.2.1 Since Switzerland is not a member of the European Union, it is not bound by its Directives such as the European Works Council Directive. Nevertheless, Switzerland has enacted a statute on the information and consultation of employees in enterprises,[1] which provides specific participation rights for employees. Elections for works councils must be held if requested by at least 20% of the employees in the case of enterprises with more than 50 employees, or if requested by 100 employees if the enterprise employs more than 500 employees.

[1] *Bundesgesetz vom 17Dezember 1993 über die Information und Mitsprache der Arbeitnehmerinnen und Arbeitnehmer in den Betrieben* [SR 822.14].

S10.2.2 Works councils have the right to be informed by the management about all matters relevant to the fulfilment of their tasks. Furthermore, the works councils have a right of participation in matters regarding health and safety measures, transfers of businesses and mass dismissals.

11 EMPLOYMENT DISPUTES

11.1 Labour Courts/Tribunals

S11.1.1 In Switzerland, a variety of courts may have jurisdiction over employment disputes, depending on the subject matter of the particular dispute. For collective labour disputes, for example, conciliatory agencies and arbitrators have jurisdiction. However, as a matter of federal constitutional law, the organisation of the courts on the cantonal level is subject to cantonal law, which provides for different schemes according to the needs and resources of the particular canton. Approximately half of the cantons have specialised employment tribunals whose three-judge panels generally consist of a chairperson (who is an ordinary judge), and two wing members (representing employers and employees, respectively). The details, however, vary from canton to canton. In Zurich, for instance, the Employment Tribunal has jurisdiction over any disputes between employer and employee arising out of their employment relationship, but its jurisdiction does not extend to disputes between the government and its personnel. Furthermore, after the dispute has arisen, the parties may stipulate in writing that their dispute is subject to the jurisdiction of the ordinary courts instead.[1]

1 See s 13 of the Zurich Court Organisation Act (*Gerichtsverfassungsgesetz vom 13 Juni 1976*).

S11.1.2 As for the organisation of the courts in general, it is generally a matter of cantonal law which cases may be appealed to appellate courts and, ultimately, to the Federal Tribunal. In the cantons that have employment tribunals, appeals are generally made to ordinary appellate courts. The only exception is Geneva, where an employment appeals court exists. Afterwards, essentially depending upon the amount of money at issue, the aggrieved party may have the right to appeal to the Federal Tribunal.

11.2 Procedural Particularities

S11.2.1 Despite the fact that the law of civil procedure is generally governed by cantonal law,[1] the federal legislature has enacted provisions essentially harmonising the law of civil procedure as applied to matters of employment law.[2] For instance, the cantons must provide a simple and expeditious procedure for cases that have an amount in dispute of no more than CHF 20,000.[3] and no court fees or court expenses must be charged to the parties for such proceedings, except to those parties bringing frivolous actions. It is for the court ex officio to establish the facts and appraise the evidence at its discretion.

1 It should be noted, however, that the Swiss people recently adopted a new constitutional provision empowering the federal legislature to enact a single uniform law of civil procedure to be used throughout Switzerland: see art 122 Const.
2 See art 343 CO.
3 Note that this restriction does not apply whenever the Gender Equality Act applies (art 12 GEA).

S11.2.2 In addition, the Swiss Gender Equality Act provides for free-of-charge conciliatory proceedings conducted by a cantonal conciliation authority to advise the parties and to attempt to settle the dispute prior to the commencement of formal litigation.[1] The conciliatory proceedings are not mandatory, but the cantons may enact rules pursuant to which formal litigation may not be entered into prior to the end of the conciliatory proceedings. If a party wishes to conduct conciliatory proceedings, it must initiate such proceedings before the claim is barred by the applicable statute of limitations. Collective employment contracts may provide for private conciliatory proceedings, instead of governmental proceedings, for disputes between labour unions and individual employees.

1 See art 11 GEA.

11.3 Forum Selection

S11.3.1 If the subject matter of employment litigation does not have any international aspects, the forum is either the domicile of the defendant or, alternatively, the place of the business where the employee works.[1] This forum is mandatory and may not be changed to the detriment of either party by private forum selection clauses.[2]

1 See art 343 CO.
2 See art 361 CO.

S11.3.2 If the subject matter of the international litigation involves member states of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention), the general forum is the domicile of the defendant[1] or, alternatively, the place of performance, which is defined as the place where the employee usually works.[2] Forum selection clauses excluding this forum are only valid if they have been agreed upon after the dispute arose.[3]

1 See art 2 Lugano Convention.
2 See art 5 no 1 Lugano Convention.
3 See art 17 para 4 Lugano Convention.

S11.3.3 If the subject matter of international litigation does not involve member states of the Lugano Convention, the Swiss Code of International Private Law[1] (CIPL) applies. According to art 115 CIPL, Swiss courts have jurisdiction in the defendant's domicile or in the place where the employee usually performs his work. Additionally, if the employee is the plaintiff, Swiss courts have jurisdiction at the employee's domicile or residence. These jurisdictional provisions are not mandatory, however, and they may be changed by forum selection clauses if the dispute regards monetary claims.[2]

[1] *Bundesgesetz vom 18 Dezember 1987 über das Internationale Privatrecht* [SR 291].
[2] See art 5 CIPL.

11.4 Choice of Law

S11.4.1 The law applicable to employment contracts is the law of the country in which the employee usually performs his work. If the employee usually performs his work in several countries, the law applicable to the employment contract will be the law of the country of the employer's business establishment or, if such establishment does not exist, the law of the country of the employer's domicile or residence. The parties may provide for a choice of law clause, but their choice is limited to the law of the countries in which the employee usually resides, in which the employer's business establishment is located, or in which the employer has his domicile or usual residence.[1]

[1] See art 121 CIPL.

12 WHISTLEBLOWING/DATA PROTECTION

12.1 Whistleblowing

S12.1.1 Switzerland does not have a separate statute dealing with the issue of whistleblowing. Instead, the general principles governing employment contracts apply. Because of the employee's duty of loyalty,[1] he or she may not provide any information to third parties such as the news media or even government agencies, if the disclosure of such information might be harmful to the employer's reputation, regardless of whether the employee is able to prove that the information disclosed is true. In rare circumstances, a disclosure of internal information to third parties may be absolutely necessary to protect interests that outweigh the employer's right of confidentiality. But even in such cases, the employee must first raise the issue with the employer prior to releasing any information to outsiders. Otherwise, the employee will be in breach of contract.

[1] See art 321a para 1 CO.

S12.1.2 If the facts to be disclosed encompass manufacturing or trade secrets, additional rules must be considered, because the employee is bound by a statutory obligation not to make any use of or inform others of any such secrets.[1] This obligation continues even after the termination of the employment relationship, to the extent required to safeguard the employer's legitimate interests. It should be noted that the breach of the employee's duty of confidentiality need not be intentional to constitute a breach of contract.[2] However, if the disclosure was made intentionally, criminal liability may attach in addition to liability for breach of contract.[3]

[1] See art 321a para 4 CO.
[2] See art 321e para 1 CO.
[3] See art 162 of the Swiss Penal Code (*Schweizerisches Strafgesetzbuch vom 21 Dezember 1937* [SR 311.0]).

12.2 Data Protection

S12.2.1 The employer may have a legitimate interest in collecting information about a particular employee in order to assess the employee's performance and ability to perform the duties contractually undertaken. However, the employer may only do so to the extent that the data to be collected relates to the fulfilment of the employment contract.[1]

[1] See art 328b CO.

S12.2.2 Further, the employer must comply with the Swiss Data Protection Act[1] (DPA). This means that the employer must disclose to the employee that he or she is collecting data about him or her; otherwise, the employer must register any data collection with the Federal Data Protection Officer.[2] Thus, employees must generally be notified in advance about any monitoring of telephone conversations or use of video surveillance equipment which the employer undertakes.

[1] *Bundesgesetz über den Datenschutz vom 19 Juni 1992* [SR 235.1].
[2] See art 11 para 3 DPA.

S12.2.3 Any application materials submitted by a potential employee for the purpose of recruitment must be given back to the applicant or destroyed, unless the applicant expressly agrees to the employer keeping the materials on file.[1] to An applicant who is rejected by a potential employer is entitled to a written statement about the data processed in the context of the application, eg the content of letters of reference may then be disclosed to the employee.[2] During the employment relationship, the employer must ensure that the data collected about the employee is and remains accurate[3] and that such data is safe from unauthorised access by third parties.[4]

[1] See art 12 para 2 lit b, 13 para 2 lit a, 15 para 1 DPA.
[2] See art 8 DPA.
[3] See art 5 DPA.
[4] See art 7 DPA.

13 HUMAN RIGHTS

S13.1.1 The individual rights granted by the European Convention on Human Rights are directly applicable in Switzerland. However, because individual rights under the ECHR must be asserted against the government, persons employed by private employers may not directly invoke these rights against their employer. Nevertheless, human rights should not be disregarded in the context of private employment, because they are taken into consideration by the courts when interpreting and applying broad rules of employment law to specific sets of facts.