Changing Terms of Employment (Switzerland)

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A Practice Note dealing with the legal and practical considerations which arise when an employer wishes to change the terms of an employee's (or a number of employees') employment contracts in Switzerland. This Note addresses what changes an employer is permitted to make and whether an employer can make any unilateral changes.

An employee's terms of employment change during their employment. For example, annual pay increases and promotions are likely to constitute changes to the employment contract.

Occasionally, however, either the employer or the employee may wish to make changes to the employment contract that the other party may not want to accept. This Note focuses on how the law in Switzerland regulates the way in which employers may make changes to terms of employment and the remedies available to the employee when the employer makes unilateral changes to their employment contract.

Terms of Employment

The crucial minimum terms of employment that the parties must agree on to conclude a valid employment agreement are that:

- The employee agrees to perform work for the employer for a fixed or indefinite term.
- The employer agrees to pay the employee's salary based on the time served or the work performed.

(Article 321, paragraph 1, Federal Act on the Amendment of the Swiss Civil Code (Part Five: Code of Obligations) (*CO*).)

Except for certain special categories of employment agreements (for example, apprenticeships, commercial traveller agreements, and employment agreements for leased staff, which must be concluded in written form), the employment agreement itself is not generally subject to any requirements concerning its form and can be verbally or tacitly agreed (Article 320, CO). However, where an employment agreement is concluded for an indefinite term, or its term exceeds one month in duration, the employer must provide the employee with all the following information in writing:

- The names of the contracting parties.
- The date the employment commences.
- An outline of the employee's function and duties.
- Details concerning the salary and any other additional payments.
- The employee's weekly working time.

(Article 330b, CO.)

In addition, in the context of an employment agreement, certain employment terms are only valid if agreed in written form, for example:

- Terms concerning additional compensation for overtime.
- Post-contractual restrictive covenants.
- Notice periods that deviate from the statutory default.
- Probationary periods that deviate from the statutory default.

Additional employment terms stated in employee regulations or side letters, and even those based on tacit practice, can also form part of the terms of an employment agreement to the extent both parties agree to their inclusion. Any additional documents containing terms to be included in the employment agreement must be provided to the employee, or at least be made available to the employee (for example, on an intranet).

Material employment terms (there is no legal definition of material employment terms and it depends on the individual circumstances what terms are of such importance, though generally these are terms of particular importance to the parties and include, for example, terms concerning compensation, duties, duration and termination), and terms that must mandatorily be included in written form, should be included in the employment contract itself, not in general employment regulations (that is, an employer's internal employee regulations).

General employment regulations are often accepted by employees without those employees actually reading them. Therefore, the courts apply further scrutiny to these and will consider whether the employee could have expected the terms in good faith and therefore validly accepted them. In particular:

- Terms that are unusual will not usually be considered to have been validly accepted by an employee.
- Terms that have been worded unclearly will generally be interpreted in the employee's favour.

Permitted Changes

Changes to employment terms are permitted to the extent that those changes do not deviate from the mandatory provisions of:

- Any applicable law (including any mandatory employment law provisions).
- Any applicable collective bargaining agreements (CBAs).

Changes that are made to any CBAs applicable to an employment relationship are automatically effective without the need for any further action to be taken. Employers in Switzerland will often apply the terms of CBAs to all categories of employees even if they are specifically only applicable to certain categories of employees. Such CBAs are in most cases to the employees' benefit compared to the statutory default, which is why employee consent is usually not problematic in such cases.

Changes with Consent

The individual employee's consent is generally required to change that employee's employment terms. Unilateral changes by the employer (see *Unilateral Changes by the Employer*) are permissible only to a limited extent and are not permitted for changes to material terms of employment or terms that form part of the employment agreement between the parties.

There is no requirement to provide consideration for the employee's consent, unless the changes to the terms of employment are not only effective for the future but also affect pre-existing mandatory entitlements for past service, which the employee cannot waive during employment (in which case, consideration must be provided, for example payment of mandatory salary entitlements).

While written consent is only required for changes regarding certain employment terms that require written form (see *Terms of Employment*), it is nevertheless always recommended to obtain written consent for evidential purposes. Consent must be clear regarding a specific change, but it can make reference to other documents that contain the change(s) consented to (for example, internal employee regulations).

Unilateral Changes by the Employer

The employer is entitled to issue general directives and specific instructions to their employees regarding the performance of the work and the employees' conduct in the business (Article 321d, CO). The right to issue instructions allows the employer to substantiate and adapt the employment relationship to some extent to the changing needs of the business. Within the scope of this right to issue instructions, the employer can make reasonable adjustments to the employees' employment terms unilaterally and on short notice. Since employees owe a duty of care and loyalty to their employers (Article 321a, CO), they can be required to follow the reasonable instructions of the employer. For example, an employer can instruct an employee to work at another place provided that this other place is within reasonable commuting distance for the employee.

However, the terms agreed in the employment agreement between the parties are likely to limit the employer's entitlement to unilaterally change employment terms. For example, if the employment agreement defines the employee's place of work and does not reserve the employer's right to unilaterally define another place of work, that term (the place of work) forms part of the employment agreement and it can only be changed bilaterally with the agreement of both the employer and employee.

The material terms of employment are generally deemed as agreed between the parties and cannot be changed by an employer's unilateral instruction (for example, the terms concerning salary, holiday entitlements, and so on). The courts are usually reluctant to conclude that a lack of protest from an employee concerning a change of terms made unilaterally by the employer constitutes tacit acceptance of that change, since employees are generally economically dependent on the employer.

However, where a change of employment terms benefits an employee, this is unlikely to lead to a dispute between the employer and the employee, and the courts are more willing to accept that a lack of protest from the employee in this circumstance does constitute tacit acceptance of the change (as the change is to the employee's benefit).

Contractual Clauses Enabling Unilateral Changes

The parties can agree, either in the employment agreement or in the employer's internal regulations (or in both), that the employer has a right to unilaterally change specific terms of the employment, provided that both:

- The change is not made to a material term of employment.
- The change is not abusive and does not violate:
    - any mandatory provisions of law that apply to the employment relationship;
    - any mandatory provisions of applicable CBAs.

It is common for an employment agreement in Switzerland to include provisions reserving the employer's right to unilaterally change the employee's place of work and the employee's work functions, and these provisions are valid and enforceable. In addition, the employer's right to unilaterally change the non-material terms included in the employer's internal employee regulations is also usually reserved in the employment agreement, allowing the employer to unilaterally change these non-material terms where required.

Changes to Employee Duties

The employer can unilaterally change the employee's duties to the extent the main function of the employee as a material term of employment remains (for example, a person employed as assistant may be required to make coffee, but not to clean restrooms).

Changes to Employee Benefits

Changes to an employee's benefits are typically not subject to unilateral changes by the employer unless there is no entitlement to such benefits and the employer's discretion remains reserved (for example, the employment agreement often reserves the employer's discretion regarding bonus payments).

Non-Contractual Policies

The employer's right to unilaterally change the non-material terms included in the employer's internal employee regulations is usually reserved in the employment agreement, allowing the employer to unilaterally change these non-material terms where required.

Employee Remedies When a Unilateral Change Has Been Imposed

As employees owe a duty of care and loyalty to their employers (Article 321a, CO), they are required to follow the employer's reasonable and acceptable instructions. To determine if an employer's instruction is reasonable and acceptable, the parties' legitimate interests must be weighed up against each other. In any event, the intended change must:

- Comply with any mandatory provisions of the applicable law (for example, it must not violate the employee's personal rights).
- Comply with any applicable CBAs.

If an employer's instruction is considered either unreasonable or unacceptable in light of the above requirements, the employee can protest against the change to the employer or can simply refuse to follow the unreasonable or unacceptable instruction and the respective change made to the employment terms.

If a change of employment terms has a detrimental effect on the employee (for example, a change of employment terms resulting in reduced compensation for the employee), the employee can file a claim (for fulfilment of the originally agreed terms) against the employer to the competent conciliation authority under the applicable procedural law.

Consultation

In most cases where an employer makes unilateral changes to non-material terms of employment, no information or consultation requirements are triggered, and it is sufficient for the employer to inform the employee that the unilateral change has been made.

However, Article 10 of the Swiss Federal Statute on Participation Rights of Employees (*Mitwirkungsgesetz*) of 17 December 1993 (as amended) provides certain information and consultation requirements with the employees' representation (or the affected employees, where no employees' representation exists) where an employer intends to make changes to certain specific employment terms. In particular, there are information and consultation requirements in the following circumstances:

- Employment safety matters.
- Business transfers.
- Mass redundancies.
- Accession to, or separation from, pension funds.

In addition to the provisions contained in Article 10 as outlined above, some CBAs and internal employment regulations also provide further information and consultation rights to employees for changes to specific terms of employment.

Where information and consultation rights exist concerning changes made to specific employment terms, this usually must involve the employees' representation or, if no employee representation exists, the individual employees affected by the relevant change. Whilst there are no specific requirements concerning the form of such information and consultation, it is recommended that it is made in written form for evidential purposes.

The specific information and consultation requirements that must be met will depend on the matter at hand and comprise, in most cases of:

- Provision of information to the employees' representation (or employees, if no employee representation exists).
- Consideration of any suggestions made by the employees' representation (or employees, if no employee representation exists) and received by the employer in a timely manner (usually a period of a few weeks).

The employer can then make its decision and provide its reasoning for that decision to the employees' representation (or employees, if no employee representation exists) before implementing the relevant unilateral change.

For changes concerning employment safety matters, employees have an additional right to participate in the deliberations concerning that change before the employer implements any unilateral change. For example, the employees (and respectively their representation) have a right to take part in meetings where the topic to be decided upon is discussed.

For changes concerning the accession to, or separation from, pension funds, the employees' representation (or the majority of employees, where no employee representation exists) must agree to the change before it can be implemented.

Consultation proceedings are administered by the employer. In particular, the information and consultation requirements are also subject to detailed statutory requirements with regard to changes to terms of employment in the following circumstances:

- Business transfers (Article 333 et seq, CO) (see *Transfer of a Business*).
- Mass redundancies (Article 335d et seq, CO) (see *Redundancy*).

Any violation of these requirements can render any related dismissals:

- Abusive, and subject to statutory penalties of up to six monthly salaries for each affected employee.

- Null and void.

Where a change to the terms of employment concerns a merger, demerger or asset transfer as outlined in the Swiss Federal Merger Act (SR 221.301), that employee (or those employees) affected can file a claim with the competent court to block the registration of that transaction in the Commercial Register where there has been a violation of the information and consultation requirements.

Disciplinary

Changes as Disciplinary Sanction for Breach of Duties

If employees breach their employment duties, the employer can reasonably change non-material terms of employment as a disciplinary sanction to the extent that such a unilateral change is permissible (see *Unilateral Changes by the Employer*). For example, it may be possible to demote the employee, provided that this is permitted under the relevant employment agreement. However, if the employment agreement expressly states the employee's function as a term of the employment, and the employer has not reserved the right to unilaterally change that function within the employment agreement, then a change to the employee's function will not be permitted.

Disciplinary Sanctions for Refusal of Reasonable and Acceptable Changes

If an employee refuses to follow the employer's reasonable and acceptable instructions regarding changes to the employment terms (see *Unilateral Changes by the Employer*), the employer can impose disciplinary sanctions on that employee. Such sanctions must be reasonable in the circumstances and can include:

- A demotion.
- A decrease to discretionary payments.
- Termination of employment with or without notice (see *Dismissal*).

In addition, the employer can file a claim with the competent conciliation authority (for damages caused by the employee's refusal to adhere to an employer's reasonable and acceptable instructions that involve a change to the employment terms).

Dismissal

If an employer cannot implement a unilateral change to the employment terms by way of a reasonable instruction (see *Unilateral Changes by the Employer*), the only way to force the employee to accept a change to the employment terms is by giving a notice of termination pending a change of contract (*Änderungskündigung*).

There are three types of notice of termination pending a change of contract that can be given to employees:

- A notice of termination that simultaneously offers the employee a completely new employment agreement.
- A conditional notice of termination that is subject to the employee accepting the suggested changes to the existing employment agreement.
- A notice of termination of employment that results from the employee's rejection of the employer's offer of a changed employment agreement.

However, certain legal requirements must be met before an employer can give an employee notice of termination pending a change of contract. It is generally permissible for an employer to force changes to the employment terms on an employee by giving notice of termination pending a change of contract provided that any detriment suffered by the employee as a result of the change to the employment terms is objectively justified by the employer and the change is made for operational or market-related reasons (Decision of the Swiss Federal Supreme Court, dated 3 October 2003, BGE 130 III 19, E. 3.1.2.2). For example, a change will be objectively justified and made for operational/market-related reasons if it is:

- Due to the restructuring of the employing company.
- Caused by the employing company's poor profits.

A change to the employment terms can also be objectively justified and made for operational or market-related reasons if it is intended to adapt the employing company's working conditions to the current employment market.

Where an employer gives notice of termination pending a change of contract, in addition to the requirements outlined above, the employer must also:

- Give the affected employee(s) ample time to consider the change.
- Respect the relevant notice period to implement the change as provided for in the:
    - employment agreement;
    - employer's internal regulations;
    - any applicable CBA.

An employer therefore cannot:

- Offer a change to the employment terms that will be effective immediately.
- Ask an employee to sign and agree to a change to the employment terms immediately.

Where any of the requirements outlined above are not met, a notice of termination pending a change of contract will be considered to be abusive, and the affected employee(s) can file a claim with the competent conciliation authority (the employer can be subject to pay penalties of up to six monthly salaries for each affected employee under Article 336 et seq of the CO). However, even where a notice of termination pending a change of contract is considered to be abusive, the termination of employment itself will still be considered to be valid in any event.

Redundancy

The same requirements that apply concerning an employer giving notice of termination pending a change of contract in the case of dismissals (see *Dismissal*) also apply to redundancies. In particular, if an employee is made redundant and that redundancy cannot be objectively justified by the employer as being based on operational or market-related reasons, and the redundancy is in fact made as a result of the employee's refusal to accept an offer of changed employment terms, then that redundancy may qualify as an abusive termination of employment (for employee remedies for abusive termination, see *Dismissal*).

Where an employer issues notices of termination pending a change of contract to numerous employees (the threshold depends on the total number of employees, but in any case it must be at least ten notices of termination issued within 30 days in the same business unit), the provisions concerning mass redundancies (Article 335d et seq of the CO) will also apply (see *Consultation*).

Transfer of a Business

In case of a transfer of a business (or a part of a business), there are mandatory provisions of employment law providing that all existing employment relationships (together with the associated rights and obligations stemming from those employment relationships) automatically pass to the acquirer on the day of the transfer, unless any individual employee (or a number of employees) refuses to accept the transfer.

The employment of employees who refuse to accept the transfer will end upon expiry of the statutory (not contractual) notice period depending on years of service (Articles 333 and 335c, CO).

The employees who are automatically transferred to the acquirer keep all their previous seniority rights. The seller (employer) and the acquirer are jointly and severally liable for any employees' claims until the date on which the employment relationship could normally be terminated (taking into account the contractual notice period) or is terminated following the employee's refusal to accept the transfer in accordance with the statutory notice period. The terms of any applicable CBAs also continue to apply to the transferred employees for one year after the date of the business transfer (Article 333, CO).

The employer must also inform the employees about the business transfer in due time before the transfer takes place. If measures affecting the employees are intended to be introduced such as any changes to the employees' employment terms, the employer must also consult with the employees about those measures (Article 333a, CO) (see *Consultation*).

Any attempt to circumvent the mandatory provisions concerning the automatic transfer of employees on a business transfer (for example, if the seller (employer) terminates the employees' employment and attempts to conclude new employment agreements between those employees and the acquirer) will be null and void.

The acquirer, as the employees' new employer, can agree with each individual transferred employee to change the terms of employment after the business transfer, but this can only be done to the extent that such changes do not affect the employee's mandatory employment rights (for example, employees' seniority rights, and the continued applicability of any CBAs for one year after the date of the business transfer).

For unilateral changes to the employment terms that go beyond the employer's right to issue instructions (see *Unilateral Changes by the Employer*), the acquirer can give the employees a notice of termination pending a change of contract (see *Dismissal*). Provided that the purpose of the notice of termination pending a change of contract is to adapt the terms of employment of the newly-acquired employees to those which are similar to or the same as the acquirer's own employees, this will constitute an objectively justified reason and any terminations that result from the provision of the notice are unlikely to be considered to be abusive (where a termination is considered abusive, the employer may be subject to pay penalties of up to six monthly salaries for each affected employee under Article 336 et seq of the CO).

Changes Across Jurisdictions

If an employer's group intends to make changes to the terms of employment across their global entities, the abovementioned Swiss rules will apply to the extent Swiss law applies to each individual employment agreement (which will usually be the case for employees working in Switzerland).

General

As mandatory law and the discretion of the competent courts are involved, numerous factors may be relevant if an employer wishes to change an employee's terms of employment. The options to facilitate changes to the employee's terms of employment by including respective provisions in the employment contract or other policies are very limited (see *Contractual Clauses Enabling Unilateral Changes*).

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