Mutual termination agreement and release (employment) Q&A: Switzerland

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Switzerland-specific information concerning the key legal and commercial issues to be considered when drafting mutual termination agreements for use internationally.

This Q&A provides country-specific commentary on *Practice note, Mutual termination agreements (employment): International*.

See also *Standard document, Mutual termination agreement (employment): International*, with country specific drafting notes.

Form of settlement

1. In your jurisdiction, how can parties record a mutual termination agreement between them?

In Switzerland, mutual termination agreements can be made in writing, verbally or even implicitly (*Article 115, Swiss Code of Obligations*). However, certain possible clauses in mutual termination agreements must by law be agreed in writing to be enforceable (for example, non-compete covenants). For this reason, and for practical evidentiary purposes, it is advisable in all cases to record a mutual termination agreement in writing;

In court proceedings, the parties can also request that a mutual termination agreement they have reached be recorded in the minutes of the court; the court will then set out the mutual termination agreement in its order dismissing the proceedings. The parties' settlement during court proceedings has the same effect as a binding court decision.

2. What is the name used for the type of agreement that records the termination of employment where a current or former employee agrees to waive or settle a claim (or more usually, all possible claims) against the employer in return for a payment?

The name used for any such type of agreement is "mutual termination agreement" or "settlement agreement", in German "*Aufhebungsvereinbarung*", in French "*accord de résiliation*" and in Italian "*accordo di risoluzione*".

Statutory obligations

3. Are there any legal requirements for employment termination agreements in your jurisdiction?

For a termination agreement to be valid and enforceable:

- Both parties must make real concessions.
- The employee must have a justifiable reason for entering into a termination by mutual consent, because by doing so they forego the protection from the prolongation of the notice period in case of accident, illness or pregnancy.

In practice, the payment of adequate severance by the employer will often be sufficient to satisfy the requirement that the employee has a justifiable reason.

Scope of settlement

4. Are there any restrictions on the type of disputes that can be settled by parties in an agreement on termination of employment?

As long as the requirements set out in *Question 3* are met, there are no restrictions on the types of dispute which can be settled by parties in a mutual agreement on termination of employment.

No claims or disputes need to be referred to expressly in the termination agreement.

However, depending on the circumstances of the individual case, it may make sense to mention the matters in dispute between the parties in the recitals to the termination agreement.

Timing of settlement

5. In your jurisdiction, when should the termination agreement be provided to the employee?

The time at which a termination agreement should be provided to the employee depends on the circumstances of the individual case.

If the employer wishes to give the employee notice of termination and at the same time offer them to conclude a termination agreement, it makes sense to submit the termination agreement to the employee together with the notice of termination.

In all cases, the employee should be given sufficient time to review the termination agreement proposed by the employer before signing it. There is no precedent on how much time the employee will need to have, but three to five days should be sufficient.

Pre-agreement negotiations

6. Does "settlement privilege" and/or "without prejudice" apply to termination negotiations and the settlement terms in your jurisdiction?

Under Swiss law, "settlement privilege" or "without prejudice privilege" do not automatically apply to termination negotiations and settlement terms.

However, the parties are free to make such a reservation during termination negotiations when exchanging a settlement proposal or documents which they do not wish to be used in potential subsequent court proceedings (this can be done by marking them as "without prejudice and not for court use").

If this reservation is clearly stated by a party during termination negotiations, and evidenced by the parties' correspondence, the other party must comply with it and not use those proposals or documents as evidence in any subsequent legal proceedings. Courts usually also accept these reservations and do not consider in their decision the proposals made by the parties, and the documents and communications exchanged by the parties during the settlement negotiation. However, "without prejudice and not for court use" reservations made by a party are binding only on the parties participating in the settlement negotiations, and will not override a court order requesting that a party discloses these documents in proceedings involving other parties.

Statements made by the parties during settlement negotiations that take place during mandatory conciliation proceedings preceding court proceedings, or during "instruction hearings" before the court, cannot be recorded or

used subsequently in court proceedings or for the court's decision (*Article 205, Code of Civil Procedure*). Therefore, the parties do not need to specify a "without prejudice and not for court use" reservation in this scenario.

7. Can pre-termination agreement negotiations become legally binding in any circumstances?

Although mutual termination agreements can be concluded in writing, verbally or even implicitly (see *Question 1*), in light of the far-reaching consequences that the termination of the employment relationship would usually have for the employee in particular, it is very unlikely that pre-contractual negotiations of a termination agreement would be deemed to have become legally binding without the parties actually signing a written termination agreement.

Nevertheless, Swiss law recognises a pre-contractual obligation on the parties when negotiating a potential settlement agreement; during the contract negotiations, even before a possible agreement is concluded, the parties must act in good faith towards each other (*Article 2, paragraph 2, Civil Code*).

If one party culpably breaches this pre-contractual obligation, it is liable to the other party for any resulting damage.

8. Should the agreement specifically state that it is without prejudice and subject to contract as set out in *Standard document, Mutual termination agreement (employment): International: clause 13*? Are these concepts understood in your jurisdiction?

The parties to a mutual termination agreement are free to include a provision like that in *Standard document, Mutual termination agreement (employment): International, clause 13*stating that the agreement is without prejudice and subject to contract until signature by both parties.

However, even though these concepts are understood under Swiss law (see *Question 6*), it is not standard practice to include such a clause in a termination agreement, because it is very unlikely for a proposed draft of a termination agreement or for pre-contractual negotiations of a termination agreement to be deemed legally binding without the parties actually having signed the termination agreement (see *Question 7*).

Parties

9. What information needs to be included about the parties at the start of the agreement?

There are no legal requirements as to what information should be included about the parties to a mutual termination agreement; however, they should be clearly identifiable.

It is usual practice to include the full name of the employee and the company name of the employer, as well as their full addresses. Occasionally, mutual termination agreements will also include the employee's date of birth and/or the employer's Swiss company identification number (UID).

Termination date

10. Can the parties agree any date when the employment will end (*Standard document, Mutual termination agreement (employment): International: clause 1*)?

The parties are free to agree on the end date of their employment relationship in a mutual termination agreement. This end date can be before the expiry of the contractual notice period.

However, for the employee to have a justifiable reason for entering into a termination by mutual consent (see *Question 3*), they will need to be paid the salary owed to them until the expiry of the contractual notice period (in addition to any severance payment).

The parties can therefore agree in the mutual termination agreement on a payment in lieu of the notice period, which would not be possible in the event of unilateral termination by one of the parties.

It is also possible to agree for the employee to be put on garden leave before the fixed end date, even if provision is not made for this in the original terms of employment.

11. Can the employee be placed on garden leave prior to the termination date (*Standard document, Mutual termination agreement (employment): International: clause 3*)? If so, can any untaken annual leave or time of in lieu be offset against the garden leave period?

The parties to a mutual termination agreement are free to agree for the employee to be put on garden leave before the termination date.

It depends on the circumstances in each individual case whether an employee is released from work duties before the termination date agreed on in a mutual termination agreement. However, a release from work at full pay before the termination date is usually considered an additional benefit for the employee which would count towards the validity requirement of having a justifiable reason for a mutual termination agreement. A set-off of outstanding

vacation entitlements against the release period would therefore be seen as diminishing the necessary concession by the employer (see *Question 3*).

The Federal Supreme Court has held that accrued vacation is lost by compensation if the duration of the leave of absence significantly exceeds the remaining entitlement (*BGE 128 III 282 E.4*). The Zurich Labour Court has established the following rule of thumb: the leave period must be at least three times as long as the outstanding leave in order for it to be considered compensated. An offsetting of overtime or time off in lieu against the garden leave period is also possible if agreed by the parties.

Severance pay

12. What must be included in the amount paid to the employee under the mutual termination agreement at *Standard document, Mutual termination agreement (employment): International: clause 4* in your jurisdiction? How are the various amounts calculated?

In Switzerland, the termination payment usually includes:

- Any salary due until expiry of the contractual notice period (in particular, if the parties agree a termination date earlier than the contractual notice period expiry date).
- Any bonus payments or payments based on an employee participation programme due to the employee.
- Any remuneration for outstanding vacation entitlements.
- Overtime hours or time off in lieu to the extent they are not compensated by a garden leave period (see *Question 11*).
- Compensation for involuntary early retirement.
- A severance payment (depending on the employee's years of service, the equivalent of at least one to two months' salary (offsetting the loss of the prolongation of the notice period in the case of illness/accident during the notice period).
- Any compensation for any other claim or entitlement to which the employee is entitled under their employment agreement.

It depends on the circumstances of the individual case whether separate amounts are set out for each individual entitlement in the termination agreement or whether all entitlements are combined in one amount to form a "severance payment".

13. Under local laws, how do the amounts payable to the employee vary depending on whether the employment is terminated with or without cause? Please cite any relevant statutory provisions.

In case of a termination for cause, the employment automatically ends immediately; as a result, the employee no longer has any protection if they fall sick, have an accident or get pregnant. There is usually therefore no severance pay in the case of a termination for cause. The employer will still have to pay all entitlements accruing until the termination date (for example, salary, vacation, overtime).

14. Are taxes payable on the payments made to employees on termination in your jurisdiction? If so, does this need to be stated in the agreement?

Social security taxes

Severance payments made to the employee on termination of employment are usually part of the employee's salary and so subject to social security contributions. The employer must deduct the employee's part of social security contributions from these payments before transferring any amount to the employee. If a payment is subject to social security contributions, this is to be indicated in the termination agreement by adding the word "gross" to the amount payable. In other words, the overall amount will be described as gross, but the employee will receive a lower, net amount once social security contributions have been deducted.

Taxes on income

Severance payments made to Swiss tax resident employees on the termination of employment are usually subject to Swiss income taxation. The employee has to self-declare the severance payment for Swiss income tax purposes.

The severance payment may be subject to a preferential income taxation rate if the employee meets all the following criteria:

- They are older than 55.
- They are giving up their professional activity.
- They face a gap in their pension fund contributions due to the early retirement.

Foreign nationals living and working in Switzerland are subject to wage tax at source if they:

- Do not hold a permanent residence permit ("permit C").
- Are not married to a Swiss national, but are Swiss tax resident.

The employer deducts the wage tax at source directly from the gross amount of the severance payment.

Severance payments to non-Swiss tax resident employees working in Switzerland but living abroad (for example, international weekly commuters or cross-border commuters) that qualify as remuneration for the period before the employment contract was terminated are subject to wage tax at source. If the severance payment to a non-Swiss tax resident employee contains payments for an early retirement or the loss of future income, the right of Swiss taxation of these payments may be restricted according to the applicable double tax treaty with the employee's state of residence.

15. In your jurisdiction, are there any time limits imposed by law on when payments need to be made to employees on termination?

All claims arising from the employment relationship become due at the latest on termination of the employment relationship (*Article 339, paragraph 1, Code of Obligations*). Therefore, payments to employees on termination have to be made as per the last day of employment, at the latest. However, the parties can also agree in the mutual termination agreement on a later payment date.

16. In your jurisdiction, are there any limitations on the scope of the release clauses with respect to existing and future claims, whether known or unknown, as set out in *Standard document, Mutual termination (employment): International: clause 8*? Please cite any relevant legal provisions.

If the requirements for a mutual termination agreement to be valid and enforceable according to Swiss case law are met (see *Question 3*), there are usually no limitations on the scope of the release clause with respect to existing and future claims which are actually known to the parties or of which the parties should be aware.

However, the Swiss Supreme Court requires that for a party to be able to validly release the other party from any and all claims arising from or in connection with the employment or its termination, they must be aware of corresponding claims or at least consider the existence of those claims to be possible. Therefore, unknown claims, of which the employee was unaware or of which they should not have been aware, might not be covered by the release clause in individual cases.

It is therefore advisable for employers to inform less experienced employees (or employees not advised by a lawyer) about their possible claims under the employment relationship, to reduce the risk that the release clause in a subsequent settlement agreement may not cover those claims.

Standard document, Mutual termination agreement (employment): International, clause 8 can remain as it stands, as it favours the presumption of a comprehensive release clause and therefore a definitive termination of all disputes between the parties.

References

17. Is it common in your jurisdiction to include a mutually agreed reference in the termination agreement? Can the wording of the reference be set out in a Schedule and can an employer decline to give the agreed reference if new circumstances come to light as set out in *Standard document, Mutual termination agreement (employment): International: clause 7*?

Yes. The employee is entitled to a final work certificate/reference letter on termination of the employment relationship (*Article 330a, Swiss Code of Obligations*).

It is advisable to set out the final text of the work certificate/reference letter in the mutual termination agreement itself or in a schedule to it. However, in practice, often only the employer's obligation to issue a favourable certificate to the employee at the time of termination is mentioned, without the actual text being mentioned in the agreement or a schedule.

Whether an employer can decline to give the agreed reference if new circumstances come to light depends on the circumstances of that case, and on the wording and legal interpretation of any potential release clause in the mutual termination agreement.

18. Does a reference need to be filed with any government authority?

No. There is no obligation to file a reference with any authority in Switzerland.

Confidentiality

19. Are there any formalities or requirements to ensure that the confidentiality clause at *Standard document, Mutual termination agreement (employment): International: clause 6* is valid and enforceable in your jurisdiction?

No. There are no such requirements in Switzerland, and *Standard document, Mutual termination agreement (employment): International, clause 6* would be perfectly valid and enforceable under Swiss law.

Restrictive covenants

20. Can restrictive covenants be included in terms of the settlement? Are such clauses enforceable in your jurisdiction? What are the key things to be taken into consideration to ensure that the restrictive covenants are valid and enforceable?

The parties to a mutual termination agreement are free to restate a restrictive covenant in the mutual termination agreement as agreed on in the employment agreement to guarantee that the covenant remains in force after termination by mutual agreement. In principle, it is possible to agree on restrictive covenants in a termination agreement even where the employment contract made no such provision, though this is rare in practice.

To be valid and enforceable, restrictive covenants must be appropriately limited in terms of:

- Place.
- Time.
- Relevant (that is, forbidden) activity.

In all cases, they must not exceed three years (*Article 340a, paragraph 1, Swiss Code of Obligations*).

In addition, for a restrictive covenant to bevalid and enforceable, both the following requirements must be met:

- The employee must have had insight into the employer's client base or manufacturing and business secrets.
- The use of this knowledge by the employee must be likely to cause considerable damage to the employer.

(*Article 340a, Swiss Code of Obligations*.)

Separability/ severability

21. In your jurisdiction, are separability clauses commonly incorporated within mutual termination agreements to avoid the entire agreement being held void or unenforceable due to the illegality, invalidity or unenforceability of a part of the agreement?

Yes, it is common in Switzerland to incorporate separability clauses in mutual termination agreements. However, whether and to what extent a termination agreement still complies with the legal requirements to be valid and enforceable (see *Question 3*) after part of the agreement is held void or unenforceable, will be determined by a court in each individual case, taking into account the parties' hypothetical will.

Execution formalities

22. What are the formal requirements for executing a valid termination agreement in your jurisdiction? Do the terms of settlement require court approval? Does the agreement or any reference need to be filed as a matter of public record?

Although Swiss law does not prescribe a specific form for the conclusion of a mutual termination agreement, it is advisable in all cases to record a mutual termination agreement in writing (see *Question 1*).

As a result, the parties to the termination agreement (usually the employer and the employee) need to sign it. A wet ink signature is only required if the mutual termination agreement contains any provisions (for example, restrictive covenants) legally requiring the written form to be valid and enforceable.

There is no need in Swiss law for any signature to be witnessed, notarised or apostilled, and the settlement agreement does not need court approval or to be filed as a matter of public records either.

It is crucial that the signature on behalf on the employer is by a person legally entitled to sign on its behalf. The employer can either give an explicit power of attorney to the respective individual, or register that individual in the commercial register with signing authority.

Swiss employment law does not require that a termination agreement be drafted in an official language (mainly German, French or Italian). Rather, a termination agreement can be drafted in any language as long as both parties understand that language and are able to grasp the content of the agreement fully.

General

23. Are there any clauses in *Standard document, Mutual termination agreement (employment): International* that would not be legally enforceable or not standard practice in your jurisdiction?

Clause 1 Termination of employment

It is not standard practice in Switzerland to mention any reason for the mutual termination agreement such as "ordinary business reasons" or anything else.

In the event that another possible employment relationship may exist with a group company, that employment cannot be terminated by this mutual termination agreement, unless that group company is also a party to the termination agreement.

Clause 3 Release from duty to work

According to the rule of thumb developed by the Zurich Labour Court (see *Question 11*), a set-off of outstanding vacation days or other time off to which the employee is entitled is only possible to the extent of one third of the total release period .

An employee's release from their work duties is often considered as part of the employer's concessions under a termination agreement and so counts towards the fulfilment of the validity requirement for mutual termination agreements (that both parties make real concessions) (see *Question 3* and *Question 11*). Therefore, a set-off of outstanding vacation entitlements against the release period risks diminishing the employer's concession.

Clause 4 Payment

The following sentence should be added at the end of the first paragraph of *clause 4*: "The Termination Payment is subject to the usual deductions for tax and social security contributions."

Clause 5 Return of company property

The last sentence of the provision ("Any right of retention shall be excluded") is not enforceable under Swiss law, since the parties cannot validly waive their legal right of retention (under Article 339a of the Code of Obligations) by agreement.

Clause 7 Reference

It is not standard practice in Switzerland to mention the employer's right to decline to give the agreed reference if new circumstances come to light that would have affected its decision to provide a reference in the form set out in the mutual termination agreement. However, if there are indeed new facts and circumstances, the employer would be allowed to revisit the wording of the reference letter as initially agreed on in the termination agreement.

Clause 13 Subject to contract and without prejudice

It is not standard practice in Switzerland to include this clause in a mutual termination agreement, since it is very unlikely for pre-contractual negotiations of a termination agreement to become legally binding without the parties

signing the document (see *Question 7*). However, when submitting a proposal for a mutual termination agreement, it may make sense to mention that the proposal is "without prejudice and not for court use" (see *Question 6*).

24. Are there any other clauses that would be usual to see in a mutual termination agreement and/or that are standard practice in your jurisdiction?

In light of the Entire Agreement clause in *clause 10*, and for any contractual non-compete covenant set out in the original employment agreement to remain in force after termination by mutual consent, the wording of any non-compete covenant needs to be restated in the mutual termination agreement.

Employers must inform their employees about their benefits entitlements following the termination of the employment; that is:

- Accident insurance.
- Daily sickness insurance.
- Pension fund.

(*Article 331, paragraph 4, Code of Obligations*.)

This legal obligation of the employer exists regardless of which party gave notice, and regardless of whether the employment was terminated by mutual consent.

It is therefore standard practice, and recommended, in Switzerland that the employer verifies the exact entitlements with its insurance provider and fully informs the employee about their entitlements in the mutual termination agreement, unless the employer can prove that it has informed the employee about their benefits entitlements through another route than the termination agreement.

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