

Transferring Employees on an Outsourcing in Switzerland: Overview

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A Q&A guide to outsourcing in Switzerland.

This Q&A guide gives a high-level overview of the rules relating to transferring employees on an outsourcing, including structuring employee arrangements (including any notice, information and consultation obligations) and calculating redundancy pay.

Transfer by Operation of Law

1. In what circumstances (if any) are employees transferred by operation of law?

Initial Outsourcing

In the private sector, where a transferor transfers a business (or part of it) to a transferee:

- The employment agreements and all rights and obligations derived from them transfer by operation of law from the transferor to the transferee at the date of transfer of the business, unless the employee refuses this transfer (*Article 333, Federal Code of Obligations of 30 March 1911 (CO), as amended*).
- The transferor and the transferee are jointly and severally liable for certain employees' claims (in particular for claims which have become due before the transfer of the business) (*Article 333, CO*).
- The transferor must inform or consult with the employees' representatives or, where there is none, the employees themselves in good time before the transfer takes place (*Article 333a, CO*).

Article 333 of the CO applies to the transfer of a business, or part of a business, if the business retains essential parts of its identity (that is, its business purpose, organisation and individual character) when infrastructure, operating resources and/or customers are transferred to the transferee. It is essential that the transferee continues or resumes the same or similar business activity. According to court practice and doctrine, "business" is any permanent self-contained organisational unit which is economically autonomous, and "part of a business" is an organisational unit which lacks economic autonomy.

In outsourcings that do not fall under Article 333 of the CO, the transfer of employment agreements requires the consent of each employee.

Change of Supplier

If a change of supplier leads to a transfer of a business from the previous to the new supplier, the same rules apply as under an initial outsourcing (*see above, Initial Outsourcing*).

Termination (or Expiry)

If termination of an outsourcing agreement leads to the re-transfer of the outsourced business from the supplier to the customer, the same rules apply as under an initial outsourcing (*see above, Initial Outsourcing*).

2. If employees transfer by operation of law, what are the terms on which they do so?

General Terms

To the extent that employment agreements are automatically transferred to the supplier under Article 333 of the CO, they are transferred on essentially all their existing terms and conditions. After the transfer, the transferee can modify the employment terms (*see Question 4*).

Pensions

Employers must set up or join a pension scheme for employees who meet certain minimum requirements. The pension scheme is independent from the employer's business. When employees are transferred under Article 333 of the CO, the employees' vested benefits under the transferor's pension scheme are transferred to the transferee's pension scheme. After the transfer, the employees' pension benefits are calculated according to the new scheme's regulations.

If the workforce that forms part of the transferor's pension scheme reduces substantially, the respective pension scheme must be partially liquidated. The employees then have individual or collective claims to a portion of the non-committed funds (free reserves) in addition to their ordinary claims to the vested benefit.

Employee Benefits

The transferred employees keep all contractual benefits related to their employment agreements (for example, share option plans, benefits granted for years of service and accrued holiday entitlements).

Other Matters

The transferee must comply with any collective agreements that apply to the transferred employees immediately before the transfer for one year after the transfer (unless the collective agreement expires earlier or is terminated by notice).

Both the transferor and, on completion of the transfer, the transferee may in principle make transferring or transferred employees redundant, subject to compliance with the applicable notice period. The employer's freedom of termination, which is a signature feature of Swiss employment law, is in principle not affected by a transfer of business (see [Question 9](#) for a particular restriction). In the event the notice period of terminated employees has not expired on completion of the transfer of business, these employees will transfer, and will be employed by the transferee for the remainder of the relevant notice period.

Redundancy Pay

3. How is redundancy pay calculated?

In general, Swiss law does not require the employer to pay severance or specific redundancy pay in case of dismissal. Therefore, in the absence of severance payment agreed in an individual employment agreement, collective bargaining agreement or social plan, the employer must simply continue to pay regular salary and benefits during the relevant notice period.

Harmonisation

4. To what extent can a transferee harmonise terms and conditions of transferring employees with those of its existing workforce?

The transferor must not terminate the employment agreement in connection with the transfer of a business (or part of it), and simultaneously arrange for the offering of new employment agreements with the transferee on the transferee's terms and conditions. This would avoid the employees' protection rights under Article 333 of the Federal Code of Obligations (CO).

However, after the transfer, the transferee can modify the employment agreements (and harmonise them with those of its existing workforce) with immediate effect if either:

- The change relates to formal (non-material) aspects only.
- The transferred employees consent to the change.

The transferee can also terminate the employment agreements (by giving contractual notice) and offer new agreements on changed terms of employment (constructive dismissal). The new terms can enter into force only once the notice periods have expired.

Collective agreements can exclude or restrict the employer's termination rights in a transfer of all or part of a business.

Special rules apply to occupational pension schemes (*see Question 2, Pensions*).

Dismissals

5. To what extent can dismissals be implemented before or after the outsourcing?

Generally, dismissals can be implemented before or after an outsourcing if the party giving notice complies with the contractual notice period and applicable employment regulations and collective agreements. However, employees are protected against untimely termination of employment (for example, in case of illness, accident or pregnancy) as well as against wrongful (abusive) termination, such as:

- An unlawful avoidance of the employees' protection rights under Article 333 of the CO (*see Question 4*).
- Non-compliance with the consultation obligations required for a mass dismissal (*see Question 9*).

Untimely termination of employment is null and void. Wrongful termination is valid, but the employer must indemnify the employee up to six times the employee's monthly salary.

National Restrictions

6. To what extent can particular services only be performed by a local national trained in your jurisdiction?

Certain professional activities are subject to a licence or authorisation requirement. Citizens of the EU or EFTA member states may exercise these professions provided they have valid professional certificates in their respective country of citizenship. Certain transitional provisions still apply for citizens of Croatia.

Citizens of non-EU/EFTA member states must obtain a work permit prior to performing work in Switzerland. In contrast to citizens of EU/EFTA member states, who generally have the right to be employed in Switzerland and

receive a residence permit, citizens of non-EU/EFTA member states can only receive a work permit if they have certain qualifications and particular skills. Such work permits are subject to a quota defined by the Swiss Federal Council (*Bundesrat*).

Following withdrawal of the UK from the EU, the Treaty on the Free Movement of Persons between Switzerland and the EU (FMPA) no longer applies to the UK. However, Switzerland has concluded a Citizen's Rights Agreement (CRA) with the UK, which secures the rights of Swiss and UK nationals acquired in the other country on the basis of the FMPA until 31 December 2020. This includes residence rights and the recognition of professional qualifications. The CRA has applied since 1 January 2021. The CRA does not, however, apply to UK or Swiss nationals who migrate to Switzerland or the UK after 31 December 2020.

Secondment

7. In what circumstances (if any) can the parties structure the employee arrangements of an outsourcing as a secondment?

If Article 333 of the Federal Code of Obligations (CO) applies, employment agreements transfer to the transferee as a matter of law. A contractual clause which provides that certain employment agreements (which belong to the business) do not pass on to the transferee (and that the employee remains an employee of the customer) is invalid.

If Article 333 of the CO does not apply, the parties can arrange an outsourcing as a secondment. Employment agreements must meet certain material and formal requirements. In addition, depending on the circumstances of the case and, in particular, on the number of the seconded employees, the secondment can qualify as professional leasing of personnel. If so, the employer must obtain authorisation for the secondment from the competent authorities.

Information, Notice and Consultation Obligations

8. What information must the transferor or the transferee provide to the other party in relation to any employees?

There is no statutory rule on information the transferor and the transferee must exchange during an outsourcing. However, for a smooth transition of the outsourced parts, the outsourcing agreement must at least set out:

- Which employment agreements transfer to the transferee.
- The duty of each party to pass to the other party any employees' termination notices.

- The duty of the transferor to pass the personnel files to the transferee at the date of the transfer.

However, in view of applicable data protection provisions (*see Country Q&A: Outsourcing: Switzerland Overview: Question 10*), the exchange of information is limited to information:

- On whether the employees meet their job requirements.
- That is necessary for the performance of employment agreements.

9. What are the notice, information and consultation obligations that arise for the transferor and the transferee in relation to employees or employees' representatives?

In the case of a business transfer under Article 333a of the Federal Code of Obligations (CO) (*see Question 4*), the transferor and/or the transferee must:

- Inform the employees' representative body (or, if no such body exists, the employees) before the transfer of the business (or part of it) of both the:
 - reasons for the transfer;
 - legal, economic and social consequences of the transfer on employees.
- This information can be given after all relevant decisions have been taken, contracts signed and a public announcement of the outsourcing made (but before the outsourcing is implemented).
- Consult the employees' representative body before the decision is made (or, if no such body exists, the employees) if, in connection with the outsourcing, measures affecting the employees are planned, such as dismissals or salary cuts. This consultation obligation requires the transferor and/or transferee to hear the employees, but it is not clear whether there is an obligation to discuss with them or explain why counterproposals are not being considered.

The relevant legislation does not set out specific rules on the duration of the information and consultation procedure. In practice, a consultation period of at least ten business days should be sufficient. The law does not state the consequences for not complying with these information and consultation obligations. Under legal doctrine, the business transfer and measures affecting employees (including termination of employment contracts) remain valid.

The employer has additional information and consultation obligations if there are mass dismissals in connection with an outsourcing. These apply if the following number of employment agreements is terminated by the employer for economic reasons:

- More than ten agreements if the transferor employs between 20 and 100 employees on a regular basis.

- More than 10% of all employment agreements if the transferor employs between 100 and 300 persons on a regular basis.
- More than 30 agreements if more than 300 persons are employed on a regular basis.

If the employer does not comply with consultation obligations, it could be liable for penalty payments for unfair dismissals and damages.

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Non-professional Qualifications. Harvard Business School AMP, 2012; Doctorate in Law, 1992; Masters in Law, 1990; Masters in Economics, 1987

Recent Transactions

- Advised a Swiss based FINMA-regulated global asset manager on its procurement of integrated middle office outsourcing services and front office Software-as-a-Service solution on transactional, governance and regulatory aspects.
- Advised a global telecommunications service provider on regulatory and contract requirements for its M2M and IoT service offerings in Switzerland.
- Advised an international essential communications and digital services provider in relation to the impact of COVID-19 on international roaming agreements.
- Advised a major Swiss call centre operator and provider of personnel placement services on its compliance with GDPR and Swiss data protection law.
- Advised a global audit firm on regulatory and transactional aspects of the implementation of various cloud services from a Swiss cloud provider.

- Advised a global consulting and services company in contract negotiations with international pharmaceutical company as regards large-scale outsourcings for transformation and application management services.
- Advised an international high-tech manufacturer on the global implementation of a cloud-based Enterprise Resource Planning (ERP) System.
- Advised an international lighting design company on expanding its online shop to Switzerland.
- Advised a major textile manufacturer on the restructuring of the implementation project for its supply chain planning solution.
- Advised a major call centre provider on the implementation of a cloud-based data management solution including compliance with data protection and professional secrecy requirements.
- Advised a global Audit firm on its assessment and implementation measures for compliance with Swiss data protection law in connection with international outsourcing of audit services.
- Advised a global banking group on the implementation of digital services including e-signatures and video identification into its banking offering.
- Advised a global banking group on regulatory and transactional aspects of structuring and implementing intra-group hosted platform solutions for global data management.
- Advised a global insurance group on pan-European restructuring of insurance and intermediary operations, including intra-group and third-party outsourcing of critical functions, in regulatory and transactional aspects.
- Advised a global consulting and services company in large-scale outsourcings for transformation and application management services for an international consumer goods manufacturer.
- Advised a global wealth planning group on its assessment and implementation measures for compliance with the EU GDPR.
- Advised a Swiss based machine manufacturer with global presence in its Industry 4.0 initiative to introduce data-based services.
- Advised a global banking group on sourcing of software solution ensuring financial services and regulatory compliance.
- Advised a leading developer of autonomous drone logistic systems in its strategic co-operations in the logistics industry.
- Advised a Swiss based world leading provider of forwarding and logistics services Panalpina on the global rollout of SAP finance.
- Advised a manufacturing group with global presence in their cooperation with leading provider of manufacturing execution systems (MES) to provide an integrated solution for consolidated steering of machine parks.
- Advised Huawei, world's largest networking and telecommunications equipment manufacturer, in its implementation of monitoring solutions for compliance assurance.

- Advised a Swiss banking group on strategic sourcing and restructuring for implementing shared back office services and the creation of distinct front office banks.
- Advised a Swiss based global private banking and asset management group on their worldwide implementation of cloud-based solutions in both front and back office processes.
- Advised a Swiss based online service provider on its launch of fully automated M&A trading platforms for assets and shareholdings in small and medium sized (SME) companies.
- Advised a global reinsurance company on their firm-wide implementation of bring-your-own-device (BYOD) initiatives.
- Advised an international software engineering and consulting group on the provision of managed services in development and testing for Swiss based world leading provider of pharmaceuticals and diagnostics.
- Advised Zimmer Group, world-leading provider of healthcare products, on its outsourcing and extension of finance and accounting operations in more than 20 countries to US-based global supplier Genpact.
- Advised a global audit firm on strategic outsourcings of infrastructure and business processes, including managed print services (MPS) both onsite and offsite.
- Advised Pershing LLC (a BNY Mellon company) on its provision of world-wide banking securities custody and execution services for a global banking group with major Swiss operations.
- Advised a world-leading insurance group on its global outsourcing of network communication and security services.
- Advised a global technology provider on multiple domestic and cross-border transactions for the supply of infrastructure and BPO services.

Recent Publications

- *Morscher L., Flühler N., TMT 2021 - Switzerland, in: Chambers Global Practice Guides, February 2021.*
- *Lukas Morscher, Leo Rusterholz, Data Protection & Privacy 2021 - Switzerland, in: Getting the Deal Through, October 2020.*
- *Lukas Morscher, Fedor Poskriakov, Lukas Staub, Fintech 2020 - Switzerland, in: Global Legal Insights, 2nd edition, August 2020.*
- *Lukas Morscher, Lukas Staub, e-Commerce 2021 Switzerland, in: Getting the Deal Through, August 2020.*
- *Lukas Morscher, Lukas Staub, Insurance & Reinsurance 2020 - Switzerland, in: Getting the Deal Through, July 2020.*
- *Lukas Morscher, Lukas Staub, Digital Business in Switzerland: overview, in: Practical Law, Global Guide 2020, May 2020.*

- *Lukas Morscher, Lukas Staub, FinTech 2020 - Switzerland, in: Chambers Global Practice Guide, March 2020.*
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- *Lukas Morscher, Leo Rusterholz, TMT 2020 – Switzerland, in: Chambers Global Practice Guide, February 2020.*
- *Lukas Morscher, Stefan Bürge, Technology 2018 – Switzerland, in: The Legal 500 & The In-House Lawyer Country Comparative Guide, October 2018.*
- *Lukas Morscher, Leo Rusterholz, Jan Waltenspül, Impact of the GDPR on Swiss and US Businesses, in: Swiss-American Chamber of Commerce, Yearbook 2018/2019.*
- *Lukas Morscher, Leo Rusterholz, Outsourcing: On-, Near- und Offshoring-Vereinbarungen im Finanzdienstleistungsbereich, in: Bartholet/Brändli/Schiltknecht/Sester (Hrsg.), Finanzmarktaufsicht und Finanzmarktinfrastrukturen, St. Galler Handbuch zum Schweizer Finanzmarktrecht, Zürich/St. Gallen 2017.*
- *Lukas Morscher, M&A Transaktionen im Technologiebereich – ein besonderes Risikoprofil, in: GesKR (Gesellschafts- und Kapitalmarktrecht), issue 4/2016, 411-424.*
- *Lukas Morscher, Kommentierung von Art. 620-625 OR (Aktiengesellschaft, Allgemeine Bestimmungen), in: Kostkiewicz/Wolf/Amstutz/Fankhauser (eds.), Kommentar zum Schweizerischen Obligationenrecht, 3rd edition, Zurich 2016.*
- *Lukas Morscher, Kaj Seidl-Nussbaumer, Data Protection & Privacy – Switzerland, in: Thomson Reuters / Sweet & Maxwell, International Series, 3rd edition, London 2016, 979-999.*
- *Lukas Morscher, International Outsourcing Transactions, Chapter on Switzerland, in: Sourcing World (Lukas Morscher, Ole Horsfeldt eds.), 2nd edition, Thomson Reuters, London 2015, 465-491.*
- *Lukas Morscher, Kommentierung von Art. 1, 2, 4 FusG (Commentary on Certain Articles of the Merger Act), in: Watter/Vogt/Tschäni/Daeniker (eds.), Basler Kommentar zum Fusionsgesetz, 2nd edition, Basel 2015.*
- *Lukas Morscher, Aktuelle Entwicklungen im Technologie- und Kommunikationsrecht, in: ZBJV, volume 147, issue 3/2011, 177-221.*
- *Lukas Morscher, Philipp Frech, Media and Communications in Switzerland, in: PLC Cross-Border Handbooks, Media and Communications 2009/2010, 1-11.*
- *Lukas Morscher, Lara Dorigo, Software-Lizenzverträge, Erschöpfung bei Computerprogrammen und Gebrauchthandel mit Softwarelizenzen, in: Jörg/Arter (eds.), Internet-Recht und IT-Verträge, 2nd edition, Bern 2009, 17-72.*
- *Lukas Morscher, Oliver Arter (eds.), ICT Contracts – Outsourcing, Bern 2008*

- *Lukas Morscher, Business Process Outsourcing (BPO) - Strukturelle und rechtliche Aspekte, in: ICT-Contracts – Outsourcing (Oliver Arter, Lukas Morscher eds.), Bern 2008, 19-62.*

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Recent Transactions

- Advised ARICOMA Group (the IT services consolidation platform of KKCG Group) on the acquisition of the technology company Seavus.
- Advised a global telecommunications service provider on regulatory and contract requirements for its M2M and IoT service offerings in Switzerland.
- Advised an international essential communications and digital services provider in relation to the impact of COVID-19 on international roaming agreements.
- Advised a major Swiss call centre operator and provider of personnel placement services on its compliance with GDPR and Swiss data protection law.
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- Advised a global wealth planning group on its assessment and implementation measures for compliance with the EU GDPR.
- Advised a global banking group on sourcing of software solution ensuring financial services and regulatory compliance.
- Advised a Swiss based world leading provider of forwarding and logistics services Panalpina on the global rollout of SAP finance.

- Advised Insight Venture Partners, leading global private equity and venture capital firm with a successfully completed minority investment in SonarSource SA, a leader in code quality management.
- Advised Swiss based online service provider on its launch of fully automated M&A trading platforms for assets and shareholdings in small and medium sized (SME) companies.
- Advised Schweizerische Mobiliar, the oldest Swiss insurance company on the agreement with KKR and other shareholders to acquire a 50% interest in Scout24 Schweiz, the leading Swiss network of online marketplaces for cars, real estate and general classifieds.
- Advised international software engineering and consulting group on the provision of managed services in development and testing for Swiss based world leading provider of pharmaceuticals and diagnostics.

Recent Publications

- *Peter Ling, Sevan Antreasyan, Leo Rusterholz, Federico Trinaldo Togna, Digital Health 2021 - Switzerland, in: Getting the Deal Through, March 2021.*
- *Lukas Morscher, Leo Rusterholz, Data Protection & Privacy 2021 - Switzerland, in: Getting the Deal Through, October 2020.*
- *Lukas Morscher, Leo Rusterholz, Outsourcing: Switzerland overview, in: Practical Law, Global Guide 2020, Outsourcing, February 2020.*
- *Lukas Morscher, Leo Rusterholz, Transferring employees on an outsourcing in Switzerland: overview, in: Practical Law, Global Guide 2020, Outsourcing, February 2020.*
- *Lukas Morscher, Leo Rusterholz, TMT 2020 – Switzerland, in: Chambers Global Practice Guide, February 2020.*
- *Lukas Morscher, Leo Rusterholz, Insurance & Reinsurance 2019 - Switzerland, in: Getting the Deal Through, July 2019.*
- *Lukas Morscher, Leo Rusterholz, Jan Waltenspül, Impact of the GDPR on Swiss and US Businesses, in: Swiss-American Chamber of Commerce, Yearbook 2018/2019.*
- *Lukas Morscher, Leo Rusterholz, Outsourcing: On-, Near- und Offshoring-Vereinbarungen im Finanzdienstleistungsbereich in: Bartholet/Brändli/Schiltknecht/Sester (Hrsg.), Finanzmarktaufsicht und Finanzmarktinfrastrukturen, St. Galler Handbuch zum Schweizer Finanzmarktrecht, Zürich/St. Gallen 2017.*
- *Leo Rusterholz, Lukas Held, Beweisfragen im Zusammenhang mit der Business Judgment Rule, in: GesKR (Gesellschafts- und Kapitalmarktrecht), issue 2/2017*
- *Leo Rusterholz, Lukas Held, Ausgewählte Aspekte zur Business Judgment Rule im Licht aktueller Rechtsprechung, in: GesKR (Gesellschafts- und Kapitalmarktrecht), issue 2/2016.*
- *Flavio Delli Colli, Leo Rusterholz, Das geplante Widerrufsrecht im E-Commerce nach OR, in: Jusletter, Weblaw AG, Bern 2014.*

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