

## European (& the GCC) Employment Law Update

Jurisdiction: Switzerland  
Date: May 2019

Impact date	Development	Impact
May 7, 2018	<p><i>BGE 144 III 327</i></p> <p>Swiss Federal Supreme Court ruled on the admissibility of contractual penalties in employment agreement.</p>	<p>The Swiss Federal Supreme Court ruled that contractual penalties, which provide for the employee's liability irrespective of damage or fault, are null and void as they result in an increase of liability which is not compliant with the mandatory Article 321e CO.</p> <p>However, Article 321e CO only applies during the employment relationship and not for the subsequent period. Accordingly, contractual penalties designed to sanction post-contractual violations (e.g. post-contractual violation of the confidentiality obligations) are still enforceable. Note also that this decision does not affect the admissibility of contractual penalties for violation of post-contractual non-compete and non-solicitation covenants as set forth under Article 340b para. 2 CO.</p>
January 15, 2019	<p><i>BGer 4A_215/2018 and 4A_230/2018</i></p> <p>Swiss Federal Supreme Court ruled on the admissibility of Euro wages for Swiss cross-border commuters.</p>	<p>The Swiss Federal Supreme Court took up the issue of Euro wages for cross-border commuters for the first time in two decisions rendered on January 15, 2019. The claimants, both EU citizens residing in EU, sued for claims arising from the employment relationships with their former employers headquartered in Switzerland.</p> <p>In the 2000s' the employers, weakened by the strong Swiss franc, announced that they would be presenting an amended contract to their employees residing abroad. The claimants consented. The amendment of the employment contracts consisted of paying wages of employees residing abroad in Euros. The claimants considered themselves to be discriminated in comparison to their colleagues domiciled in Switzerland and filed lawsuits based on the Agreement on Free Movement of Persons (<b>AFMP</b>).</p> <p>The Swiss Federal Supreme Court dismissed the claims arising from labour law due to abuse of law. In substance, the Swiss Federal Supreme Court ruled that the claimants initially profited from and consented to the modification of their employment relationships; it was not until the dissolution of the</p>

		employment relationships that they invoked their alleged rights arising from the AFMP. With these judgements, the Swiss Federal Supreme Court has strengthened the position of the employers. Indeed, if an employee does not invoke the ban on discrimination until several years after the introduction of the Euro wages, his or her behaviour is an abuse of law.
July 1, 2018	<p><i>Implementation of the Popular Initiative on Mass Immigration</i></p> <p>Federal Council opted for a staggered procedure</p>	In December 2017, the Federal Council decided how the law implementing the constitutional article on controlling immigration (Article 121a of the Federal Constitution) shall be implemented at Ordinance level. The Act provides for the introduction of an obligation to register jobs in those occupations in which the unemployment rate reaches or exceeds a certain threshold. The Federal Council opted for a staggered procedure: From July 1, 2018, a threshold value of 8 percent will apply and from January 1, 2020, a threshold value of 5 percent will apply.
Expected to enter into force in early 2020	<p><i>Revision of the Federal Act on Data Protection</i></p> <p>Swiss Parliament adopted the total revision of the Federal Act on Data Protection</p>	<p>In order to meet equivalent requirements as those set forth under the GDPR, the Federal Act on Data Protection is currently undergoing a total revision. The revised Federal Act on Data Protection will also apply to employers processing data, in particular employees' data.</p> <p>In this context, the Swiss Federal Council has published a draft bill on September 15, 2017. The draft bill is expected to be debated by the Swiss Parliament in spring 2019 and should enter into force in early 2020.</p>
Expected to enter into force in summer 2020	<p><i>Revision of the Gender Equality Act</i></p> <p>Swiss Parliament adopted the partial revision of the Gender Equality Act.</p>	<p>The Swiss Parliament adopted a partial revision of the Gender Equality Act on December 14, 2018. No referendum has been requested within the deadline set and the partial revision – along with the implementing ordinances – is expected to enter into force in summer 2020.</p> <p>Under the revised Gender Equality Act, certain companies (i.e., employers with at least 100 employees) will have the obligation to conduct equal pay analyses in principle every four years. In this context, it is important to note that:</p> <ol style="list-style-type: none"> <li>1. The practical implementation and methodology are not clear at this stage; and</li> </ol>

		<p>2. The partial revision does not foresee any legal sanctions in case of non-compliance.</p> <p>An implementing ordinance is currently being drafted and a first draft is expected to be published in early summer 2019.</p>
September 2018 and not yet known	<p><i>Adoption of the Financial Services Act</i></p> <p>Swiss Parliament passed the Financial Services Act</p>	<p>On June 15, 2018, the parliament passed the Financial Services Act (<b>FIDLEG</b>).</p> <p>The FIDLEG contains rules of conduct that financial service providers must comply with vis-à-vis their customers. According to Article 25 para. 1 FIDLEG, financial service providers must take appropriate organizational precautions in order to avoid conflicts of interest that could arise in the provision of financial services or to exclude the discrimination of customers through conflicts of interest.</p> <p>The implementing Ordinance of the Federal Council (<b>FIDLEV</b>) was in consultation until February 6, 2019, but is not yet available in its final version. A final version is not expected to enter into force before August/September 2019. The draft FIDLEV provides in its Article 25(1)(e) that the remuneration systems of financial service providers shall ensure that:</p> <ul style="list-style-type: none"> <li>(i) variable remuneration elements for employees providing financial services do not affect the quality of the financial service provided to customers; and</li> <li>(ii) the remuneration of employees of different business units must not directly influence each other if a conflict of interest could arise between the activities of such business units.</li> </ul> <p>Pursuant to the draft of Article 26 FIDLEV, the financial services provider shall disclose to its customers if the measures foreseen in Article 25 para. 1, FIDLEG cannot prevent discrimination against customers.</p>
Not yet known	<p><i>Revision of the Swiss Code of Obligations</i></p> <p>Swiss Parliament adopted a special protection for whistleblowers in the work place.</p>	<p>On September 21, 2018, the Swiss Federal Council has published a draft bill aimed at inserting in the Swiss Code of Obligations provisions on the reporting of irregularities within a company by the employee. In particular, the draft bill introduces a multi-level reporting model:</p> <ul style="list-style-type: none"> <li>(i) first reporting to the employer;</li> <li>(ii) then to the competent authorities; and</li> </ul>

		<p>(iii) - in special circumstances – to the public.</p> <p>Note that this draft bill replaces a previous draft bill that was sent back by the parliament in 2015 for being too complex. The draft bill is currently under parliament deliberations.</p>
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