

# Legal News



## Transfer of business operations: Effects on employment arrangements

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Dear clients and business friends

In connection with transfers of business operations (acquisition of assets and perhaps liabilities) and corporate restructuring, there is always the question of the consequences for existing employment arrangements.

The main regulations applicable in this respect are articles 333 and 333a of the Swiss Code of Obligations (CO) as well as the stipulations applicable to the relevant circumstances contained in the Swiss Merger Law (FusG).

Apart from describing the occurrences constituting a transfer of business operations this edition of Legal News illustrates the rights and obligations of the employers and employees involved. Particular attention is paid to the repeatedly debated subject of how much leeway exists to terminate the existing employment arrangements both before and after a transfer of operations.

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### 1. The circumstances regulated by law

Articles 333 and 333a CO regulate the transfer of employment arrangements when a business operation or a part of it, i.e. the assets and possibly the liabilities, are transferred to a third party.

A *business operation* is defined as an organisational unit of activity, orientated to long-term existence, enclosed within itself and participating independently in business life. If the necessary independence is missing, one refers to a *partial business operation* to the extent that at least an organisational unit of activity can be assumed. For articles 333 et seq. CO to apply, it is necessary for the operation or partial operation to retain its identity, i.e. its existing business purpose. In most cases, the transfer of an operation is based on a purchase agreement, whereby the formal regulations for transfer of the individual assets have to be observed. One also speaks in this connection of an *Asset Deal*.

Apart from the Asset Deal described above, the stipulations of articles 333 and 333a CO are also applicable in the case of a transfer of operations in connection with a merger, a spin-off or a transfer of assets as per the *Merger Law* (FusG).

The extent to which articles 333 and 333a CO are applicable in a *compulsory liquidation* is disputed. According to the practice of the Federal Court, a party that acquires an operation from

the bankruptcy assets of the former employer is at least not liable for taking over payroll claims due for payment before the acquisition. The matter should be settled during the planned revision of the Debt Enforcement and Bankruptcy Law (SchKG).

### 2. Consequences of a transfer of operations

When a transfer of operations takes place in the sense of article 333 CO, there is an automatic change of employer. This means that the employment arrangements, along with all rights and obligations, switch to the new employer. The precise point in time at which the employer changes depends on the type of transfer of operations.

*In good time* prior to the transfer of the operation or the partial operation, the employer must inform the staff representation or, if this does not exist, the employees themselves about the reason and the consequences of the transfer and consult them with regard to the corresponding measures (article 333a CO). The question as to what constitutes "timely" *information* and *consultation* has not been regulated by law. Decisive are the circumstances in each individual case, whereby literature and case law, leaning on the comparable problems of mass redundancies, basically point to a period of at least 14 days. In objectively urgent cases, this period can be reduced.

The employees have the right to reject the transfer of employment arrangements. If they make use of this right, the employment arrangements are terminated after expiry of the period of notice prescribed by law - not the one that is contractually agreed.

Of central importance is the regulation under which the former employer and the party which acquires the transferred operations are *jointly liable* for claims of the employees which fell due *before* the transfer as well as for those that fall due by the point in time at which the employment arrangements could be terminated or are, in fact terminated following rejection of the transfer (article 333, para. 3 CO).

In the case of a transfer of operations under the Merger Law, there are further liability and assurance rules in addition to the protective stipulations under employment law. In a merger and a spin-off, the employees can, for example, demand security for their claims. Furthermore, if the obligation to provide information and carry out consultation is violated, the employees can obtain a court injunction against entry of the merger, spin-off or transfer of assets in the Commercial Register.

If a collective employment agreement is applicable for the transferred employment arrangements, it must be adhered to for a year after the transfer of operations to the extent that it does not expire before the transfer or is terminated.

### 3. Possibilities of termination

In connection with transfers of operations, the question often arises as to whether the former employer can *terminate* an employment contract before the operations are transferred. The question is disputed. From case law at Federal Court level, the answer is that the transferring employer is permitted, calling upon the freedom of termination which applies in Switzerland, to give the

employee notice of termination based on the general preconditions even if a transfer of operations is imminent. As with other notices of termination, economic and organisational reasons can therefore be presented. On the other hand, notices of termination which are issued exclusively to circumvent the legal protection of employees provided by article 333 et seq. CO are regarded as avoidance of the law and are therefore impermissible. This is, for example, the case if notices of termination are issued in order to avoid consideration of years of service resulting from transfer of the employment arrangements. The conclusion that the protection of article 333 et seq. CO is to be prevented becomes particularly obvious when the entire or most of the workforce is dismissed on the day before the transfer of operations and the jobs are later given to new recruits or the same employees are re-hired. It is disputed whether this kind of dismissal is merely improper or, in fact, null and void.

Once the operation has been transferred, the new employer can, of course, issue notices of termination as long as the general legal and employment contractual regulations (e.g. period of notice) are observed.

### 4. Unemployment compensation

If the employee becomes unemployed through fault of his own, he will have to expect reduction of payments when he applies for unemployment compensation. In connection with transfers of operations, there is thus a risk that the employee will receive a lower amount of compensation from the unemployment fund if he rejects the transfer of the employment arrangements. However, the employee cannot be deemed to be at fault if he can provide credible evidence that he could not be expected to work for the new employer for reasons related to protection of personality and in good faith.

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