ALLEN & OVERY

Homburger

Employment Reorganisation Roadmap

Switzerland

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Contents

1. Employee representation

1.1 What are the main forms of employee representation involved in restructurings?

The main forms of employee representation involved in restructurings are:

– employee representatives (in undertakings with 50+ employees – though there are not many undertakings with elected employee representatives)

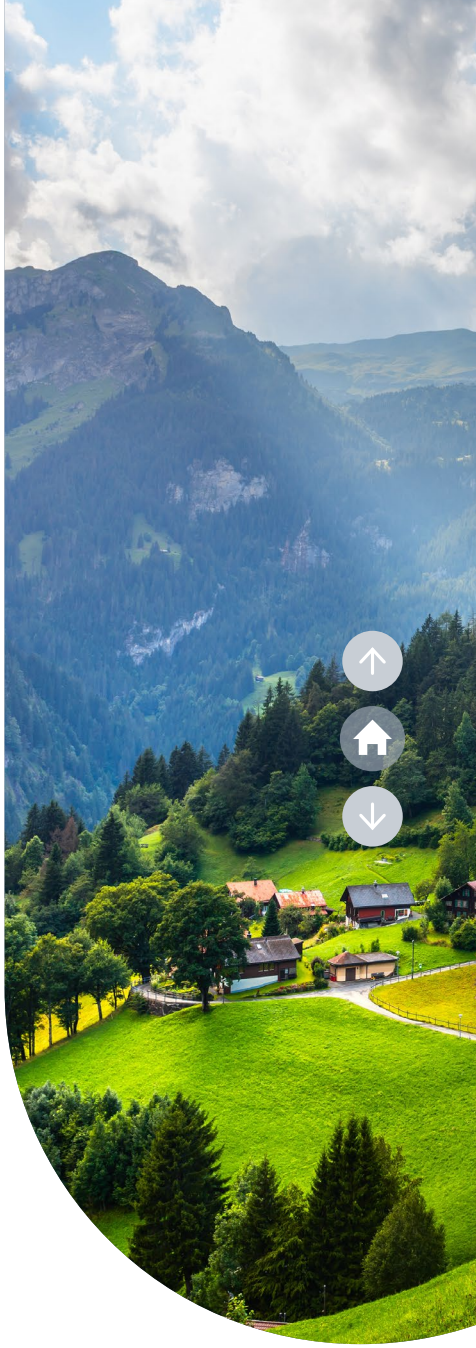
– the employees themselves (where there are no employee representatives), and

– trade unions (in addition to employees/employee representatives only if this is agreed in a collective bargaining agreement).

1.2. Is there a system of employee participation rights?

Employees have no right to management or board representation.

2. Process on business sales



2.1 Are employees automatically transferred to a buyer by operation of law on a business sale?

If a business unit is transferred in an asset deal, the contracts of employment assigned to the business are automatically transferred by operation of law from the seller to the buyer. A business unit is a permanent, self-contained organisational unit which is economically autonomous. For the automatic transfer principle to apply, it must retain essential parts of its identity (ie the buyer must continue or resume the same or a similar business activity).

2.2. If so, in broad terms, what is the legal test for identifying which employees transfer?

Employees employed by the seller immediately before the transfer and who are assigned to the business or undertaking (or part) will transfer to the buyer. Whether an employee is "assigned" depends on factors such as the percentage of time they spend working in the business or undertaking, the strength of their connection with it, and whether they work for it only temporarily.

2.3. Can employees object to the automatic transfer of their employment and what are the consequences of an objection?

Employees can object to the transfer. An objection results in termination of the employment relationship after the expiry of the statutory notice period (and not the contractually agreed notice period), but no earlier than the date the business is transferred.

Swiss employment law does not provide a specific right for employees to terminate their employment relationship in the case of detrimental changes. However, employees remain free to resign from their position.

2.4. Do obligations to inform and consult employees or employee representatives arise on a business sale?

Information must be given in due time to employee representatives or, if there are no employee representatives, directly to the employees, about the reasons for the business transfer and the legal, economic and social implications of the transfer for the employees.

If measures that might affect employees are considered (eg dismissals or changes to the terms and conditions of employment agreements), consultation is required before decisions on such measures are taken. The consultation period should be a minimum of two weeks (longer in certain circumstances), and a few additional days will be needed to prepare the requisite information and to consider any proposals made during the consultation process.

2.5. What are the penalties for non-compliance with information and consultation obligations on a business sale?

The law does not provide specific sanctions for failure to inform/consult on a business transfer. However, if the Federal Merger Act applies, employee representatives or employees have the right to block the transaction by obtaining temporary restraining orders if the employer failed to duly inform/consult. This could delay the completion of the transaction. An employee could also have a claim for specific performance or for damages, to the extent that damage can be shown.

3. Process on share sales

3.1. Do obligations to inform and consult employee representatives arise on a direct share sale (ie on the sale of the company itself)?

There is no specific obligation to inform/consult employee representatives or employees on a direct share sale.

3.2. Do obligations to inform and consult employee representatives arise on an indirect share sale (on the sale of a company's direct or indirect holding company)?

There is no specific obligation to inform/consult employee representatives or employees on an indirect share sale.

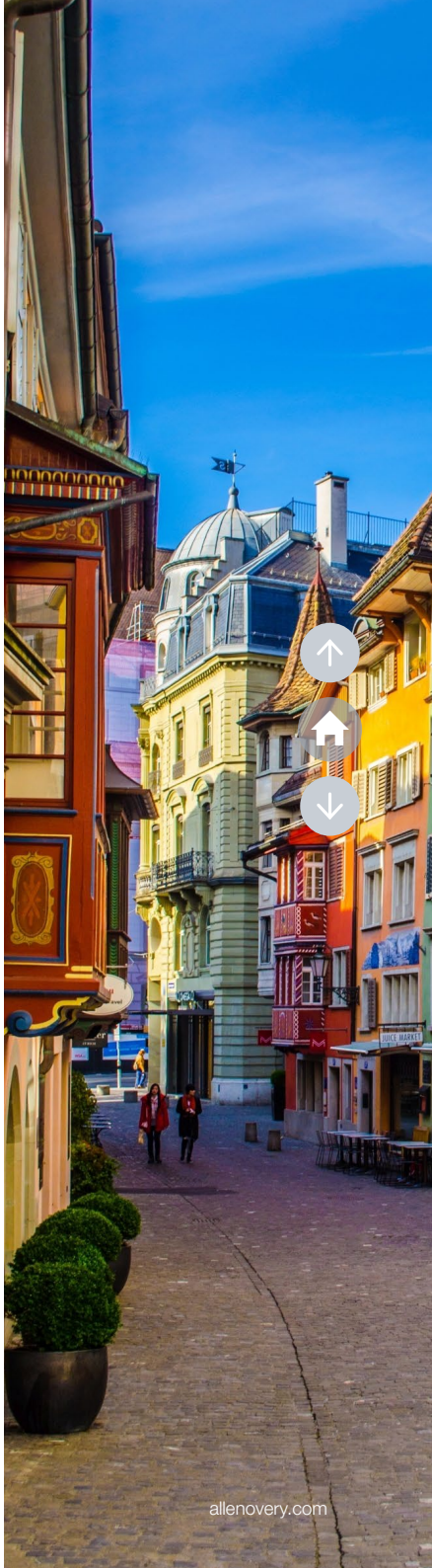
4. Process on outsourcings

4.1. Are employees transferred by operation of law in the following scenarios: (i) on an initial outsourcing of processes/services; (ii) on a change of supplier; or (iii) on an insourcing of processes/services?

Although each of the three scenarios must be assessed on a case-by-case basis in light of the general rules on business transfers (see **section 2 – Process on business sales** for further information), employees are likely to be "assigned" and thus transferred in scenarios (i) and (iii) but not in scenario (ii).

4.2. Do obligations to inform and consult employees or employee representatives apply in any of these scenarios?

Where a service provision change gives rise to a transfer of business, obligations to inform/consult apply as they do on a business sale (see **section 2 – Process on business sales** for further information).



5. Process on collective dismissals

5.1. Is a "collective dismissal" (or "mass layoff") defined by law?

A collective dismissal ("mass dismissal") arises where dismissals are proposed within a 30 day period affecting:

– at least ten employees in an undertaking with 21-99 employees

– at least 10% of employees in undertakings with 100-299 employees, or

– 30+ employees in undertakings with 300+ employees.

If a company has branches, these branches may qualify as an undertakings if they have a certain degree of autonomy.

5.2. Do obligations to inform and consult employee representatives arise on a collective dismissal?

Information must be given to employees, or to their representatives, about the proposed dismissals and the reason for the dismissals. There is also a requirement to consult them. Employees or their representatives must have an opportunity to provide their own counter proposals, showing how the dismissals can be fully or partially avoided or how the negative consequences of dismissals can be reduced. While the employer does not need to prove the reasons for the mass dismissal, it must provide sufficient information (eg the number of employees concerned, the number of employees normally employed in the business and the period within which the employer plans to issue the notices of termination) for the employees to be able to make proposals. The consultation period will be approximately two weeks, but might be shorter or longer depending on the circumstances.

Employers with more than 250 employees who intend to make – within a period of 30 days – more than 30 employees redundant must negotiate a social plan with unions, employee representatives or employees. If no agreement can be reached, the matter will be referred to an arbitration court which will implement binding terms.

5.3. Do obligations to inform and consult the competent authorities arise on a collective dismissal?

The employer must notify the cantonal employment office in writing of:

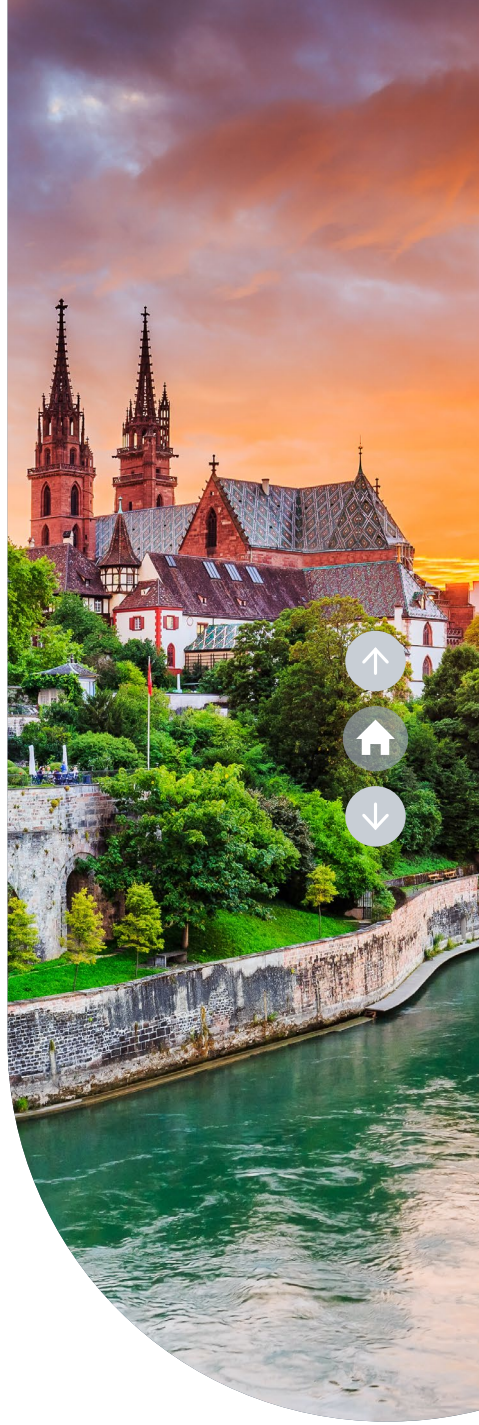
– the commencement of the information/consultation procedure with the employees or employee representatives, and

– the outcome of consultation with the employees or employee representatives,

as well as provide all appropriate information on the intended collective dismissal.

The cantonal employment office seeks solutions to the problems created by the intended collective dismissal. It can intervene on its own and make certain proposals aimed at protecting the employees who become redundant.

Termination of employment will not be effective until at least 30 days after the cantonal employment office has been notified of the results of the consultation process.



5.4. When are these obligations triggered?

The obligation to consult for collective dismissals and notify the authorities arises when dismissals are “envisaged” – this must occur before a final decision on the dismissals has been taken.

5.5. What are the penalties for non-compliance with information and consultation obligations on a collective dismissal?

If the employer does not duly and properly consult the employees or their representatives before taking the decision to dismiss, the dismissals are deemed abusive and the employees can claim compensation of up to two months’ salary at the judge’s discretion. If the employer fails to inform the cantonal employment office, the dismissals will be ineffective.

5.6. Do obligations to inform and consult employee representatives and/or competent authorities arise in the context of multiple dismissals, which do not qualify as a collective dismissal, as defined by law?

In some cantons, even the dismissal of six or more employees within a 30 day period needs to be notified to the cantonal employment office. No consultation process with employee representatives is, however, required.

5.7. Does an employer have options/alternatives when it has been unable to reach agreement with employee representatives during the negotiation period?

Apart from the employer’s duty to conduct the consultation process and – in some situations – to negotiate a social plan, there is no duty on the employer to reach agreement with employee representatives. The employer therefore remains free to take a final decision on the collective dismissals (including choosing alternative options).

6. Process on individual dismissals

6.1. Are employees entitled to a minimum period of notice on dismissal on redundancy or economic grounds?

The default statutory minimum notice entitlement depends on length of service:

– up to 1 year's service – 1 month following the end of the calendar month

– 1+ to 9 years' service – 2 months, or

– 9+ years' service – 3 months.

The first month of employment is deemed to be a probation period, which can be extended by written contract to three months. During the probation period, notice of seven days can be given at any time.

Notice periods may be amended by written agreement or collective agreement. Notice periods must always have the same duration for employers and employees.

6.2. Does any special procedure apply when proposing to implement an individual dismissal on redundancy or economic grounds?

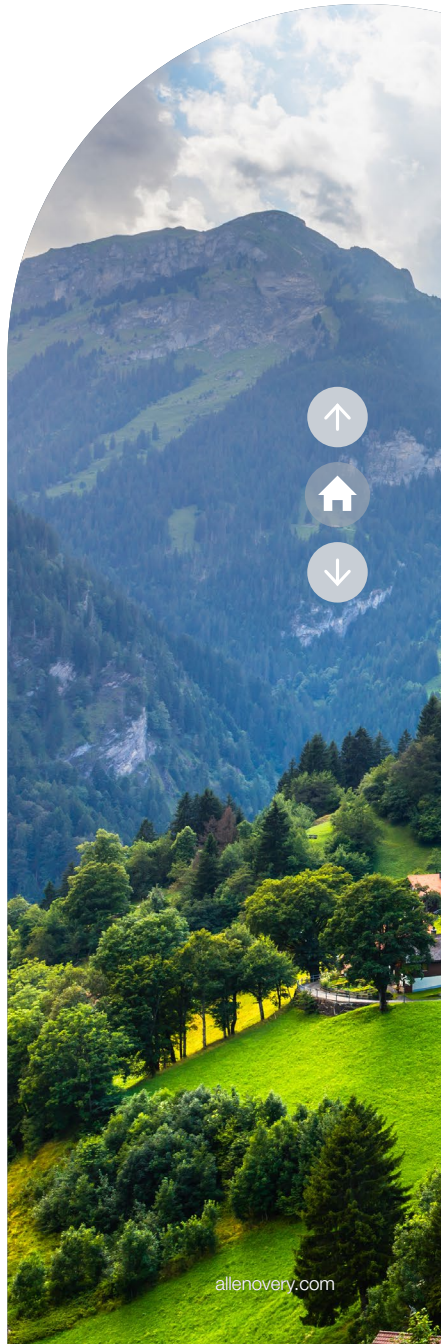
Dismissals do not need to be reasoned or justified (ie a reason does not have to be provided). The employer only needs to state the reasons in writing if an employee specifically requests this. However, employees are protected against unfair ("abusive") dismissal. The Swiss Code of Obligations includes a list of situations in which a dismissal is deemed to be abusive. Generally, a dismissal is abusive if it is conflicts with the principle of good faith, for example because it:

– violates personal or constitutional rights (for example, dismissal due to race or gender), or

– is made to prevent an employee from making contractual claims (for example, receive a contractually agreed severance payment).

The way in which notice is given might also constitute an abusive dismissal.

The law does not require notice to be in any specific form. However, for evidential purposes it is advisable to serve notice in writing. In practice, most employment contracts provide that notice must be in writing. Under Swiss law, a notice only becomes effective at the time that the relevant person receives it. It is advisable to hand over written notices in person and to request written confirmation of receipt. If that is not feasible, notice can also be served by registered mail, but appropriate time should be allowed to cover any delay in serving notice on the employee.



An employer cannot give notice of termination during certain protected periods, for example while the employee is:

– on military or civil service or a foreign aid project

– through no fault of their own, completely or partly unable to work because of sickness or accident (the latter protection period is limited to 30 to 180 days, depending on years of service), or

– pregnant, and for a period of 16 weeks following birth.

A notice of termination given during such a protected period is null and void.

The Gender Equality Act provides for additional protection. In particular, any notice given during internal or external proceedings triggered as a result of a complaint based on the Act (as well as any notice given six months after such proceedings are closed) can be challenged. The court can order reinstatement of the employee.

6.3. Does special dismissal protection apply where dismissals are to be implemented following or in connection with a business transfer?

Under Swiss employment law, there is no special dismissal protection in connection with business transfers. However, the standard protection against termination (ie, unfair dismissal, immediate dismissal, etc) continues to apply.

6.4. Are employees entitled to a minimum severance payment on dismissal for redundancy or economic grounds?

There is no general statutory entitlement to severance/redundancy compensation. Employees aged over 50 who have worked for more than 20 years for the same employer are entitled to statutory minimum severance of between two and eight months' salary. However, this requirement has become practically defunct because payments made by the employer to the pension plan can be deducted from the severance payment.

Payments may be enhanced by a social plan. Employers with more than 250 employees intending to make more than 30 employees redundant are required to negotiate a social plan. (Please see **section 5 – Process on collective dismissals** for further information.)

6.5. What are the penalties for non-compliance with individual dismissal procedure?

An employee may bring an abusive dismissal claim. There is a mandatory conciliation hearing before a claim can be filed with the court. The 26 cantons are responsible for organising the court system. Hence, depending on the place of jurisdiction, either a labour court or an ordinary district court will hear employment-related complaints. If there is a finding of abusive dismissal, this does not render a dismissal invalid. The only penalty under the Swiss Code of Obligations is the payment of compensation of up to six months' salary at the discretion of the judge.

Please note that any notice given during a protected period (see answer to **6.2** in relation to individual dismissal procedure) will be void. Further, the Gender Equality Act might provide for further consequences, including reinstatement.

6.6. Is there any special legal protection or does any special treatment apply for particular groups of workers?

Some categories of employees may benefit from special protection if their dismissal is linked to these grounds. For instance, the employer must have a good justification to dismiss members of an employees' organisation or trade union activities. Additionally, the Gender Equality Act provides for special protection in the case of termination or discrimination based on sex, marital status, family situation or pregnancy.

Furthermore, an employer cannot give notice of termination during certain protected periods (see answer to **6.2**).

7. Process when implementing alternatives to redundancy

7.1. Can changes to employment terms be made with or without express employee consent?

As a matter of principle, changes to the employment terms require the express consent of the employee. Implied consent could also be relied upon where an employee continues working under the varied terms without objection (although the courts are reluctant to accept this in practice).

In some situations, the employer may unilaterally change the employment terms (including to the detriment of the employees) providing that it complies with a specific procedure (eg by terminating employment pending a change of contract). This specific procedure must comply with certain conditions, in particular the requirement for changes to enter into force at the end of a period equivalent to the notice period at the earliest.

7.2. Must an employer consult individually or collectively with affected employees or their representatives (if any) before making changes to employment terms?

If the changes affect a single employee, only individual consultation is necessary. If the changes affect many employees, the employer must conduct collective consultation and comply with additional requirements if the collective dismissal thresholds are met.

7.3. Do additional restrictions apply if changes are proposed in connection with or following a business transfer?

If the changes affect many employees and are to be introduced using the procedure for terminating employment pending a change of contract, the employer must conduct collective consultation and comply with additional requirements if the collective dismissal thresholds are met.

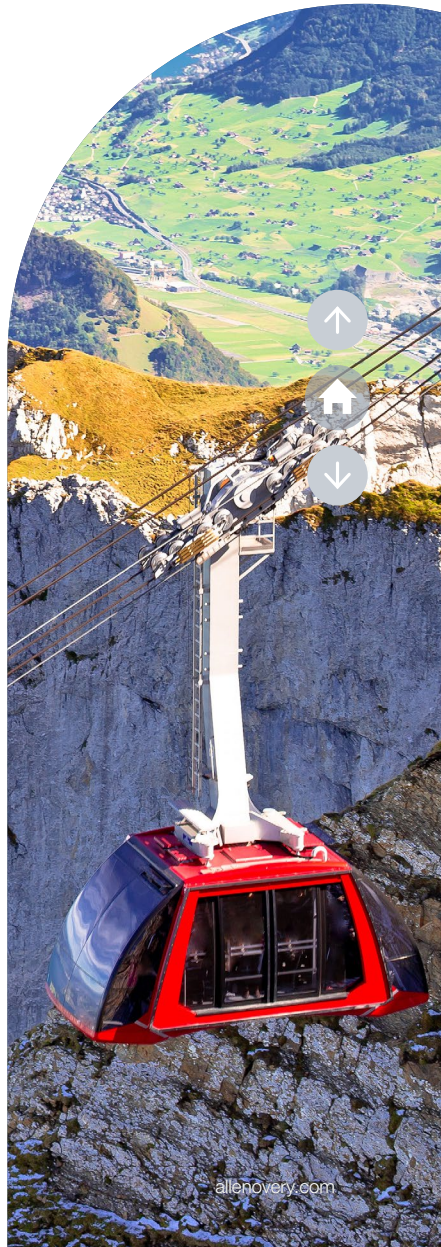
7.4. What are the penalties for non-compliance with these procedures?

Failure to comply with the collective dismissal procedure renders the termination unfair, triggering the obligation to pay an indemnity of up to two months' salary.

In the event of breach of the rules on contractual variation, the employees may claim compensation for damage caused due to breach of the employment contract.

7.5. Do national laws promote or permit any alternatives to redundancy (eg layoff or short-time working)?

Swiss law provides for alternatives to redundancy, for instance by providing for compensation for short-time work. Moreover, following an announcement of collective dismissals (please see **section 5 – Process on collective dismissals** for further information), it is not unusual for employers to find an alternative to redundancies with the cantonal employment office (eg financial support from the canton, a tax reduction, etc).



8. Process on insolvency

8.1. Do obligations to inform and consult employee representatives arise on the sale of an insolvent business (whether share sale or business sale)?

The information and consultation obligations which arise in the context of a business sale (see **section 2 – Process on business sales** for further information) apply if an insolvent business is sold before bankruptcy proceedings are commenced. As a rule, these legal provisions also apply if the insolvent business is sold once bankruptcy proceedings have already been commenced.

Employment contracts will not be automatically transferred to the buyer if a business is sold during bankruptcy proceedings (see answer to **8.2**). Notwithstanding this, the information and consultation obligations that apply in the case of a business transfer will still apply.

8.2. Does the buyer of an insolvent business inherit employees and/or employee liabilities by operation of law?

Employment contracts will not be automatically transferred to the buyer if a business is sold during a moratorium during bankruptcy proceedings or by a composition agreement with transfer of assets. Consequently, the buyer will not be liable for claims from employees whose employment contracts have not been transferred. Employment contracts will only be transferred if this is agreed between the seller and the buyer.

8.3. Do obligations to inform and consult employee representatives arise where collective dismissals are to be implemented in an insolvent business?

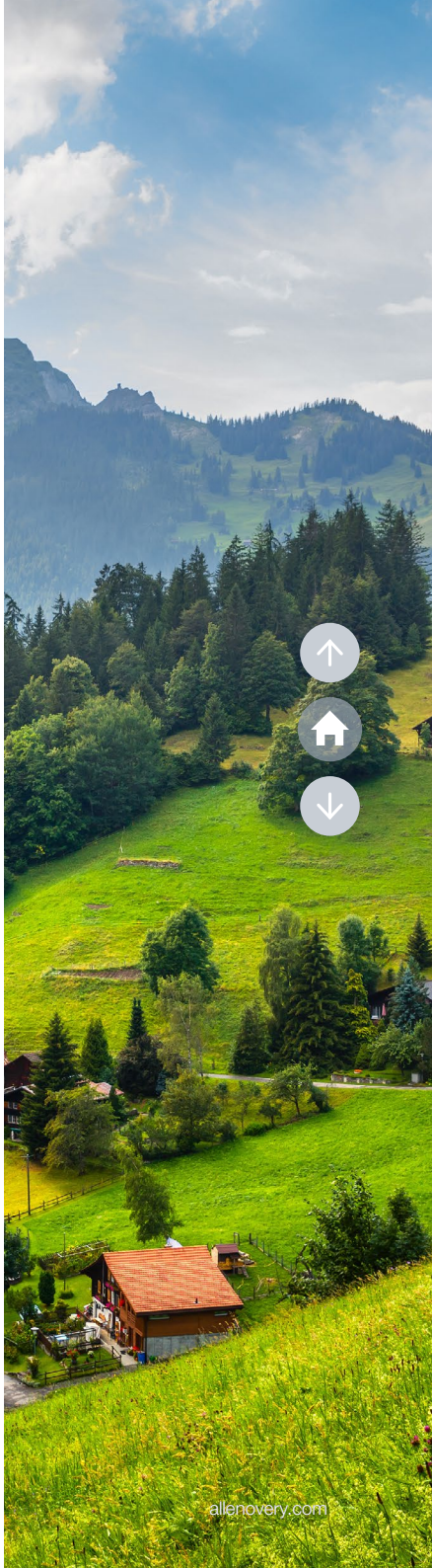
Employees' rights to be informed and consulted on collective dismissals do not apply:

– if the business has been closed by a court's decision

– if the collective dismissals occur during bankruptcy proceedings, or

– in the case of a composition agreement with assignment of assets.

Additionally, the rules requiring employers with more than 250 employees intending to make more than 30 employees redundant to negotiate a social plan do not apply.



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