

# Wilhelm Gilliéron

## AVOCATS



Auteur: Yanick Corminboeuf | Le : 8 May 2023

## Departure of an employee who is a shareholder of the company: the good leaver/bad leaver clauses that must be provided for contractually

### 1. Introduction

In practice, [companies \(start-ups, SMEs, large companies\)](#) frequently grant shares to certain employees as an incentive and with the purpose of giving them a direct share in the company's results through the receipt of dividends.

In this context, it is advisable to conclude a shareholder agreement with the employee to whom the company grants shares, or at least to include contractual clauses in the employment contract to regulate what happens with the shares in case the employee leaves the company.

In the context of shareholders' agreements, it is essential to provide for a good leaver/bad leaver clause, which regulates the fate of the shares granted to the employee in the event of his or her departure from the company.

In practice, these clauses can take many different forms, and although they may seem similar, the clauses differ from one jurisdiction to another.

### 2. Good leaver

The first step is to define the terms good leaver and bad leaver in the contractual clause. In principle, companies are free to choose their own definitions, subject to the limits of contractual freedom.

In principle, a good leaver is an employee who :

1. retires ;
2. is dismissed or resigns due to serious illness or death of the employee;
3. is dismissed due to the fact that his/her position within the company becomes obsolete, and through no fault of the employee, e.g. as a result of a merger, a collective redundancy, or a technological evolution making the position in question obsolete;
4. remains with the company for a contractually determined minimum period.

The consequence is that in the event of a good leaver, the shares held by the good leaver are bought back by the company at their real value, or at least at a favourable price.

### 3. Bad leaver

In practice, bad leavers are often defined in terms of what constitutes just cause for dismissal within the meaning of [Art. 337 CO](#), but may also include less serious cases. Examples include the following cases:

5. Dismissal due to gross negligence ;
6. Dismissal due to the commission of a criminal offence;
7. Violation of a non-competition clause;
8. Violation of the terms of the shareholders' agreement;
9. Resignation of the employee before a contractually agreed date.

With regard to voluntary resignation, there is no consensus in practice. In fact, [some companies](#) consider this behavior to be a case of good leaver, while others consider it to be a case of bad leaver.

The contractual consequence of a case of bad leaver is that the employee's shares in the company are lost.

---

**Source :**

**<https://www.wg-avocats.ch/en/news/company-law/departure-of-an-employee-who-is-a-shareholder-of-the-company-the-good-leaver-bad-leaver-clauses-that-must-be-provided-for-contractually/>**