

# Employment in Financial Services

## Contributing Editor

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## 01. What is the primary regulatory regime applicable to financial services employees in your jurisdiction?

### Hong Kong

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The primary regulatory regime applicable to financial services employees in Hong Kong are as follows:

- Under the Banking Ordinance (BO), the Hong Kong Monetary Authority (HKMA) is responsible for regulating all authorised institutions (banks, restricted-licence banks and deposit-taking companies). In particular, the HKMA needs to ensure that the chief executive, directors, controllers and executive officers of the authorised institutions are “fit and proper”.
- Under the Securities and Futures Ordinance (SFO), the Securities and Futures Commission (SFC) is responsible for regulating the securities and futures markets. Employees performing any regulated functions under the SFO must obtain the requisite licence from the SFC. Relevant individuals engaged by the authorised institutions who perform regulated functions (eg, bank staff working in the securities dealing department) are not required to be licensed or registered with the SFC but their names have to be entered in the register maintained by the HKMA.
- Under the Insurance Ordinance (IO), the Insurance Authority (IA) is responsible for regulating the insurance industry. Employees carrying on a regulated activity under the IO must obtain the requisite licence from the IA.

Last updated on 22/01/2023

### India

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The important labour laws that may apply to financial services employees are:

- Industrial Disputes Act, 1947 (IDA)
- Contract Labour (Regulation & Abolition) Act, 1970
- Payment of Gratuity Act, 1972

- Payment of Bonus Act, 1965
- Equal Remuneration Act, 1976
- Maternity Benefit Act, 1961
- Apprentices Act, 1961
- Employees' Compensation Act, 1923
- Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959
- The Employees' Provident Funds and Miscellaneous Provisions Act, 1952
- Shops and Establishments Act(s)[\[1\]](#).

In addition, there are financial services regulations in India such as the Banking Regulation Act, 1949; Reserve Bank of India Act, 1934; Securities and Exchange Board of India Act, 1992 (and the regulations thereunder); Insurance Act, 1938; Income-tax Act, 1961; and the Foreign Exchange Management Act, 1999 (and the regulations thereunder). There are also multiple regulators established under these laws.

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[\[1\]](#) State-specific.

Last updated on 16/04/2024

## Switzerland

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Employment law in Switzerland is based mainly on the following sources, set out in order of priority:

- the Federal Constitution;
- Cantonal Constitutions;
- public law, particularly the Federal Act on Work in Industry, Crafts and Commerce (the Labour Act) and five ordinances issued under this Act regulating work, and health and safety conditions;
- civil law, particularly the Swiss Code of Obligations (CO);
- collective bargaining agreements, if applicable;
- individual employment agreements; and
- usage, custom, doctrine, and case law.

Depending on the regulatory status of the employer and the specific activities of financial services employees, respectively, Swiss financial market laws may also apply. They are, in particular, the Federal banking, financial institutions and insurance supervision regulations.

Last updated on 16/04/2024

## United States

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In the United States, there are different regulatory environments, depending on the nature of the employer.

- The Securities and Exchange Commission (SEC) regulates the offer and sale of securities, the various obligations of public companies, and the registration and conduct of broker-dealers. The SEC also regulates investment advisers.
- Every state has its own securities laws, known as Blue Sky Laws. These laws vary from state to state, but most, including New York and California, impose registration requirements on broker-dealers. State laws also require employees of brokers and dealers engaged in securities transactions to

register as agents or salespersons.

- The California Corporate Securities Law of 1968 covers securities offerings in the state of California.
- The New York General Business Law and the New York Compilations of Codes, Rules and Regulations cover securities offerings in the state of New York.
- The Financial Industry Regulatory Authority (FINRA) is a private self-regulatory organisation that oversees exchange markets and brokerage firms and regulates the conduct of broker-dealer member firms.
- The Commodity Futures Trading Commission (CFTC) regulates commodities or future brokers and exchanges under the Commodity Exchange Act (CEA).
- Banks are regulated by both federal and state regulators, including the Federal Reserve Board, the Office of the Comptroller of the Currency, the Consumer Financial Protection Bureau, and the Federal Deposit Insurance Corporation.
- Commodities or future brokers or exchanges are covered by the CEA and are regulated by the CFTC.
- The Protocol for Broker Recruiting is an agreement signed by more than 2,000 broker-dealers. This Protocol specifically places limits on the restrictions a signatory firm can place on representatives who move to another signatory firm.

Most states have their own financial regulatory regimes. For example:

- The New York Department of Financial Services has regulatory authority over banks and certain other financial services entities within the state of New York.
- The California Department of Financial Protection and Innovation has regulatory authority over financial services entities within the state of California.

Last updated on 22/01/2023

## **02. Are there particular pre-screening measures that need to be taken when engaging a financial services employee? Does this vary depending on seniority or type of role? In particular, is there any form of regulator-specified reference that has to be provided by previous employers in the financial services industry?**



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There are no particular pre-screening measures specified by the financial regulators in Hong Kong. Nevertheless, financial institutions would generally conduct background checks on prospective employees (especially those taking on senior positions) to ensure they comply with the “fit and proper” requirements of the financial regulators.

There is no particular form of regulator-specified reference to be provided by previous employers in the financial services industry. Nevertheless, the SFC has specified disclosure obligations for licensed corporations in respect of outgoing employees who were subject to internal investigations (see question 10).

Last updated on 22/01/2023

## India

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The pre-screening measures, when employing a financial service employee, are carried out in compliance with the frameworks laid down by the respective industry regulators. For instance, the Reserve Bank of India (RBI), the central banking sector regulator in India, periodically issues certain guidelines for banking and non-banking employers to conduct mandatory employee background checks. These regulators also recognise certain “Self-Regulatory Organisations” (SROs), who then play the primary role in conducting grassroots verifications. SROs conduct character and antecedent verification of employees registered with them as per the standards set by the regulator. Strict police verification of at least the last two addresses is usually mandated and verifications are periodically updated and shared on a common database at an industry level. For instance, the Finance Industry Development Council is an SRO of Non-Banking Finance Companies (NBFCs) and is registered with the RBI.

A financial services employer should be sensitive to the data being used for pre-screening measures as India protects individual privacy. Hence, both the employer and the service provider engaged by the employer should obtain prior consent from the prospective employee before pre-screening. If the pre-screening measures include the collection of “sensitive personal data information<sup>[1]</sup>”, then an employer must seek the individual’s consent, which would also help mitigate risks for any claims concerning the invasion of an employee’s privacy. Employers should ideally ensure that pre-screening is complete before the employee is hired. A comprehensive pre-screening will include verification of educational qualifications, checks with past employers, verification of residential addresses, police records, and passport status. Usually, with seniority of the role, checks with past employers happen more rigorously, while for entry-level employees, checks with academic institutions about educational qualifications may be done more rigorously. Similar standards must be met by contract employees empanelled by the service providers.

There is no regulator-specified reference that must be provided by previous employers in the financial services industry. However, in practice, most public sector banks (eg, Bank of India) and many central public sector undertakings in financial services (eg, Life Insurance Corporation of India (LIC)), as per their selection or onboarding protocols, require at least two “Character Certificates”, one of which should be from the head of the educational institution last attended or the present employer and the other should be from gazetted officers<sup>[2]</sup> or bank officers, without any familial ties to the employee.

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<sup>[1]</sup> Information Technology Act, 2000 & Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011.

<sup>[2]</sup> A ‘gazetted officer’ is a high rank government official working as an officer for the government of India or any state government whose name and credentials are published in the Gazette of India.

Last updated on 16/04/2024

## Switzerland

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Under Swiss civil law, there is no requirement to apply pre-screening measures. However, while not a statutory requirement under Swiss financial market laws per se, companies subject to these laws apply pre-screening measures to ensure that a prospective financial services employee meets the requirements set forth by these laws. In particular, regulated companies such as banks, securities firms, insurance companies, fund management companies, managers of collective investment schemes and asset managers are required to obtain authorisation from the Swiss Financial Market Supervisory Authority (FINMA) relating to strategic and executive management and each change thereto.

As a general rule, the higher the responsibility or position of a person, the more requirements financial services employees may need to fulfil. Persons holding executive or overall management functions (eg, a member of the board or members of the senior management) are required to fulfil certain requirements set forth by the applicable Swiss financial market regulations. Such requirements may include providing current CVs showing relevant work experience and education as well as excerpts from the debt and criminal register. It may also include providing various declarations (eg, concerning pending and concluded proceedings, qualified participations and other mandates). Furthermore, financial services employees holding certain control functions (eg, compliance officer, risk officer and their deputies) may also be required to prove that they are suitable for the position by providing, for example, a current CV showing relevant work experience and education.

Last updated on 16/04/2024



## United States

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In addition to the standard hiring measures that must be taken when engaging an employee, several additional steps must be taken when engaging financial services employees in the United States. Generally, financial services employees must pass certain screening and disclosure steps, including:

- background checks;
- criminal background disclosures; and
- fingerprinting.

Broker-dealers and investment advisors must register with FINRA (see below).

### **Background checks**

FINRA-regulated entities must investigate each person they plan to register with FINRA to ensure that they meet FINRA Form U4 requirements regarding that person's history of formal charges and indictments.

If the applicant has previously registered with FINRA, broker-dealers must also review an applicant's most recent Form U5 or be able to demonstrate to FINRA that it has made reasonable efforts to review Form U5 but has been unable to do so. If the applicant has previously registered with a CFTC-registered firm, the broker-dealer must review CFTC Form 8-T.

Bank employees must undergo a background check. Certain criminal conduct may statutorily disqualify an applicant from employment. For example, federal law prohibits any person convicted of a criminal offence involving dishonesty or breach of trust (or who has entered into a pre-trial diversion or similar programme regarding such an offence) from serving as a director, officer, or employee of an FDIC-insured bank without the FDIC's consent. Banks must conduct reasonable inquiries into an applicant's background to avoid hiring persons barred from employment by this law. Banks may be protected from claims of disparate impact (under state "ban-the-box" laws) when terminating or withdrawing offers from disqualified employees under this law. Both California and New York explicitly provide such carve-outs. However, these are position-specific rather than employer-specific, and employees with positions not subject to FINRA or other statutorily required background checks or disqualifiers based on criminal history may still be subject to state or local "fair chance" or ban-the-box laws. Therefore, as a best practice, non-bank financial services employers should avoid relying on these exceptions for all of their employees. Relatedly, the FDIC does not consider "de minimus" criminal violations disqualifying, including minor offences by young adults, bad cheques for less than \$1,000 and simple theft of less than \$500.

### **Fingerprinting**

Entities covered by the SEC are also subject to fingerprinting requirements. Every member of a national securities exchange, broker, dealer, registered transfer agent, registered clearing agency, registered securities information processor, national securities exchange, and national securities association must

ensure that each of its partners, directors, officers, and employees are fingerprinted and must submit such fingerprints, or cause the same to be submitted, to the Attorney General of the United States for identification and appropriate processing. Employees who will not be selling, keeping, or handling securities or supervising those who do are exempt from this requirement.

While New York generally prohibits fingerprinting, there is an exception where, as here, fingerprinting is statutorily required.

California Financing Law requires fingerprinting for certain individuals seeking to license in California.

Please note, during the COVID-19 epidemic, the SEC temporarily paused the fingerprinting requirements. This pause was lifted in September 2022.

Last updated on 22/01/2023

## **03. What documents should be put in place when engaging employees within the financial services industry? Are any particular contractual documents required?**



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In addition to an employment contract, there are additional documentation requirements in connection with the application or transfer of the employee's licence with the financial regulators.

Last updated on 22/01/2023



### **India**

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When engaging employees within the financial services industry, documents covering past employment, educational qualifications, certificates of achievement, income tax returns, medical health fitness certificates attested by a registered doctor, official identity cards and proof of address (Aadhar Card and Voter ID card, Driving Licence or Passport) and documentation for anything mentioned on a curriculum vitae. In the financial services industry, certificates showing excellence in finance-related services will increase the candidature of a potential employee. The contract of employment of an employer usually contains clauses that make the offer conditional upon the fulfilment of the employee's representations relating to educational qualifications, background, work experience, skill certifications (if applicable), character certificate, etc.

Last updated on 16/04/2024



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No special contractual documents are required when engaging employees within the financial services industry.

However, it is generally recommended to conclude a written employment contract with each employee. FINMA, for instance, requires a copy of employment contracts concluded with senior management of regulated entities.

In particular, the employment contract should reference the employer's (regulatory) set of directions and the employee's obligation to comply with said instructions. In addition, because regulated companies such as banks, securities firms, fund management companies, managers of collective assets or asset managers are required to obtain authorisation from FINMA before the engagement of key personnel, it may be sensible to include a condition precedent relating to FINMA's acceptance of the relevant employee in the employment contract.

The mandatory, partially mandatory, and optional elements of an individual employment contract are outlined in article 319 et seq of the CO (in particular regarding remuneration, working time, vacation, and incapacity for work). Further regulations may apply based on collective bargaining agreements.

Last updated on 16/04/2024



## United States

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### **FINRA**

Broker-dealers and investment advisors regulated by FINRA must electronically file FINRA's Form U4 when registering "associated persons" with FINRA or transferring their registration to another broker-dealer. Broker-dealers must also create and implement written procedures to verify the facts disclosed by prospective employees on the U4.

- "Associated persons" include employees of all levels involved with investment and securities operations.
- The U4 form requires disclosure of the associated person's background history, including any criminal convictions or civil actions, regulatory proceedings or sanctions, administrative proceedings, financial disclosures (such as bankruptcy), customer complaints, or arbitration awards.

Form U4 also contains an agreement requiring employees to submit to arbitration "any dispute, claim or controversy that may arise between [them and their] firm, or a customer, or any other person..."

Member firms must provide registered employees with an arbitration disclosure when asked to sign a U4.

### **SEC**

SEC-regulated entities require every prospective employee to complete a questionnaire disclosing their identifying information, employment history, and record of any disciplinary actions, denial or suspension of membership of registration, criminal record, or any record of civil action against that employee. FINRA form U4, if completed, fulfils the requirements of this Rule.

### **California**

California employees must be provided with:

- A notice of workers' compensation rights;
- notice of disability insurance and paid family leave insurance benefits;
- sexual harassment information under the Fair Employment and Housing Act;
- notice of pay information (if applicable);

- commission contract (if applicable);
- notice of rights for victims of crime or abuse; and
- lactation accommodation policy

## New York

New York employees must be provided with:

- notice of pay rate and pay days;
- commissions Agreement (if applicable);
- New York Health and Essential Rights Act;
- notice of electronic monitoring;
- New York State Workers' Compensation Board Statement of Rights – Disability Benefits Law;
- New York State Paid Family Leave Statement of Rights;
- New York City Earned Safe and Sick Time Act (City only);
- New York City Stop Sexual Harassment Act fact sheet (City only); and
- New York City Pregnancy Accommodations at Work fact sheet (City only).

Last updated on 22/01/2023

## 04. Do any categories of employee need to have special certification in order to undertake duties for financial services employers? If so, what are the requirements that apply?



## Hong Kong

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### SFC

The “Guidelines on Competence” published by the SFC lists the necessary qualifications for employees carrying on regulated activities. For academic qualifications, employees should attain at least Level 2 in either English or Chinese as well as in Mathematics in the Hong Kong Diploma of Secondary Education or equivalent. In addition, employees are expected to obtain recognised industry qualifications and pass the local regulatory framework paper. For responsible officers (ROs), the SFC requires higher levels of educational qualifications and experience.

### IA

The “Guideline on ‘Fit and Proper’ Criteria for Licensed Insurance Intermediaries Under the Insurance Ordinance” published by the IA sets out the education requirements for licenced employees under the IO. Higher levels of educational qualifications are required for responsible officers.

Last updated on 22/01/2023



## India

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The recruitment of financial services employees for public-sector enterprises may be done through competitive scores secured through multi-level tests held for generalist and specialist posts. For instance, the Institute of Banking Personnel Selection conducts tests for selection for public sector banks; and the Securities and Exchange Board of India (SEBI), LIC, etc, hold similar tests for their recruitment.

In terms of industry practice, eligibility to appear at the preliminary levels or the final interview stages of the above tests may sometimes require certain specific certifications (eg, computer certifications for clerical posts in the banking sector. These certifications are prescribed by industry regulators and are actioned by industry collectives. For instance, the RBI[1] has made it mandatory for all banking and non-banking financial institutions to obtain certification for their employees. Industry collective the Indian Banking Association provides such certifications in specific areas like treasury operations, risk management, accounting and credit management. Along with this, further certifications may also be required for Anti-Money Laundering (AML), Know Your Customer (KYC), compliance with foreign exchange regulations, awareness of legal aspects of cyber security, etc.[2]

Similarly, the National Institute of Securities Markets (NISM), an institute promoted by SEBI, accredits institutions that coach and certify wealth management advisors. NISM-accredited qualifications are compulsory for wealth managers in the capital market segment. Also, the Indian Institute of Banking and Finance (IIBF) gives certification for Debt Recovery Agents based on RBI guidelines. Various collectives like the Fixed Income Money Market and Derivatives Association of India, Foreign Exchange Dealers Association of India and the Institute of Company Secretaries of India, inter alia, collaborate with the IIBF in the certification process in the treasury, forex and compliance sectors. The IIBF's certification for customer service, KYC/AML programmes of the IIBF, and other similar certified courses from the NISM/AMFI/IRDA etc, are essential before hiring employees for certain specialised roles.

As part of the registration process, the SEBI regulations relating to portfolio managers and investment advisors require certain specific employees to be employed with minimum qualifications.

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[1] Capacity Building in Banks and AIFIs, August 11, 2016 available at <<https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI36A5A106C515E84422947AB1D42F6EB391.PDF>>; IBA Circular no. CIR/HR&IR/KSC/2017-18/2602.

[2] RBI mandate on capacity building in banks, KPMG, available at <<https://home.kpmg/in/en/home/services/learning-academy/aas-learning-solutions/rbi-mandate-capacity-building-banks.html>>

Last updated on 16/04/2024



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Depending on the status of the employing entity and the position of the financial services employee, a special certification or, more generally, proof of relevant work experience and sufficient education is required.

As a general rule, persons holding executive, overall management, oversight or control functions (eg, a member of the board, CEO, compliance officer, risk officer or their deputies) in regulated companies such as banks, insurance companies, securities firms, fund management companies, managers of collective assets or asset managers are required to demonstrate to FINMA that they have sufficient relevant work experience and education. As proof, FINMA requests current CVs, diplomas, certifications and contact details of references. The scope and nature of the future business activity and the size and complexity of the company in question also need to be considered.

Furthermore, client advisers of so-called financial service providers (eg, investment advisers) must have sufficient expertise on the code of conduct and the necessary expertise required to perform their work.

Client advisors often prove that these requirements have been met by successfully attending special courses. In addition, insurance intermediaries registered with FINMA's insurance intermediary register have to prove that they have undergone sufficient education and have sufficient qualifications. For this purpose, FINMA has published a list of different Swiss and foreign educational qualifications deemed to be sufficient on its website.

Last updated on 16/04/2024



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For an individual's FINRA registration to become effective, they must pass the Securities Industries Essentials examination. FINRA rules also require registered persons to participate in continuing education courses. Failure to do so may result in a covered person's registration being deemed inactive until the requirement has been satisfied.

California Financing Law requires the licensing and regulation of finance lenders and brokers making and brokering consumer and commercial loans, unless exempt.

Last updated on 22/01/2023

## 05. Do any categories of employee have enhanced responsibilities under the applicable regulatory regime?



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Under the SFO, ROs have enhanced responsibilities. They assume primary responsibility for compliance at a licensed corporation and are involved in supervising the regulated activities. A licensed corporation is required to appoint no less than two ROs to directly supervise the conduct of each regulated activity. Similarly, under the BO, registered institutions are required to appoint no less than two executive officers to be responsible for directly supervising the conduct of each regulated activity under the SFO. For each regulated activity, at least one RO must be available at all times to supervise the business and must be an executive director.

Under the IO, an RO of a licensed insurance agency or licensed insurance broker company has enhanced responsibilities. Responsible officers must use their best endeavours to ensure the agency or broker has established and maintains proper controls and procedures for securing compliance with the conduct requirements under the IO.

Last updated on 22/01/2023



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There are no provisions that lay down enhanced responsibilities for a particular category of employees in the financial services sector.

However, the conduct rules for employees in the financial sector mandate employees to adhere to higher standards of code of conduct and self-discipline. Their codes of conduct include inter alia anti-bribery obligations, prohibition from accepting gifts in an official capacity, making representations to media, making contribution to political parties, holding demonstration against public interest, exercising undue influence to secure appointments of family members at same organisation or granting banking facilities without permission. They are supposed to observe secrecy in general and specifically, maintain financial secrecy about stocks too.

This question was upheld in *Harinarayan Seet v. Andhra Bank*<sup>[1]</sup>, wherein the Andhra Pradesh High Court recognised that banking sector employees are mandated to exhibit higher standards of honesty, integrity, devotion and diligence and any failure to discharge such duty with diligence may trigger dismissal.

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<sup>[1]</sup> WP No. 23310 of 2011.

Last updated on 16/04/2024



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Specifically, employees holding executive, overall management, oversight or control functions in regulated companies are responsible for ensuring that the companies' organization ensures the continued compliance with applicable financial market laws. Swiss financial market laws do not have enhanced responsibilities for different employee categories. Instead, a person's fitness and propriety are assessed within the context of the specific requirements and functions of a given company, the scope of activities at that company, and the complexity of that company.

Last updated on 23/01/2023



## United States

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While there are certain responsibilities for financial employees, such as being able to pass applicable certifications (see question 4) or registering with certain entities (see question 6), the American regulatory system does not include statutory delineations that create enhanced responsibilities for certain categories of employees.

Last updated on 22/01/2023

**06. Is there a register of financial services employees that individuals will need to be listed on to undertake particular business activities? If so, what are the steps required for registration?**



## Hong Kong

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The HKMA, SFC and IA each have a register for licensed employees to be listed on to undertake regulated activities:

- HKMA – the register of securities staff of authorised institutions is available on the HKMA’s website[1]. For registration, the names and particulars of the relevant individuals are required to be submitted to the HKMA for inclusion on the HKMA Register.
- SFC – the register of licensed persons is available on the SFC’s website[2]. For registration, individual applicants would need to submit an electronic application to the SFC through its online platform. When there is a change of employment, the licensed representative may apply for a transfer of accreditation through SFC’s online platform within 180 days after the cessation of the previous employment. It takes approximately seven business days to process an application for transfer of accreditation to carry on the same types of regulated activity for which the licensed representative was licensed immediately before the cessation.
- IA – the register of licensed insurance intermediaries is available on the IA’s website[3]. For registration, applicants can submit their licence applications to the IA by paper submission or electronic submission via an online portal.

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[1] <https://apps.hkma.gov.hk/eng/index.php>

[2] <https://apps.sfc.hk/publicregWeb/searchByName?locale=en>

[3] <https://iir.ia.org.hk/#/index>

Last updated on 22/01/2023



## India

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There is no one-point register for financial services employees that individuals need to be listed on to undertake business activities. Such a register may vary depending upon the industry one is seeking and whether the post is that of a specialist or a generalist. Specialists like IT professionals, lawyers etc., working in financial services are bound by registration requirements mandated by the practice rules of their domains. For example, IT or ITES industry professionals may register themselves with the “National Skills Registry”[1], an initiative of the technology industry body NASSCOM. This registry maintains a central database of their qualifications, experiences and demographic information. NASSCOM also runs a BFSI Sectoral Skill Council (BFSI SSC) to cater to the financial services sector. The National Institute of Securities Market (NISM) Skills Registry is another similar initiative by the NISM.

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[1] FAQs on Understanding NSR, available at <<https://nationalskillsregistry.com/faq-understanding-nsr.htm>>

Last updated on 16/04/2024



## Switzerland

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There is no universal register of all financial services employees. Rather, different Swiss financial market laws provide for a registration requirement that may apply to individual financial service employees. Whether a particular financial market law, and, consequently, a registration requirement, applies to a financial services employee depends specifically on the regulatory status of the employing entity and the particular activity of that employee.

- Also, client advisers of Swiss or foreign financial service providers (eg, investment advisers) may be required to register with the adviser register, unless an exemption applies. Client advisers are the natural persons who perform financial services on behalf of a financial service provider or in their own capacity as financial service providers. Client advisers are entered in the register of advisers if they prove that i) they have sufficient knowledge of the code of conduct set out in the financial services regulations and the necessary expertise required to perform their activities, ii) their employee has taken out professional indemnity insurance or that equivalent collateral exists, and iii) their employee is affiliated with a recognized Swiss ombudsman in their capacity as a financial service provider (if such affiliation duty exists).

Furthermore, “non-tied” insurance intermediaries (ie, persons who offer or conclude insurance contracts on behalf of insurance companies) are required to register with FINMA’s register of insurance companies. To register, persons must inter alia prove that they have sufficient qualifications and hold professional indemnity insurance or provide an equivalent financial surety. “Tied” intermediaries will no longer be able to register voluntarily in the FINMA register (unless this is required by the respective country of operation for activities abroad).

Last updated on 16/04/2024



## United States

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### **FINRA**

Broker-dealers and Investment Advisors regulated by FINRA must file FINRA’s Form U4 when registering associated persons with FINRA or transferring their registration to another broker-dealer. Broker-dealers must also create and implement written procedures to verify the facts disclosed by prospective employees on the U4.

“Associated persons” include employees of all levels involved with the investment and securities operations, including:

- partners;
- officers;
- directors;
- branch managers;
- department supervisors;
- investment bankers;
- brokers;
- financial consultants; and
- salespeople.

The U4 form requires disclosure of the associated person’s background history, including any criminal convictions or civil actions, regulatory proceedings or sanctions, administrative proceedings, financial disclosures (such as bankruptcy), customer complaints, or arbitration awards.

## SEC

Investment advisers must register with the SEC under the Advisers Act. They must submit Form ADV using the Investment Adviser Registration Depository (IARD), an internet-based filing system maintained by FINRA.

SEC-regulated entities require every prospective employee to complete a questionnaire disclosing their identifying information, employment history, and record of any disciplinary actions, denial or suspension of membership of registration, criminal record, or any record of civil action against that employee. FINRA form U4, if completed, fulfils the requirements of this Rule.

Last updated on 22/01/2023

## **07. Are there any specific rules relating to compensation payable to financial services employees in your jurisdiction, including, for example, limits on variable compensation, or provisions for deferral, malus and/or clawback of monies paid to employees?**



### Hong Kong

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There are no specific mandatory rules relating to compensation payable to financial services employees in Hong Kong.

The HKMA has issued a Supervisory Policy Manual CG-5 “Guideline on a Sound Remuneration System”. This focuses on providing a broad idea and introducing basic principles of how remuneration policies should be designed and implemented in the authorised institution, to encourage employee behaviour that supports the risk management framework, corporate values and long-term financial soundness of the authorised institution.

Under the Guideline, the elements of a sound remuneration system are as follows:

#### **Governance**

- Remuneration policy should be in line with objectives, business strategies and the long-term goals of the authorised institution.
- The remuneration arrangement for employees whose activities could have a material impact on the authorised institution’s risk profile and financial soundness should support, but not undermine, the overall risk management approach.
- The Board of an authorised institution is ultimately responsible for overseeing the formulation and implementation of the remuneration policy.
- The establishment of a Board remuneration committee would assist the Board in discharging its responsibility for the design and operation of the authorised institution’s remuneration system.
- Risk control personnel should have appropriate authority and involvement in the process of design and implementation of the authorised institution’s remuneration policy.

#### **Structure of remuneration**

- Balance of fixed and variable remuneration should be determined with regard to the seniority, role,

responsibilities and activities of their employees and the need to promote behaviour among employees that support the authorised institution's risk-management framework and long-term financial soundness.

- Variable remuneration should be paid in such a manner as to align an employee's incentive awards with long-term value creation and the time horizons of risk.
- Guaranteed minimum bonus to senior management or key personnel should be subject to the approval of the Board (or the Board's remuneration committee with the necessary delegated authority).

### **Measurement of performance for variable remuneration**

- The award of variable remuneration should depend on the fulfilment of certain pre-determined and assessable performance criteria, which include both financial and non-financial factors.
- Size and allocation of variable remuneration should take into account the current and potential risks associated with the activities of employees, as well as the performance (overall performance of the relevant business units and the authorised institution as a whole as well as the contribution of individual employees to such performance).
- Judgement and common sense may be required during the process to arrive at a fair and appropriate remuneration decision. The rationale for the exercise of judgment and the outcomes should be recorded in writing.

### **Alignment of remuneration pay-outs to the time horizon of risks**

- Deferment of variable remuneration is appropriate when the risks taken by the employee in question are harder to measure or will be realised over a longer timeframe.
- The award of deferred remuneration should be subject to a minimum vesting period and pre-defined vesting conditions in respect of future performance.
- Authorised institutions should seek undertakings from employees not to engage in personal hedging strategies or remuneration and liability-related insurance to hedge their exposures in respect of the unvested portion of their deferred remuneration.

### **Remuneration disclosure**

- Authorised institutions should make remuneration disclosures at least annually. The disclosure should include the qualitative and quantitative information that the HKMA has set out in its annual remuneration disclosure.

Last updated on 22/01/2023



## **India**

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There are certain rules relating to compensation payable to financial services employees, such as those in the banking, mutual fund or asset management, and insurance industries.

The central bank of India, the RBI, deals with the compensation policy for all private-sector banks and foreign banks operating in India by requiring them to formulate their own compensation policy and annually reviewing it. Banks are not allowed to employ or continue the employment of any person whose remuneration is excessive in the RBI's opinion. For instance, the RBI lays down guidelines on the compensation of "Whole Time Directors ("WTD") / Chief Executive Officers / Material Risk Takers and Control Function Staff"[\[1\]](#), elaborate guidelines encompassing the governance of compensation and its alignment with prudent risk-taking, policies for risk control and compliance staff, the identification of "material risk takers", and disclosure and engagement by stakeholders. It even envisages deferred payments being subjected to malus or clawback arrangements if there was negative performance. For variable pay, it mandates banks to incorporate malus or clawback mechanisms and suggests they specify periods of malus or clawback application to cover at least deferral and retention periods.[\[2\]](#) It is pertinent to



highlight that private sector and foreign banks in India must obtain regulatory approval[3] for the grant of remuneration to WTDs or CEOs.

The RBI also prescribes guidelines around compensation for key managerial personnel (KMP) and senior management in non-banking financial companies (NBFCs)[4]:

- NBFCs are mandated to form “Nomination and Remuneration Committees” (NRCs) as per Section 178 of the Companies Act, 2013, which will then be entrusted with framing, reviewing and implementing the compensation policy to be approved by the board of the company.
- The compensation must align with the risk related to the decision-making process. The compensation package can comprise both fixed and variable pay and may also be a mix of cash, equity or other forms, in line with projected risk factors.
- A bonus has no bearing on the performance of the individual. The bonus is guaranteed based on the fulfilment of certain criteria as may be specified in the compensation policy. A guaranteed bonus should neither be considered part of fixed pay nor variable pay and the same is not payable to KMP and senior management. However, a guaranteed bonus can be paid to new employees as part of a sign-on bonus whereby potential employees can be incentivised to join NBFCs.
- "Deferred compensation may be subject to malus/clawback arrangements." The compensation policy concerning malus or clawback must mandatorily apply for the period equal to at least the deferred retention period.

Despite the aforementioned guidelines being applicable from 1 April 2023, NBFCs must immediately begin aligning their internal procedures to comply with the mandatory guidelines above to assist the transition. Existing remuneration policies being followed by the NBFCs should be reviewed to make the necessary changes to be compliant with the above-mentioned policies.

When it comes to regulations on an “employee stock option plan” (ESOP) for financial services employees, regulators may impose industry-specific guidelines. For instance, as per the SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021[5], the employee stock option scheme should be drafted in a manner that no such employee violates SEBI (Insider Trading) Regulations, 1992 and SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to the Securities Market) Regulations, 1995. ESOPs issued to managerial staff and for non-cash consideration shall be treated as part of managerial remuneration. In another development, the RBI has directed that ESOPs should be at a fair value, shooting up costs and creating the cascading effect of replacing ESOPs with deferred bonus payments for senior managerial personnel.

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[1] Guidelines on Compensation of Whole Time Directors/Chief Executive Officers/Material Risk Takers and Control Function staff, November 4, 2019, available at <<https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI898C120D41D0E3465B8552E5467EDD7A56.PDF>>

[2] Guidelines on Compensation of Whole Time Directors/Chief Executive Officers/Material Risk Takers and Control Function staff, November 4, 2019, available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI898C120D41D0E3465B8552E5467EDD7A56.PDF>

[3] Section 35B, Banking Regulation Act 1949.

[4] Guidelines on Compensation for Key Managerial Personnel (KMP) and Senior Management in non-banking financial companies (NBFCs), April 29, 2022, available at <<https://rbidocs.rbi.org.in/rdocs/notification/PDFs/KMPNBFCs962EC76438C845A6846A5BD59BC7513D.PDF>>

[5] Securities and Exchange Board of India (Share Based Employee Benefits and Sweat Equity) Regulations 2021, August 13, 2021, available at <[https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-share-based-employee-benefits-and-sweat-equity-regulations-2021\\_51889.html](https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-share-based-employee-benefits-and-sweat-equity-regulations-2021_51889.html)>

Last updated on 16/04/2024



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Swiss civil law provides for special rules that govern the compensation of current and former members of inter alia the board and executive committee (Ordinance against Excessive Compensation) of Swiss companies limited by shares that are listed on a Swiss or foreign stock exchange. In addition, there are disclosure provisions listed companies need to follow concerning remuneration under stock exchange regulations.

In addition to the above, FINMA has formulated ten principles regarding remuneration that banks, securities firms, financial groups and conglomerates, insurance companies, insurance groups and conglomerates are required to implement. The principles serve as minimum standards for the design, implementation and disclosure of remuneration schemes.

These schemes should not incentivise to take inappropriate risks and thereby potentially damage the stability of financial institutions.

One of the focal points of the principles is variable remuneration that depends on business performance and risk. In particular, all variable remuneration must have been earned by the company over the long term. Consequently, remuneration is dependent on performance, taking into account the sustainability of such performance as well as the risks. That said, FINMA's principles do not limit the amount of variable remuneration. However, FINMA aims to prevent the granting of high remuneration based on large risks and the generation of short-term, unsustainable earnings. Furthermore, persons who have significant responsibility relating to the risk or receive a high total remuneration, must receive a significant part of the variable remuneration on a deferred basis and consequently, in a way that is linked to the current risk. Under the FINMA principles, "clawback" and "malus" arrangements are permitted.

Last updated on 16/04/2024



## United States

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### Overtime

Financial services employees in the United States are commonly classified as administrative employees exempt from both minimum wage and overtime laws. To qualify for this administrative exception under the Fair Labor Standard Acts (FLSA) and often, applicable state law, an employee must:

- be compensated on a salary or fee basis at a rate at least equal to the minimum required threshold (at the time of writing set at \$684 a week or \$35,568 annually); and
- have a primary duty:
  - that is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
  - includes the exercise of discretion and independent judgment on significant matters.

Examples of employees qualifying for the administrative exemption are those whose duties include:

- collecting and analysing information regarding the customer's income, assets, investments or debts;
- determining which financial products best meet a customer's needs;
- advising customers regarding the pros and cons of various financial products; and
- marketing, servicing, or promoting financial products.

An employee whose sole duty is selling financial products does not qualify for the administrative exemption. United States courts are split on whether financial advisors are exempt.

Many states have a higher minimum annual salary threshold for the administrative exemption, including California (\$1,240 a week, as of 1 January 2023) and New York (\$1,125 a week for New York City and

Nassau, Suffolk, and Westchester counties and \$990 a week for the remainder of the state. The remainder of the State increased to \$1,064.25 a week on 31 December 2022).

California has an administrative exemption test, which also requires the employee to customarily and regularly exercise discretion and independent judgement, in addition to being primarily engaged in administrative duties. Employees that do not qualify as non-exempt under one of the exemptions must receive overtime pay under California law.

FLSA also exempts “highly compensated” employees. To qualify for this exemption, an employee must earn at least \$107,432 in total annual compensation (not including discretionary bonuses), must perform office or non-manual work as part of their primary duty, and must customarily perform one or more exempt duties of an administrative, executive, or professional employee.

### **Bonuses**

Discretionary bonuses can be for any amount and can be determined on quantitative factors (eg, employer profits) or subjective factors (eg, known performance indicators, performance, merit) and employers may condition an employee’s eligibility to receive a bonus on their active employment at the time when bonuses are paid.

Guaranteed bonuses are typically non-discretionary and set at a fixed number or percentage (eg, a percentage of the employee’s annual base salary or the employer’s profits). A guaranteed bonus (unlike a discretionary one) creates a contractual obligation and will be considered wages. Once a payment is considered a “wage,” employers generally cannot withhold, recover or claw back the bonus from an employee.

California requires non-discretionary bonuses to be included in a non-exempt employee’s regular rate for overtime calculation.

Certain compensation plans include “forgivable loans,” conditioning an employee’s obligation to repay on their continued employment with the new employer for a time. If the employee leaves or is fired for certain reasons before the full loan amount is forgiven, the unforgiven share, with interest, can become due and payable.

California generally prohibits employers from deducting any outstanding loan balances from an employee’s final paycheck without express permission in contemporaneous writing signed by the employee, both at the time the loan or advance was given and at separation.

Similarly, New York has extremely nuanced rules related to permissible deductions for employee benefits, which are limited (eg, authorised deductions and deductions for the benefit of the employee).

Last updated on 22/01/2023

## **08. Are there particular training requirements for employees in the financial services sector?**



**Hong Kong**

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### **SFC**

Persons engaging in regulated activities are required to continuously update their knowledge and skills through continuous professional training (CPT). The “Guidelines on Continuous Professional Training” published by the SFC provides for the following CPT requirements:

- a minimum of 10 CPT hours a year for licensed representatives and relevant individuals; and
- a minimum of 12 CPT hours a year for responsible officers and executive officers (including 2 CPT hours on topics relating to regulatory compliance).

In addition, an individual should attend at least five CPT hours a year (out of the 10 hours for licensed representatives and relevant individuals and 12 hours for responsible officers and executive officers) on topics directly relevant to the regulated activities for which he or she is licensed at the time the CPT hours are undertaken.

## HKMA

The HKMA has implemented the “Enhanced Competency Framework”(ECF) for banking practitioners. While the ECF is not a mandatory regime, banks are strongly encouraged to adopt it as the benchmark for enhancing the level of core competence and ongoing professional development of banking practitioners.

## IA

Under the “Guideline on Continuing Professional Development for Licensed Insurance Intermediaries”, licensed insurance intermediaries who are individuals are required to receive training through CPD to preserve their professional competence and standards in providing service to policyholders and potential policyholders.

The minimum number of CPD hours for individual licensees is 15 CPD hours for each assessment period, including a minimum of three compulsory CPD hours on “Ethics or Regulations” courses.

Financial services employees are also required to receive training on anti-money laundering and counter-financing of terrorism. New staff should be required to attend initial training as soon as possible after being hired or appointed. Apart from the initial training, refresher training should be provided regularly to ensure that staff are reminded of their responsibilities and are kept informed of new developments.

Last updated on 22/01/2023



## India

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Financial services employees may undergo necessary training once they are selected and onboarded.

Financial services sectors categorise employees as specialists and generalists. On one hand, those in charge of specialist roles are deployed in treasury, derivatives trading, IT, forex, risk management, service delivery groups, product roles, legal, etc., while on the other, the generalists are deployed in branches, administrative functions, finance, some areas of treasury, taxation, general management, operations, relationship or sales managing, etc. They should possess differentiated requisite academic qualifications with skill certifications (if any) or obtain competitive scores in recruitment tests.

As such, there are no legal requirements for prior training of employees in the financial services sector. There are various certificate courses, workshops and diplomas by financial institutions and agencies, which are recommended to be attended regularly to stay abreast of industry knowledge and to secure an edge in intra-organisational promotions.

Last updated on 16/04/2024



## Switzerland

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In general, regulated companies (eg, banks, insurance companies or asset managers) are required to set up and maintain an organisation that ensures compliance with applicable financial market laws. Given the organisational measures and depending on the regulatory status of the employing entity and the position and activities of the financial services employee, there are training requirements.

While Swiss financial market regulations do not have an exhaustive list of exact training requirements, FINMA requires, among others, that the highest bodies of supervised companies (eg, executives of board members of banks, securities firms, insurance and reinsurance companies, fund management companies, managers of collective assets or asset managers) can fulfil the requirements of the so-called fit and proper test. These requirements extend to all character-related and professional elements that enable an officeholder to manage a supervised company in compliance with applicable laws. Part of the professional elements are relevant work experience and education. In addition, persons holding key positions (eg, compliance and risk officers and their deputies) are required to demonstrate sufficient know-how because of their work experience and education.

That said, the Swiss financial services and insurance supervisory regulations provide for more concrete training requirements. In particular, client advisers of Swiss and foreign financial service providers (eg, investment advisers) may need to demonstrate that they have sufficient knowledge of the code of conduct rules of the Swiss financial services regulation and the necessary expertise required to perform their activities. In addition, insurance intermediaries registered with FINMA's insurance intermediary register have to prove that they have undergone sufficient education and have sufficient qualifications. On its website, FINMA has published a list of different educational Swiss and foreign qualifications that it deems to be sufficient.

Last updated on 16/04/2024



## United States

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All employees in some states, including California and New York, are required to receive periodic sexual harassment training. Additionally, employees may be required to pass certain skills tests before registering with regulators or engage in continuing education programmes (most notably FINRA, see question 4).

Last updated on 22/01/2023

## **09. Is there a particular code of conduct and/or are there other regulations regarding standards of behaviour that financial services employees are expected to adhere to?**



## Hong Kong

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### **SFC**

Under the SFO, licensed representatives and ROs are required to be “a fit and proper person” to carry on the regulated activities and must adhere to the standards of behaviour set out in the “Code of Conduct for

Persons Licensed by or Registered with the Securities and Futures Commission”. Other relevant guidelines regarding standards of behaviour include:

- “Fit and Proper Guidelines”, which set out the general expectations of the SFC of what is necessary to satisfy the licensing or registration requirements that a person is fit and proper.
- “Guidelines on Competence”, which set out the competence requirements and its objective to ensure a person is equipped with the necessary technical skills and professional expertise to be “fit”, and is aware of the relevant ethical standards and regulatory knowledge to be “proper” in carrying on any regulated activities.

## HKMA

Under the BO, employees of an authorised institution that carry on regulated activities under the SFO are required to be fit and proper. In addition, the HKMA needs to be satisfied that the chief executive, directors, controllers and executive officers of the authorised institutions are fit and proper. Other relevant guidelines regarding standards of behaviour include:

- “Code of Banking Practice”, which is to be observed by authorised institutions in dealing with and providing services to their customers.
- Supervisory Policy Manual CG – 2 “Systems of Control for Appointment of Managers”, which sets out the system of control that authorised institutions should have for ensuring the fitness and propriety of individuals appointed as managers.

## IA

The conduct requirements for licensed insurance agents and brokers are set out in Division 4 of the IO. Other relevant codes and guidelines include:

- “Code of Conduct for Licensed Insurance Agents”, which sets out the fundamental principles of professional conduct that buyers of insurance are entitled to expect in their dealings with licensed insurance agents.
- “Code of Conduct for Licensed Insurance Brokers”, which sets out the fundamental principles of professional conduct that buyers of insurance are entitled to expect in their dealings with licensed insurance brokers.
- “Guideline on ‘Fit and Proper’ Criteria under the Insurance Ordinance”

Last updated on 22/01/2023



## India

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Financial services regulators like the RBI, SEBI and Insurance Regulatory and Development Authority of India (IRDAI) regulate employees through prescribed frameworks and their organisation-specific rules.

The obligations for the conduct of employees in financial services are determined depending upon the type of organisation: public sector banks (majorly owned by the state) or private banks; sectors (banking, non-banking, insurance, capital market); regions (different local laws); and level of seniority (liability of officers or manager is different from regular employees or clerical staff). Though there are no statutory standards, judicial pronouncements have set a higher threshold of duty of care for employees in the financial services sectors. The Andhra Pradesh High Court in *Harinarayan Seet v Andhra Bank*<sup>[1]</sup> held dismissal of service as a proportionate punishment for dereliction of duty by banking employees, which would have otherwise attracted a lesser penalty for employees in less-critical sectors.

In terms of general labour legislation also applicable to financial services employees, financial services organisations fall under the definition of “commercial establishments”, whose definition has been laid down by the Shops & Commercial Establishments Act (state level). They provide certain conduct-specific obligations, for example, a prohibition against discrimination, suspension or dismissal for misconduct.

The other major piece of labour legislation that lays down standards of conduct is the Industrial Employment (Standing Orders) Act, 1946 (IESOA). However, its applicability to commercial establishments or to a specific industry is dependent upon state-wide laws. For example, the states of Haryana and Karnataka have notified the application of the IESOA to commercial establishments with a minimum of 50 employees. This implies that financial services institutions in these states, meeting the above criteria, are bound to comply with the IESOA. Upon the application of the IESOA, the establishments are required to submit to the certifying officer draft standing orders proposed for their establishment, which should cover acceptable standards for employees.

In the banking sector, employees of public-sector banks, private-sector banks and foreign banks are bound by the obligations laid down by the RBI and their organisation rules. The provisions of these rules, which are different from other industries, are stricter: observance of secrecy; prohibition against using influence to secure employment for family members; bypassing regular compliance checks for availing of banking facilities; prohibition against media contributions, participating in politics or standing for election; demonstrations prejudicial to the public interest; and acceptance of gifts in an official capacity.

In terms of financial propriety, employees must not indulge in speculation in stocks and shares, but must avoid personal insolvency and even disclose their moveable and immoveable assets. During employment, they are also forbidden from engaging in any outside employment (stipendiary or honorary) without the prior approval of the organisation. Higher managerial employees are subject to additional scrutiny. Those belonging to public sector enterprises are brought within the jurisdiction of the Central Vigilance Commission, the apex vigilance institution. It is due to the gravity of corruption cases that the senior management of private sector banks is also included within the ambit of “public servant”, which usually includes employees of only public sector organisations. This was upheld by the Supreme Court of India in the case of Central Bureau of Investigation v Ramesh Gelli<sup>[2]</sup>. The organisations in the insurance and capital markets sectors also have similar institution-wide conduct and disciplinary rules.

Directors of organisations in the financial services sector may also be subject to duties stated in Schedule IV of the Companies Act 2013 and the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015.

When it comes to outsourcing activities, financial institutions formulate a board-approved “Code of Conduct” as part of the “Outsourcing Agreement”, which is to be complied with by the outsourced service providers and their employees.<sup>[3]</sup>

Though financial services employees are held to a higher set of moral standards, their right to participate in trade union actions for voicing their concerns has been upheld time and again. Recently, the Madras High Court in the case of D Thomas Franco Rajendra Dev v The Disciplinary Authority and Circle Development Officer and State Bank of India<sup>[4]</sup> observed bank officers’ right to unionise. However, the right of bank employees to go on a strike gets limited since banks and other financial institutions are declared as ‘Public Utility Services’ (“PUS”). Accordingly, while they are not barred from going on strike, they must adhere to certain pre-requisites namely service of notice of at least 6 weeks before going on a strike, prohibition of any strike within 14 days from date of service of above notice, prohibition of going on a strike before the expiry of the date of that strike and non-authorization of any strike during the pendency of any conciliation proceedings or 7 days after the conclusion of such a proceeding. Upon being declared a PUS, the concerned industry must adhere to these conditions failing which the strikes would be declared as illegal.

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<sup>[1]</sup> WP No. 23310 of 2011.

<sup>[2]</sup> (2016) 3 SCC 788.

<sup>[3]</sup> Directions on Managing Risks and Code of Conduct in Outsourcing of Financial Services by NBFCs, November 9, 2017, available at [https://rbidocs.rbi.org.in/rdocs/Notification/PDFs/NT87\\_091117658624E4F2D041A699F73068D55BF6C5.PDF](https://rbidocs.rbi.org.in/rdocs/Notification/PDFs/NT87_091117658624E4F2D041A699F73068D55BF6C5.PDF)

<sup>[4]</sup> W.A. No. 432 of 2013 and W.P. No. 16746 of 2013

## Switzerland

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Depending on the regulatory status of the employing entity and, as the case may be, on the exact activities of a financial service employee, a financial service employee needs to adhere to certain code of conduct rules (eg, regarding transparency and care, documentation and accountability).

Supervised companies in Switzerland are, in principle, required to set up an organisation that ensures the compliance with Swiss financial market laws and its statutory code of conduct rules. For this purpose, among others, companies are required to issue regulations that their employees must follow.

Under Swiss financial market laws, code of conduct rules are generally based on abstract statutory rules and concretized by recognised privately organised associations.

In particular, several professional organisations (eg, the Swiss Bankers Association or the Asset Management Association) and self-regulated organisations issue their own set of code of conduct rules that members are required to follow.

Last updated on 16/04/2024

## United States

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Employees in some states, including California and New York, are required to receive periodic sexual harassment training.

Employers are also required to implement anti-discrimination and anti-harassment policies that:

- contain information about where and how employees can report improper conduct;
- prohibit retaliation for reporting or opposing improper conduct, or participating in an investigation regarding misconduct; and
- comply with state and local provisions that require employer policies to contain certain provisions (eg, New York, Los Angeles and San Francisco).

New York law prohibits employers from mandating confidentiality or non-disclosure provisions when settling sexual harassment claims (though it allows such provisions where it is the employee's preference to include them).

California law prohibits employers from mandating confidentiality or non-disclosure provisions in employment agreements, settlement agreements, and separation agreements that are designed to restrict an employee's ability to disclose information about unlawful acts in the workplace, including information pertaining to harassment or discrimination or any other conduct the employee has reason to believe is unlawful.

FINRA and the SEC both have requirements and recommendations for social media use.

FINRA requires that broker-dealers retain records of social media communications related to the broker-dealer's business made using social media sites and adopt policies and procedures designed to ensure that their employees who use social media sites for business purposes are appropriately supervised and trained, and do not present an undue risk to investors.

The SEC similarly requires that social media use complies with all federal security laws, including antifraud, compliance, and recordkeeping provisions.

Banking regulators provide guidance stating that each financial institution is expected to carry out an



## 10. Are there any circumstances in which notifications relating to the employee or their conduct will need to be made to local or international regulators?



### Hong Kong

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#### **SFC - Self-reporting obligation**

An SFC-licensed intermediary is subject to the self-reporting obligation under paragraph 12.5 of the “Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission”. A licensed or registered person should report to the SFC immediately upon the occurrence of any material breach, infringement or non-compliance with any laws, rules regulations, and codes administered or issued by the SFC, exchange or clearing house of which it is a member or participant of, and the requirement of any regulatory authority applicable to that intermediary. This encompasses both actual and suspected breaches, infringements or non-compliance. In the report, the particulars of the actual or suspected breach, infringement or non-compliance, and relevant information and documents must be included to fulfil the obligation.

The same is to be reported by the registered institutions to the HKMA. The HKMA also requires authorised institutions to submit an incident report on the same day of discovering the incident.

#### **SFC - Internal investigation disclosure obligation**

In addition, a licensed corporation is required to provide the SFC with information about whether a licensed individual who ceases to be accredited to it (outgoing employee) was under any investigation commenced by the licensed corporation within six months preceding his or her cessation of accreditation. If the internal investigation commences after the notification of cessation of accreditation, the licensed corporation should also notify the SFC as soon as practicable. In addition, even if a firm has completed its investigation and made no negative findings against an outgoing employee, the firm will still be required to notify the SFC of the investigation.

The SFC expects licensed corporations to proactively disclose information about all investigative actions and the following is a non-exhaustive list of examples of investigations involving an outgoing employee that a licensed corporation should disclose to the SFC:

- investigations about a suspected breach or breach of applicable laws, rules and regulations;
- investigations about a suspected breach or breach of the licensed corporation's internal policies or procedures;
- investigations about misconduct that are likely to give rise to concerns about the fitness and properness of the outgoing employee;
- investigations about any matter that may have an adverse market or client impact; and
- investigations about any matter potentially involving fraud, dishonesty and misfeasance.

#### **HKMA - Reporting incidents to HKMA**

According to the “Incident Response and Management Procedures” published by the HKMA, once an



authorised institution has become aware that a significant incident has occurred, the authorised institution concerned should notify the HKMA immediately and provide it with whatever information is available at the time. An authorised institution should not wait until it has rectified the problem before reporting the incident to the HKMA.

According to the Supervisory Policy Manual SB-1 “Supervision of Regulated Activities of SFC-Registered Authorized Institutions”, to be in line with the reporting requirements imposed by the SFC on licensed representatives, authorised institutions will be required to notify the HKMA in writing within seven business days upon knowledge of the occurrence of certain information (including any subsequent changes) of the relevant individuals. The required information is on whether or not the person is or has been:

- convicted of or charged with any criminal offence (other than a minor offence) in Hong Kong or elsewhere;
- subject to any disciplinary action, or investigation by a regulatory body or criminal investigatory body (as the case may be) in Hong Kong or elsewhere;
- subject to, or involved in the management of a corporation or business that has been or is subject to, any investigation by a criminal investigatory body or any regulatory body in Hong Kong or elsewhere concerning offences involving fraud or dishonesty;
- engaged in any judicial or other proceedings, whether in Hong Kong or elsewhere, that is material or relevant to the fitness and propriety of the individual; or
- bankrupt or aware of the existence of any matters that might render him insolvent or lead to the appointment of a receiver of his property under the Bankruptcy Ordinance.

### **HKMA - Guidance Note on Cooperation with HKMA Investigations**

Under the “Guidance Note on Cooperation with the HKMA in Investigations and Enforcement Proceedings”, the HKMA encourages and recognises the cooperation of authorised institutions, banks and their staff in investigations and enforcement proceedings. Under this Guidance Note, cooperation includes early and voluntary reporting of any suspected breach or misconduct, taking a proactive approach to assist the HKMA’s investigation, and making timely arrangements to provide evidence and information.

### **IA - Self-reporting obligation**

Under “the Code of Conduct for Licensed Insurance Agents/Brokers”, there is a self-reporting obligation by licensed insurance agencies or brokerages to the IA. A licensed insurance agency or brokerage is required to have proper controls and procedures to ensure the following incidents are reported to the IA as soon as is reasonably practicable:

- a disciplinary action taken by the HKMA, the SFC or the Mandatory Provident Fund Schemes Authority;
- a criminal conviction (other than a minor offence) by any court in Hong Kong or elsewhere;
- any material breaches of requirements under the IO or any rules, regulations, codes or guidelines administered or issued by the IA; and
- any material incidents which happen to the agency or brokerage.

Last updated on 22/01/2023



**India**

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The RBI requires banks to conduct an annual review of fraud committed and provide a note of the total number to the board of directors or the local advisory board. These reports are not to be sent to the RBI but are to be preserved for verification by the RBI’s inspecting officers<sup>[1]</sup>. Necessary disclosures may also need to be made to SEBI under some of its regulations.

Publicly listed financial services companies may be required to make necessary disclosures, including to the stock exchanges and their auditors, in case of workplace fraud.

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[1] Master Directions on Frauds – Classification and Reporting by commercial banks and select FIs (Updated as on July 03, 2017), available at <[https://rbi.org.in/scripts/BS\\_ViewMasDirections.aspx?id=10477](https://rbi.org.in/scripts/BS_ViewMasDirections.aspx?id=10477)>

Last updated on 16/04/2024

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As a general principle, supervised companies are required to ensure that persons holding, in particular, executive, overall management, oversight or control functions fulfil the requirements of the “fit and proper” test. Consequently, such persons must be of good repute and can guarantee compliance with applicable laws and regulations.

If a person cannot guarantee that the regulatory requirements are fulfilled at all times (eg, because of a material breach of its duties) the employing entity and its audit companies may be required to immediately report to FINMA, respectively, any incident that is of significance.

Last updated on 16/04/2024

## United States

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FINRA members must report to FINRA within 30 calendar days after the firm has concluded, or reasonably should have concluded, that an associated person of the firm or the firm itself has violated any securities, insurance, commodities, financial or investment-related laws, rules, regulations or standards of conduct of any domestic or foreign regulatory body or self-regulatory organisation.

While there is no requirement to report misconduct to regulators, the SEC routinely gives credit to organisations that voluntarily choose to self-report, which can lead to reduced fines, non-prosecution agreements, deferred prosecution agreements, waivers of disqualification following regulatory or criminal actions, or more organisation-friendly language in settlement documents. However, such disclosed information may later be discoverable by private plaintiffs.

The SEC has issued guidance that a failure to self-report significant misconduct can lead to more severe penalties.

Last updated on 22/01/2023

# **11. Are there any particular requirements that employers should implement with respect to the prevention of wrongdoing, for example, related to whistleblowing or the prevention of harassment?**

## Hong Kong

Author: *Charles Mo, Joanne Mok*

## **Anti-money laundering and counter-financing of terrorism**

Financial services employees are required to receive training on anti-money laundering and counter-financing of terrorism. New staff should be required to attend initial training as soon as possible after being hired or appointed. Apart from the initial training, refresher training should be provided regularly to ensure that staff are reminded of their responsibilities and are kept informed of new developments (see question 8).

## **Whistleblowing**

There is no single comprehensive whistleblowing legislation to protect whistleblowers in Hong Kong. However, piecemeal provisions in various ordinances may protect specific whistleblowers for the reporting of specific offences. For example, the Employment Ordinance provides that an employer shall not terminate (or threaten to terminate) the employment of, or in any way discriminate against, an employee because the employee has given evidence or information in any proceedings or inquiry in connection with the enforcement of the Employment Ordinance, work accidents or breach of work safety legislation.

While it is not legally required, as good practice, employers should consider implementing a whistleblowing policy to set out, among others, the type of incidents that should be reported and the procedures for filing the report.

## **Workplace harassment**

Under the Sex Discrimination Ordinance, Disability Discrimination Ordinance and Race Discrimination Ordinance, any harassment in the workplace based on sex, pregnancy, disability and race (which includes colour, descent, ethnic or national origins) is unlawful.

As employers are vicariously liable for the wrongful acts of their employees (whether or not the act was done with the employer's knowledge or approval), one of the statutory defences is for employers to establish that they took "reasonably practicable steps" to prevent the wrongful act in the workplace. Employers should therefore put in place anti-harassment policies and procedures to prevent harassment from happening in the workplace and to provide complaint or reporting procedures to handle such incidents.

Last updated on 22/01/2023



## **India**

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Corporate whistleblowing is still at a nascent stage in India and there isn't a robust legislative framework for it. Section 177[1] of the Companies Act 2013, clause 49 on "Corporate Governance" of the Listing Agreement between a listed entity and a stock exchange and the guidelines issued by RBI under Section 35(A) of the Banking Regulation Act 1949 [2] constitute the corpus of early whistleblower jurisprudence in India. Publicly listed financial services companies are required to have whistleblowing policies.

In terms of generally applicable laws, the IDA lists "Unfair Labor Practices" that the employer is prohibited from engaging in. There are certain state-specific laws which reiterate the same. There might also be sector-specific initiatives. One such example is the "Protected Disclosures Scheme for Private Sector and Foreign Banks" by the RBI, which cover areas such as corruption, criminal offences, non-compliance with rules, misuse of office, suspected or actual fraud causing financial and reputational loss and detriment to the public interest.

When it comes to the prevention of harassment, the general statutes are also applicable to financial sector organisations. Employers are required to comply with the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redress) Act, 2013, by taking reasonable steps to assist affected women

workers. If harassment is coupled with any other issue like caste-based discrimination, then employees may register complaints through well-established civil or criminal redress mechanisms in the legal system.

[1] Section 177, Companies Act 2013, available at <<https://ca2013.com/177-audit-committee/>>

[2] Section 35A, Banking Regulation Act 1949, available at <<https://indiankanoon.org/doc/587034/#:~:text=it%20is%20necessary%20to%20issue,to%20comply%20with%20such%20directions>>

Last updated on 16/04/2024

## Switzerland

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There are no specific whistleblowing laws in Switzerland, but employees have a right to report grievances and misconduct to their employer, provided that they do not commit a breach of a fiduciary duty or cause damage (eg, malicious false reports).

However, employees must also report material facts or incidents of misconduct and the misconduct of other employees discovered in the course of their work to their employer under the employee's duty of loyalty.

On the other hand, an employee's duty of loyalty and, in particular, an employee's statutory duty of confidentiality flowing from it may also give rise to a duty to not report.

Based on the current legal situation, there may be a conflict between an employee's need to report grievances (internally or externally) and a possible duty to not report with regard to an external report. An attempt to resolve this conflict through legislation has failed, and a new attempt to introduce whistleblowing legislation in Switzerland is not expected anytime soon.

Concerning whistleblowing by employees to a public authority or even to the public, employees are regularly prevented from doing so by confidentiality obligations under criminal law. Any justification for such a disclosure will usually only be examined in the context of a criminal investigation against the employee.

However, larger companies have taken measures and set up certain processes to uncover and prevent wrongdoing without having to do so under mandatory laws. For instance, companies have implemented internal or external reporting offices.

When it comes to harassment, an employer is explicitly required to protect employees from sexual harassment (prevention) and to protect any victims from further disadvantages (active protection). According to the Gender Equality Act, victims of sexual harassment may be awarded compensation of up to six months' wages by the courts, in addition to damages and restitution, unless the employer can prove that they have "taken all measures that are necessary and appropriate according to experience to prevent sexual harassment and that they can reasonably be expected to take". Employers are therefore advised to actively address the issue of sexual harassment (as well as general discrimination and bullying) in the workplace and include it in their regulations or directives.

Last updated on 16/04/2024

## United States

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Whistleblowing in the United States is governed by two main statutory sources, the Sarbanes-Oxley Act (SOX) and the Dodd-Frank Act (Dodd-Frank).

SOX protects whistleblowers who report violations of securities laws to:

- federal regulatory bodies or law enforcement;
- members of Congress or congressional committees; or
- supervisors or persons authorised by the employer to investigate, discover, or terminate misconduct.

Dodd-Frank generally only protects whistleblowers who report violations of the securities or commodities laws to the SEC or CFTC. However, it also prohibits employers from discriminating against financial services employees for objecting or refusing to participate in any activity that would be a violation of securities law (note that Dodd-Frank prohibits mandatory arbitration of retaliation claims under the Act).

Whistleblowers in the banking industry are also protected under both federal and applicable state laws for reporting violations of banking law to the US Department of Justice.

Under Dodd-Frank and banking laws, employees may be offered a bounty for whistleblowing activities that results in successful enforcement actions.

Employment Discrimination and Sexual Harassment Claims are not subject to mandatory FINRA arbitration, though the claims may be arbitrated if all parties agree.

Californian employers with at least five employees globally must implement policies and provide training on the prohibition of harassment, discrimination, and retaliation in the workplace.

Last updated on 22/01/2023

## **12. Are there any particular rules or protocols that apply when terminating the employment of an employee in the financial services sector, including where a settlement agreement is entered into?**



### **Hong Kong**

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There are no particular rules or protocols that apply when terminating the employment of an employee in the financial services sector. The termination procedures will follow the requirements under the Employment Ordinance and the contractual terms of the employment contract. In certain cases (eg, termination of senior executives), the parties may enter into a mutual release and settlement agreement.

The licensed corporations should notify the regulators of any changes, including cessation of appointment of the licensed representative and responsible officer or managers-in-charge of core functions, within seven business days. In the case of registered institutions, the notification should be made to both the SFC and the HKMA.

Under section 64R of the IO, within 14 days after the day on which an authorised insurer, a licensed insurance agency or a licensed insurance broker company (collectively, “Appointing Principal”) terminates the appointment of a licensed insurance agency, a licensed individual insurance agent, a licensed technical representative (agent), a licensed technical representative (broker) or a responsible officer (as the case may be), then the Appointing Principal should notify the IA in writing of the termination.

Last updated on 22/01/2023

## India

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The general legal standards on termination of employment are also applicable to employees in the financial services sector. India is not an “at-will” jurisdiction but is also not an “employment-for-life” jurisdiction. In general, termination of employment may be carried out for reasonable cause or on account of misconduct. In cases of termination on any ground other than misconduct, the employee must be provided with prior notice of termination or pay in lieu thereof. The body of laws that govern employee rights around termination are the IDA, state-specific shops and establishments acts, standing orders, and the employment contract. Workmen (basically non-managers) have additional protection in terms of the right to retrenchment compensation when terminated.

Last updated on 16/04/2024

## Switzerland

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There are no specific rules or protocols that apply when terminating the employment of an employee in the financial services sector. However, because changes in the strategic and executive management of, in particular, regulated companies such as banks, insurance companies, securities firms, fund management companies, managers of collective assets or asset managers are subject to a prior authorization by FINMA, the timing of termination and re-hiring of particular persons should be considered.

The general rules on the termination of an employment relationship apply under Swiss law: any employment contract concluded for an indefinite period may be unilaterally terminated by both employer and employee, subject to the contractual or (if no contractual notice period was agreed) statutory notice periods for any reason (ordinary termination).

The termination notice needs to be physically received before the notice period can start, meaning the notice needs to be received by the employee before the end of a month so that the notice period can start on the first day of the next month. If notice is not received before the end of the month, the notice period would start the month following the receipt of the notice. A termination notice might be either delivered by mail or personally.

Swiss law does not provide for payment in lieu of a notice period. The only option in this regard is to either send the employee on garden leave or to agree within the termination agreement to terminate the employment relationship per an earlier termination date than the one provided for in the termination notice.

As a general rule, an employment contract may be terminated by either party for any reason. However, Swiss statutory law provides for protection from termination by notice for both employers and employees, distinguishing between abusive and untimely notices of termination.

Based on social policy concerns, the employer must observe certain waiting periods, during which a notice cannot validly be served (so-called untimely notice). Such waiting periods apply (art. 336c CO), for example, during compulsory military or civil defence service, full- or part-time absence from work due to illness or an accident, or during an employee's pregnancy and 16 weeks following the birth of the child. Any notice given by the employer during these waiting periods is void. Any notice given before the respective period is effective, but once the special situation has occurred and for the period it lasts, the running of the applicable notice period is suspended and only continues after the end of the period in question.

In addition, Swiss civil law defines certain grounds based on which terminations are considered abusive (article 336 CO). Termination by the employer might be considered abusive (eg, if it is based on a personal

characteristic of the other party (eg, gender, race, age), or if the other party exercises a right guaranteed by the Swiss Federal Constitution (eg, religion or membership in a political party) unless the exercise of this right violates an obligation of the contract of employment or is seriously prejudicial to the work climate). If the employer abusively terminates the employment contract, the employer has to pay damages to the employee and a penalty of up to six months' remuneration (article 336a CO). Nevertheless, an abusive termination remains valid.

Regarding settlement agreements, Swiss employment law allows the conclusion of such agreements, but there are strict limits on the parties' freedom of contract. Termination agreements may not be concluded that circumvent statutory provisions on employee protection. According to Swiss case law, termination agreements are usually valid and enforceable if both parties make real concessions, and if the agreement is also favourable for the employee. To conclude a termination agreement initiated by the employer, the employee must also be granted a sufficient reflection period. No further formalities need to be observed when concluding termination agreements, although it is generally advisable to have them in writing.

Last updated on 16/04/2024



## United States

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Form U5, the Uniform Termination Notice for Securities Industry Registration, is used by broker-dealers to terminate the registration of an associated person with FINRA and in other applicable jurisdictions and self-regulatory organisations. A FINRA member firm must file Form U5 within 30 days of an employee's termination. This form includes the reason for an employee's departure and must include a detailed description of the reasons for termination. Employee appeals related to the content of the U5 are arbitrated before FINRA (eg, if an employee challenges their termination).

### **Payments to retiring employees**

FINRA prohibits paying commissions to unregistered persons, except for retired representatives receiving trailing commissions where a bona fide contract was entered into between the broker-dealer and the retiring employee.

### **California**

California law prohibits the use of non-disclosure provisions in settlement agreements that are designed to restrict an employee's ability to disclose information about unlawful acts in the workplace, including information pertaining to harassment or discrimination or any other conduct the employee has reason to believe is unlawful. Provisions protecting the identity of a claimant are permitted where requested by the claimant. California law also prohibits "no-rehire" provisions in settlements of employment disputes, with limited exceptions for employees whom the employer, in good faith, determined engaged in sexual harassment or sexual assault, or any criminal conduct.

Last updated on 22/01/2023

## **13. Are there any particular rules that apply in relation to the use of post-termination restrictive covenants for employees in the financial services sector?**



## Hong Kong



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There are no particular rules that apply concerning the use of post-termination restrictive covenants for employees in the financial services sector. The rules concerning post-termination restrictive covenants are governed by common law principles in which they will only be enforced if the restriction is necessary for the protection of the employer's legitimate business interest and is reasonable in scope and duration.

Last updated on 22/01/2023



## India

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Post-termination non-competes are not enforceable, as they are treated as a restraint of trade. Courts have given prevalence to the livelihood of the employee over the employer's interests. However, a reasonable non-solicit restriction may be enforceable in India.<sup>[1]</sup>

Employees in financial services are also bound by post-employment (for both resignation and retirement) obligations.<sup>[2]</sup> RBI employees<sup>[3]</sup> who cease to be in service should not accept or undertake "commercial employment"<sup>[4]</sup> for one year from the date on which they cease to be in service without the prior approval of the concerned authority. For SEBI employees<sup>[5]</sup>, the cooling-off period is also one year. "Commercial employment"<sup>[6]</sup> broadly includes employment in any company or setting up their own practice without having professional qualifications and relying only on official experience. Such engagement may bestow an unfair advantage upon clients by virtue of the ex-employees' prior experience at the organisation. The grant of prior approval by the concerned authority is dependent on whether there is any ensuing conflict of interest from such engagement.

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[1] Employment Contracts in India: Enforceability of Restrictive Covenants, available at <[https://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research%20Papers/Employment\\_Contracts\\_in\\_India.pdf](https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Employment_Contracts_in_India.pdf)>

[2] Section 55, SEBI (Employees' Service) Regulations 2001.

[3] General Administration Manual, RBI, available at <<https://rbidocs.rbi.org.in/rdocs/content/pdfs/71073.pdf>>

[4] Section 2, Regulation 37A, RBI Staff Regulations, 1948.

[5] Section 55(3), SEBI (Employees' Service) Regulations 2001.

[6] Section 55(2), SEBI (Employees' Service) Regulations 2001; Section 2, Regulation 37A, RBI Staff Regulations, 1948.

Last updated on 16/04/2024



## Switzerland

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There are no particular rules that apply concerning the use of post-termination restrictive covenants for employees in the financial services sector in Switzerland. Rather, general post-contractual non-compete regulations come into play: the parties of an employment contract may agree on a non-compete clause,



which must be included in the employment contract in writing to be valid. For the non-compete clause to be relevant, it must be sufficiently limited in terms of time, place and subject matter. Normally, the duration of a post-termination non-compete clause is no more than one year; however, the statutorily permissible duration is three years.

As a prerequisite for a contractual non-compete clause to be binding, access to sensitive data is required. The employee must either have access to customer data or manufacturing or business secrets. However, access alone is not enough. There must also be the possibility of harming the employer using this knowledge.

If a relationship between the customer and the employee or employer is personal (which is, for example, the case for lawyers or doctors), a post-termination non-compete clause is not applicable according to the Federal Supreme Court.

If there is an excessive non-compete clause, this can be restricted by a judge. In practice, most of the time, no restriction of the post-termination non-compete clause is imposed if the employer offers consideration in return for the agreement. The prohibition of competition may become invalid for two reasons. Firstly, the clause can become irrelevant if the employer has no more interest in maintaining the non-compete clause. Secondly, the clause is not effective if the employer has terminated the employment relationship. However, this does not apply if the employee has given the employer a reason to terminate the employment relationship.

Swiss employment law does not provide for any compensation for a post-termination non-compete clause.

Last updated on 16/04/2024



## United States

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The enforceability of restrictive covenants varies greatly depending on applicable state law. Many states impose specific requirements or limitations on enforceable covenants.

FINRA-regulated firms must comply with additional regulations:

- FINRA rules prohibit interference with a customer's choice to follow a former representative during a change in employment where there is no existing dispute with the customer about the account. The FINRA-registered agent must help transfer a customer's account in the event of such a customer request. Note that this only explicitly affects requests by customers and not solicitation by a representative. A non-solicit provision might be upheld whereas a non-compete might not.
- Broker-dealer firms that are signatories to the Protocol for Broker Recruiting are subject to additional requirements. Under this protocol, a departing employee may be permitted to take certain information regarding clients they serviced while at the firm to a new employer and use that information to solicit clients. Non-signatories are not bound to this protocol and can sue departing brokers for violating the terms of otherwise enforceable covenants.

Non-competes and so-called garden leave provisions are regularly included in termination documents. The enforceability of these covenants vary based on jurisdiction, with courts evaluating provisions based on duration and geographic scope.

### New York

New York law disfavors non-compete agreements as a general rule. However, such agreements may be enforceable if the restrictions are reasonable and are intended to protect a legitimate interest. A court can enforce a non-compete only if the covenant:

- is no greater than required to protect an employer's legitimate interests;

- does not impose undue hardship on the employee;
- does not cause injury to the public; or
- is reasonable in duration and geographic scope.

## California

California law does not allow post-employment non-compete or non-solicit agreements except agreements involving the sale or dissolution of a business. California law protects employer confidential information and prohibits current or former employees from using employer confidential information in the solicitation of employees.

Last updated on 22/01/2023

# 14. Are non-disclosure agreements (NDAs) potentially lawful in your jurisdiction? If so, must they follow any particular form or rules?



## Hong Kong

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Non-disclosure agreements are legally enforceable in Hong Kong. They follow the contract law rules and there is no other particular form or rules. To be enforceable, a non-disclosure agreement must protect information that is both confidential and valuable. There are common exceptions where confidentiality will not apply to certain information, including information available in the public domain, information lawfully received from a third party without proprietary or confidentiality limitations, information known to the employee before first receipt of same from the employer, and information disclosed in circumstances required by law or regulatory requirement.

Last updated on 22/01/2023



## India

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NDAs are governed by the Indian Contract Act, 1872 and are generally lawful in India.

Generally, post-contract restrictive covenants like non-compete clauses that restrain a person's exercise of lawful trade, profession or business are declared void because of Section 27 of the Indian Contract Act.

The enforceability of NDAs may be affected if they restrain an employee from exercising a lawful profession, trade or business. Accordingly, an NDA crafted to protect the "confidential information" of the former employer but not to impose the above-mentioned restraints on the employee is saved from any clash with Section 27 of the Indian Contract Act and is, therefore, enforceable in the courts of law in India. If NDAs prohibit an employee from disclosing commercial or trade secrets, then they cannot be held to be in restraint of trade. This was observed by the Bombay High Court in *VFS Global Services Pvt Ltd v Mr Suprit Roy*<sup>[1]</sup>.

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[1] 2008 (2) BomCR 446.

Last updated on 16/04/2024

## Switzerland

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Non-disclosure agreements (NDAs) are generally lawful in Switzerland. However, NDAs are not regulated by statutory law and therefore do not have to follow any particular statutory form or rule. Nevertheless, most NDAs often contain a similar basic structure.

The core clauses of an NDA concern:

- manufacturing and business secrets or the scope of further confidentiality;
- the purpose of use;
- the return and destruction of devices containing confidential information; and
- post-contractual confidentiality obligations.

As a general rule, it is recommended to use the written form.

To ensure possible enforcement of an NDA in the employment context, the requirements of a post-contractual non-compete obligation (see below) must be met.

Last updated on 16/04/2024

## United States

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Non-disclosure agreements are currently permissible under United States law with some exceptions, typically pertaining to whistleblower, harassment, and discrimination matters. On 7 December 2022, President Joe Biden signed the Speak Out Act, which prohibits the enforcement of non-disclosure and non-disparagement provisions that were agreed to before an incident of workplace sexual assault or sexual harassment occurred. In other words, it does not prohibit these provisions in settlement or severance agreements.

Both Dodd-Frank and SOX prohibit employers from impeding an individual's whistleblowing process. Confidentiality provisions should expressly authorise employee communications directly with, or responding to any inquiry from, or providing testimony before the SEC, FINRA, any other self-regulatory organisation or any other state or federal regulatory authority.

The United States Tax Cuts and Jobs Act of 2018 discourages NDAs in the settlement of sexual harassment claims. Under this law, employers settling claims alleging sexual harassment or abuse that include a confidentiality or non-disclosure provision in the settlement agreement cannot take a tax deduction for that settlement payment or related attorneys' fees.

Under the National Labor Relations Act, employees (except for supervisors) cannot be prohibited from discussing their compensation or working conditions

### **California**

- California Law prohibits NDAs that would prevent employees from discussing or disclosing their compensation or discussing the wages of others. However, California permits the use of a non-disclosure provision that may preclude the disclosure of any amount paid in any separation or settlement agreement.
- California imposes restrictions on the use of non-disclosure provisions that are designed to restrict an employee's ability to disclose information about unlawful acts in the workplace, including information pertaining to harassment or discrimination or any other conduct the employee has reason to believe is unlawful in employment agreements, settlement agreements, and separation agreements.

- California employers cannot:
  - require employees, in exchange for a raise or a bonus, or as a condition of employment or for continued employment, to sign any non-disparagement or non-disclosure provision that denies the employee the right to disclose information about unlawful acts in the workplace;
  - include in any separation agreement a provision that prohibits the disclosure of information about unlawful acts in the workplace; or
  - include a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to claims for sexual assault, sexual harassment, workplace harassment or discrimination, retaliation, or failure to prevent workplace harassment or discrimination that are filed in a civil or administrative action, unless the settlement agreement is negotiated, which means that the agreement is voluntary, deliberate, informed, provides consideration of value to the employee, and the employee is giving notice and an opportunity to retain an attorney or is represented by an attorney.

## New York

- New York law prohibits NDAs that:
  - prevent an employee from discussing or disclosing their wages or the wages of another employee.
  - prevent an employee from disclosing factual information related to a future discrimination claim, unless the agreement notifies employees that it does not prevent them from speaking to the EEOC, the New York Department of Human Rights, and any local human rights commission or attorney retained by the individual.

New York law also prohibits employers from mandating confidentiality or non-disclosure provisions when settling sexual harassment claims (though allows such provisions where it is the employee's preference to include them).

Last updated on 22/01/2023

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