

Employment in Financial Services

Contributing Editor

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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?

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.

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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 disfavours 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.

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