

Employment in Financial Services

Contributing Editor

Louise Skinner at Morgan Lewis & Bockius

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?

Ireland

Author: *Karen Killalea, Ciara Ni Longaigh*
at Maples Group

RFSPs must satisfy themselves that all CF and PCF candidates or employees comply with the F&P Standards. Pre-employment due diligence must be performed, including asking the candidate to certify they will comply with the F&P Standards and notify the RFSP immediately of any change in circumstance that may mean they no longer comply. Employers must continue to ensure that in scope employees comply with the F&P Standards and must complete an annual declaration to this effect. This means that due diligence must continue throughout the employment relationship and not just at the recruitment stage.

Candidates for PCF roles must complete an online individual questionnaire, which is submitted to the CBI in advance of appointment to the role through the Central Bank portal. The CBI must grant its approval for the PCF appointment before a candidate can take up the role. Any PCF offer of employment must be conditional on that approval being obtained. The CBI may request applicants attend an interview as part of the approval process.

Employers should take all reasonable steps to secure references from previous employers in order to due diligence the candidate's compliance with the F&P Standards and their suitability for the role. However, an employer is not obliged to issue a reference in respect of a former employee which means that a prospective employer may not be able to secure a reference from a previous employer. The CBI does not oblige employers to either issue or obtain a reference as part of screening checks, however employers must make good efforts to do so.

There are material obstacles from a data privacy and practical perspective to employers conducting criminal background checks in relation to prospective employees. Data relating to criminal convictions is special category data under the GDPR. Employers would need to satisfy both Article 6 and Article 9

requirements under the GDPR to justify the processing of this data. In terms of Article 9, this means employers would need to show reasons of substantial public interest or that they are carrying out their legal obligations in processing the data. In terms of Article 6 the employer will need to show that the processing is necessary to comply with a legal obligation to which the employer is subject or the processing is necessary for the employer's legitimate interests for example to ensure the suitability and honesty of its employees and to protect its reputation. Employers are also prevented from asking candidates about "spent convictions" which are usually minor criminal offences dating back over seven years.

Pre-employment medical checks must also have a clear legal basis justifying the processing of an employee's medical and health information.

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United States

Author: *Melissa Hill, Leora Grushka*
at Morgan Lewis & Bockius

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.

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



Ireland

Author: *Karen Killalea, Ciara Ni Longaigh*
at Maples Group

The following documents should be in place:

- written statement of terms of employment e.g., a written contract of employment that complies with the Terms of Employment (Information) Act 1994-2014 and the European Union (Transparent and Predictable Working Conditions) Regulations 2022;
- grievance and disciplinary policy;
- protected disclosures policy;
- dignity at work policy (anti-harassment and bullying prevention);
- safety statement; and
- where possible, an employee handbook that details all the statutory leave policies and other bespoke policies of the RFSP.

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United States

Author: *Melissa Hill, Leora Grushka*
at Morgan Lewis & Bockius

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).

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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?



Ireland

Author: *Karen Killalea, Ciara Ni Longaigh*
at Maples Group

Yes, under the Minimum Competency Regime (see question 1), employees who perform certain prescribed functions and roles in prescribed RFSPs such as insurance businesses and credit unions, must meet the required competencies and qualifications standards.

The 2023 Act also introduces a new requirement that persons can only be permitted to perform a CF role (including a PCF role) where a certificate of compliance with the F&P Standards given by the firm is in force (Certification Regime).

As part of the Certification Regime, a certificate of compliance may only be given if:

1. the firm is satisfied on reasonable grounds that the person complies with the F&P Standards; and
2. the person has agreed to abide by the F&P Standards and to notify the firm without delay if for any reason they no longer comply with the F&P Standards.

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United States

Author: *Melissa Hill, Leora Grushka*
at Morgan Lewis & Bockius

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.

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



Ireland

Author: *Karen Killalea, Ciara Ni Longaigh*
at Maples Group

Yes. Common Conduct Standards and Additional Conduct Standards were introduced by the 2023 Act and employers need to update employees' contractual documents to reflect same.

The Common Conduct Standards set out standards of behaviour expected of individuals carrying out Controlled Functions (CFs) within firms. The Common Conduct Standards are basic standards such as acting with honesty and integrity with due skill, care and diligence and in the best interest of customers. An individual that is subject to the Common Conduct Standards will be expected to take reasonable steps to ensure that the Common Conduct Standards are met.

In addition, senior executives, which includes individuals performing PCF roles (e.g. the directors, designated persons) and other individuals who exercise significant influence on the conduct of a firm's affairs (CF1) will also have Additional Conduct Standards related to running the part of the business for which they are responsible. An individual who performs a PCF/CF1 role should take reasonable steps to

ensure that the Additional Conduct Standards are met.

When SEAR comes into effect, those performing senior executive functions will be required to have detailed statements of responsibility setting out the scope of their role. The Duty of Responsibility which the PCF will have under SEAR is extensive. The duty extends to taking any step that is reasonable in the circumstances to avoid a breach by their firm of its obligations in relation to an aspect of the firm's affairs for which the PCF is responsible.

There are a number of General Prescribed Responsibilities that will need to be assigned to PCFs:

- (a) Performance by the Firm of its obligations under SEAR
- (b) Performance by the Firm of its obligations under the F&P framework
- (c) Performance by the Firm of its obligations under the new Conduct Standards
- (d) Responsibility for overseeing the adoption of the firm's policy on diversity and inclusion.

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United States

Author: *Melissa Hill, Leora Grushka*
at Morgan Lewis & Bockius

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.

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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?

Ireland

Author: *Karen Killalea, Ciara Ni Longaigh*
at Maples Group

No.

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United States

Author: *Melissa Hill, Leora Grushka*
at Morgan Lewis & Bockius

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.

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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?

Ireland

Author: *Karen Killalea, Ciara Ni Longaigh*
at Maples Group

There are prescriptive, sector-specific requirements, which apply to the remuneration of specified categories of employees or directors, and which apply in the asset management, investment services, banking, and insurance sectors.

Employers in these sectors are tasked with ensuring that the remuneration paid to material risk takers (individuals whose professional activities have a material impact on an RFSP's risk profile) or identified staff

align with the RFSP risk profile.

There are detailed rules with technical guidance (emanating from EU law) specific to each sector, but at a high level they (to differing degrees) set out rules on; variable remuneration composition, ratios or other metrics to compare variable to fixed remuneration to ensure it is appropriate; malus requirements, which would allow the RFSP to cancel or reduce the employee's variable remuneration before it is paid out; and clawback provisions which allow RFSPs to recover variable remuneration after it has been awarded. It is important to ensure that employees' contracts of employment acknowledge that any variable remuneration will be subject to all regulatory restrictions and rules and may be clawed back in certain circumstances.

The CBI's 2014 Guidelines on Variable Remuneration Arrangements for Sales Staff also emphasise the importance of remuneration structures to have sufficient deterrents built into them (such as malus and clawback mechanisms) to avoid incentivising undesirable/risky behaviours from sales staff in the banking, insurance and investment services sectors.

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United States

Author: *Melissa Hill, Leora Grushka*
at Morgan Lewis & Bockius

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).

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



Ireland

Author: *Karen Killalea, Ciara Ni Longaigh*
at Maples Group

Yes. A CF employee, subject to the Minimum Competency regime, will be required to complete CPD training. Evidence of meeting that CPD requirement is also a factor in determining a person's F&P. RFSPs must maintain records of CPD training provided to CFs to demonstrate compliance with the minimum competency regime.

The 2023 Act also introduces new training obligations for those subject to the Common and Additional Conduct Standards, with firms being required to train those persons on how these obligations apply to them and their new duties of responsibility. Attendance at, or completion of, training in respect of the Conduct Standards should be mandatory and such attendance should be carefully documented with refresher training rolled out periodically.

Employers within the scope of the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 - 2021 (including RFSPs) are required to provide annual training to relevant staff and directors on its requirements and the RFSP must have procedures in place to comply with that legislation and associated guidance.

Depending on the RFSP's business, additional mandatory training may be needed annually, for example, on topics such as market abuse.

The designated person for responding to protected disclosures should be trained and competent in the identification and handling of protected disclosures.

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United States

Author: *Melissa Hill, Leora Grushka*
at Morgan Lewis & Bockius

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).

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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?



Ireland

Author: *Karen Killalea, Ciara Ni Longaigh*
at Maples Group

Yes there are. They are:

- the F&P Standards;
- the minimum competency regime; and
- the IAF and SEAR (see question 1).

There are also sector-specific conduct of business requirements in legislation and codes, including the Consumer Protection Code 2012, the MiFID II regime, and other regulatory requirements applicable to RFSPs based on their industry sector that apply and deal with matters such as:

- error handling,
- disclosures to customers,
- acting in the best interests of customers; and
- complaints handling.

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United States

Author: *Melissa Hill, Leora Grushka*
at Morgan Lewis & Bockius

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 appropriate risk assessment that takes social media activities into consideration.

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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?



Ireland

Author: *Karen Killalea, Ciara Ni Longaigh*
at Maples Group

The CBI expects RFSPs to be open and transparent in their engagement, including concerning compliance with the F&P Standards and the Common Conduct Standards. While early versions of the IAF regulations and related guidance contained an obligation on a RFSP to report to the CBI if disciplinary action had been taken against an individual, the obligation was removed from the latest version of the draft legislation. The Guidance indicated that the CBI would expect that they would have already received relevant details as it provides that firms and persons performing PCF roles are required to report to the CBI where they suspect that a "prescribed contravention" may have occurred for the purposes of the CBI legislative framework and the CBI states that a breach of the Common Conduct Standards and/or Additional Conduct Standards is a "prescribed contravention" for these purposes.

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United States

Author: *Melissa Hill, Leora Grushka*
at Morgan Lewis & Bockius

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.

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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?



Ireland

Author: *Karen Killalea, Ciara Ni Longaigh*
at Maples Group

Yes. Concerning the prevention of wrongdoing, RFSPs should implement a written protected disclosures/whistleblowing policy that explains the secure and confidential internal and external reporting channels available to workers who wish to report relevant wrongdoings. The anti-retaliation protection should be explained and workers should understand from the policy how a report of relevant wrongdoing will be dealt with by the RFSP.

RFSPs should ensure that they have clear, up-to-date and fully compliant policies governing:

- dignity at work (including anti-harassment and anti-bullying measures); and
- grievance and disciplinary policies.

RFSPs should ensure that employees are trained on the RFSP's dignity at work (anti-bullying and harassment) policies to ensure that the RFSP's values, culture and commitment to preventing harassment and bullying are clear regarding their rights and obligations.

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United States

Author: *Melissa Hill, Leora Grushka*
at Morgan Lewis & Bockius

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.

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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?

Ireland

Author: *Karen Killalea, Ciara Ni Longaigh*
at Maples Group

Where possible it is important to try to resolve any outstanding issues that a PCF has or may have before the PCF's contract is terminated. An RFSP is required to give details of the circumstances of a PCF's termination of employment and to confirm whether or not there are outstanding issues regarding the PCF.

It is important to ensure that there are adequate provisions to govern the following in any settlement agreement or termination arrangements:

- adequate handover of operational responsibility;
- continued co-operation on operational matters within the employee's knowledge or in relation to matters that may subsequently be investigated by the CBI;
- secure return of all company property including any personal data; and
- post-termination confidentiality obligations and any other necessary post-termination restrictions.

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United States

Author: *Melissa Hill, Leora Grushka*
at Morgan Lewis & Bockius

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.

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Contributors



Ireland

Karen Killalea
Ciara Ni Longaigh
Maples Group



United States

Melissa Hill
Leora Grushka
Morgan Lewis & Bockius