

Employment in Financial Services

Contributing Editor

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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

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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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Netherlands

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Under Dutch law, all financial services sector companies must make substantiated assessments on the reliability and integrity of candidates to be appointed in integrity-sensitive positions. However, in practice, almost all financial services sector companies have made a pre-employment screening mandatory for all candidates (for any position).

The exact pre-screening process differs per financial service industry and company. In general, the following components are part of the pre-screening process: proof of identity; insolvency check; highest level of education; work experience (reference check); certificate of conduct (VOG, see question 3); and an integrity questionnaire.

Reference checks that go back five years are common in the financial services sector.

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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?



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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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All employees must provide identity documentation and required diplomas to the financial services sector employer (including relevant Wft diploma(s), see question 4).

Before entering into an employment agreement, almost all financial services sector companies require a certificate of conduct (VOG). A VOG is a document by which the Dutch minister of legal protection declares that a candidate's (judicial) past does not constitute an obstacle to fulfilling a specific task or position. When assessing a VOG application, the Dutch minister of legal protection checks whether a candidate has criminal offences to his name that pose a risk to the position or purpose for which he is applying for the VOG.

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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?



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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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According to Dutch law, financial services sector companies must guarantee the quality of their services. This means, among other things, that they must have skilled employees for the subjects on which they advise. After all, the consumer must be able to trust that an employee has the right knowledge and skills to provide appropriate advice.

Therefore, all financial services sector employees with substantive customer contact must have up-to-date professional competence at all times. This means that employees must be skilled, aware of current developments in their field, and can apply these in their work. The obligation to maintain up-to-date professional competence at all times is an open standard. Financial services companies may, therefore, decide for themselves how to implement this standard.

There is, however, a mandatory Wft diploma requirement for employees who provide financial advice. Which products and services an employee may provide advice on depends on the specific Wft diplomas he or she has obtained (after passing an exam). A Wft diploma is valid for a definite period (with a maximum of three years). To renew a Wft diploma, an employee must pass a new exam.

Furthermore, all candidates who will (co-)determine the policy of a financial services company must also be assessed by local authorities and will be tested for reliability and suitability.

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

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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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The reliability, propriety and fitness of (supervisory) directors and executives in the financial services sector, as well as employees in an integrity-sensitive position, must be "beyond doubt". This is also assessed by local authorities.

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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?

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No.

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There is no mandatory register for Dutch financial services employees.

Companies in the financial sector, however, must have a licence to provide financial services. Local regulators are responsible for the issuance of such licences. Companies in the financial sector with a license are published by the local regulator on a public register.

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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?

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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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Remuneration policy

Under Dutch law, financial services companies must implement an internal remuneration policy. Financial services companies must explain in the management report the relationship between the remuneration policy and the social function of the company.

Variable remuneration

The variable remuneration that a financial services company awards to an employee amounts to a maximum of 20% of that person's fixed annual remuneration. There are a (very) limited number of exceptions to this maximum.

Five-year statutory retention period for shares and other financial instruments

Financial services employees whose fixed remuneration consists of shares or related instruments may only

sell them after five years.

Adjustment or recovery of bonuses (claw-back)

Adjustment or recovery of bonuses is mandatory if a financial services employee has failed to meet appropriate standards of competence and proper conduct or has been responsible for conduct that led to a significant deterioration in the company's position.

Severance payments

Paying out severance payments by financial services companies is not allowed if the employee leaves voluntarily or if there are seriously culpable acts or omissions in the performance of the function. Severance payments for directors (or other policymakers) may not exceed more than 100 per cent of their fixed annual salary.

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



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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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Please see question 4.

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?

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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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Under Dutch law, financial services companies must maintain integrity and ensure safety, stability and integrity within their company. This also means that financial services companies must prevent their employees from committing criminal offences, other violations of the law or socially inappropriate behaviour that undermines confidence in the financial services sector or financial markets. For these reasons, it is common to implement company-specific codes of conduct.

There are many statutory general regulations and standards of behaviour that financial services employees are expected to adhere to. Moreover, all industries have their own specific industry-wide guidelines and codes of conduct.

An important statutory obligation for directors, (other) policymakers and employees with customer contact is to take an oath or promise before entering into employment. The oath or promise contains a declaration that – among other things – the employee will perform his or her duties with care and integrity, will put customer interests first and will make every effort to maintain and promote confidence in the financial services sector.

In addition to the oath or promise as mentioned above, there is also the “banker's oath”. This oath goes

further than the oath or promise mentioned above and is mandatory for all employees who work for banks.

Breaching guidelines, codes of conduct or the statutory oath could lead to disciplinary sanctions being taken by the company itself (such as termination of the employment contract) or by disciplinary supervisors (such as a reprimand or a fine).

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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?

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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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Financial services companies must report to local regulators any behaviour or event that poses a serious threat to the ethical conduct of the business of the company or may affect the reliability of policymakers, sound and controlled business operations and continuity.

Furthermore, there are several local disciplinary authorities where reports can be made about financial services employees who fail to comply with Dutch law, guidelines and rules of conduct.

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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?

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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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Financial services companies must create a safe and healthy work environment. Furthermore, financial services sector companies have a statutory responsibility to protect consumers from unethical, unprofessional and negligent behaviour and services. In this regard, it is advisable (and common) to implement an internal code of conduct.

Under Dutch law, financial services companies must set up an internal reporting procedure (with specific requirements) where suspected misconduct can be reported.

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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?

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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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There are no particular rules or protocols that apply when terminating the employment of financial services employees.

Please see question 7 for more information on severance payments.

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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?



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No there are no bespoke rules that apply. Post termination restrictions in Ireland are void as being in restraint of trade unless it can be shown that the restrictions are necessary to protect an employer's legitimate proprietary interest and they are proportionate and reasonable in their scope and duration to achieve that protection^[i].

[i] Law as of 15 April 2024

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There are no particular rules that apply concerning the use of post-termination restrictive covenants for financial services employees.

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

Ireland

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Yes. It is possible to use NDAs in Ireland and it is quite common for them to be used, but there are some limitations on their use and enforceability.

Certain mandatory reporting obligations will override a contractual non-disclosure agreement, such as the requirement for PCFs under section 38(2) of the CBI (Supervision and Enforcement) Act 2013 to disclose certain matters to the CBI.

Further, an NDA cannot extinguish an employee's right to anti-retaliation protection where the employee makes a protected disclosure either internally or externally under the Protected Disclosures Act 2014 - 2022.

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Since there is no specific legislation on NDAs under Dutch law, the general principle is that NDAs are permitted.

NDAs may never prevent a financial sector employee from reporting or revealing suspected misconduct.

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