Employment in Financial Services

Contributing Editor

Louise Skinner at Morgan Lewis & Bockius

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

Mexico

Author: *Héctor González Graf*
at Marván, González Graf y González Larrazolo

All employees, including general managers and officers, must keep information and documents confidential and may only provide information to the competent authorities or authorised parties, with the prior express authorisation of the user or client.

Also, employees must:

- not stop internal committees from carrying out their functions;
- disclose to the financial entity all information regarding the use of illegal resources, or any act against goods, services, an individual's life, or physical or emotional integrity, the use of toxic substances, or terrorist acts, so that the financial entity may provide the SHCP with a report on the subject; and
- in insurance or bonding Institutes, not offer discounts, reduce premiums or grant different benefits than those outlined in the corresponding policy.

General managers and officers must provide reports and information to the board of directors and the corresponding authorities periodically. The general manager must also provide precise data and reports to assist the board of directors in making prudent decisions.

General managers must develop and present to the board of directors, for its approval, adequate policies for employment and the use of material and human resources, including restrictions on the use of goods, supervision and control mechanisms, and the application of resources to the company's activities consistent with their business purposes.

Insurance and bond companies will respond to the conduct of the general manager and officers, without prejudice to the civil and criminal liabilities that they may personally incur.

Also, if any conflict of interest exists or arises, general managers and officers must inform their employers immediately and suspend any activity within the scope of the contract that gives rise to the conflict until the matter is addressed.

Additionally, general managers and officers must verify the compliance of all individuals under their responsibility with all applicable legal provisions for financial services. These include: confidential obligations; the development of reports; informing their direct superior, officers, general manager or board of directors if there is a conflict of interest; informing the SCHP and Prosecutor's Office if there is an act, operation or service using illegal resources, or an act that may harm the company, or the health or wellbeing of an individual or the general public.

Specifically, general managers in brokerage houses must:

- design and carry out a communications policy regarding identifying contingencies;
- implement and distribute the continuity business plan within the brokerage house and establish training programmes;
- inform the CNBV of contingencies in any of the systems and channels for clients, authorities and central securities counterparties;
- ensure that the continuity business plan is submitted for efficiency testing; and
- inform the CNBV in writing of the hiring or removal of the responsible party for internal audit functions.

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Switzerland

Author: *Simone Wetzstein, Matthias Lötscher, Sarah Vettiger*
at Walder Wyss

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.

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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?

Mexico

Author: *Héctor González Graf*
at Marván, González Graf y González Larrazolo

Under the Constitution and the FLL, an employee has the right to secure employment (employment stability right) and an employer cannot terminate an employment contract without legal cause.

An employer may only dismiss an employee under one or more of the legal causes provided for in article 47 of the FLL (eg, lack of ethics, dishonesty, violence, harassment, absence more than three times in a month without authorisation, disobedience, and intoxication). Dismissal should be carried out within the one month after the employer becomes aware of the legal cause for termination (statute of limitations).

The FLL requires employers to provide the employee with a written notice of dismissal in which the date and causes are expressly described. A lack of written notice makes the termination unlawful and triggers

the severance obligation described below.

In addition, financial entities may end the employment of individuals without notice in the following circumstances:

- if a general manager or officer no longer complies with the legal requirements to occupy their position (see question 2);
- if the CNBV or the CNSF, as applicable, disqualifies, removes, or relieves individuals from their positions; and
- if a brokerage house's proxies are no longer authorised by the CNBV.

If there are no legal grounds to justify the termination and an employee is dismissed, the dismissal is wrongful and the employee has the right to:

- be reinstated (article 49 of the FLL establishes the cases where an employer is exempt from reinstating an employee, for example employees of trust); or
- a severance payment (three months of salary, plus 12 days of salary for each year of service capped at twice the general minimum wage of the geographic area where the employee rendered services, plus 20 days of salary per year of service, and, if applicable, back pay.

These obligations are only enforceable (reinstatement and payment of severance) if the dismissal is deemed wrongful by the labour authorities in their corresponding resolution. Nevertheless, if there are no legal grounds that justify the termination, it is common practice to pay the severance in advance if there is no intention to reinstate the employee after termination.

When termination occurs, financial entities must inform the self-regulated bodies to revoke powers of attorney within five days. The self-regulated body must then inform the CNBV of the revocation. For the removal or resignation of the general manager and officers, financial entities must inform the corresponding authority within five to ten days, depending on the type of financial entity.

For the termination of employment of employees in general positions, there is no particular document to execute other than a termination document (resignation or employment termination agreement and release).

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Switzerland

Author: *Simone Wetzstein, Matthias Lötscher, Sarah Vettiger*
at Walder Wyss

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.

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Contributors

Mexico

Héctor González Graf
Marván, González Graf y González Larrazolo

Switzerland

Simone Wetzstein
Matthias Lötscher
Sarah Vettiger
Walder Wyss