

Employment in Financial Services

Contributing Editor

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

Mexico

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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

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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.

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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?

Mexico

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There are no particular rules or legal provisions concerning the use of post-termination restrictive covenants. Nevertheless, it is common practice to execute termination agreements with officers and general managers whereby non-disclosure, non-compete and non-solicitation provisions are set forth by the parties. The use of non-compete and non-solicitation provisions in termination agreements is only recommended for very specific employees and must be negotiated when the employment is terminated.

Plain non-compete and non-solicitation provisions binding employees after termination are not enforceable under Mexican law, because the Mexican Constitution grants individuals the right to perform any job, industry, commerce or work as long it is legal and not prohibited by a judicial or governmental decision.

Post-employment non-compete obligations, which are treated as an exception, must be agreed upon in connection to specific activities that may be deemed unfair competition, and may be enforced with economic compensation.

The period of enforceability must be proportional to:

- the number of years of employment;
- the level of information and importance of the position;
- the economic compensation; and
- the scope of the non-compete obligations.

Unfair competition and solicitation – either for business, or to induce other individuals to leave the company, while the employment contract between an individual and employer is in effect – may be considered misconduct. This misconduct is a cause of termination without notice for the company, and therefore it is feasible to enforce it.

The terms and conditions must be specifically addressed in writing, within the employment termination agreement, making express reference to the importance of the information, potential competition, activities that may be deemed unfair competition, intellectual property, and commercial advantages. The compensation paid is usually similar to or above the income of the employee while he or she was active with the company. Clawback and damages payments for breach of contract are standard practices.

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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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