

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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Under Swiss civil law, there is no requirement to apply pre-screening measures. However, while not a statutory requirement under Swiss financial market laws per se, companies subject to these laws apply pre-screening measures to ensure that a prospective financial services employee meets the requirements set forth by these laws. In particular, regulated companies such as banks, securities firms, insurance companies, fund management companies, managers of collective investment schemes and asset managers are required to obtain authorisation from the Swiss Financial Market Supervisory Authority (FINMA) relating to strategic and executive management and each change thereto.

As a general rule, the higher the responsibility or position of a person, the more requirements financial services employees may need to fulfil. Persons holding executive or overall management functions (eg, a member of the board or members of the senior management) are required to fulfil certain requirements set forth by the applicable Swiss financial market regulations. Such requirements may include providing current CVs showing relevant work experience and education as well as excerpts from the debt and criminal register. It may also include providing various declarations (eg, concerning pending and concluded proceedings, qualified participations and other mandates). Furthermore, financial services employees holding certain control functions (eg, compliance officer, risk officer and their deputies) may also be required to prove that they are suitable for the position by providing, for example, a current CV showing relevant work experience and education.

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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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No special contractual documents are required when engaging employees within the financial services industry.

However, it is generally recommended to conclude a written employment contract with each employee. FINMA, for instance, requires a copy of employment contracts concluded with senior management of regulated entities.

In particular, the employment contract should reference the employer's (regulatory) set of directions and the employee's obligation to comply with said instructions. In addition, because regulated companies such as banks, securities firms, fund management companies, managers of collective assets or asset managers are required to obtain authorisation from FINMA before the engagement of key personnel, it may be sensible to include a condition precedent relating to FINMA's acceptance of the relevant employee in the employment contract.

The mandatory, partially mandatory, and optional elements of an individual employment contract are outlined in article 319 et seq of the CO (in particular regarding remuneration, working time, vacation, and incapacity for work). Further regulations may apply based on collective bargaining agreements.

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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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Depending on the status of the employing entity and the position of the financial services employee, a special certification or, more generally, proof of relevant work experience and sufficient education is required.

As a general rule, persons holding executive, overall management, oversight or control functions (eg, a member of the board, CEO, compliance officer, risk officer or their deputies) in regulated companies such as banks, insurance companies, securities firms, fund management companies, managers of collective assets or asset managers are required to demonstrate to FINMA that they have sufficient relevant work experience and education. As proof, FINMA requests current CVs, diplomas, certifications and contact details of references. The scope and nature of the future business activity and the size and complexity of the company in question also need to be considered.

Furthermore, client advisers of so-called financial service providers (eg, investment advisers) must have sufficient expertise on the code of conduct and the necessary expertise required to perform their work. Client advisors often prove that these requirements have been met by successfully attending special courses. In addition, insurance intermediaries registered with FINMA's insurance intermediary register have to prove that they have undergone sufficient education and have sufficient qualifications. For this purpose, FINMA has published a list of different Swiss and foreign educational qualifications deemed to be sufficient on its website.

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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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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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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 universal register of all financial services employees. Rather, different Swiss financial market laws provide for a registration requirement that may apply to individual financial service employees. Whether a particular financial market law, and, consequently, a registration requirement, applies to a financial services employee depends specifically on the regulatory status of the employing entity and the particular activity of that employee.

- Also, client advisers of Swiss or foreign financial service providers (eg, investment advisers) may be required to register with the adviser register, unless an exemption applies. Client advisers are the natural persons who perform financial services on behalf of a financial service provider or in their own capacity as financial service providers. Client advisers are entered in the register of advisers if they prove that i) they have sufficient knowledge of the code of conduct set out in the financial services regulations and the necessary expertise required to perform their activities, ii) their employee has taken out professional indemnity insurance or that equivalent collateral exists, and iii) their employee is affiliated with a recognized Swiss ombudsman in their capacity as a financial service provider (if such affiliation duty exists).

Furthermore, “non-tied” insurance intermediaries (ie, persons who offer or conclude insurance contracts on behalf of insurance companies) are required to register with FINMA’s register of insurance companies. To register, persons must inter alia prove that they have sufficient qualifications and hold professional indemnity insurance or provide an equivalent financial surety. “Tied” intermediaries will no longer be able to register voluntarily in the FINMA register (unless this is required by the respective country of operation for activities abroad).

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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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Swiss civil law provides for special rules that govern the compensation of current and former members of inter alia the board and executive committee (Ordinance against Excessive Compensation) of Swiss companies limited by shares that are listed on a Swiss or foreign stock exchange. In addition, there are disclosure provisions listed companies need to follow concerning remuneration under stock exchange regulations.

In addition to the above, FINMA has formulated ten principles regarding remuneration that banks, securities firms, financial groups and conglomerates, insurance companies, insurance groups and conglomerates are required to implement. The principles serve as minimum standards for the design, implementation and disclosure of remuneration schemes.

These schemes should not incentivise to take inappropriate risks and thereby potentially damage the stability of financial institutions.

One of the focal points of the principles is variable remuneration that depends on business performance and risk. In particular, all variable remuneration must have been earned by the company over the long term. Consequently, remuneration is dependent on performance, taking into account the sustainability of such performance as well as the risks. That said, FINMA's principles do not limit the amount of variable remuneration. However, FINMA aims to prevent the granting of high remuneration based on large risks and the generation of short-term, unsustainable earnings. Furthermore, persons who have significant responsibility relating to the risk or receive a high total remuneration, must receive a significant part of the variable remuneration on a deferred basis and consequently, in a way that is linked to the current risk. Under the FINMA principles, "clawback" and "malus" arrangements are permitted.

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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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In general, regulated companies (eg, banks, insurance companies or asset managers) are required to set up and maintain an organisation that ensures compliance with applicable financial market laws. Given the organisational measures and depending on the regulatory status of the employing entity and the position and activities of the financial services employee, there are training requirements.

While Swiss financial market regulations do not have an exhaustive list of exact training requirements, FINMA requires, among others, that the highest bodies of supervised companies (eg, executives of board members of banks, securities firms, insurance and reinsurance companies, fund management companies, managers of collective assets or asset managers) can fulfil the requirements of the so-called fit and proper test. These requirements extend to all character-related and professional elements that enable an officeholder to manage a supervised company in compliance with applicable laws. Part of the professional elements are relevant work experience and education. In addition, persons holding key positions (eg, compliance and risk officers and their deputies) are required to demonstrate sufficient know-how because of their work experience and education.

That said, the Swiss financial services and insurance supervisory regulations provide for more concrete training requirements. In particular, client advisers of Swiss and foreign financial service providers (eg, investment advisers) may need to demonstrate that they have sufficient knowledge of the code of conduct rules of the Swiss financial services regulation and the necessary expertise required to perform their activities. In addition, insurance intermediaries registered with FINMA's insurance intermediary register have to prove that they have undergone sufficient education and have sufficient qualifications. On its website, FINMA has published a list of different educational Swiss and foreign qualifications that it deems to be sufficient.

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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?

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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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Depending on the regulatory status of the employing entity and, as the case may be, on the exact activities of a financial service employee, a financial service employee needs to adhere to certain code of conduct rules (eg, regarding transparency and care, documentation and accountability).

Supervised companies in Switzerland are, in principle, required to set up an organisation that ensures the compliance with Swiss financial market laws and its statutory code of conduct rules. For this purpose, among others, companies are required to issue regulations that their employees must follow.

Under Swiss financial market laws, code of conduct rules are generally based on abstract statutory rules and concretized by recognised privately organised associations.

In particular, several professional organisations (eg, the Swiss Bankers Association or the Asset Management Association) and self-regulated organisations issue their own set of code of conduct rules that members are required to follow.

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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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As a general principle, supervised companies are required to ensure that persons holding, in particular, executive, overall management, oversight or control functions fulfil the requirements of the "fit and proper" test. Consequently, such persons must be of good repute and can guarantee compliance with applicable laws and regulations.

If a person cannot guarantee that the regulatory requirements are fulfilled at all times (eg, because of a material breach of its duties) the employing entity and its audit companies may be required to immediately report to FINMA, respectively, any incident that is of significance.

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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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There are no specific whistleblowing laws in Switzerland, but employees have a right to report grievances and misconduct to their employer, provided that they do not commit a breach of a fiduciary duty or cause damage (eg, malicious false reports).

However, employees must also report material facts or incidents of misconduct and the misconduct of other employees discovered in the course of their work to their employer under the employee's duty of loyalty.

On the other hand, an employee's duty of loyalty and, in particular, an employee's statutory duty of confidentiality flowing from it may also give rise to a duty to not report.

Based on the current legal situation, there may be a conflict between an employee's need to report grievances (internally or externally) and a possible duty to not report with regard to an external report. An attempt to resolve this conflict through legislation has failed, and a new attempt to introduce whistleblowing legislation in Switzerland is not expected anytime soon.

Concerning whistleblowing by employees to a public authority or even to the public, employees are regularly prevented from doing so by confidentiality obligations under criminal law. Any justification for such a disclosure will usually only be examined in the context of a criminal investigation against the employee.

However, larger companies have taken measures and set up certain processes to uncover and prevent wrongdoing without having to do so under mandatory laws. For instance, companies have implemented internal or external reporting offices.

When it comes to harassment, an employer is explicitly required to protect employees from sexual harassment (prevention) and to protect any victims from further disadvantages (active protection). According to the Gender Equality Act, victims of sexual harassment may be awarded compensation of up to six months' wages by the courts, in addition to damages and restitution, unless the employer can prove that they have "taken all measures that are necessary and appropriate according to experience to prevent sexual harassment and that they can reasonably be expected to take". Employers are therefore advised to actively address the issue of sexual harassment (as well as general discrimination and bullying) in the workplace and include it in their regulations or directives.

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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 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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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

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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