Employment in Financial Services

Contributing Editor

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01. What is the primary regulatory regime applicable to financial services employees in your jurisdiction?

Belgium

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Financial services employees are primarily subject to general employment law, such as the Employment Contracts Act of 3 July 1978.

Moreover, sectoral collective bargaining agreements (CBAs) also apply. The main concerned joint committees (JCs) are JC No. 310 for banks (including savings banks and stockbroker companies) and JC No. 341 for banking and investment services intermediaries

JC No. 309 for stockbroker companies is abolished since 1 July 2023 and the employees who were covered by it are now covered by joint committee No. 310. A specific CBA was adopted to regulate employees' rights following this change (Collective bargaining agreement of 3 July 2023 concluded within the Joint Commission for Banks concerning the transfer of stockbroker companies from JC No. 309 to JC No. 310).

Due to the peculiarities of the financial sector, they are also governed by specific regulations, such as Regulation (EU) No. 468/2014 of the European Central Bank; Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms; Directive 2014/65/EU on markets in financial instruments; the Status and Supervision of Credit Institutions Act of 25 April 2014, the Prevention of Money Laundering and Terrorist Financing Act of 18 September 2017; and the Supervision of the Financial Sector and on Financial Services Act of 2 August 2002.

Finally, the regulations adopted by supervisory authorities, such as the National Bank of Belgium (NBB), the European Central Bank and the Financial Services and Markets Authority (FSMA), apply to the sector. The Belgian Financial Sector Federation (Febelfin) also issues guidelines.

Last updated on 16/04/2024

France

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Due to the unique activities of the financial sector, which involve confidential information, the handling of funds, possible conflicts of interest, etc, there is a special legal framework, specific to financial services employees, which is deployed at national and European levels.

Companies and employees in the sector are subject to private law. As such, they are bound by all the norms of French law, such as Law No. 2016-1691 dated 9 December 2016, on transparency, the fight against corruption and the modernisation of economic life; Ordinance No. 2017-1387 of 22 September 2017, on the predictability and securitisation of labour relations; Law No. 2022-401 of 21 March 2022, aimed at improving the protection of whistleblowers, or Law No. 2022-1598 of December 21, 2022 on emergency measures relating to the functioning of the labor market with a view to full employment. Most legal provisions specific to financial services employees are contained in the Monetary and Financial Code.

In addition, collective agreements govern the working conditions of financial services employees. The most common collective agreements in the financial services sector are:

- The national collective agreement of financial companies of 22 November 1968;
- The national collective agreement for financial market activities of 11 June 2010; and
- The national collective agreement of the bank of 10 January 2000.

Finally, two authorities supervise operators in the financial services sector: the Financial Markets Authority (FMA), which is an independent administrative authority that regulates and supervises financial services operators, through its General Regulations; and the French Prudential Supervision and Resolution Authority (ACPR), which is part of the Banque de France and is responsible for supervising banks.

At a European level, several instruments provide a framework for the financial services sector, including:

- for investment funds (Annex II of Directive 2011/61/EU for alternative investment funds (AIF) and Articles 14a, 14b of Directive 2009/65/EC for UCITS) ;
- for investment firms (Directive 2019/2034/EU, on the prudential supervision of investment firms) ; and
- for markets in financial instruments (Directive 2014/65/EU).

Last updated on 16/04/2024

Hong Kong

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The primary regulatory regime applicable to financial services employees in Hong Kong are as follows:

- Under the Banking Ordinance (BO), the Hong Kong Monetary Authority (HKMA) is responsible for regulating all authorised institutions (banks, restricted-licence banks and deposit-taking companies). In particular, the HKMA needs to ensure that the chief executive, directors, controllers and executive officers of the authorised institutions are “fit and proper”.

- Under the Securities and Futures Ordinance (SFO), the Securities and Futures Commission (SFC) is responsible for regulating the securities and futures markets. Employees performing any regulated functions under the SFO must obtain the requisite licence from the SFC. Relevant individuals engaged by the authorised institutions who perform regulated functions (eg, bank staff working in the securities dealing department) are not required to be licensed or registered with the SFC but their names have to be entered in the register maintained by the HKMA.

- Under the Insurance Ordinance (IO), the Insurance Authority (IA) is responsible for regulating the insurance industry. Employees carrying on a regulated activity under the IO must obtain the requisite licence from the IA.

Last updated on 22/01/2023

Switzerland

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Employment law in Switzerland is based mainly on the following sources, set out in order of priority:

- the Federal Constitution;
- Cantonal Constitutions;
- public law, particularly the Federal Act on Work in Industry, Crafts and Commerce (the Labour Act) and five ordinances issued under this Act regulating work, and health and safety conditions;
- civil law, particularly the Swiss Code of Obligations (CO);
- collective bargaining agreements, if applicable;
- individual employment agreements; and
- usage, custom, doctrine, and case law.

Depending on the regulatory status of the employer and the specific activities of financial services employees, respectively, Swiss financial market laws may also apply. They are, in particular, the Federal banking, financial institutions and insurance supervision regulations.

Last updated on 16/04/2024

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?

Belgium

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Members of management should at all times be of good repute and possess sufficient knowledge, skills and experience to perform their duties (article 91, Directive 2013/36/EU; and article 9, Directive 2014/65/EU).

Anyone in an executive position (i.e. members of the legal administrative body, the effective management and independent controllers) at a financial institution must exclusively be natural persons and must at all times have the necessary professional standing and expertise to perform their duties (article 19, Act of 25 April 2014). Since 2023, it is specified that “in particular, these persons must demonstrate honesty, integrity and independence of mind which, in the case of members of the legal administrative body, enable them to effectively evaluate and, if necessary, question the decisions of the actual management and to ensure the effective supervision and monitoring of the management decisions taken” (Art. 19, Act of 25 April 2014).

In addition, they must not have been convicted of any of the offences listed in article 20 of the Act of 25 April 2014. This concerns convictions with a professional ban and violations of financial legislation, company codes and insurance law.

The NBB will verify that these persons meet the conditions listed above. Forms for a new appointment, additional elements during the employment, termination of an appointment or renewal of an appointment are available on the NBB website (www.nbb.be). These forms require information mainly regarding education, past financial services experience, training, any criminal or administrative or civil proceedings or investigations, disciplinary decisions, bankruptcy, insolvency, potential conflicts of interest, and time commitments for the new appointment.

The NBB will assess the ability of the person based on five criteria:

- expertise, covering knowledge, experience and skills;
- professional repute;
- independence of mind;
- time commitment; and
- collective suitability for the board (ie, to verify whether the expertise within the said body is sufficiently guaranteed, given the person's knowledge, experience and skills (NBB Fit & Proper Handbook of 22 December 2022, 2:26, p. 16)).

Concerning "N-1" effective managers (managers who exercise direct and decisive influence over the management of the institution, but who are not members of the management committee) other than branch managers, the supervisory authority does not have to authorise them (NBB Fit & Proper Handbook of 22 December 2022, 2:9, p. 14). This does not mean that these persons must not have the required expertise and professional reputation, but only that the NBB will not conduct an assessment.

Last updated on 16/04/2024

France

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In the financial services sector, candidates must comply with standard recruitment practices, but also with suitability, requirements and, for certain positions, with supervision by the ACPR or the European Central Bank (ECB).

Traditionally, employees in the financial services sector are required to provide the usual documents requested when applying for a job: a cover letter and a curriculum vitae. This is especially important because, as we will see, access to certain positions is conditional. For example, investment advisors must provide proof of either a national diploma attesting to three years of study, or training, or professional experience in the field.

Also, due to the very nature of the financial services business, employees of companies in the sector are required to be honourable.

The Monetary and Financial Code provides that certain operational activities in the financial services sector, such as being a managing director, are barred in the event of a felony conviction, a prison sentence of at least six months with a suspended sentence in connection with the financial world, or a management ban (article L. 500-1 of the Monetary and Financial Code). For this reason, the criminal record of a concerned candidate is generally requested at the time of hiring.

In addition, the appointment or renewal of a senior executive of a credit institution, a finance company, an investment firm other than a portfolio management company, a payment institution or an electronic money institution must be ratified by the ACPR, and by the ECB in the case of major credit institutions. Validation of the appointment or renewal is based on good reputation and competence, which is assessed based on five criteria: experience, reputation, absence of conflicts of interest and independence of mind, availability, and collective ability.

Last updated on 16/04/2024

Hong Kong

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There are no particular pre-screening measures specified by the financial regulators in Hong Kong. Nevertheless, financial institutions would generally conduct background checks on prospective employees (especially those taking on senior positions) to ensure they comply with the “fit and proper” requirements of the financial regulators.

There is no particular form of regulator-specified reference to be provided by previous employers in the financial services industry. Nevertheless, the SFC has specified disclosure obligations for licensed corporations in respect of outgoing employees who were subject to internal investigations (see question 10).

Last updated on 22/01/2023

Switzerland

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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.

Last updated on 16/04/2024

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

Belgium

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Regarding anyone in an executive position (i.e. members of the legal administrative body, the effective management and independent controllers) at a financial institution, it is necessary to use the forms provided by the NBB to ensure that they are “fit and proper” and are authorised by the NBB (see question 2).

It is also recommended to foresee restrictive covenants in the employment contract, such as confidentiality, other professional activities, non-solicitation, non-competition and intellectual property provisions.

Last updated on 16/04/2024

France

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The hiring of employees in the financial services sector follows the common law regime. Thus, in principle, the hiring of an employee means the contractualising of the employment relationship. Although it is not in principle mandatory for the parties to sign an employment contract, but for exceptional cases (part-time employment contract, fixed-term contract, etc), it is nevertheless recommended to contractualise the relationship to avoid any future dispute.

It is also common, at the time of hiring, for the employee to commit to a non-compete and confidentiality obligation concerning his employer, either through clauses in his employment contract or through a separate agreement. These obligations must be the subject of a signed document and are therefore generally incorporated into the employment contract. In addition, most companies in the financial services sector make the hiring of an employee conditional upon that person signing a charter of good conduct or a policy to prevent and manage conflicts of interest.

The employer is also required to make a pre-employment declaration.

Finally, as stated, for certain positions, the employer must notify the ACPR or the ECB of the hire, and they must ratify the appointment.

Last updated on 16/04/2024

Hong Kong

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In addition to an employment contract, there are additional documentation requirements in connection with the application or transfer of the employee’s licence with the financial regulators.

Last updated on 22/01/2023

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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.

Last updated on 16/04/2024

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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Anyone in an executive position (i.e. members of the legal administrative body, the effective management and independent controllers) at a financial institution must, at all times, have the necessary professional standing and expertise to perform their duties.

This will be assessed by the NBB through standard forms to complete if there is a new appointment, new elements during employment, termination of appointment or renewal of appointment.

"N-1" effective managers must meet the same criteria, but authorisation by the NBB is not necessary (see question 2).

Last updated on 16/04/2024

France

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Since 1 July 2010, the FMA General Regulation requires investment services providers to pass an examination to ensure that certain employees have a minimum knowledge base in the field.

This applies to salespersons, managers, financial instrument clearing managers, post-trade managers, financial analysts, financial instruments traders, compliance and internal control officers, and investment services compliance officers.

Since 1 January 2020, the following must also obtain certification: natural persons acting as a financial investment advisor; natural persons with the power to manage the legal person authorised as a financial investment advisor; and persons employed to provide investment advice by the legal person authorised as a financial investment advisor.

FMA certification must be obtained within a maximum of six months of the beginning of that person's employment with an investment services provider. Certification is issued by FMA-certified organisations.

People already in practice before 1 July 2010 are exempt from this certification. This is known as a grandfather clause.

In addition to this minimum knowledge requirement, certain professionals are subject to an assessment of their knowledge and skills. This applies to natural persons who provide not only information but also financial advice, and generally takes the form of an annual evaluation interview.

Last updated on 16/04/2024

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SFC

The "Guidelines on Competence" published by the SFC lists the necessary qualifications for employees carrying on regulated activities. For academic qualifications, employees should attain at least Level 2 in either English or Chinese as well as in Mathematics in the Hong Kong Diploma of Secondary Education or equivalent. In addition, employees are expected to obtain recognised industry qualifications and pass the local regulatory framework paper. For responsible officers (ROs), the SFC requires higher levels of educational qualifications and experience.

IA

The "Guideline on 'Fit and Proper' Criteria for Licensed Insurance Intermediaries Under the Insurance Ordinance" published by the IA sets out the education requirements for licenced employees under the IO. Higher levels of educational qualifications are required for responsible officers.

Last updated on 22/01/2023

Switzerland

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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.

Last updated on 16/04/2024

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

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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.

Last updated on 16/04/2024

France

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The activities of certain categories of employees in the financial services sector benefit from greater supervision, due to the risky nature of their activity. These include employees who have business dealings with individuals and employees who may have exposure to the financial markets.

Thus, Article L.533-10 of the Monetary and Financial Code provides that portfolio management companies and investment service providers must, on the one hand, put in place rules and procedures to ensure compliance with the provisions applicable to them. On the other hand, they must put in place rules and procedures defining the conditions and limits under which their employees may carry out personal transactions on their behalf.

They must still take all reasonable steps to prevent conflicts of interest that could affect their clients. In practice, these employees may be referred to as "sensitive personnel".

In addition, Law No. 2013-672 of 26 July 2013, on the separation and regulation of banking activities introduced several provisions constraining employees who may expose their company to the financial markets. These employees must comply with strict obligations in their activity to limit risk-taking.

Last updated on 16/04/2024

Hong Kong

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Under the SFO, ROs have enhanced responsibilities. They assume primary responsibility for compliance at a licensed corporation and are involved in supervising the regulated activities. A licensed corporation is required to appoint no less than two ROs to directly supervise the conduct of each regulated activity. Similarly, under the BO, registered institutions are required to appoint no less than two executive officers to be responsible for directly supervising the conduct of each regulated activity under the SFO. For each regulated activity, at least one RO must be available at all times to supervise the business and must be an executive director.

Under the IO, an RO of a licensed insurance agency or licensed insurance broker company has enhanced responsibilities. Responsible officers must use their best endeavours to ensure the agency or broker has established and maintains proper controls and procedures for securing compliance with the conduct requirements under the IO.

Last updated on 22/01/2023

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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.

Last updated on 23/01/2023

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?

Belgium

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There is no list of financial services employees as such, but the NBB will assess, among others, the experience and the credibility of the person when granting the "fit and proper" authorisation.

This concerns anyone in an executive position (i.e. members of the legal administrative body, the effective management and independent controllers) at a financial institution (see question 2).

However, it should be noted that financial services institutions approved by the NBB are listed on its website. Moreover, banking and investment services intermediaries must be registered and file through an

online application to the FSMA (www.fsma.be) documents attesting, inter alia, their knowledge, clean criminal record, and professional liability insurance.

Last updated on 16/04/2024

France

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In principle, working in the financial services sector does not require registration. However, some companies, such as banks, must be licensed.

The following natural persons who are not employees of a legal person must be registered in the Single Register of Insurance, Banking and Finance Intermediaries (article L.546-1 of the Monetary and Financial Code, amended by article 18 of order no. 2021-1735 of December 22, 2021 modernizing the framework for participative financing):

- intermediaries in banking and payment services as defined in article L. 519-1 of the Monetary and Financial Code.
- financial investment advisors as defined in article L. 541-1 of the Monetary and Financial Code;
- tied agents as defined in article L. 545-1 of the Monetary and Financial Code and intermediaries in participatory financing.

To be registered, these intermediaries must meet four professional conditions: professional liability insurance, good repute, professional capacity and financial guarantees, which are verified by the unique register of insurance, banking and financial intermediaries when they are registered.

In addition, the providers of participative financing services mentioned in article L. 547-1 of the Monetary and Financial Code must be approved by the Financial Markets Authority (FMA).

Last updated on 16/04/2024

Hong Kong

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The HKMA, SFC and IA each have a register for licensed employees to be listed on to undertake regulated activities:

- HKMA – the register of securities staff of authorised institutions is available on the HKMA's website[1]. For registration, the names and particulars of the relevant individuals are required to be submitted to the HKMA for inclusion on the HKMA Register.

- SFC – the register of licensed persons is available on the SFC's website[2]. For registration, individual applicants would need to submit an electronic application to the SFC through its online platform. When there is a change of employment, the licensed representative may apply for a transfer of accreditation through SFC's online platform within 180 days after the cessation of the previous employment. It takes approximately seven business days to process an application for transfer of accreditation to carry on the same types of regulated activity for which the licensed representative was licensed immediately before the cessation.

- IA – the register of licensed insurance intermediaries is available on the IA's website[3]. For registration, applicants can submit their licence applications to the IA by paper submission or electronic submission via an online portal.

[1] https://apps.hkma.gov.hk/eng/index.php

[2] https://apps.sfc.hk/publicregWeb/searchByName?locale=en

[3] https://iir.ia.org.hk/#/index

Last updated on 22/01/2023

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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).

Last updated on 16/04/2024

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?

Belgium

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Specific rules apply to personnel whose professional activities have a significant impact on the company's risk profile (article 92, 2. Directive 2013/36/EU; article 67, Act of 25 April 2014), including:

- all members of the legal administrative body and senior management;
- staff members with supervisory responsibility for control functions or business units;
- employees who received significant remuneration during the previous year (ie, 500,000 EUR or more and equal to or greater than the average remuneration of members of the legal administrative body and senior management) and the employee performs the professional activity in a critical business unit and the nature of the activity is such that it has a significant impact on the risk profile of the business unit concerned.

Variable remuneration is capped at 50% of the fixed remuneration or 50,000 EUR, without exceeding the fixed remuneration, whichever is higher (article 1, Annex II, Act of 25 April 2014). Moreover, it is forbidden to have a guaranteed variable remuneration (article 5). 40% of variable remuneration is delayed for four to five years, with a minimum of five years for members of the legal administrative body and senior management. When the variable remuneration is very high, the percentage of the delayed variable remuneration is 60% (article 7).

The total variable remuneration will be significantly reduced if the company generates a reduced or negative financial return. This applies to variable remuneration not yet earned, variable remuneration earned but not yet paid, and variable remuneration that has already been paid. It occurs through malus or clawback schemes, in particular when the person has participated in practices that have resulted in significant losses, has not respected the “fit and proper” duties or has set up a specific mechanism for tax fraud (article 8).

A termination indemnity is considered a variable remuneration, except for a legal indemnity in lieu of notice or a non-compete indemnity (based on the calculation provided by the Employment Contracts Act). Furthermore, a termination indemnity higher than 12 months, or 18 months for a motivated decision from the remuneration committee, can only be granted subject to the approval of the first ordinary general meeting following the termination (articles 12 and 12/1).

For companies that benefit from government intervention, there is in principle no variable remuneration, except for the person recruited after the public intervention to carry on the restructuring. Moreover, the termination indemnity is capped at nine months, unless the legal indemnity in lieu of notice (based on seniority) is higher (articles 16 and 17).

Last updated on 16/04/2024

France

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Under French law, several mechanisms regulate the compensation of employees in the financial services sector to limit risk-taking.

Concerning guaranteed variable remuneration (welcome bonus, recruitment bonus, etc) for new staff, establishments are not allowed to guarantee this beyond the first year of employment; it is said to be "exceptional" and can only be granted if the financial base is sufficiently sound and solid.

In addition, European Directive 2013/36 EU, UCITS V, of 26 June 2013 introduced a "clawback" mechanism that the legislature has transposed into French law. Thus, article L.511-84 of the Monetary and Financial Code provides that "the total amount of variable remuneration may, in whole or in part, be reduced or give rise to restitution when the person concerned has failed to comply with the rules laid down by the institution with regard to risk-taking, in particular because of his responsibility for actions that have led to significant losses for the institution or in the event of failure to comply with the obligations of good repute

and competence".

In addition and following the above-mentioned Directive 2013/36/EU (article 94) concerning the deferral of remuneration, the payment of variable remuneration should be made in part immediately and in part on a deferred basis.

Institutions are encouraged to implement a deferral schedule, that properly aligns staff compensation with the institution's business, economic cycle, and risk profile, so that a sufficient portion of variable compensation can be adjusted to results through ex-post risk adjustments.

This schedule consists of the portion of variable compensation deferred, the length of the deferral period and the speed ofvesting of the deferred compensation.

In the event of poor or negative performance by the institutions, leading to a reduction in the total amount of variable compensation, the payment of variable compensation may be subject to specific arrangements implemented by the institutions, as referred to in Directive 2013/36/EU.

In addition, article L.511-84-1 of the French Monetary and Financial Code specifies that the variable portion that may be reduced or even recovered as a penalty is excluded from the calculation of several indemnities in the event of dismissal, including the legal indemnity for dismissal.

Finally, following Law No. 2013-672 of 26 July 2013 on the separation and regulation of banking activities, the variable remuneration of managers and traders is capped, and cannot exceed the fixed part. In addition, a "say on pay" mechanism has been implemented (ie, the general meeting of shareholders must be consulted on the remuneration paid to executives and traders).

Last updated on 16/04/2024

Hong Kong

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There are no specific mandatory rules relating to compensation payable to financial services employees in Hong Kong.

The HKMA has issued a Supervisory Policy Manual CG-5 “Guideline on a Sound Remuneration System”. This focuses on providing a broad idea and introducing basic principles of how remuneration policies should be designed and implemented in the authorised institution, to encourage employee behaviour that supports the risk management framework, corporate values and long-term financial soundness of the authorised institution.

Under the Guideline, the elements of a sound remuneration system are as follows:

Governance

- Remuneration policy should be in line with objectives, business strategies and the long-term goals of the authorised institution.
- The remuneration arrangement for employees whose activities could have a material impact on the authorised institution’s risk profile and financial soundness should support, but not undermine, the overall risk management approach.
- The Board of an authorised institution is ultimately responsible for overseeing the formulation and implementation of the remuneration policy.
- The establishment of a Board remuneration committee would assist the Board in discharging its responsibility for the design and operation of the authorised institution’s remuneration system.
- Risk control personnel should have appropriate authority and involvement in the process of design and implementation of the authorised institution’s remuneration policy.

Structure of remuneration

- Balance of fixed and variable remuneration should be determined with regard to the seniority, role, responsibilities and activities of their employees and the need to promote behaviour among employees that support the authorised institution's risk-management framework and long-term financial soundness.
- Variable remuneration should be paid in such a manner as to align an employee's incentive awards with long-term value creation and the time horizons of risk.
- Guaranteed minimum bonus to senior management or key personnel should be subject to the approval of the Board (or the Board's remuneration committee with the necessary delegated authority).

Measurement of performance for variable remuneration

- The award of variable remuneration should depend on the fulfilment of certain pre-determined and assessable performance criteria, which include both financial and non-financial factors.
- Size and allocation of variable remuneration should take into account the current and potential risks associated with the activities of employees, as well as the performance (overall performance of the relevant business units and the authorised institution as a whole as well as the contribution of individual employees to such performance).
- Judgement and common sense may be required during the process to arrive at a fair and appropriate remuneration decision. The rationale for the exercise of judgment and the outcomes should be recorded in writing.

Alignment of remuneration pay-outs to the time horizon of risks

- Deferment of variable remuneration is appropriate when the risks taken by the employee in question are harder to measure or will be realised over a longer timeframe.
- The award of deferred remuneration should be subject to a minimum vesting period and pre-defined vesting conditions in respect of future performance.
- Authorised institutions should seek undertakings from employees not to engage in personal hedging strategies or remuneration and liability-related insurance to hedge their exposures in respect of the unvested portion of their deferred remuneration.

Remuneration disclosure

- Authorised institutions should make remuneration disclosures at least annually. The disclosure should include the qualitative and quantitative information that the HKMA has set out in its annual remuneration disclosure.

Last updated on 22/01/2023

Switzerland

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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.

Last updated on 16/04/2024

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

Belgium

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To keep the "fit and proper" authorisation, the concerned persons must ensure that they follow the relevant training.

Regarding the prevention of money laundering, financial institutions must ensure that personnel whose function requires it is aware of the legislation, knows the internal policies, is aware of the internal reporting procedure and receives special continuing education programmes (article 11, §1, Act of 18 September 2017).

At a sectoral level, JC Nos. 310 and 341 provide for an individual right to five days of training per year per full-time equivalent employee.

Last updated on 16/04/2024

France

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In general, "the employer shall ensure that employees are adapted to their workstation" and "shall ensure that their ability to hold a job is maintained, particularly with regard to changes in jobs, technologies and organizations". This general obligation is imposed on the employer if there is a change in the job description.

In addition, the FMA General Regulation requires all persons mentioned in article 325-24 of the Monetary and Financial Code, including investment service providers, salespersons, managers, and persons responsible for clearing financial instruments, to undergo annual training appropriate to their activity and experience.

Law 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life also provides that in companies employing at least 500 people, or belonging to a group of companies whose parent company has its registered office in France and whose workforce includes at least 500 people, and whose revenue or consolidated revenue is more than €100 million, a training system must be set up for managers and staff most exposed to the risks of corruption and influence peddling.

Decree no. 2022-894 of 15 June 2022 on the conditions governing the exercise of the profession of intermediary in banking operations and payment services introduces a new obligation in terms of continuing training. From now on, all intermediaries in banking operations and payment services carrying out intermediary activities in real estate credit and their staff must update their professional knowledge and skills, as part of their continuing education, “through professional training of sufficient duration adapted to their activities, taking particular account of changes in the applicable legislation or regulations” (article L. 519-11-3 of of the Monetary and Financial Code). Finally, as we have seen, some positions in the financial services industry may require specific training and certification.

Last updated on 16/04/2024

Hong Kong

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SFC

Persons engaging in regulated activities are required to continuously update their knowledge and skills through continuous professional training (CPT). The “Guidelines on Continuous Professional Training” published by the SFC provides for the following CPT requirements:

- a minimum of 10 CPT hours a year for licensed representatives and relevant individuals; and
- a minimum of 12 CPT hours a year for responsible officers and executive officers (including 2 CPT hours on topics relating to regulatory compliance).

In addition, an individual should attend at least five CPT hours a year (out of the 10 hours for licensed representatives and relevant individuals and 12 hours for responsible officers and executive officers) on topics directly relevant to the regulated activities for which he or she is licensed at the time the CPT hours are undertaken.

HKMA

The HKMA has implemented the “Enhanced Competency Framework”(ECF) for banking practitioners. While the ECF is not a mandatory regime, banks are strongly encouraged to adopt it as the benchmark for enhancing the level of core competence and ongoing professional development of banking practitioners.

IA

Under the “Guideline on Continuing Professional Development for Licensed Insurance Intermediaries”, licensed insurance intermediaries who are individuals are required to receive training through CPD to preserve their professional competence and standards in providing service to policyholders and potential policyholders.

The minimum number of CPD hours for individual licensees is 15 CPD hours for each assessment period, including a minimum of three compulsory CPD hours on “Ethics or Regulations” courses.

Financial services employees are also required to receive training on anti-money laundering and counter-financing of terrorism. New staff should be required to attend initial training as soon as possible after being hired or appointed. Apart from the initial training, refresher training should be provided regularly to ensure that staff are reminded of their responsibilities and are kept informed of new developments.

Last updated on 22/01/2023

Switzerland

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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.

Last updated on 16/04/2024

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?

Belgium

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The NBB has issued a Fit & Proper Handbook, which was last updated on 22 December 2022.

Besides, Febelfin has adopted codes of conduct and regulations for relations between financial institutions and their customers, which can be considered standard practice in the sector.

Each financial institution may also provide more concrete or more precise quality standards for its clientele.

Last updated on 16/04/2024

France

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First of all, various obligations discussed so far have the effect of forcing, if they were not already there, employees in the financial services sector to behave in an honourable manner and respect prudential rules.

In addition, Law 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life states in article 17 that in certain large companies, managers must take all measures to prevent and detect the commission, in France or abroad, of acts of corruption or influence peddling.

This means setting up a code of conduct that will be integrated into the internal regulations, in compliance with the procedure for consulting employee representatives provided for in article L. 1321-4 of the French Labour Code.

This code of conduct involves the implementation of measures and procedures that will be monitored by the French Anti-Corruption Agency. In particular, the code of conduct must define and provide examples of the various types of behaviour to be prohibited as likely to constitute corruption or influence peddling. It must also establish an evaluation and control system, as well as a disciplinary system, enabling the company's employees to be sanctioned if there is a violation of the company's code of conduct.

In addition to this code of conduct, which is part of the internal regulations, almost all players in the financial services sector have put in place charters and policies to protect confidential information and regulate risky activities.

Last updated on 16/04/2024

Hong Kong

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SFC

Under the SFO, licensed representatives and ROs are required to be “a fit and proper person” to carry on the regulated activities and must adhere to the standards of behaviour set out in the “Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission”. Other relevant guidelines regarding standards of behaviour include:

- “Fit and Proper Guidelines”, which set out the general expectations of the SFC of what is necessary to satisfy the licensing or registration requirements that a person is fit and proper.
- “Guidelines on Competence”, which set out the competence requirements and its objective to ensure a person is equipped with the necessary technical skills and professional expertise to be “fit”, and is aware of the relevant ethical standards and regulatory knowledge to be “proper” in carrying on any regulated activities.

HKMA

Under the BO, employees of an authorised institution that carry on regulated activities under the SFO are required to be fit and proper. In addition, the HKMA needs to be satisfied that the chief executive, directors, controllers and executive officers of the authorised institutions are fit and proper. Other relevant guidelines regarding standards of behaviour include:

- “Code of Banking Practice”, which is to be observed by authorised institutions in dealing with and providing services to their customers.
- Supervisory Policy Manual CG – 2 “Systems of Control for Appointment of Managers”, which sets out the system of control that authorised institutions should have for ensuring the fitness and propriety of individuals appointed as managers.

IA

The conduct requirements for licensed insurance agents and brokers are set out in Division 4 of the IO.

Other relevant codes and guidelines include:

- “Code of Conduct for Licensed Insurance Agents”, which sets out the fundamental principles of professional conduct that buyers of insurance are entitled to expect in their dealings with licensed insurance agents.
- “Code of Conduct for Licensed Insurance Brokers”, which sets out the fundamental principles of professional conduct that buyers of insurance are entitled to expect in their dealings with licensed insurance brokers.
- “Guideline on ‘Fit and Proper’ Criteria under the Insurance Ordinance”

Last updated on 22/01/2023

Switzerland

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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.

Last updated on 16/04/2024

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?

Belgium

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If a new element occurs that can influence one or more of the five criteria assessing the suitability of a person for the “fit and proper” authorisation (see question 2), the financial institution must file the adequate form with the NBB.

Notification to the NBB is also required in the event of termination or reappointment.

Last updated on 16/04/2024

France

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In principle, the relationship between companies and employees in the financial services sector is private. As such, companies do not have to communicate confidential information about their employees to third parties, as this would constitute an infringement of their fundamental freedoms. However, in certain cases, employers must alert the competent authorities in the event of behaviour or "suspicions" of behaviour by one of their employees that is contrary to the law.

Thus, the Monetary and Financial Code provides that companies in the financial services sector, referred to in article L.561-2 of the code (the list of which was updated by Ordinance no. 2023-1139 of December 6, 2023 on credit managers and credit buyers to include "Credit managers"), must report to the national financial intelligence unit (Tracfin) all sums or transactions that they suspect to be the result of an offence punishable by a prison sentence of more than one year, or related to the financing of terrorism or tax evasion. This declaration may be made in respect of any employee of one of these companies.

In addition, when facts likely to constitute violations of the anticorruption code of conduct or to qualify as corruption or influence peddling are brought to the attention of the company and its managers, an internal investigation must be conducted (article 17 of Law No. 2016-1691 of 9 December 2016 on transparency). If the investigation confirms the suspicions, the employer must, on the one hand, sanction the employee, but also inform the prosecuting authority of the facts.

In smaller companies, the employer will also be able to report to the prosecution authorities any behaviour that could lead to criminal sanctions.

Last updated on 16/04/2024

Hong Kong

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SFC – Self-reporting obligation

An SFC-licensed intermediary is subject to the self-reporting obligation under paragraph 12.5 of the “Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission”. A licensed or registered person should report to the SFC immediately upon the occurrence of any material breach, infringement or non-compliance with any laws, rules regulations, and codes administered or issued by the SFC, exchange or clearing house of which it is a member or participant of, and the requirement of any regulatory authority applicable to that intermediary. This encompasses both actual and suspected breaches, infringements or non-compliance. In the report, the particulars of the actual or suspected breach, infringement or non-compliance, and relevant information and documents must be included to fulfil the obligation.

The same is to be reported by the registered institutions to the HKMA. The HKMA also requires authorised institutions to submit an incident report on the same day of discovering the incident.

SFC - Internal investigation disclosure obligation

In addition, a licensed corporation is required to provide the SFC with information about whether a licensed individual who ceases to be accredited to it (outgoing employee) was under any investigation commenced by the licensed corporation within six months preceding his or her cessation of accreditation. If the internal investigation commences after the notification of cessation of accreditation, the licensed corporation should also notify the SFC as soon as practicable. In addition, even if a firm has completed its investigation and made no negative findings against an outgoing employee, the firm will still be required to notify the SFC of

the investigation.

The SFC expects licensed corporations to proactively disclose information about all investigative actions and the following is a non-exhaustive list of examples of investigations involving an outgoing employee that a licensed corporation should disclose to the SFC:

- investigations about a suspected breach or breach of applicable laws, rules and regulations;
- investigations about a suspected breach or breach of the licensed corporation's internal policies or procedures;
- investigations about misconduct that are likely to give rise to concerns about the fitness and properness of the outgoing employee;
- investigations about any matter that may have an adverse market or client impact; and
- investigations about any matter potentially involving fraud, dishonesty and misfeasance.

HKMA – Reporting incidents to HKMA

According to the “Incident Response and Management Procedures” published by the HKMA, once an authorised institution has become aware that a significant incident has occurred, the authorised institution concerned should notify the HKMA immediately and provide it with whatever information is available at the time. An authorised institution should not wait until it has rectified the problem before reporting the incident to the HKMA.

According to the Supervisory Policy Manual SB-1 “Supervision of Regulated Activities of SFC-Registered Authorized Institutions”, to be in line with the reporting requirements imposed by the SFC on licensed representatives, authorised institutions will be required to notify the HKMA in writing within seven business days upon knowledge of the occurrence of certain information (including any subsequent changes) of the relevant individuals. The required information is on whether or not the person is or has been:

- convicted of or charged with any criminal offence (other than a minor offence) in Hong Kong or elsewhere;
- subject to any disciplinary action, or investigation by a regulatory body or criminal investigatory body (as the case may be) in Hong Kong or elsewhere;
- subject to, or involved in the management of a corporation or business that has been or is subject to, any investigation by a criminal investigatory body or any regulatory body in Hong Kong or elsewhere concerning offences involving fraud or dishonesty;
- engaged in any judicial or other proceedings, whether in Hong Kong or elsewhere, that is material or relevant to the fitness and propriety of the individual; or
- bankrupt or aware of the existence of any matters that might render him insolvent or lead to the appointment of a receiver of his property under the Bankruptcy Ordinance.

HKMA – Guidance Note on Cooperation with HKMA Investigations

Under the “Guidance Note on Cooperation with the HKMA in Investigations and Enforcement Proceedings”, the HKMA encourages and recognises the cooperation of authorised institutions, banks and their staff in investigations and enforcement proceedings. Under this Guidance Note, cooperation includes early and voluntary reporting of any suspected breach or misconduct, taking a proactive approach to assist the HKMA’s investigation, and making timely arrangements to provide evidence and information.

IA – Self-reporting obligation

Under “the Code of Conduct for Licensed Insurance Agents/Brokers”, there is a self-reporting obligation by licensed insurance agencies or brokerages to the IA. A licensed insurance agency or brokerage is required to have proper controls and procedures to ensure the following incidents are reported to the IA as soon as is reasonably practicable:

- a disciplinary action taken by the HKMA, the SFC or the Mandatory Provident Fund Schemes Authority;
- a criminal conviction (other than a minor offence) by any court in Hong Kong or elsewhere;
- any material breaches of requirements under the IO or any rules, regulations, codes or guidelines administered or issued by the IA; and
- any material incidents which happen to the agency or brokerage.

Last updated on 22/01/2023

Switzerland

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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.

Last updated on 16/04/2024

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?

Belgium

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EU Directive 2019/1937 on whistleblowing has been transposed in Belgium by the Act of 28 November 2022. Financial services are included in its material scope (article 2, 1°, b)). In general, companies with more than 250 employees had to create an internal whistleblowing system by 15 February 2023. For companies with between 50 and 250 employees, the deadline was 17 December 2023. However, these thresholds do not count for legal entities who are active in financial services, therefore they needed to install an internal whistleblowing system no matter their employee count and respect the deadline of 15 February 2023 (article 57, §3). The FSMA will have to verify whether the financial institutions are respecting their whistleblowing obligations (article 36). Furthermore, persons who report violations relating to financial services receive better protection and are awarded higher lump sum compensation if they are the victim of a retaliation measure (six months gross remuneration; article 27, §3).

Regarding the prevention of money laundering, financial institutions were already required to provide a procedure to enable their personnel, agents or distributors to report a violation of the legislation, through a specific, independent and anonymous channel (article 10, Act of 18 September 2017).

The employer must ensure the wellbeing of its employees, which includes the prevention of harassment. If harassment has occurred, they must provide appropriate support, including remediating measures, protection against dismissal and investigation by a prevention advisor specialising in psychosocial risks (Wellbeing Act of 4 August 1996, Wellbeing Code of 28 April 2017). The procedure must be detailed in the work rules of the financial institutions.

Last updated on 16/04/2024

France

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Financial services companies, like any private employer, must implement procedures to prevent wrongdoing.

Concerning harassment, the Labour and the Penal Codes punish acts constituting moral and sexual harassment. It is the employer's responsibility, under their safety obligation, to prevent and, if necessary, deal with any behaviour constituting moral harassment. In this respect, an individual must be appointed by the social and economic committee to combat sexual harassment and sexist behaviour.

For whistleblowing, following Directive 2019/1937/EU, the system for whistleblowers that already existed in France was strengthened by Law 2022-401 of 21 March 2022 on the protection of whistleblowers. From now on, companies with more than 50 employees must internally set up a procedure for collecting and handling whistleblowers. Without an internal procedure, the whistleblower can go through an external channel, which presents a risk to the company's reputation.

In addition, following Law 2022-401, the FMA and the French Prudential Supervision and Resolution Authority have set up special procedures allowing any person to report to them, even anonymously, any infringement of European legislation, the Monetary and Financial Code or the AMF General Regulation (articles L. 634-1 to L. 634-4 of the Monetary and Financial Code).

Last updated on 16/04/2024

Hong Kong

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Anti-money laundering and counter-financing of terrorism

Financial services employees are required to receive training on anti-money laundering and counter-financing of terrorism. New staff should be required to attend initial training as soon as possible after being hired or appointed. Apart from the initial training, refresher training should be provided regularly to ensure that staff are reminded of their responsibilities and are kept informed of new developments (see question 8).

Whistleblowing

There is no single comprehensive whistleblowing legislation to protect whistleblowers in Hong Kong. However, piecemeal provisions in various ordinances may protect specific whistleblowers for the reporting of specific offences. For example, the Employment Ordinance provides that an employer shall not terminate (or threaten to terminate) the employment of, or in any way discriminate against, an employee because the employee has given evidence or information in any proceedings or inquiry in connection with the enforcement of the Employment Ordinance, work accidents or breach of work safety legislation.

While it is not legally required, as good practice, employers should consider implementing a whistleblowing policy to set out, among others, the type of incidents that should be reported and the procedures for filing the report.

Workplace harassment

Under the Sex Discrimination Ordinance, Disability Discrimination Ordinance and Race Discrimination Ordinance, any harassment in the workplace based on sex, pregnancy, disability and race (which includes colour, descent, ethnic or national origins) is unlawful.

As employers are vicariously liable for the wrongful acts of their employees (whether or not the act was

done with the employer’s knowledge or approval), one of the statutory defences is for employers to establish that they took “reasonably practicable steps” to prevent the wrongful act in the workplace. Employers should therefore put in place anti-harassment policies and procedures to prevent harassment from happening in the workplace and to provide complaint or reporting procedures to handle such incidents.

Last updated on 22/01/2023

Switzerland

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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.

Last updated on 16/04/2024

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?

Belgium

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If the person concerned is subject to “fit & proper” authorisation from the NBB (see question 2), a form must be filed with the NBB to inform it of the termination.

Furthermore, the settlement agreement cannot include payments that would not respect the caps for remuneration and termination indemnities (see question 7).

Finally, job security clauses have been negotiated at a sectoral level, meaning a specific procedure must be followed for individual or collective dismissal under JC No. 310, with a sanction of six to nine months’ remuneration.

Last updated on 16/04/2024

France

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The general law regarding dismissals applies to employees in the financial services sector. Under French law, there are two grounds for dismissal: personal reasons, which are related to the employee's behaviour or state of health; and economic reasons, which are not related to the employee. In both cases, the cause must be real and serious (ie, the reason must be objective and materially verifiable, as well as proportionate to the facts put forward). Failing that, the judge may propose the reinstatement of the employee, but if one of the parties refuses, then the employee is entitled to compensation for dismissal without real and serious cause, the latter depending on the employee's seniority.

Certain grounds for dismissal are null and void, in particular dismissals that are discriminatory or contrary to a fundamental freedom. The employee may then be reinstated (in very specificcases) or compensated, but this compensation may not be less than six months' salary.

Dismissal for personal reasons cannot be declared before a preliminary interview with the employee and must be notified at least two working days after this interview, unless otherwise stipulated by collective bargaining agreement. For example, the national collective bargaining agreement for the banking industry stipulates that the preliminary interview cannot take place less than 7 calendar days, except in the case of more favourable legal provisions or specific arrangements (e.g. inaptitude), from the date of first presentation to the employee of the letter of summons (article 26).

Dismissal for economic reasons may be individual or collective. Individual dismissals for economic reasons also require a prior interview and notification of redundancy, but above all notification to the Administration. Collective dismissals for economic reasons require consultation of the Social and Economic Committee, as well as the establishment of an employment protection plan if the termination concerns at least 10 employees within 30 days.

Since 1 July 2010, the FMA's General Regulation requires investment service providers to pass an examination to obtain certification. This certification must be obtained within six months of hiring, so not securing this certification by the end of this period may justify a dismissal.

A dismissal means a redundancy payment is excluded, except in the case of employment protection plans, from assessment for social security contributions for the portion not subject to income tax within certain exemption limits. In addition, article L.511-84-1 of the French Monetary and Financial Code excludes the variable portion of compensation that may be reduced or recovered as a penalty under the "clawback" mechanism from assessment for severance pay.

Last updated on 16/04/2024

Hong Kong

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There are no particular rules or protocols that apply when terminating the employment of an employee in the financial services sector. The termination procedures will follow the requirements under the Employment Ordinance and the contractual terms of the employment contract. In certain cases (eg, termination of senior executives), the parties may enter into a mutual release and settlement agreement.

The licensed corporations should notify the regulators of any changes, including cessation of appointment of the licensed representative and responsible officer or managers-in-charge of core functions, within seven business days. In the case of registered institutions, the notification should be made to both the SFC and the HKMA.

Under section 64R of the IO, within 14 days after the day on which an authorised insurer, a licensed insurance agency or a licensed insurance broker company (collectively, “Appointing Principal”) terminates the appointment of a licensed insurance agency, a licensed individual insurance agent, a licensed technical representative (agent), a licensed technical representative (broker) or a responsible officer (as the case may be), then the Appointing Principal should notify the IA in writing of the termination.

Last updated on 22/01/2023

Switzerland

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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.

Last updated on 16/04/2024

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?

Belgium

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There are no specific rules for the financial services sector, except that they cannot have an effect that does not respect the caps for remuneration (see question 7).

Last updated on 16/04/2024

France

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Three specific clauses are potentially relevant to employees in the financial services sector.

Firstly, regarding the confidentiality clause, employees in the financial services sector are bound to respect professional and banking secrecy.

More specifically, article 25 of Section III of Chapter 4 of Title II of Book 1 of the national collective agreement for financial companies of 22 November 1968, provides that all staff members are bound by

professional secrecy within the company and towards third parties. Employees may not knowingly pass on to another company information specific to their employer or previous employer.

Article 24 of Chapter 3 of Title III of the national collective bargaining agreement for bank employees of 10 January 2000 codifies the absolute respect of professional secrecy.

Article 44 of Chapter 2 of Title IV of the national collective bargaining agreement for the financial markets of 11 June 2010 states that the employee must comply specifically with the rules of conduct regarding professional secrecy, both within the company and concerning third parties.

Confidentiality clauses can also be concluded between the employee and his or her employer, to reinforce the obligation of confidentiality.

In principle, a confidentiality clause allows for the protection of certain information exchanged during the contract and can be enforced after the termination of the employment contract if it is not perpetual. In this case, it is quite conceivable to contractualise such an obligation for employees in the financial services sector because of their functions, which by their very nature require discretion.

The law already states that anyone who uses or discloses confidential information obtained in the course of negotiations without authorisation is liable. Case law has addressed the issue of confidentiality clauses by ruling that an employee not executing this clause after his or her departure makes him or her liable for the resulting damage, without the employer having to prove gross negligence. The clause may be accompanied by a pecuniary sanction, which may be altered by the judge if it is lenient or excessive.

This clause in no way imposes a non-compete obligation and, therefore, does not entitle the employee to financial compensation.

In practice, it is complex to ensure compliance with this clause; however, the more specific the clause, the more effective it is.

Secondly, a non-compete clause allows an employer to limit an employee's professional activity at the end of an employment contract to prevent that employee from working for a competing company.

Despite the specificity of the activities of the financial sector, it seems that the common law of noncompetition clauses applies.

Thus, such a clause may be provided for by a collective agreement, in which case it is a conventional non-compete obligation. To be enforceable, the employee must have been informed of the existence of the applicable collective agreement. In this case, article 35 of Chapter I of Title IV of the national collective bargaining agreement for financial markets of 11 June 2010 provides for a non-compete obligation.

The non-compete clause is, in the majority of cases, contractual (ie, present in the employee’s employment contract). To be valid, this clause must meet various cumulative conditions to be compatible with the principle of freedom to work.

It must be essential to the protection of the legitimate interests of the company, limited in time and space, take into account the specificities of the employee's job, and include an obligation for the employer to pay the employee meaningful financial compensation. All these conditions are cumulative, and the employer cannot unilaterally extend the scope of the clause, otherwise it is null and void. Given the specificity of the activity of companies in the financial services sector, the condition of protection of the legitimate interests of the company would be met. However, taking into account the specificities of the employee's job may undermine such a clause if it is proven that his or her training and experience would prevent him or her from finding a job. The company's interest in imposing a noncompete clause must therefore be demonstrated.

The judge may restrict the application of the non-compete clause by limiting its effect in time, space or other terms when it does not allow the employee to engage in an activity consistent with his or her training and experience. However, the scope of application of the clause cannot be reduced by the judge if only the nullity of the clause has been invoked by the employee. If the non-compete clause is not enforced, the employer may take summary proceedings against the former employee who does not respect it, and also against the employee's new employer if they were hired with full knowledge of the facts, or if they continue

to be employed after learning of the clause.

The employer may waive the clause if this is explicit and results from an unequivocal will. In the specific case of contractual termination, the employer who wishes to waive the clause must do so no later than the termination date set in the agreement.

Finally, concerning the non-solicitation clause, such a clause can be concluded between two companies through a commercial contract. These companies mutually prohibit each other from hiring their respective employees. Therefore, this clause is distinct from a non-compete clause and does not meet its conditions of validity. However, it must be proportionate to the legitimate interests to be protected given the purpose of the contract.

Last updated on 16/04/2024

Hong Kong

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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. The rules concerning post-termination restrictive covenants are governed by common law principles in which they will only be enforced if the restriction is necessary for the protection of the employer's legitimate business interest and is reasonable in scope and duration.

Last updated on 22/01/2023

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.

Last updated on 16/04/2024

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

Belgium

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Employees must not, both during and after the termination of the contract, obtain, use or unlawfully disclose a business secret he or she became aware of in the course of his or her professional activity, or disclose the secrecy of any matter of a personal or confidential nature of which he or she became aware in the course of his or her professional activity (article 17, 3°, a, Employment Contracts Act).

The company can include a NDA in the employment contract to underline what is considered confidential information. A penalty clause (with a lump sum to be paid) can be foreseen in case of a breach after the end of the employment contract, but not during the period of the employment relationship. This is because of the prohibition on restricting the rights of employees or increasing their obligations in comparison with what is foreseen by the Employment Contracts Act (article 6).

Last updated on 16/04/2024

France

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All actors in the financial services sector are bound by strict professional and banking secrecy.

But beyond the professional secrecy that is inherent to the employment contract, there may be an interest in particular circumstances to strengthen this requirement and make it an obligation of absolute professional secrecy. This is legal under French law and generally takes the form of a confidentiality clause (non-disclosure) inserted in the employee's employment contract.

In principle, a confidentiality clause, which includes an obligation of professional secrecy to which the employee is bound as well as an obligation of discretion, is not subject to any particular conditions. In particular, it does not require the payment of any financial consideration.

On the other hand, when an employee by an agreement or transaction goes further and waives his freedom of expression, the case law sets stricter conditions of validity. The agreement must be adapted, necessary and proportionate to the aim sought.

Confidentiality clauses must also comply with any obligations in terms of transparency, the fight against corruption and influence peddling provided for by Law No. 2016-1691 of 9 December 2016.

The only entities against which banking secrecy cannot be invoked are the French Prudential Supervision and Resolution Authority, the Banque de France and the judicial authority acting in the context of criminal proceedings (article L. 511-33 of the Monetary and Financial Code). On the other hand, bank secrecy is enforceable in civil court proceedings, as confirmed by abundant case law.

Last updated on 16/04/2024

Hong Kong

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Non-disclosure agreements are legally enforceable in Hong Kong. They follow the contract law rules and there is no other particular form or rules. To be enforceable, a non-disclosure agreement must protect information that is both confidential and valuable. There are common exceptions where confidentiality will not apply to certain information, including information available in the public domain, information lawfully received from a third party without proprietary or confidentiality limitations, information known to the employee before first receipt of same from the employer, and information disclosed in circumstances required by law or regulatory requirement.

Last updated on 22/01/2023

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Non-disclosure agreements (NDAs) are generally lawful in Switzerland. However, NDAs are not regulated by statutory law and therefore do not have to follow any particular statutory form or rule. Nevertheless, most NDAs often contain a similar basic structure.

The core clauses of an NDA concern:

- manufacturing and business secrets or the scope of further confidentiality;
- the purpose of use;
- the return and destruction of devices containing confidential information; and
- post-contractual confidentiality obligations.

As a general rule, it is recommended to use the written form.

To ensure possible enforcement of an NDA in the employment context, the requirements of a post-contractual non-compete obligation (see below) must be met.

Last updated on 16/04/2024

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