# Employment in Financial Services

## Contributing Editor

*Louise Skinner at Morgan Lewis & Bockius*

## 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?

### France

Author: *Béatrice Pola*
at DS Avocats

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

## Switzerland

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

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?

## France

Author: *Béatrice Pola*
at DS Avocats

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

## Switzerland

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

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?

## France

Author: *Béatrice Pola*
at DS Avocats

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

## Switzerland

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

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?

## France

Author: *Béatrice Pola*
at DS Avocats

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

## Switzerland

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

Specifically, employees holding executive, overall management, oversight or control functions in regulated companies are responsible for ensuring that the companies' organization ensures the continued compliance with applicable financial market laws. Swiss financial market laws do not have enhanced responsibilities for different employee categories. Instead, a person's fitness and propriety are assessed within the context of the specific requirements and functions of a given company, the scope of activities at that company, and the complexity of that company.

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?

## France

Author: *Béatrice Pola*
at DS Avocats

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

## Switzerland

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

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?

## France

## France

Author: *Béatrice Pola*
at DS Avocats

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

## Switzerland

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

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?

### France

Author: *Béatrice Pola*
at DS Avocats

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

### Switzerland

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

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?

### France

Author: *Béatrice Pola*
at DS Avocats

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

## Switzerland

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

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?

## France

Author: *Béatrice Pola*
at DS Avocats

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

## Switzerland

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

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?

## France

Author: *Béatrice Pola*
at DS Avocats

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

## Switzerland

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

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?

## France

Author: *Béatrice Pola*
at DS Avocats

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

## Switzerland

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

There are no specific rules or protocols that apply when terminating the employment of an employee in the financial services sector. However, because changes in the strategic and executive management of, in particular, regulated companies such as banks, insurance companies, securities firms, fund management companies, managers of collective assets or asset managers are subject to a prior authorization by FINMA, the timing of termination and re-hiring of particular persons should be considered.

The general rules on the termination of an employment relationship apply under Swiss law: any employment contract concluded for an indefinite period may be unilaterally terminated by both employer and employee, subject to the contractual or (if no contractual notice period was agreed) statutory notice periods for any reason (ordinary termination).

The termination notice needs to be physically received before the notice period can start, meaning the notice needs to be received by the employee before the end of a month so that the notice period can start on the first day of the next month. If notice is not received before the end of the month, the notice period would start the month following the receipt of the notice. A termination notice might be either delivered by mail or personally.

Swiss law does not provide for payment in lieu of a notice period. The only option in this regard is to either send the employee on garden leave or to agree within the termination agreement to terminate the employment relationship per an earlier termination date than the one provided for in the termination notice.

As a general rule, an employment contract may be terminated by either party for any reason. However, Swiss statutory law provides for protection from termination by notice for both employers and employees, distinguishing between abusive and untimely notices of termination.

Based on social policy concerns, the employer must observe certain waiting periods, during which a notice cannot validly be served (so-called untimely notice). Such waiting periods apply (art. 336c CO), for example, during compulsory military or civil defence service, full- or part-time absence from work due to illness or an accident, or during an employee's pregnancy and 16 weeks following the birth of the child. Any notice given by the employer during these waiting periods is void. Any notice given before the respective period is effective, but once the special situation has occurred and for the period it lasts, the running of the applicable notice period is suspended and only continues after the end of the period in question.

In addition, Swiss civil law defines certain grounds based on which terminations are considered abusive (article 336 CO). Termination by the employer might be considered abusive (eg, if it is based on a personal characteristic of the other party (eg, gender, race, age), or if the other party exercises a right guaranteed by the Swiss Federal Constitution (eg, religion or membership in a political party) unless the exercise of this right violates an obligation of the contract of employment or is seriously prejudicial to the work climate). If the employer abusively terminates the employment contract, the employer has to pay damages to the employee and a penalty of up to six months' remuneration (article 336a CO). Nevertheless, an abusive termination remains valid.

Regarding settlement agreements, Swiss employment law allows the conclusion of such agreements, but there are strict limits on the parties' freedom of contract. Termination agreements may not be concluded that circumvent statutory provisions on employee protection. According to Swiss case law, termination agreements are usually valid and enforceable if both parties make real concessions, and if the agreement is also favourable for the employee. To conclude a termination agreement initiated by the employer, the employee must also be granted a sufficient reflection period. No further formalities need to be observed when concluding termination agreements, although it is generally advisable to have them in writing.

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?

### France

Author: *Béatrice Pola*
at DS Avocats

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

## Switzerland

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

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

Contributors

France

## France

Béatrice Pola
*DS Avocats*

## Switzerland

Simone Wetzstein
Matthias Lötscher
Sarah Vettiger
*Walder Wyss*