

# Workplace Investigations

## Contributing Editors

*Phil Linnard at Slaughter and May*  
*Clare Fletcher at Slaughter and May*

### **06. Can co-workers be compelled to act as witnesses? What legal protections do employees have when acting as witnesses in an investigation?**

#### Italy

Author: *Giovanni Muzina, Arianna Colombo*  
at BonelliErede

In general, employees must cooperate with a workplace investigation (as it is part of their general duty of diligence, as provided under article 2104 of the Italian Civil Code), and this may also include a duty to act as a witness.

In this respect, it must be pointed out that, even if the employee has a contractual duty to provide information requested by the employer, one limit to this principle could be, for example, self-incrimination.

However, caution is necessary during the interviews both with the employee under investigation and with co-workers, to avoid the risk of transforming the interview into what could be considered the de facto start of a disciplinary procedure. In other words, during the interview, the employer should only gather information on certain facts, and not put forward charges against the employee; otherwise, this could prevent or limit the employer's possibility to take disciplinary action regarding the same facts.

Furthermore, employees who cooperate within the workplace investigation must be protected against any retaliatory action directly or indirectly linked to their testimony (eg, as far as is possible, anonymity should be guaranteed, and disciplinary measures should apply to those who breach measures in place to protect the employee).

Apart from workplace investigations, employees are protected against retaliatory measures of any kind, which are always null and void and subject to appeal.

For a defensive criminal law investigation (see par. 4), the witness can refuse to testify; in this case, the criminal law lawyer may ask the prosecutor to interview the witness.

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#### Switzerland

Author: *Laura Widmer, Sandra Schaffner*

Due to the employee's duty of loyalty towards the employer and the employer's right to give instructions to its employees, employees generally must take part in an ongoing investigation and comply with any summons for questioning if the employer demands this (article 321d, Swiss Code of Obligations). If the employees refuse to participate, they generally are in breach of their statutory duties, which may lead to measures such as a termination of employment.

The question of whether employees may refuse to testify if they would have to incriminate themselves is disputed in legal doctrine.<sup>[1]</sup> However, according to legal doctrine, a right to refuse to testify exists if criminal conduct regarding the questioned employee or a relative (article 168 et seq, Swiss Criminal Procedure Code) is involved, and it cannot be ruled out that the investigation documentation may later end up with the prosecuting authorities (ie, where employees have a right to refuse to testify in criminal proceedings, they cannot be forced to incriminate themselves by answering questions in an internal investigation).<sup>[2]</sup>

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<sup>[1]</sup> Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on [hrtoday.ch](https://www.hrtoday.ch), last visited on 17 June 2022.

<sup>[2]</sup> Same opinion: Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on [hrtoday.ch](https://www.hrtoday.ch), last visited on 17 June 2022.

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## 13. Can non-disclosure agreements (NDAs) be used to keep the fact and substance of an investigation confidential?



### Italy

Author: *Giovanni Muzina, Arianna Colombo*  
at BonelliErede

Yes, in principle, NDAs can be used to keep the fact and substance of an investigation confidential, even if it is not strictly necessary (and not often done in our experience).

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### Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
at Bär & Karrer

In addition to the above-mentioned statutory confidentiality obligations, separate non-disclosure agreements can be signed. In an internal investigation, the employee should be expressly instructed to maintain confidentiality.

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## Contributors



### Italy

Giovanni Muzina  
Arianna Colombo  
*BonelliErede*



### Switzerland

Laura Widmer  
Sandra Schaffner  
*Bär & Karrer*

[www.internationalemploymentlawyer.com](http://www.internationalemploymentlawyer.com)