

Workplace Investigations

Contributing Editors

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10. What confidentiality obligations apply during an investigation?

Italy

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From an employment law perspective, confidentiality obligations may be seen from two different points of view:

- as a general duty of the employee related to the employment relationship, according to article 2105 of the Italian Civil Code, a “loyalty obligation”, which includes confidentiality obligations. On top of these, there are usually further confidentiality clauses in individual employment contracts; and
- as a general duty (linked to the outcome of the investigation) of the employer to keep confidential the identity of the employee who cooperates during the investigation (as whistleblower or a witness) to protect him or her.

In defensive criminal law investigations, the witness can't reveal questions or answers given in his or her interview to a third party.

With regards to the confidentiality applicable to the whistleblower, see above under question 9 and below under question 12.

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Switzerland

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Besides the employee's duty of performance (article 319, Swiss Code of Obligations), the employment relationship is defined by the employer's duty of care (article 328, Swiss Code of Obligations) and the employee's duty of loyalty (article 321a, Swiss Code of Obligations). Ancillary duties can be derived from the two duties, which are of importance for the confidentiality of an internal investigation.[\[1\]](#)

In principle, the employer must respect and protect the personality (including confidentiality and privacy) and integrity of the employee (article 328 paragraph 1, Swiss Code of Obligations) and take appropriate

measures to protect the employee. Because of the danger of pre-judgment or damage to reputation as well as other adverse consequences, the employer must conduct an internal investigation discreetly and objectively. The limits of the duty of care are found in the legitimate self-interest of the employer.^[2]

In return for the employer's duty of care, employees must comply with their duty of loyalty and safeguard the employer's legitimate interests. In connection with an internal investigation, employees must therefore keep the conduct of an investigation confidential. Additionally, employees must keep confidential and not disclose to any third party any facts that they have acquired in the course of the employment relationship, and which are neither obvious nor publicly accessible.^[3]

^[1] Wolfgang Portmann/Roger Rudolph, BSK OR, Art. 328 N 1 et seq.

^[2] Claudia Fritsche, *Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute*, p. 202.

^[3] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 133.

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21. How do you handle a parallel criminal and/or regulatory investigation?



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Generally speaking, internal investigations and those performed by external authorities are autonomous.

In addition, there are no general rules under which the employer must wait for the completion of a criminal investigation before completing its investigation and taking disciplinary action; if the employer believes it has sufficient grounds and evidence to take disciplinary action, it does not have to wait.

That being said, criminal investigations – given the wider investigation powers that public prosecutors or regulators have – may help to gather further evidence on the matter. From a practical point of view, the employer may decide to suspend (with pay) the employee pending the outcome of the criminal investigation, although this option must be evaluated carefully, given the potentially long duration of criminal proceedings, and the fact that the employer normally would not be in a position to access the documents and information about the criminal investigation (unless the company is somehow involved in the proceeding).

Lastly, in very general terms, police or public prosecutors have broad investigatory powers during criminal investigations, which could in certain circumstances make it compulsory for an employer to share evidence (but a case-by-case analysis is necessary regarding specific situations). Moreover, public prosecutors usually do not appreciate that, pending criminal proceedings, internal investigations are being conducted, because it can interfere with the criminal investigation.

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The actions of the employer may carry through to a subsequent state proceeding. First and foremost, any prohibitions on the use of evidence must be considered. Whereas in civil proceedings the interest in establishing the truth must merely prevail for exploitation (article 152 paragraph 2, Swiss Civil Procedure Code), in criminal proceedings, depending on the nature of the unlawful act, there is a risk that the evidence may not be used (see question 27 and article 140 et seq, Swiss Civil Procedure Code).

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