

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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