

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?



Spain

Author: *Sergio Ponce, Daniel Cerrutti*
at Uría Menéndez

A company cannot force an employee to actively take part in a workplace investigation or to act as a witness. However, if a co-worker's decision not to collaborate could be construed as an attempt to conceal evidence of wrongdoing, the company could then enforce disciplinary measures for this reason.

In our experience, employees tend to collaborate during workplace investigations and no retaliatory action can be taken against them for this reason. For example, if an employee provided evidence against his or her direct manager, the manager could not reprimand the employee or take any action that could be construed as such.

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Switzerland

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

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.^[1] 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).[2]

[1] 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.

[2] 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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09. What additional considerations apply when the investigation involves whistleblowing?



Spain

Author: *Sergio Ponce, Daniel Cerrutti*
at Uría Menéndez

Directive (EU) 2019/1937 of the European Parliament and of the Council, of 23 October 2019, on the protection of persons who report breaches of Union law, has been implemented in Spain through Law 2/2023 (Ley 2/2023, de 20 de febrero, reguladora de la protección de las personas que informen sobre infracciones normativas y de lucha contra la corrupción). This law limits the capacity of companies to retaliate or to take any action against employees who report workplace violations or breaches of the law. Any action taken against an employee in such a position would be considered null and void if challenged in court.

Spanish law allows anonymous reports to protect whistleblowers from retaliation.

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Switzerland

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

If an employee complains to his or her superiors about grievances or misconduct in the workplace and is subsequently dismissed, this may constitute an unlawful termination (article 336, Swiss Code of Obligations). However, the prerequisite for this is that the employee behaves in good faith, which is not the case if he or she is (partly) responsible for the grievance.

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Contributors



Spain

Sergio Ponce
Daniel Cerrutti

Uría Menéndez



Switzerland

Laura Widmer
Sandra Schaffner
Bär & Karrer

www.internationalemploymentlawyer.com