

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
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12. Can the identity of the complainant, witnesses or sources of information for the investigation be kept confidential?

Spain

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As in question 10, the identity of the complainant or other employees involved in the investigation may be kept confidential and companies do not have to share their identity with investigated employees. Anonymous complaints are expressly allowed under Spanish law (see question 9).

Companies may have to produce this information and share it with the investigated employees if it is necessary to allow them to defend themselves from disciplinary measures taken against them. Similarly, in the context of litigation, an employee or plaintiff could request a Labour Court to order the company to disclose the details of the investigation.

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Switzerland

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As mentioned under Question 10, the employer's duty of care (article 328, Swiss Code of Obligations) also entails the employer's duty to respect and protect the personality (including confidentiality and privacy) and integrity of employees (article 328 paragraph 1, Swiss Code of Obligations) and to take appropriate measures to protect them.

However, in combination with the right to be heard and the right to be informed regarding an investigation, the accused also has the right that incriminating evidence is presented to them throughout the investigation and that they can comment on it. For instance, this right includes disclosure of the persons accusing them and their concrete statements. Anonymisation or redaction of such statements is permissible if the interests of the persons incriminating the accused or the interests of the employer override the accused' interests to be presented with the relevant documents or statements (see question 11; see also article 9 paragraphs 1 and 4, Swiss Federal Act on Data Protection). However, a careful

assessment of interests is required, and these must be limited to what is necessary. In principle, a person accusing another person must take responsibility for their information and accept criticism from the person implicated by the information provided.[1]

[1] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 390.

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25. Who can (or must) the investigation findings be disclosed to? Does that include regulators/police? Can the interview records be kept private, or are they at risk of disclosure?



Spain

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Companies may only disclose the outcome of an investigation to employees or officers of the company who are empowered to adopt the measures that are necessary because of the investigation's results (see question 4).

This disclosure obligation does not extend to authorities: while there is a general obligation to report criminal or administrative offences to the competent authorities, this obligation must be read in line with the companies' right not to self-report themselves. What a company must not do is cover up, aid or otherwise become an accessory to the offence.

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Switzerland

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The employer is generally not required to disclose the final report, or the data obtained in connection with the investigation. In particular, the employer is not obliged to file a criminal complaint with the police or the public prosecutor's office.

Exceptions may arise, for example, from data protection law (see question 22) or a duty to release records may arise in a subsequent state proceeding.

Data voluntarily submitted in a proceeding in connection with the internal investigation shall be considered private opinion or party assertion.[1] If the company refuses to hand over the documents upon request, coercive measures may be used under certain circumstances.[2]

[1] Oliver Thormann, *Sicht der Strafverfolger – Chancen und Risiken*, in: Flavio Romerio/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 123.

[2] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romero/Claudio Bazzani (Hrsg.), Interne und regulatorische Untersuchungen, Zürich/Basel/Genf 2016, p. 102 et seq.

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