

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?

Netherlands

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There is no statutory regime for employee witnesses in internal (workplace) investigations and, hence, no specific statutory regime for legal protection. However, as part of the idea that employees have to act in line with good employment practices (section 7:611 DCC), employees, who potentially acquired knowledge in a work-related context on the subject matter of an investigation, are typically required vis-à-vis their employer to participate in such internal investigations. The required degree of cooperation will depend on the type and nature of the investigation and the matter that is being investigated. The principle of “good employment practices” in turn requires the employer to be guided by proportionality and subsidiarity considerations: which information is relevant to the investigation and what is the least burdensome means of collecting such information?

This may also impact the degree to which an employer can involve employee witnesses in an investigation. Increased prudence should be observed, among other things, if the relevant employee witnesses may themselves become implicated in the investigation or when the employer envisages sharing certain investigative findings with regulatory or criminal authorities, for instance as part of cooperation arrangements in an ongoing investigation. In such cases, the relevant employee should at least be allowed to retain legal counsel before continuing interview procedures.

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Singapore

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Singapore law does not impose any statutory or legal obligation on an employee to act as a witness in the investigation. Accordingly, an employer does not have the power to compel its employees to act as witnesses in an investigation.

Notwithstanding this, an employer may require an employee to assist in investigations pursuant to specific contractual obligations in the employee's terms of employment (as may be contained in the employment contract, employee handbook or the employer's internal policies and procedures in dealing with the investigations, etc). Further, a request for an employee to provide evidence of an event that he or she knows of may reasonably be deemed to be a lawful and reasonable directive from an employer.

Consequently, an employee's refusal to act as a witness may amount to an act of insubordination that may attract disciplinary action by the employer.

Employers requiring employees to act as witnesses in an investigation must ensure that they comply with the expectations and norms set out by the Tripartite Guidelines on Fair Employment Practices and the TAFEP Grievance Handling Handbook.

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Switzerland

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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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20. What if the employee under investigation goes off sick during the investigation?

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If the employee under investigation goes off sick during the investigation, they will generally be treated as

a regular employee on sick leave, meaning they are entitled to continued salary payment and that both employer and employee have a reintegration obligation. This entails regular consults with the company doctor to determine how recovery progresses and when the employee can return to work. If the employer suspects that the employee is merely calling in sick to delay the investigation and such suspicion is not confirmed by the company doctor, the employer can ask the Employees Insurance Agency (UWV) to give a second opinion. When it is determined that the employee is in fact fit for work, the employer can oblige the employee to return to work and cooperate with the investigation. If the employee fails to comply, the employer can – after due warning – suspend the employee's salary payment.

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If the employee under investigation has already responded to the allegations made against him or her and his or her participation is no longer required at this stage in the investigation, the employer may proceed with the investigation even while the employee is off sick.

However, if the employee under investigation has not responded to the allegations made against him or her and his or her participation is still required in the investigation, the company may exercise its discretion to pause the investigation until the employee can assist in the investigations. To prevent an employee from using a medical condition as an excuse to delay or avoid the investigation, the company may require the employee to provide specific medical documentation to address the issue of the employee's ability to participate in the investigation and to adjust the investigation process accordingly. For instance, instead of scheduling an in-person interview, the company may send a list of written questions for the employee to answer, and may also extend timelines for responding, etc.

If the employee is unable to return to work for the foreseeable future, the employer may consider reaching a provisional outcome based on the available evidence, which would be subject to change when the employee under investigation can return to work.

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Switzerland

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The time spent on the internal investigation by the employee should be counted as working time^[1]. The general statutory and internal company principles on sick leave apply. Sick leave for which the respective employee is not responsible must generally be compensated (article 324a paragraph 1 and article 324b, Swiss Code of Obligations). During certain periods of sick leave (blocking period), the employer may not ordinarily terminate the employment contract; however, immediate termination for cause remains possible.

The duration of the blocking period depends on the employee's seniority, amounting to 30 days in the employee's first year of service, 90 days in the employee's second to ninth year of service and 180 days thereafter (article 336c paragraph 1 (lit. c), Swiss Code of Obligations).

[1] Ullin Streiff/Adrian von Kaenel/Roger Rudolph, Arbeitsvertrag, Praxiskommentar zu Art. 319–362 OR, 7. A. 2012, Art. 328b N 8 OR.

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