

Workplace Investigations

Contributing Editors

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13. Can non-disclosure agreements (NDAs) be used to keep the fact and substance of an investigation confidential?

Germany

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In principle, it is possible to conclude non-disclosure agreements with external consultants of the investigation or with employees involved in the investigation. However, regarding external lawyers, a non-disclosure agreement is not necessary since lawyers are already subject to professional confidentiality. Concerning employees, it is rare in Germany to conclude confidentiality agreements in connection with a workplace investigation.

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Ireland

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There is no legislation regarding NDAs, but there is a Bill before the legislature proposing to “restrict the use of non-disclosure agreements as they relate to incidents of workplace sexual harassment and discrimination”. It is currently at the report stage. Whether it passes remains to be seen, but there has in recent times been strong criticism of the use of NDAs to cover up matters that ought to be fully investigated and dealt with in an organisation.

Settlement agreements, however they arise, may include confidentiality clauses which may, depending on the terms of the agreement, extend to the fact and substance of an investigation, but as in the UK an employee's right to make a protected disclosure or report a criminal offence cannot be waived by signing an NDA.

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In addition to the above-mentioned statutory confidentiality obligations, separate non-disclosure agreements can be signed. In an internal investigation, the employee should be expressly instructed to maintain confidentiality.

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