

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
Clare Fletcher at Slaughter and May

10. What confidentiality obligations apply during an investigation?

Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

A workplace investigation is often a sensitive matter that requires necessary confidentiality to find out the truth discreetly and objectively. Nevertheless, there is often pressure from employees, trade unions or even the media and general public to be transparent and communicate about the case. From a legal perspective, it is not recommended to communicate openly about an ongoing investigation, as this can jeopardise the investigation or the possibility of taking disciplinary measures.

Whistleblower investigations will be bound by a strict duty of confidentiality regarding anything that could reveal the identity of the reporter.

In complaints due to sexual harassment, violence or bullying at work, the prevention adviser is bound by professional secrecy. Consequently, he or she may not disclose to third parties any information about individuals that have come to his or her knowledge in the performance of his or her duties. However, he or she still has the freedom to inform the people concerned to carry out his or her tasks in the procedure.

Last updated on 15/09/2022

Germany

Author: *Hendrik Bockenheimer, Susanne Walzer, Musa Müjdecı*
at Hengeler Mueller

Depending on the subject of the investigation and the severity and significance of the suspected violation, employees who are involved in the workplace investigation may already have to maintain confidentiality based on their contractual duties. The prerequisite for this is that the employer has a legitimate interest in maintaining confidentiality. Criminal acts are not subject to confidentiality, but there is also no general obligation for the employee to report or disclose a criminal act to the authorities or the public prosecutor. However, reporting to the competent authorities may be required in certain cases (see question 25).

Lawyers are bound by professional confidentiality and are generally not allowed to provide information

about any information they receive from their clients. An exception exists, for example, if the lawyer must provide information to defend himself in court proceedings. There is also no absolute protection against the seizure of documents at an attorney's office (see question 14).

Last updated on 15/09/2022



Switzerland

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

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.

Last updated on 15/09/2022

Contributors



Belgium

Nicolas Simon
Van Olmen & Wynant



Germany

Hendrik Bockenheimer
Susanne Walzer
Musa Müjdeci
Hengeler Mueller



Switzerland

Laura Widmer
Sandra Schaffner
Bär & Karrer

www.internationalemploymentlawyer.com