

# Workplace Investigations

## Contributing Editors

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

## 10. What confidentiality obligations apply during an investigation?



### 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).

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### 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.<sup>[3]</sup>

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<sup>[1]</sup> Wolfgang Portmann/Roger Rudolph, BSK OR, Art. 328 N 1 et seq.

<sup>[2]</sup> Claudia Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 202.

<sup>[3]</sup> David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 133.

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## 16. If there is a works council or trade union, does it have any right to be informed or involved in the investigation?



### Germany

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

The works council does not have a general right of co-determination on whether and in what way a workplace investigation is carried out. However, workplace investigations may trigger co-determination rights of the works council in specific cases, as outlined below. If co-determination rights come into consideration, the employer must inform the works council about the investigation to put the works council in a position to assess whether or not co-determination rights are affected.

In connection with workplace investigations, the works council may have a co-determination right in the following cases:

- If e-mail accounts and data are screened by using technical devices that are suitable to monitor the behaviour or performance of employees (section 87 paragraph 1 no. 6, BetrVG).
- If, for example, the employer instructs all or a large group of employees to participate in interviews, the co-determination right of the works council regarding the rules of operation of the establishment and the conduct of employees in the establishment (section 87 paragraph 1 no. 1, BetrVG) may be affected.
- If standardised questionnaires are used in employee interviews, provided they are used for a large group of interviewed employees (section 94, BetrVG).

If co-determination rights exist in the specific case, the works council has the right to co-determine the type and structure of the specific investigative measures used (ie, the relevant investigative measure cannot be carried out without the works council's consent). To avoid any conflicts, the employer should set up, together with the works council, general rules about workplace investigations well ahead of any investigation.

Trade unions have no right of co-determination in workplace investigations.

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## Switzerland

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

In general, works councils and trade unions are not very common in Switzerland and there are no statutory rules that would provide a works council or trade union a right to be informed or involved in an ongoing internal investigation. However, respective obligations might be foreseen in an applicable collective bargaining agreement, internal regulations or similar.

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### Contributors



#### Germany

Hendrik Bockenheimer  
Susanne Walzer  
Musa Müjdeci  
*Hengeler Mueller*



#### Switzerland

Laura Widmer  
Sandra Schaffner  
*Bär & Karrer*