

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?

Austria

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An essential part of an internal investigation is the questioning of employees. Their statements contribute significantly to clarifying possible violations. In particular, the legal principles that apply to criminal proceedings, including the right to refuse to testify, do not apply directly to internal investigations.

Employees do not legally have to participate in such interviews. Their duty to cooperate arises indirectly from other legal provisions, in particular from employees' duties of loyalty and service under labour law.

Austrian law suggests there is a general principle of loyalty, which triggers a "duty to inform" under some circumstances; in principle, the employee and any witnesses are expected to provide information in the context of internal investigations. While the employee is not compelled to incriminate him or herself, he or she also may not withhold work-related information that the employer legitimately wishes to protect, for the sole reason that it might incriminate him or her. The decision as to whether the employee must disclose information depends on a balancing of interests in the specific case.

Investigators and employers must strictly adhere to the permissible limits. This requires compliance with labour law, criminal law and data protection law.

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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, 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, last visited on 17 June 2022.

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