

# Workplace Investigations

## Contributing Editors

*Phil Linnard at Slaughter and May*  
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## 10. What confidentiality obligations apply during an investigation?

### Australia

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Confidentiality protects the interests of the persons involved in the investigation as well as the integrity of the investigation. Before providing information as part of the investigation, employers should direct the complainant, respondent or witnesses to sign confidentiality agreements. This agreement should direct the person to refrain from discussing the investigation or matters that are the subject of the investigation with any person other than the investigator.

It is also best practice for participants in the investigation to be directed not to victimise (threaten or subject to any detriment) any persons who are witnesses to or are otherwise involved in the investigation.

After an investigation, employers should write to the complainant, respondent and any witnesses reminding them of their ongoing confidentiality obligations.

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### Greece

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Confidentiality applies as a general principle in disciplinary investigations.

Moreover, L. 4990/2022, which transposed EU Directive 2019/1937 into Greek Law, regulates the issue of confidentiality during investigations that start based on an internal report. The managers conducting the investigation must respect and abide by the rules of confidentiality regarding the information they have become aware of when exercising their duties<sup>[1]</sup>. They must also protect the complainant's and any third party's (referred to in the report) confidentiality by preventing unauthorised persons from accessing the report<sup>[2]</sup>.

Finally, L. 4808/2021 provides that employers must create a procedure that should be communicated to employees regarding all the necessary steps of an investigation following a complaint. Throughout the

whole process, the employer, managers and the employer's representatives responsible for the investigation must respect and abide by the rules of confidentiality in a manner that safeguards the dignity and personal data of the complainant and the person under investigation<sup>[3]</sup>.

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<sup>[1]</sup> Law 4990/2022, art. 9 par.8(b)

<sup>[2]</sup> Law 4990/2022, art. 10 par. 2(e)

<sup>[3]</sup> Law 4808/2021 art. 5 par.1(a) and 10 par.2(b)

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## Switzerland

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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.<sup>[1]</sup>

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.<sup>[2]</sup>

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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