

Workplace Investigations

Contributing Editors

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

10. What confidentiality obligations apply during an investigation?

Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

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[1]. 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[2].

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[3].

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

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

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

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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.^[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.

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12. Can the identity of the complainant, witnesses or sources of information for the investigation be kept confidential?



Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

According to express provisions of L.4990/2020, in principle personal data and any other information that may lead directly or indirectly to the identification of the complainant must not be disclosed to anyone other than the investigating individuals unless the complainant gives consent^[4] and that is why pseudonyms should be used. The witnesses and third persons that aid the complainant are deemed as “mediators” by the Law and their contribution to the procedure should be confidential^[5].

L.4808/2021 does not indicate when such disclosures are permitted; however, it is obvious that this is a matter of cost-benefit analysis where the public interest and the fundamental rights of the involved persons should be considered in a balanced way to ensure the best results. From a data protection perspective, it could be argued that the person under investigation's right to know the identity of the complainant, witnesses or sources of information should be limited to protect the rights of these persons.

[4] Law 4990/2022 art.14 par.1

[5] Law 4990/2022, art.3 par. 7 and art.10 par.2(e)



Switzerland

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

As mentioned under Question 10, the employer's duty of care (article 328, Swiss Code of Obligations) also entails the employer's duty to respect and protect the personality (including confidentiality and privacy) and integrity of employees (article 328 paragraph 1, Swiss Code of Obligations) and to take appropriate measures to protect them.

However, in combination with the right to be heard and the right to be informed regarding an investigation, the accused also has the right that incriminating evidence is presented to them throughout the investigation and that they can comment on it. For instance, this right includes disclosure of the persons accusing them and their concrete statements. Anonymisation or redaction of such statements is permissible if the interests of the persons incriminating the accused or the interests of the employer override the accused' interests to be presented with the relevant documents or statements (see question 11; see also article 9 paragraphs 1 and 4, Swiss Federal Act on Data Protection). However, a careful assessment of interests is required, and these must be limited to what is necessary. In principle, a person accusing another person must take responsibility for their information and accept criticism from the person implicated by the information provided.^[1]

^[1] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 390.

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24. What next steps are available to the employer?



Greece

Author: *Angeliki Tsatsi, Anna Pechlivanidi, Pinelopi Anyfanti, Katerina Basta*
at Karatzas & Partners

For workplace violence and harassment investigations, depending on the outcome of the internal investigation, the employer may adopt certain measures including, for example, recommendations to the employee under investigation, changes to the employee's working hours and transfer to another department.

If the employer decides to terminate the employment relationship, without having previously followed existing corporate policies regarding reporting procedures or without having provided the alleged perpetrator with the right to be heard, the dismissal could be deemed invalid. In any case, the measures adopted should be appropriate and proportional to the act committed.

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Switzerland

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

If the investigation uncovers misconduct, the question arises as to what steps should be taken. Of course, the severity of the misconduct and the damage caused play a significant role. Furthermore, it must be noted that the cooperation of the employee concerned may be of decisive importance for the outcome of the investigation. The possibilities are numerous, ranging, for example, from preventive measures to criminal complaints.^[1]

If individual disciplinary actions are necessary, these may range from warnings to ordinary or immediate termination of employment.

^[1] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 180 et seq.

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Contributors



Greece

Angeliki Tsatsi
Anna Pechlivanidi
Pinelopi Anyfanti
Katerina Basta
Karatzas & Partners



Switzerland

Laura Widmer
Sandra Schaffner
Bär & Karrer