

Workplace Investigations

Contributing Editors

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10. What confidentiality obligations apply during an investigation?

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[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

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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.^[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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14. When does privilege attach to investigation materials?



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Regarding L.4990/2022 for whistleblowers' procedures, many categories of privilege may occur during an investigation, such as: attorney-client privilege; doctor-patient privilege; and court or other proceedings' privilege deemed as classified. L.4990/2022 provides that its provisions do not affect any of these privileges and these privileges supersede^[6].

Privilege may also be attached to investigation materials in investigations relating to workplace harassment and violence incidents; however, since L.4808/2021 does not offer a specific provision and criminal proceedings may also commence, the matter of privilege must be examined ad hoc.

[6] Law 4990/2022 art.5 par.2(b) and par.2(c)

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As outlined above, all employees generally have the right to know whether and what personal data is being or has been processed about them (article 8 paragraph 1, Swiss Federal Act on Data Protection; article 328b, Swiss Code of Obligations).

The employer may refuse, restrict or postpone the disclosure or inspection of internal investigation documents if a legal statute so provides, if such action is necessary because of overriding third-party interests (article 9 paragraph 1, Swiss Federal Act on Data Protection) or if the request for information is manifestly unfounded or malicious. Furthermore, a restriction is possible if overriding the self-interests of the responsible company requires such a measure and it also does not disclose the personal data to third parties. The employer or responsible party must justify its decision (article 9 paragraph 5, Swiss Federal Act on Data Protection).^[1]

The scope of the disclosure of information must, therefore, be determined by carefully weighing the interests of all parties involved in the internal investigation.

^[1] Claudia M. Fritsche, *Interne Untersuchungen in der Schweiz*, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 284 et seq.

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