

Workplace Investigations

Contributing Editors

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

09. What additional considerations apply when the investigation involves whistleblowing?

Austria

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The provisions of the Whistleblowing Directive must be respected. In Austria, these have been implemented through the Whistleblower Protection Act (HSchG). If the whistleblower or the persons concerned fall within the scope of the Directive, their identity must be protected. Only authorised persons may access the report. Retaliatory measures are invalid or must be reversed. Within a maximum of seven days, the whistleblower must receive a confirmation of his or her complaint. Feedback to the whistleblower must then be provided within a maximum of three months.

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Switzerland

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If an employee complains to his or her superiors about grievances or misconduct in the workplace and is subsequently dismissed, this may constitute an unlawful termination (article 336, Swiss Code of Obligations). However, the prerequisite for this is that the employee behaves in good faith, which is not the case if he or she is (partly) responsible for the grievance.

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25. Who can (or must) the investigation findings be disclosed to? Does that include regulators/police? Can the interview records be kept private, or are they at risk of disclosure?

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It is up to management to decide which results should be disclosed and to whom. It is important to know who the persons concerned are and who has an interest in disclosure.

From a legal perspective, disclosure must follow the GDPR. Internal policies can specify how the results are to be handled. Works Council Agreements (WCAs) may also contain regulations on how to deal with internal investigations and the disclosure of results.

There is no requirement to publish the results of the investigation, but it may be advisable to cooperate with the authorities. This is particularly the case if the employer has suffered damage or is himself threatened with prosecution. The release of investigation results can be compelled through the courts.

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Switzerland

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The employer is generally not required to disclose the final report, or the data obtained in connection with the investigation. In particular, the employer is not obliged to file a criminal complaint with the police or the public prosecutor's office.

Exceptions may arise, for example, from data protection law (see question 22) or a duty to release records may arise in a subsequent state proceeding.

Data voluntarily submitted in a proceeding in connection with the internal investigation shall be considered private opinion or party assertion.^[1] If the company refuses to hand over the documents upon request, coercive measures may be used under certain circumstances.^[2]

^[1] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 123.

^[2] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 102 et seq.

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