

Workplace Investigations

Contributing Editors

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

13. Can non-disclosure agreements (NDAs) be used to keep the fact and substance of an investigation confidential?

Ireland

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There is no legislation regarding NDAs, but there is a Bill before the legislature proposing to “restrict the use of non-disclosure agreements as they relate to incidents of workplace sexual harassment and discrimination”. It is currently at the report stage. Whether it passes remains to be seen, but there has in recent times been strong criticism of the use of NDAs to cover up matters that ought to be fully investigated and dealt with in an organisation.

Settlement agreements, however they arise, may include confidentiality clauses which may, depending on the terms of the agreement, extend to the fact and substance of an investigation, but as in the UK an employee's right to make a protected disclosure or report a criminal offence cannot be waived by signing an NDA.

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Switzerland

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In addition to the above-mentioned statutory confidentiality obligations, separate non-disclosure agreements can be signed. In an internal investigation, the employee should be expressly instructed to maintain confidentiality.

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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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Depending on the nature of the subject matter of the investigation, it may be appropriate to notify the Garda Síochána or a specific government body such as Revenue. Also, if the employee occupies a regulated position, it may be necessary to inform the relevant regulator. Again, compliance with GDPR obligations should be borne in mind.

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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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