

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
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06. Can co-workers be compelled to act as witnesses? What legal protections do employees have when acting as witnesses in an investigation?

Belgium

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Employees cannot be forced by their employer to act as a witness. If they decide to nonetheless testify as a witness, they do not, in principle, have particular rights. If the employee puts himself in a difficult or even dangerous position to act as a witness, it is up to the employer to offer the necessary protection or take measures to prevent any harm (eg, by keeping the identity of the witness confidential or by planning the hearing at a place or time when the employees involved are not aware of it).

However, this is not the case for whistleblowing reports, where a witness might be seen as a “facilitator” who can receive protection against any retaliation by the employer.

Also, workers who were direct witnesses to official allegations of sexual harassment, violence or bullying at work are protected against retaliation by the employer. This also applies to witnesses in court.

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Hong Kong

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Under Hong Kong law, the employee has an implied duty to obey lawful instructions from his or her employer and to serve the employer with fidelity and good faith during the term of his or her employment. A lawful instruction from an employer may include a reasonable request for the employee to participate and provide information in the workplace investigation. If the employee refuses to comply with such instruction or is obstructive or provides untrue or misleading information, it could constitute a ground for summary dismissal under the EO and at common law.

That said, in general terms, an employer should not compel any employee to testify against a co-worker, particularly if such a co-worker is a senior colleague, as evidence provided under compulsion may not be

helpful to the investigation.

Employees who act as witnesses must be treated as per their contractual and statutory rights, including the right against self-incrimination. If the investigation involves allegations of discrimination on the ground of sex, race or disability, the employer should ensure that the witnesses will not be victimised or treated less favourably than other employees.

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Switzerland

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Due to the employee's duty of loyalty towards the employer and the employer's right to give instructions to its employees, employees generally must take part in an ongoing investigation and comply with any summons for questioning if the employer demands this (article 321d, Swiss Code of Obligations). If the employees refuse to participate, they generally are in breach of their statutory duties, which may lead to measures such as a termination of employment.

The question of whether employees may refuse to testify if they would have to incriminate themselves is disputed in legal doctrine.^[1] However, according to legal doctrine, a right to refuse to testify exists if criminal conduct regarding the questioned employee or a relative (article 168 et seq, Swiss Criminal Procedure Code) is involved, and it cannot be ruled out that the investigation documentation may later end up with the prosecuting authorities (ie, where employees have a right to refuse to testify in criminal proceedings, they cannot be forced to incriminate themselves by answering questions in an internal investigation).^[2]

^[1] Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on [hrtoday.ch](https://www.hrtoday.ch), last visited on 17 June 2022.

^[2] Same opinion: Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on [hrtoday.ch](https://www.hrtoday.ch), last visited on 17 June 2022.

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Employees may be reluctant to be interviewed or act as witnesses as part of an investigation, perhaps due to fear of reprisals. The investigator should discuss any concerns with the employee and attempt to alleviate any fears.

In general terms, an employer should not compel any employee to provide a witness statement. There may be circumstances in which this could be seen as a reasonable management instruction (and any refusal to comply treated as a disciplinary matter), but these will be rare. Evidence that is compelled is unlikely to be particularly useful to the investigator.

It may be possible to establish an express or implied obligation for senior managers to report on another employee's misconduct – as a feature of either their employment contractual duties, their fiduciary duties or their implied duty of fidelity. However, it is unlikely, in the absence of an express obligation, that a junior employee would be compelled to give evidence against a colleague.

Employees who act as witnesses benefit from their usual employment protections, and must be treated as per their contractual and statutory rights, as well as any policy governing the investigation. If the investigation involves allegations which could involve discrimination, the EA 2010 extends protection from victimisation to “giving evidence or information in connection with proceedings under this Act”. Witnesses should therefore not be subject to any detrimental treatment because they have acted as a witness in this type of investigation. Witnesses may also be entitled to protection as whistleblowers if their evidence amounts to a protected disclosure (see question 9).

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