

Workplace Investigations

Contributing Editors

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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?

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, 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, 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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21. How do you handle a parallel criminal and/or regulatory investigation?



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The actions of the employer may carry through to a subsequent state proceeding. First and foremost, any prohibitions on the use of evidence must be considered. Whereas in civil proceedings the interest in establishing the truth must merely prevail for exploitation (article 152 paragraph 2, Swiss Civil Procedure Code), in criminal proceedings, depending on the nature of the unlawful act, there is a risk that the evidence may not be used (see question 27 and article 140 et seq, Swiss Civil Procedure Code).

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This situation needs to be handled with caution. It is important to remember that regulatory or criminal proceedings, and employment proceedings, are separate; while there may be an overlap of alleged misconduct, they are usually addressing different questions, with different standards of proof. The outcome in one should not, therefore, be treated as determinative of the other.

Where the employee is suspected of, charged with, or convicted of, a criminal or regulatory offence, the

employer should still investigate the facts as far as possible, come to a view about them and consider whether the conduct is sufficiently serious to warrant instituting the disciplinary procedure.

In terms of timing, there are no concrete rules governing how an employer must proceed in the circumstances of a parallel criminal investigation. Much will depend upon the circumstances of the case, the length of delay, the size of and resources available to the employer, and the preferences (if expressed) of the external authority. If the employer is concerned about prejudicing the regulatory or criminal proceedings or otherwise prefers to wait for their conclusion before instigating internal proceedings, they are unlikely to be criticised for delaying. The accused employee may also be advised not to provide a statement in the workplace investigation for fear of a negative impact on the criminal investigation. This would make it difficult to proceed with the workplace investigation, unless the employer is confident it has strong enough evidence to justify any disciplinary action subsequently taken.

On the other hand, regulatory or criminal investigations may take months or years to progress; it may not be realistic for the employer to keep any investigation in abeyance for so long. This is particularly true when the accused employee is suspended on full pay, witness recollections will grow less reliable, and the alleged victim may feel unable to return to work until the matter is resolved.

In these circumstances, the employer may continue with their investigation if they believe it is reasonable to do so, and consultations have commenced with the external agency. The court will usually only intervene if the employee can show that the continuation of the disciplinary proceedings will give rise to a real danger that there would be a miscarriage of justice in the criminal proceedings.

Employers should consider carefully whether and when to involve the police in allegations of employee misconduct. Employers must be careful not to subject their employees to the heavy burden of potential criminal proceedings without the most careful consideration, and a genuine and reasonable belief that the case, if established, might justify the epithet “criminal” being applied to the employee's conduct.

Where the police are called in, they should not be asked to conduct any investigation on behalf of the employer, nor should they be present at any meeting or disciplinary meeting. The employer should, however, communicate with the police to see if they have a strong view about whether the internal process should be stayed, or whether they should interview witnesses first.

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