

# Workplace Investigations

## Contributing Editors

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

### 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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The employer should first identify which individuals may have protection as whistleblowers. This could be a current or former employee who raises the initial complaint, a co-worker who gives evidence as part of the investigation, or the accused employee.

In each case, consider whether a “protected disclosure” has been made (under Part IVA ERA 1996). This requires analysis of the subject matter of the disclosure, how it is made, and a reasonable belief that it is made in the public interest.

Employers must then ensure there is no detrimental treatment or dismissal of any worker on the grounds of their protected disclosure. Although the causation test for these purposes is not straightforward, as a general rule if the protected disclosure has a “material influence” on the decision to discipline or dismiss, there may be liability. Individual managers may be personally liable alongside the employer. Compensation for whistleblowing cases is uncapped, meaning businesses and individuals can face significant financial and reputational exposure.

What this means in practical terms is that the employer should promote a “speak-up” culture and, where protected disclosures are made, ensure they are handled by a team who are properly trained in how to do

## 10. What confidentiality obligations apply during an investigation?

### 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.[\[3\]](#)

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[\[1\]](#) 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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Workplace investigations should usually be conducted on a confidential basis, so that only those involved in the investigation are aware of its existence and subject matter. The need to maintain confidentiality about both the fact of the investigation, and any content discussed with an investigator, should be emphasised to all those involved. It may also be necessary to explain that a breach of confidentiality could be viewed as a disciplinary matter. Appropriate exceptions must, however, be made to allow employees to speak to any relevant employee or trade union representative, legal adviser and potentially the police or other regulators. Confidentiality provisions cannot override the rights of workers to make protected disclosures

(see question 9).

In some situations, such as those involving a wide-ranging investigation into the organisation's working practices and culture, it may be more appropriate to investigate a more "open" basis, and inform employees and other stakeholders.

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