

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?

India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*
at Trilegal

Yes. While it is common for employees to be bound by general confidentiality obligations at the beginning of employment, it is advisable to reiterate such confidentiality obligations through NDAs during an investigation.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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?

India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*
at Trilegal

Please see question 22.

For SH complaints, the report would normally contain a complete record of interviews conducted, evidence provided and other associated artefacts.

While investigation reports for other forms of misconduct may be kept private (subject to observations in the prior response relating to disciplinary inquiries), whether or not the investigative report should be disclosed to external agencies such as the police or other regulators would be a subjective decision. Disclosure may be necessary where a demand is made by the external agency as per powers it enjoys under the law (to seek production of necessary documents or personnel Rules of legal privilege may also be important to assess if any information can be withheld based on client-attorney privilege.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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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Contributors



India

Atul Gupta
Kanishka Maggon
Kopal Kumar
Trilegal



Switzerland

Laura Widmer
Sandra Schaffner
Bär & Karrer

www.internationalemploymentlawyer.com