

# Workplace Investigations

## Contributing Editors

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

### **06. Can co-workers be compelled to act as witnesses? What legal protections do employees have when acting as witnesses in an investigation?**

#### Portugal

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If the employer decides on an internal investigation to assess potential wrongful actions carried out within the company, employees must cooperate. However, employees are entitled to the privilege against self-incrimination established in the Portuguese Criminal Code, according to which individuals are not obliged to self-report.

An employee's refusal to cooperate with an internal investigation may be regarded as a breach of conduct by the employer and, ultimately, may lead to disciplinary sanctions.

Employees who act as witnesses in cases of harassment cannot be sanctioned unless they acted with wilful misconduct, and any sanction applied to an employee who acted as a witness in a harassment procedure will be presumed to be abusive.

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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.<sup>[1]</sup> 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]

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[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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