

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?

France

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Co-workers can spontaneously act as witnesses and provide statements to superiors before, during or after the interviews. Co-workers can also be interviewed as witnesses at the investigator's request, although they are not under any obligation to answer the questions and they cannot be compelled to do so. The investigators have an absolute obligation of discretion during the investigation and cannot reveal any details of the information gathered.

Certain employees may benefit from whistleblower status, which implies that they may be exempt from potential criminal and civil liability relating to their report or testimony and they are protected from any retaliatory measures from the employer. "Facilitators" who helped the whistleblower and the individuals connected with the whistleblower and risk retaliatory measures by testifying as a witness may also benefit from this status, as of 1 September 2022.

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South Korea

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While there are no laws to compel co-workers to act as witnesses, the company may have internal policies (eg, rules of employment, code of conduct) that require employees to cooperate with company actions such as a workplace investigation. That said, it would be difficult to enforce such policies even if the employee refuses to cooperate (eg, taking disciplinary action against an employee who refuses to act as a witness).

There may be instances when the company is required to provide certain legal protection to employees acting as witnesses in an investigation. For example, if a whistleblower falling under the WPA is required to act as a witness, they would be entitled to legal protections as discussed in question 1. The company may also have internal policies that provide protection to employees 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](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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11. What information must the employee under investigation be given about the allegations against them?

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According to the French data protection authority, the employee under investigation must be informed of the name of the person in charge of the investigation, the alleged facts that have led to the whistleblowing alert and their rights to access and rectify data collected about them. This information must be given as soon as the data collection starts, before the interviews, as per GDPR principles.

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South Korea

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There is no requirement to notify an employee under investigation concerning the allegations against him or her when requesting cooperation with a workplace investigation (eg, requesting the employee's consent to review electronic data, or requesting an interview).

However, the company may strategically consider explaining the general purpose of the investigation before requesting consent to review electronic data or when requesting an interview. This may help increase the likelihood of cooperation and also reduce the risk of the employee raising objections to the company's findings from the investigation by saying he or she was not properly informed of the purpose of the investigation, or that the investigation was conducted in a coercive manner.

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Switzerland

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As a result of the employer's duty of care (article 328, Swiss Code of Obligations), employees under investigation have certain procedural rights. These include, in principle, the right of the accused to be heard. In this context, the accused has the right to be informed at the beginning of the questioning about the subject of the investigation and at least the main allegations and they must be allowed to share their view and provide exculpatory evidence.^[1] The employer, on the other hand, is not obliged to provide the employee with existing evidence, documents, etc, before the start of the questioning.^[2]

Covert investigations in which employees are involved in informal or even private conversations to induce them to provide statements are not compatible with the data-processing principles of good faith and the requirement of recognisability, according to article 4 of the Swiss Federal Act on Data Protection.^[3]

Also, rights to information arise from the Swiss Federal Act on Data Protection. In principle, the right to information (article 8, Swiss Federal Act on Data Protection) is linked to a corresponding request for information by the concerned person and the existence of data collection within the meaning of article 3 (lit. g), Swiss Federal Act on Data Protection. Insofar as the documents from the internal investigation recognisably relate to a specific person, there is in principle a right to information concerning these documents. Subject to certain conditions, the right to information may be denied, restricted or postponed by law (article 9 paragraph 1, Swiss Federal Act on Data Protection). For example, such documents and reports may also affect the confidentiality and protection interests of third parties, such as other employees. Based on the employer's duty of care (article 328, Swiss Code of Obligations), the employer is required to protect them by taking appropriate measures (eg, by making appropriate redactions before handing out copies of the respective documents (article 9 paragraph 1 (lit. b), Swiss Federal Act on Data Protection)).^[4] Furthermore, the employer may refuse, restrict or defer the provision of information where the company's interests override the employee's, and not disclose personal data to third parties (article 9 paragraph 4, Swiss Federal Act on Data Protection). The right to information is also not subject to the statute of limitations, and individuals may waive their right to information in advance (article 8 paragraph 6, Swiss Federal Act on Data Protection). If there are corresponding requests, the employer must generally grant access, or provide a substantiated decision on the restriction of the right of access, within 30 days (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 paragraph 4, Ordinance to the Federal Act on Data Protection).

^[1] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 390.

^[2] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 390.

[3] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 390.

[4] Claudia Götz Staehelin, Unternehmensinterne Untersuchungen, 2019, p. 37.

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