

Workplace Investigations

Contributing Editors

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10. What confidentiality obligations apply during an investigation?

France

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Interviewers, investigators, interviewees or any others involved in the investigation are often bound by a reinforced confidentiality obligation, particularly when the internal investigation is triggered by a whistleblower alert. In addition, every person that comes to know of the investigation, facts or people involved is bound by an obligation of discretion. Furthermore, investigators should specifically be trained for interviews and be reminded of their obligations relating to the investigation.

The investigators will need to determine the order of the tasks to be carried out in the investigation, as this will have a significant impact on confidentiality management. Should they start with the hearings or a review of documents? The answer may depend on the subject matter of the investigation. It is advisable to first review the documentation before organising interviews, particularly to avoid the destruction of certain documents by employees acting in bad faith or by those wishing to erase the traces of alleged wrongdoing. Sometimes, however, it is possible to start with the interviews, especially in the case of harassment, as there may be no documents to review. If the decision is taken to conduct the documentation review after the interviews, it could be useful to ask the employees involved to sign a document stating that they must preserve and retain documents, meaning that if they delete or destroy documents, they would be acting against the company and in breach of the law.

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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.[\[3\]](#)

[\[1\]](#) 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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22. What must the employee under investigation be told about the outcome of an investigation?



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The employee under investigation, like the other employees interviewed and the whistleblower, must be informed that the investigation has been completed. However, there is no obligation to provide them with the report and, for reasons of confidentiality, it is very often best not to do so.

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Workplace investigations often result in an investigation report that is intended to serve as the basis for any measures to be taken by the company's decisionmakers.

The employee's right to information based on article 8, Swiss Federal Act on Data Protection also covers the investigation report, provided that the report and the data contained therein relate to the employee.[\[1\]](#) In principle, the employee concerned is entitled to receive a written copy of the entire investigation report free of charge (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 et seq, Ordinance to the Federal Act on Data Protection). Redactions may be made where the interests of the company or third parties so require, but they are the exception and must be kept to a minimum.[\[2\]](#)

[1] Arbeitsgericht Zürich, Entscheide 2013 No. 16; Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 393 et seq.

[2] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 394.

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