

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
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10. What confidentiality obligations apply during an investigation?

Poland

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The law does not cover this issue, apart from whistleblower regulations, as it should be regulated by the employer in their internal rules. The employer should ensure all participants of the investigation keep information related to it secret, as long as is necessary for the investigation (or even longer, if required by law concerning personal data or other specially protected information). Reputation, personal data and the personal rights of other people cannot be breached during the proceedings and this should be protected.

Moreover, according to the Draft Law – a whistleblower's personal data should be kept confidential. It can only be disclosed if law enforcement authorities require it. Also, confidentiality should be guaranteed for the subject and other interested persons.

Last updated on 20/04/2023

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.

Last updated on 15/09/2022

16. If there is a works council or trade union, does it have any right to be informed or involved in the investigation?



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There is no such obligation, unless it is provided for in an internal procedure or, for example, in the applicable collective bargaining agreement. It is neither a recognised practice nor recommended that such persons participate in the investigation.

However, in the event of violations that justify the termination of an employment contract with the employee, the employer should consult with that employee's union about their intention to immediately terminate any employment contract concluded with that person or to terminate, with notice, the employment contract agreed with him or her for an indefinite term, or apply for consent to terminate the employment contract with an employee who is protected by a union.

Last updated on 20/04/2023



Switzerland

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In general, works councils and trade unions are not very common in Switzerland and there are no statutory rules that would provide a works council or trade union a right to be informed or involved in an ongoing internal investigation. However, respective obligations might be foreseen in an applicable collective bargaining agreement, internal regulations or similar.

Last updated on 15/09/2022

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