Workplace Investigations

Contributing Editors

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10. What confidentiality obligations apply during an investigation?



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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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investigation be given about the allegations against them?

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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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26. How long should the outcome of the investigation remain on the employee's record?

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From an employment law point of view, there is no statute of limitations on the employee's violations. Based on the specific circumstances (eg, damage incurred, type of violation, basis of trust or the position of the employee), a decision must be made as to the extent to which the outcome should remain on the record.

From a data protection point of view, only data that is in the interest of the employee (eg, to issue a reference letter) may be retained during the employment relationship. In principle, stored data must be deleted after the termination of the employment relationship. Longer retention may be justified if rights are still to be safeguarded or obligations are to be fulfilled in the future (eg, data needed regarding foreseeable legal proceedings, data required to issue a reference letter or data in relation to a non-competition clause).[1]

[1] Wolfgang Portmann/Isabelle Wildhaber, Schweizerisches Arbeitsrecht, 4. Edition, Zurich/St. Gallen 2020, N 473.

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