

Workplace Investigations

Contributing Editors

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01. What legislation, guidance and/or policies govern a workplace investigation?



Brazil

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There is no specific law governing workplace investigations in Brazil, but Law 14.457/2022 states that companies must have rules that relate to sexual and other forms of harassment in their internal policies, address the rules for receiving and processing accusations, assess the facts, and discipline any individuals directly and indirectly involved in acts of sexual harassment or violence.

If the investigation has any connection with anticorruption matters, the investigation procedure must comply with Law 12846/2013 (Brazilian Anticorruption Act) and Decree 8420/2015.

As a result, Brazilian employers usually follow the rules determined by internal corporate policies, which often result from international regulations and principles that differ from the Brazilian ones, which inadvertently expose the Brazilian subsidiary to liability. The answers below will highlight common examples of this, when appropriate.

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Italy

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From an Italian employment law perspective, there is no specific body of legislation that governs investigations. However, several legal and case-law principles may be relevant concerning various specific aspects of investigations, and to which reference will be made below (eg, provisions under Law No. 300 of 1970, the so-called Workers' Statute regarding "controls on employees", both physical and "remote", or regarding "disciplinary proceedings").

In addition, and outside of the specific scope of employment law, other law provisions may have an impact on investigations, including those regarding privacy law (eg, Italian Legislative Decree No. 196 of 2003 and the Regulation (EU) No. 679 of 2016 (GDPR), regarding data protection and the related policies),

whistleblowing (Law No. 179 of 2017 and Directive (EU) No. 1937 of 2019, regarding whistleblower protection) and criminal law (eg, Italian Criminal Procedure Code, providing rules for criminal investigation and Italian Legislative Decree No. 231 of 2001, regarding the corporate (criminal) liability of legal entities).

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02. How is a workplace investigation usually commenced?



Brazil

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Workplace investigations usually commence on the receipt of an allegation, which can be presented orally or in writing to an assigned member of the company (usually, within the HR, Compliance or Legal Departments, or to a direct supervisor) or via an external channel, as determined by the company's policy.

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Italy

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Generally speaking, a workplace investigation can commence either as a consequence of facts reported by employees or third parties (either anonymous or not), for instance within a whistleblowing procedure or as part of normal and periodical activity carried out by internal auditing.

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03. Can an employee be suspended during a workplace investigation? Are there any conditions on suspension (eg, pay, duration)?



Brazil

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Yes, an employee can be suspended during or before a workplace investigation. However, suspending an employee is not a legal requirement in Brazil. It is also not standard business practice and entails legal risk, as detailed below.

While internal policies in line with a company's global investigation approach may determine whether investigated employees are suspended during an investigation, the suspension of an accused employee is not recommended. The only exception is when the accused employee, upon becoming aware of the existence of the investigation, poses a clear and imminent risk of physical danger to other employees or

interfering with the investigation.

The suspension of an employee during an investigation makes it difficult for the company to keep the investigation confidential, because the absence of the investigated employee will have to be explained to his or her colleagues and business contacts. As a result, the investigated employee may be exposed to the stigma of being associated with potential misconduct.

Even if the accusation is confirmed and the individual is terminated with cause, the employer cannot disclose the reason for the termination or that the contract was terminated for a cause or violation in the employee's employment records. Also, if the employer shares such information with prospective employers they may be liable for damages.

Termination for cause on the grounds of dishonest conduct, if not upheld by the labour court, usually leads to liability for damages to the former employee due to the accusation and the stigma associated with it.

Therefore, if the company decides to suspend the employee during the investigation and terminate his or her employment at the end of the investigation, the suspension will be associated with wrongdoing, and the individual will have grounds to claim damages for the association between the termination, the investigation and wrongdoing, which will likely be presumed by a labour court (damage *in re ipsa*).

On the other hand, if the accusation is deemed groundless, the connection between the employee and potential wrongdoing resulting from his or her suspension can be used as grounds for damages because of the resulting environment at the workplace or the development of mental health conditions such as depression or anxiety by the investigated employee due to the investigation and uncertainty about the negative effect of it on his or her reputation.

Because suspension during an investigation is not a disciplinary measure, if the company decides to suspend, the employee's salary cannot be affected. Also, the suspension period must be as short as possible, and can in no circumstance be longer than 30 days. If it exceeds 30 days, it would trigger termination for cause by the company, which increases the amount of statutory severance due to the employee.

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In general, from an Italian employment law perspective, there is no specific legal rule governing the suspension of an employee during a workplace investigation.

However, it should be noted that:

- certain National Collective Bargaining Agreements (NCBAs) may provide, in particular circumstances, for the possibility of suspending (with pay) an employee (eg, when the employee is under criminal proceedings – as stated, for example, in the NCBA for executives of credit, financial and investment companies);
- according to well-established case law, the employer may suspend the employee from work (with pay) in the framework of a disciplinary procedure (which, according to Italian law, must be followed before applying any disciplinary sanction, including dismissal^[1]), where the facts behind the procedure are sufficiently serious;
- certain case-law decisions have also stated that – even in the absence of a disciplinary procedure – the employer may suspend (with pay) the employee when it has very serious suspicions of an employee's unlawful conduct, and for the time that is strictly necessary to ascertain his or her liability.

The above may be done by the employer, for instance, if keeping the employee in service may cause a risk of tampering with evidence or a risk of damage to the physical safety of other employees or company

property.

Normally, in the above-mentioned circumstances, the suspension is with pay and with job security.

[1] The steps of the disciplinary procedure can be summarised as follows: (i) the employer must send a letter to the employee in which the disciplinary facts are described in detail and precisely; (ii) the employee can submit his written or oral defence to the employer within five days from receiving the letter (or different term provided under applicable collective bargaining); during this period, the employer cannot take any punitive measures against the employee; (iii) after receiving the employee's defence (or, if the employee has not submitted any defence within the relevant term), the employer may serve the executive with a notice of dismissal (certain NCBA's set a term within which a sanction, if any, should be applied by the employer). Failure to comply with the procedure results in the dismissal being null and void. According to the law, the dismissal takes effect from the commencement of the disciplinary procedure itself.

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04. Who should conduct a workplace investigation, are there minimum qualifications or criteria that need to be met?



Brazil

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There is no statutory rule, and therefore the investigator can be chosen by the company.

In sensitive matters, it is recommended that attorneys undertake the investigation due to legal privilege. Engaging external lawyers increases the confidence of witnesses and parties in the independence and lack of bias of the investigation process, especially when the allegations involve senior employees.

Additionally, attorneys are trained to collect information based on legal thresholds that apply to the allegations, allowing the decision-makers to understand the events as they would be posed before a labour judge or a prosecutor, and enabling them to clearly assess the legal risk involved in the situation.

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In general, from an employment law perspective, there is no specific legal rule governing the minimum qualifications of who should conduct a workplace investigation. Generally speaking, a workplace investigation is carried out by the internal audit function, when there is one (generally in large companies), or by the HR or legal departments.

Outside the workplace, the employer may carry out investigations on the employee – normally without the latter knowing – through a private investigator. This investigation should be carried out to verify that the employee does not engage in conduct contrary to the company's interests (eg, unlawful competition, disclosure of confidential information, criminal breaches). In such cases, the private investigator must comply with specific rules, mainly found in Italian Royal Decree No. 773 of 1931, according to which the investigator must, among other things: hold a licence issued by the competent authority; and keep a

register of the activities conducted daily.

In addition, if there is a suspicion that a crime has been committed, the company may appoint a criminal law lawyer to conduct their own defensive criminal law investigation, as provided by article 391bis and the Italian Criminal Procedure Code.

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05. Can the employee under investigation bring legal action to stop the investigation?



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Employees are not legally prohibited from bringing legal action, but because investigations are within an employer's powers, a legal action to broadly stop an investigation (as opposed to an injunction to prevent a limited measure within an investigation, such as the review of private messages) would likely be deemed groundless.

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In principle, no. However, if the employee believes that, during the workplace investigation, there is a breach of his or her rights, he or she could act to protect them before the court (eg, through precautionary urgency proceedings under Article 700 of the Italian Civil Procedure Code).

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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?



Brazil

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Employees cannot be compelled to act as witnesses. Employers may have trouble enforcing internal policies stating that employees who refuse to participate in investigations will be disciplined (warned, suspended or have their contract terminated for cause), but can terminate their contract without cause.

There are no explicit legal protections for employees acting as witnesses, but it is common best practice to have witnesses' identities protected to the extent necessary for the investigation, and to protect them from

retaliation.

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In general, employees must cooperate with a workplace investigation (as it is part of their general duty of diligence, as provided under article 2104 of the Italian Civil Code), and this may also include a duty to act as a witness.

In this respect, it must be pointed out that, even if the employee has a contractual duty to provide information requested by the employer, one limit to this principle could be, for example, self-incrimination.

However, caution is necessary during the interviews both with the employee under investigation and with co-workers, to avoid the risk of transforming the interview into what could be considered the de facto start of a disciplinary procedure. In other words, during the interview, the employer should only gather information on certain facts, and not put forward charges against the employee; otherwise, this could prevent or limit the employer's possibility to take disciplinary action regarding the same facts.

Furthermore, employees who cooperate within the workplace investigation must be protected against any retaliatory action directly or indirectly linked to their testimony (eg, as far as is possible, anonymity should be guaranteed, and disciplinary measures should apply to those who breach measures in place to protect the employee).

Apart from workplace investigations, employees are protected against retaliatory measures of any kind, which are always null and void and subject to appeal.

For a defensive criminal law investigation (see par. 4), the witness can refuse to testify; in this case, the criminal law lawyer may ask the prosecutor to interview the witness.

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07. What data protection or other regulations apply when gathering physical evidence?



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The Brazilian General Data Protection Law (LGPD) does not have specific rules or principles that apply to internal investigations conducted within private organisations. Despite that, the general principles and obligations set forth by the LGPD apply to any processing of personal data carried out within the context of such investigations. As a result, the company must ensure the transparency of such processing activities through a privacy notice addressed to the data subjects; only process the personal data that is necessary for the investigation; define the lawful basis that applies to such processing activities (especially for sensitive data); and apply any other obligations established by the LGPD.

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Several legal and case-law principles may be relevant depending on the kind of investigation, including the following:

- gathering evidence through employee “physical inspections and inspections on the employee’s belongings”: according to article 6 of the Workers’ Statute, these inspections are generally prohibited. They are permitted only where necessary to protect company assets (in such cases, corporal inspections may be carried out, subject to trade union agreement or National Labour Inspectorate authorisation, provided that, for example, they are carried out outside the workplace, that employees are selected with an automatic selection tool, and that the dignity and confidentiality of employees are protected);
- gathering evidence through “audiovisual equipment and other instruments from which the possibility of remote control of employees’ activities arises”: according to article 4 of the Workers’ Statute, remote systems cannot be directly aimed at controlling employees’ activity, but can only be put in place for organisational, production, work safety or asset-protection needs (which may result in an indirect control over employees’ activity), and may be installed before a trade union agreement or with previous authorisation from the National Labour Inspectorate; however, these rules do not apply to working tools in an employee’s possession (see question 8) and, in any case, employees must be informed of the possibility of remote control;
- gathering physical evidence through so-called defensive controls: according to the most recent case law, “defensive controls” can be defined as investigations carried out by the company where it has a suspicion of unlawful conduct by its employees. These controls can be carried out within certain limits and restrictions provided by case law – even in the absence of the guarantees provided for in article 4 of the Workers’ Statute.

In addition, when gathering physical evidence, there may be other provisions of law not strictly related to employment law that must be followed, for example, regarding privacy regulations (eg, minimisation of the use of personal data, collection of data only for specific purposes, and adoption of safety measures).

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08. Can the employer search employees’ possessions or files as part of an investigation?

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No; employers are only generally allowed to search the work tools they provide to employees, such as company mobile phones, electronic files, and company email and other electronic communications. However, they may also request that employees turn over any company documents in their possession.

Searches of employees’ private possessions or files during an investigation can only occur with the verifiable consent of the employee.

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In light of the legal and case-law principles as outlined above:

- see question 7 regarding employee “physical inspections and inspections on the employee’s belongings”;
- regarding “audiovisual equipment and other instruments from which the possibility of remote control of employees’ activities also arises”, article 4 of the Workers’ Statute provides for:
 - the prohibition of the use of audiovisual equipment and instruments of “direct” remote control (ie, whose sole purpose is to verify the manner, quality and quantity of working performance (eg, a camera installed in an office to film employees’ working activities, without any other purpose));
 - the possibility of carrying out controls through audiovisual equipment and “indirect” remote instruments (ie, instruments that serve different needs (organisational, production, work safety or company assets’ protection), but which indirectly monitor working activities (eg, a camera installed in a warehouse to prevent theft, but which indirectly monitors the activity of warehouse workers), which may only be installed with a trade union agreement (or National Labour Inspectorate authorisation);
 - the possibility of carrying out checks using working tools in the employee’s possession (e.g., PCs, tablets, mobile phones, e-mail), which may be carried out even in the absence of any trade union agreement, provided that the employee is given adequate information on how to use the tools and how checks may be carried out on their use (according to privacy law strictly related to the employment relationship).

Furthermore, based on case law, the employer can carry out so-called defensive controls (ie, actions carried out in the absence of the guarantees provided for in article 4, to protect the company and its assets from any unlawful conduct by employees). These “defensive controls” can be carried out if:

- they are intended to determine unlawful behaviour by the employee (ie, not simply to verify his or her working performance);
- there is a “well-founded suspicion” that an offence has been committed;
- they take place after the conduct complained of has been committed; and
- adequate precautions are nevertheless put in place to guarantee a proper balancing between the need to protect company assets and safeguarding the dignity and privacy of the employee.

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09. What additional considerations apply when the investigation involves whistleblowing?

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If the investigation involves matters within the scope of a specific whistleblowing policy, the policy rules should prevail against the general investigation rules if there is a conflict.

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The regulations on whistleblowing in the private sector were originally outlined in article 6 of Italian Legislative Decree No. 231 of 2001 (as amended by Law No. 179 of 2017), which state that the models of organisation must provide for one or more channels that allow persons in positions of representation, administration and management of the entity (and persons subject to their direction or supervision) to report unlawful conduct according to Italian Legislative Decree No. 231 of 2001 and violations of the entity's organisational and management rules.

Currently, Italy has implemented Directive (EU) No. 1937 of 2019, which provides for the adoption of new standards of protection for whistleblowers, through the Italian Legislative Decree No. 24 of 2023 (WB Decree)[1].

In line with the Directive, the WB Decree states, inter alia, that[2]:

- an internal whistleblowing reporting channel must be put in place by all private legal entities (and legal entities in the public sector) that have employed, during the previous year, an average of 50 employees or, even below this threshold, operate in certain industries[3] or have adopted an organizational model in accordance with Legislative Decree no. 231 of 2001;
- the WB Decree prescriptions apply to reports concerning breaches of certain national/EU[4] legal provisions (varying depending on features such as the private or public nature of the employer and its dimensions), and not to claims or requests linked to interests of a personal nature of the reporting individuals (pertaining to their individual employment contracts or to relations with their superiors)[5];
- whistleblowers' reporting may take place through:
 - the company's internal reporting channels and internal reporting procedures (with the possibility – for entities employing up to 249 employees, even if not part of the same group – to share whistleblowing reporting channels); or
 - external reporting channels and external reporting procedures established by the member states' competent authorities (in Italy, ANAC, i.e. the National Anticorruption Authority); or
 - in certain circumstances, public disclosure;
- whistleblowing systems must provide:
 - a duty of confidentiality regarding the whistleblowers' identity (which generally may not be disclosed to persons other than those competent to receive or investigate on the reports, except in specific case and with the whistleblower's consent; see also answer to question 12 below); and
 - ways of protecting collected data according to the GDPR, as well as tight deadlines for communication with whistleblowers[6]; and
 - an integrated system of protection of whistleblowers against any retaliatory action directly or indirectly linked to their reports or declarations, with a reversal of the burden of proof (meaning the employer must give proof of the non-retaliatory nature of measures adopted vis-à-vis whistleblowers); and
 - the procedures to be taken in case of anonymous whistleblowing report.

[1] The provisions of the Decree are binding since July 15, 2023, for larger companies, and as of Dec. 17, 2023, for entities employing an average of from 50 to 249 employees.

[2] This is only a brief and non-exhaustive summary of some of the main provisions under the WB Decree.

[3] In particular, companies that fall within the scope of application of EU acts listed in Annex (part I.B and II) of the WB Decree (for instance, financial services, products and markets; money laundering/terrorism prevention; transportation security; etc.)

[4] Listed in art. 2 and in Annex 1 of the WB Decree (for instance, regarding financial services, products and markets sector) or protecting the EU financial interests or internal market.

[5] Listed in art. 2 and in Annex 1 of the WB Decree (for instance, regarding financial services, products and markets sector) or protecting the EU financial interests or internal market.

[6] In greater detail: (i) a notice acknowledging the receipt of the WB report must be released within seven

days; (ii) contacts must be kept with the whistleblower for any additions needed (if the identity is known); and (iii) within three months of the notice of receipt of the report, a follow-up notice must be given to the whistleblower (which may also be non-definitive, with a status update on activities in progress).

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10. What confidentiality obligations apply during an investigation?



Brazil

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Law 14.457/2022 states that companies must guarantee the anonymity of accusers. As a result, it is best practice that companies allow for anonymous submissions, or allow accusers to voluntarily disclose their identity while acknowledging that they agree that it will be kept confidential to the extent required by the investigation.

Also, companies should have internal rules stating that all parties involved in an investigation (accusing party, accused party, witnesses, investigators, and any other person that has any contact with the investigation) must keep the existence of the investigation and of the events related to the investigation confidential to the extent required by the investigation, and discipline any individuals that violate this.

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Italy

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From an employment law perspective, confidentiality obligations may be seen from two different points of view:

- as a general duty of the employee related to the employment relationship, according to article 2105 of the Italian Civil Code, a “loyalty obligation”, which includes confidentiality obligations. On top of these, there are usually further confidentiality clauses in individual employment contracts; and
- as a general duty (linked to the outcome of the investigation) of the employer to keep confidential the identity of the employee who cooperates during the investigation (as whistleblower or a witness) to protect him or her.

In defensive criminal law investigations, the witness can't reveal questions or answers given in his or her interview to a third party.

With regards to the confidentiality applicable to the whistleblower, see above under question 9 and below under question 12.

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11. What information must the employee under

investigation be given about the allegations against them?



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There is no obligation to inform an employee under investigation that this is the case, and it should not happen automatically.

While some policies require that the investigated employee be informed about the allegations against them at the beginning of the investigation, from a local perspective it is recommended that the accused employee be notified about the existence of the allegations if, after a reasonable review, there are elements that suggest that the accusation may be material.

In this context, the employee should be informed about the accusation and be allowed to confirm, deny, provide further context or justify each reported or identified event; offer evidence; and indicate persons or sources of information that could corroborate his or her defence. Information about the accusation must be focused on facts rather than on how the company obtained the information.

If the accusation is found to be groundless after initial review, involving the accused employee at the beginning of the process may have triggered unjust and unnecessary stress and a disruption in the employment relationship that may not be satisfactorily repaired by a determination that the accusation was void. This may result in a legal liability for the company or HR issues that could otherwise have been avoided.

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Italy

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From an employment law perspective, our legal system does not provide a specific duty for an employer to inform employees that a workplace investigation is in progress.

In addition, disclosing such information could put at risk the outcome of the workplace investigation (eg, destruction of evidence), and it would therefore be arguable that no information should be provided to employees.

On the other hand, if, upon completion of the investigation, the employer decides to bring disciplinary action against the employee, then the latter must be informed of the complaints with a letter stating the procedure (see questions 3 and 12).

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12. Can the identity of the complainant, witnesses or sources of information for the investigation be kept confidential?



Brazil

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Yes, the identity of the complainant, witnesses and sources of information for the investigation should be kept confidential.

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Yes, in principle the identity of the complainant, witnesses or sources of information for the investigation can be kept confidential.

On the other hand, if the employer – after having concluded the investigation – brings disciplinary action against the employee, the employer must send a letter to the employee in which the facts are described in detail, objectively and in a precise way, identifying when and where they have taken place, to allow a proper defence for the employee.

Even at this stage, however, the employer has no obligation to provide the employee with the evidence underlying the facts ascribed to him (ie, the employer has no obligation to specify the identity of the individuals through which they gained knowledge of the facts reported in the disciplinary letter).

However, if the employee subsequently challenges the disciplinary sanction before a judge, the employer bears the burden of proof, which may mean having to call the individuals interviewed within the internal investigation to stand as witnesses in court.

Moreover, in case of whistleblowing reports falling within the scope of the WB Decree, the employer is requested to generally keep the whistleblower's identity confidential (according to art. 12 of the WB Decree). More specifically: (i) if the disciplinary charges are grounded on investigations which are different and additional to the whistleblowing report (although arising as a consequence of the report), the whistleblower's identity may not be disclosed; (ii) if the disciplinary charges are grounded, in whole or in part, on the whistleblowing report, and knowing the identity of the whistleblower is indispensable for the defendant, such report may be used for the purpose of the disciplinary proceeding only if the whistleblower gives consent to his/her identity being revealed.

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13. Can non-disclosure agreements (NDAs) be used to keep the fact and substance of an investigation confidential?

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Yes, NDAs may be executed to reinforce the confidentiality obligations outlined in the company's policies and reinforced in interviews.

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Yes, in principle, NDAs can be used to keep the fact and substance of an investigation confidential, even if it is not strictly necessary (and not often done in our experience).

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14. When does privilege attach to investigation materials?



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Privilege attaches to investigation materials when attorneys conduct interviews and take notes, and when they write reports and recommendations.

However, if other persons participate in an interview or write a report, and they are not attorneys, they can be required to testify about what they witnessed while participating in the interview or to discuss or disclose their investigation report.

For this reason, when starting an investigation, and depending on the matters to be investigated, it is important to determine whether it is convenient to allocate lawyers to certain roles to increase the company's control of corporate confidentiality resulting from third-party involvement in the investigation.

Attorneys should also clearly state to participants of the investigation that they are attorneys representing the company and that their work papers fall under attorney-client privilege and will not be shared with them.

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In general, from an employment law perspective, workplace investigations made by corporate departments (eg, HR and legal counsel who do not operate in their function as lawyers) are not covered by privilege. Generally speaking, privilege covers correspondence and conversations between lawyers.

In defensive criminal law investigations, legal privilege applies.

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15. Does the employee under investigation have a right to be accompanied or have legal representation during the investigation?



Brazil

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Legally, a minor or someone with limited mental capacity must be represented by his or her parents or legal guardian in a meeting at work. Besides that, employers are not legally required to allow any external person to accompany employees during investigations, since these are internal proceedings and, generally, employee participation should be voluntary and not subject to retaliation, including if the employee refuses to participate.

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In principle no, because the investigations' interviews should only deal with the collection of data/or information and not have any disciplinary or accusatory purpose.

However, if the investigation leads to a disciplinary procedure, the employee – under article 7 of the Workers' Statute – has the right to ask for a meeting to present his or her justification and, on that occasion, to be assisted by a trade union representative. Employees sometimes ask to be assisted by a lawyer and companies usually accept, as a standard practice.

In defensive criminal law investigations, if the employee is suspected of having committed a crime, he or she must be interviewed with the assistance of a criminal lawyer.

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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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No, there is no such right.

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Italy



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Generally speaking, a workplace investigation does not require the involvement of a trade union (on the assumption that no specific union agreement has been reached at a company level to entitle trade unions to specific forms of consultation or involvement in workplace investigations, which is not common).

According to section 4 of the Workers' Statute, as stated above, the involvement of the trade union is necessary regarding the installation and use of specific equipment (such as cameras, switchboards, software) that potentially allows the employer to remotely monitor working activity, and which can be done only with prior agreement of the unions (or authorised by the labour inspectorate). The union agreement must be made before the installation of the system, and therefore would normally be already in place when an investigation starts.

Pursuant to the WB Decree (Art. 4), union representatives (or external unions) should be "heard" before the employer activates a WB reporting channel^[1].

^[1] According to certain guidelines issued by the industrial trade association (Confindustria), the involvement should be purely for information purposes.

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17. What other support can employees involved in the investigation be given?



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It is highly recommended that investigation interviews are conducted in the interviewed person's native language, even if the individual speaks the language used for business within the company, to ensure that there is no miscommunication or loss of accuracy in the determination of the facts. Also, speaking their native tongue reduces the discomfort of participating in the interview and potential extra work due to post-interview correction or confirmation. Depending on the scope of the investigation, the company can have attorneys who speak both the individual's language and the company's business language conducting interviews.

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According to the law, there is no other specific kind of support other than what is mentioned above.

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18. What if unrelated matters are revealed as a result of the investigation?



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If unrelated matters are revealed as a result of the investigation, the company must be notified and must start a new investigation regarding them per the appropriate rules, without affecting the original investigation.

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If further misconduct (unrelated to the investigation matters) is revealed, the company may start a new investigation.

Furthermore, even if the employee has a contractual duty to provide the information requested by the employer, one limit to this principle could be, for example, self-incriminating statements of the employee acting as a witness. However, if an employee nevertheless makes self-incriminating statements, the company could decide to start a new investigation.

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19. What if the employee under investigation raises a grievance during the investigation?



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If the object of the grievance is connected to the ongoing investigation, the investigator may pursue that grievance within the same procedure or open a separate matter, under the company's rules governing such a situation.

If the object of the grievance is not connected to the investigation, the employee must report the matter, or the investigator can do it, if the company's policies allow it.

Last updated on 14/09/2023



Italy

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Generally speaking, grievances from the employee do not per se automatically entail an interruption of the investigation. This conclusion, however, should be double-checked on a case-by-case basis, depending on what kind of grievance the employee under investigation raises, and on the potential effect of that grievance (if grounded): for example, should the grievance concern alleged unlawful processing of personal data, the employer could consider suspending the investigation while checking if the grievance has grounds, to avoid collecting data that cannot be used.

Grievances may be raised “internally” vis-à-vis the employer, possibly through procedures regulated by internal policies or codes (including, for example, whistleblowing procedures), if any, or brought to external authorities (which, depending on the kind of issue, could be a labour court, the Data Privacy Authority, law enforcement authorities, etc).

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20. What if the employee under investigation goes off sick during the investigation?



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Sick leave suspends the employment agreement, and as a rule the employee should not be contacted during such a suspension. The investigation may continue without the participation of the investigated employee while that employee is absent, have its conclusion suspended while he or she is on leave, and resume once the employee returns to work.

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Although there are no specific rules stating an investigation must be suspended if the employee under investigation goes off sick, practically speaking, this may slow down the process. Indeed, the employer would not be in the position to “force” the employee, while he or she is absent from work, to physically attend meetings, although they may ask for the employee’s availability to attend remote interviews (eg, via videoconference).

There is case law regarding an employee’s sickness during a disciplinary procedure (i.e. the procedure described above in point 3): according to certain rulings, if an employee, as per his or her rights, asks to submit an oral defence, but then falls sick, this does not prevent the employer from completing the procedure (and taking disciplinary action), unless the employee proves that his or her sickness prevents him or her from physically attending the meeting (being said that, above all if the procedure ends with a dismissal, a case-by-case analysis on how to manage such situations is highly recommended).

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21. How do you handle a parallel criminal and/or regulatory investigation?



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The company may be required to share information or documents with authorities such as a judge, the police, or the Public Attorney's office, or be subject to a government authority's dawn raid. Workplace investigations can and in most cases should continue, and in such circumstances client-work privilege will be essential to enable the employer to control information being shared with third parties.

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Generally speaking, internal investigations and those performed by external authorities are autonomous.

In addition, there are no general rules under which the employer must wait for the completion of a criminal investigation before completing its investigation and taking disciplinary action; if the employer believes it has sufficient grounds and evidence to take disciplinary action, it does not have to wait.

That being said, criminal investigations – given the wider investigation powers that public prosecutors or regulators have – may help to gather further evidence on the matter. From a practical point of view, the employer may decide to suspend (with pay) the employee depending on the outcome of the criminal investigation, although this option must be evaluated carefully, given the potentially long duration of criminal proceedings, and the fact that the employer normally would not be in a position to access the documents and information about the criminal investigation (unless the company is somehow involved in the proceeding).

Lastly, in very general terms, police or public prosecutors have broad investigatory powers during criminal investigations, which could in certain circumstances make it compulsory for an employer to share evidence (but a case-by-case analysis is necessary regarding specific situations). Moreover, public prosecutors usually do not appreciate that, pending criminal proceedings, internal investigations are being conducted, because it can interfere with the criminal investigation.

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22. What must the employee under investigation be told about the outcome of an investigation?



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There is no legal obligation to inform them of the outcome. Any obligation would come from the company's

policies.

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If the outcome of the investigation does not lead to a disciplinary procedure, there is no specific obligation for the employer regarding this.

However, to a certain extent, under privacy laws, the employee may exercise his or her right of access to information strictly related to him or her, arising from the investigation (which is, however, a wider privacy issue to be assessed under the GDPR.)

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23. Should the investigation report be shared in full, or just the findings?



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There is no legal requirement or recommendation for the company to share the full or partial report or findings. It is also not a recommended measure. Therefore, unless the internal rules determine that the company must do it, any answer to queries should be limited to the fact that the investigation was concluded, and the company took the appropriate action.

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There is no general obligation of the employee to share an investigation report with the employee: only if and when disciplinary action is brought against the employee, the latter must be informed precisely of the allegations (but, once again, without being entitled to review the investigation report). In court, employees may ask for an exhibition of documents, including the investigation report, if not already filed by the employer, to use in its defence (but such request is not necessarily automatically granted by the court, as certain requirements must be met.

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24. What next steps are available to the employer?

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If investigators conclude that a breach has occurred, the company may determine the appropriate response, which may include verbal or written warnings; the suspension of employment without payment (for up to 29 days) or termination of employment without or with cause; a review of policies or operational protocols; and new training modules or the updating of training modules.

If the investigators conclude that a breach has not occurred but determine that the report was made in good faith, the case must be set aside. If the investigators determine that the report was made in bad faith, the employer must determine how to respond to the bad-faith reporter.

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Upon completion of the investigation, the employer – if misconduct by the employee emerges – may bring disciplinary action against him or her (which may be either dismissal or a “conservative” measure such as an oral or written warning, a fine, or a suspension, within the limits provided under the law and possibly the applicable NCBA).

If a criminal offence by the employee emerges, the employer may also decide to report the crime to the public authorities (see question 25).

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25. Who can (or must) the investigation findings be disclosed to? Does that include regulators/police? Can the interview records be kept private, or are they at risk of disclosure?

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There are no legal requirements for the company to share the investigation findings with any party, including the reporter and the investigated party, so the employer must carefully consider the pros and cons of doing so on a case-by-case basis. Interview records can generally be kept private if interviews were conducted by an attorney.

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Generally speaking, even if the investigation leads to evidence of a criminal offence, the employer does not have to inform public authorities (citizens and private entities do not have an obligation to report crimes they discover). The existence of any obligations to report to regulatory authorities (eg, banking and insurance regulatory authorities) should be investigated on a case-by-case basis.

The internal procedures of the company – as adopted by the company in the framework of legislation on the administrative or quasi-criminal vicarious liability of legal entities – may require the findings to be disclosed to certain internal bodies or committees.

As said above, the police or public prosecutors (and possibly other public authorities) may have, within their investigatory powers, and in certain circumstances, the power to access internal investigation outcomes (but a case-by-case analysis would be necessary).

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



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The existence of the investigation should be kept on file for at least five years from the date of its conclusion. All information related to the investigation should be kept on file for the same period, but not on the employee's record, to avoid the risk of accidental access by unauthorised individuals.

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The employer would normally keep the outcomes of the investigation for the entire duration of the employment relationship with the involved employee.

After the termination of the employment relationship, it appears reasonable to conclude that the employer would be entitled to retain this information for the time necessary to exercise its defence rights in litigation (taking into account that 10 years is the statute of limitations for contractual liability). Further requirements or restrictions under general privacy laws (and particularly the GDPR) should also be checked.

According to Art. 14 WB Decree, internal and external whistleblowing reports (including related documents) must be kept for as long as necessary for report processing, but no more than five years from the date of transmission of the procedure's final outcome.

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27. What legal exposure could the employer face for errors during the investigation?



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The employer's legal exposure resulting from errors during the investigation depends on the error and the victim or victims affected. It may range from paying damages to a witness who was harassed because the company did not prevent retaliation from occurring; to the reversal of a termination for cause if a court determines that the evidence collected during the investigation did not meet the legal threshold to uphold it; to indemnification for a violation of privacy; or criminal prosecution because of unauthorised access to private communications.

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It depends on the kind of error or breach. For example:

- a breach of privacy laws (eg, acquiring data from working instruments in lack of due requirements) would lead to the application of privacy law sanctions (including monetary fines); and
- breach of provisions regarding "remote" control of employees would lead to criminal sanctions and to the inadmissibility, for disciplinary purposes, of the data collected (and thus potentially to the unlawfulness of a dismissal based on such data).

Furthermore, if the employee has suffered damages as a result of the employer's errors or breaches (and can specifically prove such damages and their amount), the employer may be held liable in court.

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