

# Workplace Investigations

## Contributing Editors

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## 11. What information must the employee under investigation be given about the allegations against them?



### Brazil

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at CGM

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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### Hong Kong

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An employer's internal policies or the employment contract may provide that an employee under investigation should be given certain information concerning the allegations raised against him or her. Such

policies or terms should be followed and failure to do so may result in a claim for breach of contract or constructive dismissal by the employee. Even where there are no express provisions, the employer still owes an implied obligation of trust and confidence towards the employee at common law, which requires the employer not to, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between itself and the employee.<sup>[1]</sup> In the context of an internal investigation, the implied duty would require the employer to conduct the investigation and reach its findings reasonably and rationally following the evidence available and in good faith. This would normally require that sufficient information about the allegations made against the employee be provided to him or her such that he or she has the opportunity to properly respond to the allegations before any disciplinary action is taken or any decision about his or her employment is made.

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<sup>[1]</sup> Malik v Bank of Credit and Commerce International SA (In Liquidation) [1998] AC 20.

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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.<sup>[1]</sup> The employer, on the other hand, is not obliged to provide the employee with existing evidence, documents, etc, before the start of the questioning.<sup>[2]</sup>

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.<sup>[3]</sup>

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)).<sup>[4]</sup> 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).

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<sup>[1]</sup> 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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