

# Workplace Investigations

## Contributing Editors

*Phil Linnard at Slaughter and May*  
*Clare Fletcher at Slaughter and May*

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



Author: *Giovanni Muzina, Arianna Colombo*  
at BonelliErede

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).

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
at Bär & Karrer

The Swiss Federal Act on Data Protection applies to the gathering of evidence, in particular such collection must be lawful, transparent, reasonable and in good faith, and data security must be preserved.<sup>[1]</sup>

It can be derived from the duty to [disclose and hand over benefits received and work produced](#) (article 321b, Swiss Code of Obligations) as they belong to the employer.<sup>[2]</sup> The employer is, therefore, generally entitled to collect and process data connected with the end product of any work completely by an employee and associated with their business. However, it is prohibited by the Swiss Criminal Code to open a sealed document or consignment to gain knowledge of its contents without being authorised to do so (article 179 et seq, Swiss Criminal Code). Anyone who disseminates or makes use of information of which he or she has obtained knowledge by opening a sealed document or mailing not intended for him or her may become criminally liable (article 179 paragraph 1, Swiss Criminal Code).

It is advisable to state in internal regulations that the workplace might be searched as part of an internal investigation and in compliance with all applicable data protection rules if this is necessary as part of the investigation.

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<sup>[1]</sup> Simona Wantz/Sara Licci, Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen, in: Jusletter 18 February 2019, N 52.

<sup>[2]</sup> Claudia Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 148.

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## United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*  
at Cravath, Swaine & Moore

Documents and instruments that set out a company's policies (eg, employee handbooks, code of conduct or other written guidelines) often contain provisions regarding employee data and document collection, workplace searches, communication monitoring, privacy, and confidentiality. As discussed below, state and federal constitutional, statutory and common law – and in some cases foreign data privacy regimes – may provide additional protections to protect employees from an unwarranted or unreasonable invasion of privacy during an internal investigation.

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### Contributors

#### Italy

Giovanni Muzina  
Arianna Colombo  
*BonelliErede*



## Switzerland

Laura Widmer  
Sandra Schaffner  
*Bär & Karrer*



## United States

Rachel G. Skaistis  
Eric W. Hilfers  
Jenny X. Zhang  
*Cravath, Swaine & Moore*

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