Workplace Investigations

Contributing Editors

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

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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Switzerland

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There is no specific legal regulation for internal investigations in Switzerland. The legal framework is derived from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights. Depending on the context of the investigation, additional legal provisions may apply; for instance, additional provisions of the Swiss Federal Act on Data Protection or the Swiss Criminal Code.

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Vietnam

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There are no specific legislative requirements for workplace investigations in Vietnam. However, Labor Code No. 45/2019/QH14 dated 20 November 2019 (2019 Labor Code), which is currently the primary legislation governing employment relationships, requires employers that have more than ten employees to provide a mechanism and procedure for handling sexual harassment cases in the workplace. Other than that, an employer may incorporate policies and guidelines on how to deal with workplace investigations into its handbook.

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02. How is a workplace investigation usually commenced?

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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Switzerland

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Internal investigations are usually initiated after reports about possible violations of the employer's code of conduct, applicable laws or regulations have been submitted by employees to their superiors, the human resources department or designated internal reporting systems such as hotlines (including whistleblowing hotlines).

For an internal investigation to be initiated, there must be a reasonable suspicion (grounds).[1] If no such grounds exist, the employer must ask the informant for further or more specific information. If no grounds for reasonable suspicion exists, the case must be closed. If grounds for reasonable suspicion exist, the appropriate investigative steps can be initiated by a formal investigation request from the company management.[2]

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[1] Claudia Fritsche, Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen, Zürich/St. Gallen 2013, p. 21.

[2] Klaus Moosmayer, Compliance, Praxisleitfaden für Unternehmen, 2. A. München 2015, N 314.

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Vietnam

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The circumstances in which an employer commences a workplace investigation may vary, either through a whistleblower, through an internal system, email or phone call; complaints from suppliers, contractors, or customers; or accounts from observations and hearsay. Sometimes, it comes from anonymous complaints. However, it is common for an employer to verify whether the report or complaint is substantiated, partially substantiated, or unsubstantiated, which is sufficient to initiate and commence a workplace investigation.

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

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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 NCBAs 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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Switzerland

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It is possible to suspend an employee during a workplace investigation.[1] While there are no limits on duration, the employee will remain entitled to full pay during this time.

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[1] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 181.

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Article 128 of the 2019 Labor Code explicitly states that an employer has the right to temporarily suspend an employee who is being investigated for committing an alleged act of misconduct in breach of the labour rules, if the following conditions are met:

- the misconduct committed is complex in nature, and any further work carried out by the employee may jeopardise the ongoing investigation. The law does not clearly define “complex nature”; it may be open to various interpretations by the employer. In practice and from our experience, allegations of sexual harassment may be considered complex misconduct and, therefore, can be a ground for suspension;
- the employer has consulted with (and effectively obtained the approval of) the grassroots-level representative organisation of the employee. No formal process is stipulated under the law for such consultation with this organisation. From our experience, the consultation can be in the form of a meeting between the management of the employer and the executive committee of the organisation. However, the organisation should require the employee to acknowledge their consent in writing by signing the meeting minutes;
- the period of suspension cannot exceed 15 days or 90 days in “special circumstances”. The law does not define what falls under “special circumstances”. In our view, this will be subject to the interpretation and discretion of the employer after consulting with the grassroots-level representative organisation of the employee; and
- the employee must be paid 50% of his or her wage that would be due during the period of the temporary suspension in advance. When the temporary suspension ends, if no disciplinary measure is imposed on the employee, the employer must pay the full wage for the period of the suspension by paying the remaining 50%.

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

to be met?

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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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The examinations can be carried out internally by designated internal employees, by external specialists, or by a combination thereof. The addition of external advisors is particularly recommended if the allegations are against an employee of a high hierarchical level[1], if the allegations concerned are quite substantive and, in any case, where an increased degree of independence is sought.

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[1] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 18.

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Vietnam

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There are no statutory minimum qualifications or criteria for someone to conduct a workplace investigation. The employer can simply delegate the investigation task to anyone. However, it is good practice for qualified persons with proper training in workplace investigations to conduct the investigation as these involve intricate issues. It is also important that investigators are fair, unbiased, and impartial. In addition, they should not be related to any parties involved in the investigation.

In complex cases or cases involving a senior or high-ranking employee, the employer should appoint a person with a higher authority or rank in the company to lead and oversee the conduct of the investigation. This also applies in instances where it is foreseeable that the investigation may lead to disciplinary action, summary dismissal of the employee, or a report to an authority.

There are instances when engaging with external parties or professional advisors may be necessary. This is especially the case if the conduct under investigation is serious or widespread, which may lead to regulatory consequences if the employer does not have the expertise to handle the investigation.

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

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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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The accused could theoretically request a court to stop the investigation, for instance, by arguing that there is no reason for the investigation and that the investigation infringes the employee's personality rights. However, if the employer can prove that there were grounds for reasonable suspicion and is conducting the investigation properly, it is unlikely that such a request would be successful.

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Vietnam

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The employee can only bring legal action to stop the investigation if he or she claims that his or her rights have been clearly and blatantly violated during the investigation. However, the employee bears a heavy legal burden of proof to substantiate his or her claims. Based on our experience, most of the time, it is very difficult for the employee to prove this and successfully stop the investigation.

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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?

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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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Due to the employee's duty of loyalty towards the employer and the employer's right to give instructions to its employees, employees generally must take part in an ongoing investigation and comply with any summons for questioning if the employer demands this (article 321d, Swiss Code of Obligations). If the employees refuse to participate, they generally are in breach of their statutory duties, which may lead to measures such as a termination of employment.

The question of whether employees may refuse to testify if they would have to incriminate themselves is disputed in legal doctrine.[1] However, according to legal doctrine, a right to refuse to testify exists if criminal conduct regarding the questioned employee or a relative (article 168 et seq, Swiss Criminal Procedure Code) is involved, and it cannot be ruled out that the investigation documentation may later end up with the prosecuting authorities (ie, where employees have a right to refuse to testify in criminal proceedings, they cannot be forced to incriminate themselves by answering questions in an internal investigation).[2]

[1] Nicolas Facincani/Reto Sutter, Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten, published on hrtoday.ch, last visited on 17 June 2022.

[2] Same opinion: Nicolas Facincani/Reto Sutter, Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten, published on hrtoday.ch, last visited on 17 June 2022.

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There are no provisions in Vietnamese law that impose any statutory or legal obligation on an employee to act as a witness in an investigation. Hence, an employer does not have the power to compel its employees to act as witnesses in an investigation. However, a request for an employee to provide evidence or give details of an event that he or she knows of may reasonably be deemed to be a lawful and reasonable directive from an employer. Consequently, an employee's refusal to act as a witness may be tantamount to an act of insubordination, which may lead to disciplinary action by the employer. In any circumstances, if an employee refuses to attend an interview or is generally not cooperating with an investigation, the reasons for this will need to be considered carefully by the employer.

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

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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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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.[1]

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.[2] 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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[1] Simona Wantz/Sara Licci, Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen, in: Jusletter 18 February 2019, N 52.

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

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Decree No. 13/2023/ND-CP on personal data protection is the main data protection regulation in Vietnam. It regulates the processing of personal data, including the collection or gathering of data. If the physical evidence contains personal data of an individual, the gathering of physical evidence must comply with this decree.

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08. Can the employer search employees' possessions

6b. Can the employer search employees' possessions or files as part of an investigation?

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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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The basic rule is that the employer may not search private data during internal investigations.

If there is a strong suspicion of criminal conduct on the part of the employee and a sufficiently strong justification exists, a search of private data may be justified.[1] The factual connection with the employment relationship is given, for example, in the case of a criminal act committed during working hours or using workplace infrastructure.[2]

[1] Claudia Fritsche, Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen, Zürich/St. Gallen 2013, p. 168.

[2] Claudia Fritsche, Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen, Zürich/St. Gallen 2013, p. 168 et seq.

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As part of an investigation, an employer may search the objects or files that are part of the company's property (eg, company or employers' laptops or phones for business purposes and emails or messages stored on the company's servers) without prior notice and without the need of the consent of the employee. However, the employer has no right to search an employee's personal possessions without consent.

To further avoid arguments or conflicts as to the right of ownership of a particular object or property, employers may specify in their internal policies, labour contracts, and handover documents what is to be regarded as the company's assets and subject to a search in a workplace investigation.

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

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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.

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[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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If an employee complains to his or her superiors about grievances or misconduct in the workplace and is subsequently dismissed, this may constitute an unlawful termination (article 336, Swiss Code of Obligations). However, the prerequisite for this is that the employee behaves in good faith, which is not the case if he or she is (partly) responsible for the grievance.

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It is up to the employer to determine whether or not to open an investigation after a complaint from a whistleblower. It is very important that the identity of the whistleblower is protected and that the employer also should not reveal the identity of the witness or the source of information, as the sources and witnesses may fear retaliation and feel uncomfortable or hesitant in giving information or raising concerns again.

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10. What confidentiality obligations apply during an investigation?

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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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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]

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[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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Workplace investigations should be conducted in a strictly confidential manner to preserve the integrity and professionalism of the investigation and to protect the identity of the employee under investigation. This means that all information gathered, received, and shared during the investigation (ie, the subject employee and any material witnesses) should only be disclosed on a need-to-know basis.

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

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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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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).

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[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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Vietnam

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There is no legal requirement as to what particular information should be stated in the allegations; however, such information must be provided to the employee under investigation. The information provided by the employer to the employee must be sufficiently clear and specific so that the latter

understands the case or alleged issues against him or her and can respond to it.

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

Italy

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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.

Last updated on 10/01/2024

Switzerland

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As mentioned under Question 10, the employer's duty of care (article 328, Swiss Code of Obligations) also entails the employer's duty to respect and protect the personality (including confidentiality and privacy) and integrity of employees (article 328 paragraph 1, Swiss Code of Obligations) and to take appropriate measures to protect them.

However, in combination with the right to be heard and the right to be informed regarding an investigation, the accused also has the right that incriminating evidence is presented to them throughout the investigation and that they can comment on it. For instance, this right includes disclosure of the persons

accusing them and their concrete statements. Anonymisation or redaction of such statements is permissible if the interests of the persons incriminating the accused or the interests of the employer override the accused' interests to be presented with the relevant documents or statements (see question 11; see also article 9 paragraphs 1 and 4, Swiss Federal Act on Data Protection). However, a careful assessment of interests is required, and these must be limited to what is necessary. In principle, a person accusing another person must take responsibility for their information and accept criticism from the person implicated by the information provided.[1]

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[1] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 390.

Last updated on 15/09/2022

Vietnam

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The identity of the complainant and witnesses must be kept confidential and cannot be disclosed to anyone, unless both the complainant and witnesses consent to its disclosure or if the employer is asked to disclose this information by the competent authorities under Vietnamese law.

Last updated on 25/09/2023

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

Italy

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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).

Last updated on 15/09/2022

Switzerland

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In addition to the above-mentioned statutory confidentiality obligations, separate non-disclosure agreements can be signed. In an internal investigation, the employee should be expressly instructed to maintain confidentiality.

Last updated on 15/09/2022

Vietnam

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Generally, NDAs can be used to keep the facts and substance of a workplace investigation confidential. There are no express prohibitions against such NDAs. However, there are cases set out under Decree No. 13/2023/ND-CP on personal data protection where personal data is allowed or required to be disclosed without the data subject's consent, in instances that are necessary to serve the public interest or to protect the life and health of the data subject.

Last updated on 25/09/2023

14. When does privilege attach to investigation materials?

Italy

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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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Switzerland

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As outlined above, all employees generally have the right to know whether and what personal data is being or has been processed about them (article 8 paragraph 1, Swiss Federal Act on Data Protection; article 328b, Swiss Code of Obligations).

The employer may refuse, restrict or postpone the disclosure or inspection of internal investigation documents if a legal statute so provides, if such action is necessary because of overriding third-party interests (article 9 paragraph 1, Swiss Federal Act on Data Protection) or if the request for information is manifestly unfounded or malicious. Furthermore, a restriction is possible if overriding the self-interests of the responsible company requires such a measure and it also does not disclose the personal data to third parties. The employer or responsible party must justify its decision (article 9 paragraph 5, Swiss Federal Act on Data Protection).[1]

The scope of the disclosure of information must, therefore, be determined by carefully weighing the interests of all parties involved in the internal investigation.

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[1] Claudia M. Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit

besonderem Fokus auf Finanzinstitute, p. 284 et seq.

Last updated on 15/09/2022

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Generally, privilege does not apply to internal workplace investigation materials as the investigation does not constitute a relationship between a lawyer and his or her client, and even less so a judicial investigation. However, if a lawyer is appointed to represent a specific party in an investigation, for example, as an investigator, the privilege may apply to materials exchanged between the lawyer and that client.

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

Italy

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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.

Last updated on 15/09/2022

Switzerland

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In the case of an employee involved in an internal investigation, a distinction must be made as to whether the employee is acting purely as an informant or whether there are conflicting interests between the company and the employee involved. If the employee is acting purely as an informant, the employee has, in principle, no right to be accompanied by their own legal representative.[1]

However, if there are conflicting interests between the company and the employee involved, when the employee is accused of any misconduct, the employee must be able to be accompanied by their own legal

representative. For example, if the employee's conduct might potentially constitute a criminal offence, the involvement of a legal representative must be permitted.[2] Failure to allow an accused person to be accompanied by a legal representative during an internal investigation, even though the facts in question are relevant to criminal law, raises the question of the admissibility of statements made in a subsequent criminal proceeding. The principles of the Swiss Criminal Procedure Code cannot be undermined by alternatively collecting evidence in civil proceedings and thus circumventing the stricter rules applicable in criminal proceedings.[3]

In general, it is advisable to allow the involvement of a legal representative to increase the willingness of the employee involved to cooperate.

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[1] Claudia Götz Staehelin, Unternehmensinterne Untersuchungen, 2019, p. 37.

[2] Simona Wantz/Sara Licci, Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen, in: Jusletter 18 February 2019, N 59.

[3] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 392; Niklaus Ruckstuhl, BSK-StPO, Art. 158 StPO N 36.

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Vietnam

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Yes, the employee under investigation has a right to be accompanied or have legal representation during the investigation. Before the start of investigation proceedings, the employee under investigation must be informed about his or her right to have someone present with him or have a legal representative during the investigation.

Last updated on 25/09/2023

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

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].

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

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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.

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In Vietnam, the “trade union” is the only organisation solely dedicated to protecting employees’ legitimate rights and interests. Under the 2012 Labor Code, the term referring to trade unions was changed to “grassroots-level representative organisation of employees”. But the essence of this organisation remained and was later defined as “the executive committee of a grassroots trade union or the executive committee of the immediate upper-level trade union in a non-unionised company”. As such, it could be said that it was old wine in a new bottle.

As required under article 70.1 of Decree No. 145/2020/ND-CP, which serves as a guide to the Labor Code on working conditions and labour relations, when suspecting that an employee has committed a violation of labour discipline, the employer has to make a record of the violation at the time and notify the grassroots-level representative organisation of employees of which the employee is a member, or the legal representative of the employee if they are under 15 years of age. If the employer detects a violation after it has occurred, it will collect evidence to prove it. In this instance, the employer has no obligation to inform or involve the trade union or grassroots-level representative organisation of employees during the workplace investigation stage.

Also, an employee who is a member of the trade union or organisation has the right to seek assistance from this organisation and may authorise the trade union’s representative to represent and get involved in the workplace investigation.

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

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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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Switzerland

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The employer does not generally need to provide specific support for employees that are subject to an internal investigation. The employer may, however, allow concerned employees to be accompanied by a trusted third party such as family members or friends.[1] These third parties will need to sign separate non-disclosure agreements before being involved in the internal investigation.

In addition, a company may appoint a so-called lawyer of confidence who has been approved by the employer and is thus subject to professional secrecy. This lawyer will not be involved in the internal investigation but may look after the concerned employees and give them confidential advice as well as inform them about their rights and obligations arising from the employment relationship.[2]

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[1] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 390.

[2] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern, 2021, p. 133.

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It is quite stressful for an employee, whether as the victim, the subject of an investigation, or a witness, to be involved in a workplace investigation. Thus, transparency in the investigation process would alleviate the employees' stress and anxiety. This could be achieved by providing involved and concerned employees with the timeline for different stages of the investigation and regular updates. Further, the employer can make necessary work arrangements to minimise potential interaction with other involved employees so that it would not further aggravate the conflict or situation, (eg, days off or temporary suspension of work).

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

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There are no regulations in this regard in the Swiss employment law framework. However, in criminal proceedings, the rules regarding accidental findings apply (eg, article 243, Swiss Criminal Procedure Code for searches and examinations or article 278, Swiss Criminal Procedure Code for surveillance of post and telecommunications). In principle, accidental findings are usable, with the caveat of general prohibitions on the use of evidence.

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Vietnam

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If unrelated matters are revealed during the investigation, the employer should consider whether an investigation is needed. If necessary, the employer should decide whether it is appropriate to incorporate the new matters into the scope of the existing investigation by expanding the terms of reference. However, such action may not be appropriate if different individuals are involved or the inclusion of a new unrelated matter would unduly complicate or delay the progress of the existing investigation. If that is the case, the employer should investigate that matter separately.

Also, as detailed in article 19 of the 2015 Criminal Code of Vietnam, there is a legal duty on any person who is aware that a certain violation is being committed or has been committed to report it to the police unless otherwise provided for under law. Failure to comply with this requirement may lead to criminal liability for the offender.

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

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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Switzerland

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In the context of private internal investigations, grievances initially raised by the employee do not usually have an impact on the investigation.

However, if the employer terminates the employment contract due to a justified legal complaint raised by an employee, a court might consider the termination to be abusive and award the employee compensation in an amount to be determined by the court but not exceeding six months’ pay for the employee (article 336 paragraph 1 (lit. b) and article 337c paragraph 3, Swiss Code of Obligations). Furthermore, a termination by the employer may be challenged if it takes place without good cause following a complaint of discrimination by the employee to a superior or the initiation of proceedings before a conciliation board or a court by the employee (article 10, Federal Act on Gender Equality).

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Vietnam

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The employer should require the employee to raise any grievance under the company’s existing policy on grievance reporting, disciplinary, and investigation processes, so that it can determine if the grievance is relevant to the current investigation. The grievance can be investigated together with the ongoing investigation. It can also be dealt with separately and independently from the existing investigation.

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

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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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The time spent on the internal investigation by the employee should be counted as working time[1]. The general statutory and internal company principles on sick leave apply. Sick leave for which the respective employee is not responsible must generally be compensated (article 324a paragraph 1 and article 324b, Swiss Code of Obligations). During certain periods of sick leave (blocking period), the employer may not ordinarily terminate the employment contract; however, immediate termination for cause remains possible.

The duration of the blocking period depends on the employee's seniority, amounting to 30 days in the employee's first year of service, 90 days in the employee's second to ninth year of service and 180 days thereafter (article 336c paragraph 1 (lit. c), Swiss Code of Obligations).

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[1] Ullin Streiff/Adrian von Kaenel/Roger Rudolph, Arbeitsvertrag, Praxiskommentar zu Art. 319–362 OR, 7. A. 2012, Art. 328b N 8 OR.

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Workplace investigations do not require the presence or active cooperation of the employee under investigation. Thus, the investigation may start or continue in the employee’s absence due to illness.

If the employee’s presence is necessary for the conclusion of the investigation, the employer may invite the employee to provide information either by submitting his or her answers to a written questionnaire or attending a virtual meeting. However, the employee may not accede to the employer’s requests and proposals, especially if the employee has an illness. As a result, the employer may not be able to conclude the investigation due to the absence of the involved employee.

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

Italy

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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 apending 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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The actions of the employer may carry through to a subsequent state proceeding. First and foremost, any prohibitions on the use of evidence must be considered. Whereas in civil proceedings the interest in establishing the truth must merely prevail for exploitation (article 152 paragraph 2, Swiss Civil Procedure Code), in criminal proceedings, depending on the nature of the unlawful act, there is a risk that the evidence may not be used (see question 27 and article 140 et seq, Swiss Civil Procedure Code).

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There are no issues with an internal workplace investigation being conducted in parallel to any criminal or

regulatory investigation. In such a case, the employer should handle the workplace investigation meticulously, pay attention to all the facts and evidence, inform the authorities of the ongoing internal workplace investigation, and ensure that it complies with all applicable legal requirements or directions made by the relevant authorities concurrently. Also, the employer should not take any steps that interfere with, hinder, or obstruct the parallel investigations.

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

Italy

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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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Workplace investigations often result in an investigation report that is intended to serve as the basis for any measures to be taken by the company's decisionmakers.

The employee's right to information based on article 8, Swiss Federal Act on Data Protection also covers the investigation report, provided that the report and the data contained therein relate to the employee.[1] In principle, the employee concerned is entitled to receive a written copy of the entire investigation report free of charge (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 et seq, Ordinance to the Federal Act on Data Protection). Redactions may be made where the interests of the company or third parties so require, but they are the exception and must be kept to a minimum.[2]

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[1] Arbeitsgericht Zürich, Entscheide 2013 No. 16; Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 393 et seq.

[2] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 394.

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It is recommended that the employer informs the employee under investigation of the outcome and provides information on a need-to-know basis. Consequently, the employer has the discretion to proceed with any labour disciplinary procedure or actions against the employee based on the outcome of the investigation.

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

Italy

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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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In principle, there is no obligation to disclose the final investigation report. Disclosure obligations may arise based on data protection law vis-à-vis the persons concerned (eg, the accused). Likewise, there is no obligation to disclose other documents, such as the records of interviews. The employee should be fully informed of the final investigation report, if necessary, with certain redactions (see question 22). The right of the employee concerned to information is comprehensive (ie, all investigation files must be disclosed to him).[1] Regarding publication to other bodies outside of criminal proceedings, the employer is bound by its duty of care (article 328, Swiss Code of Obligations) and must protect the employee as far as is possible and reasonable.[2]

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[1] Nicolas Facincani/Reto Sutter, Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten, in: HR Today, to be found on: <Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten | hrtoday.ch> (last visited on 27 June 2022).

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There is no obligation to share the investigation report or the findings unless the employer and employee agree to do so.

However, under Decree No. 13/2023/ND-CP on personal data protection, the contents of the investigation report or findings related to the employee are likely to constitute the personal data of the employee under investigation. In that case, the employee may have a right under the said Decree to obtain copies of such documents by making a statutory data access request after the workplace investigation is completed. Where the employer is required to provide such documents to the employee under Decree No. 13/2023/ND-CP but the requested documents also contain the personal data of any other third parties (such as the employee's co-workers who participated in the interview during the investigation), the employer should first redact or erase such data before providing the requested documents, unless the relevant third parties have consented to the disclosure of their personal data.

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24. What next steps are available to the employer?

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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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If the investigation uncovers misconduct, the question arises as to what steps should be taken. Of course, the severity of the misconduct and the damage caused play a significant role. Furthermore, it must be noted that the cooperation of the employee concerned may be of decisive importance for the outcome of the investigation. The possibilities are numerous, ranging, for example, from preventive measures to criminal complaints.[1]

If individual disciplinary actions are necessary, these may range from warnings to ordinary or immediate termination of employment.

[1] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 180 et seq.

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Vietnam

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After the completion of the investigation, the employer may:

- take the appropriate labour disciplinary action against the employee;
- proceed with legal action against the employee (eg, reporting the criminal violations of the employee to the proper authority or filing a civil lawsuit against the employee before the court); or
- adopting preventive or remedial measures on how to avoid these violations and to mitigate the damage to the company (eg, reviewing internal policies and conducting employee training).

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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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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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The employer is generally not required to disclose the final report, or the data obtained in connection with

the investigation. In particular, the employer is not obliged to file a criminal complaint with the police or the public prosecutor's office.

Exceptions may arise, for example, from data protection law (see question 22) or a duty to release records may arise in a subsequent state proceeding.

Data voluntarily submitted in a proceeding in connection with the internal investigation shall be considered private opinion or party assertion.[1] If the company refuses to hand over the documents upon request, coercive measures may be used under certain circumstances.[2]

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[1] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), Interne und regulatorische Untersuchungen, Zürich/Basel/Genf 2016, p. 123.

[2] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), Interne und regulatorische Untersuchungen, Zürich/Basel/Genf 2016, p. 102 et seq.

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Generally, the employer does not have to actively disclose the findings of a workplace investigation to any party.

Notwithstanding this, the employer should be aware of certain statutory disclosure requirements that may apply as a result of the matters revealed during the workplace investigation, if the said investigation reveals any knowledge or suspicion of an indictable offence that has been committed.

Interview records should be kept private unless disclosure is required by the authorities.

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

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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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Switzerland

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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]

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

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Vietnam

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Vietnamese law does not provide for a period during which the outcome of the investigation should remain on the employee’s records and files. However, this will depend on the employer’s record-retention policies, which must comply with applicable data protection laws.

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

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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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As there are no specific regulations for internal investigations, the usual legal framework within which the employer must act towards the employee derives from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights.

But, for example, unwarranted surveillance could conceivably result in criminal liability (article 179 et seq, Swiss Criminal Code) for violations of the employee's privacy. Furthermore, errors made by the employer could have an impact on any later criminal proceedings (eg, in the form of prohibitions on the use of evidence).[1]

Evidence obtained unlawfully may only be used in civil proceedings if there is an overriding interest in establishing the truth (article 152 paragraph 2, Swiss Civil Procedure Code). Consequently, in each case, a balance must be struck between the individual’s interest in not using the evidence and in establishing the truth.[2] The question of the admissibility of evidence based on an unlawful invasion of privacy is a sensitive one – admissibility in this case is likely to be accepted only with restraint.[3] Since the parties in civil proceedings do not have any means of coercion at their disposal, it is not necessary, in contrast to criminal proceedings, to examine whether the evidence could also have been obtained by legal means.[4]

Unlawful action by the employer may also have consequences on future criminal proceedings: The prohibitions on exploitation (article 140 et seq, Swiss Criminal Procedure Code) apply a priori only to evidence obtained directly from public authorities. Evidence obtained unlawfully by private persons (ie, the employer) may also be used if it could have been lawfully obtained by the authority and if the interest in establishing the truth outweighs the interest of the individual in not using the evidence.[5] Art. 140 paragraph 1 Swiss Criminal Procure Code remains reserved: Evidence obtained in violation of Art. 140 paragraph 1 Swiss Criminal Procure Code is subject to an absolute ban on the use of evidence (e.g. evidence obtained under the use of torture[6]).[7]

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[1] Cf. ATF 139 II 7.

[2] ATF 140 III 6 E. 3

[3] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), Zivilprozessrecht, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[4] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), Zivilprozessrecht, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[5] Decision of the Swiss Federal Court 6B_1241/2016 dated 17. July 2017 consid. 1.2.2; Decision of the Swiss Federal Court 1B_22/2012 dated 11 May 2012 consid. 2.4.4.

[6] Jérôme Benedict/Jean Treccani, CR-CPP Art. 140 N. 5 and Art. 141 N. 3.

[7] Yvan Jeanneret/André Kuhn, Précis de procédure pénale, 2nd Edition, Berne 2018, N 9011.

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The employer may be exposed to legal action for its failure to conduct the investigation properly, such as a lawsuit for labour disputes or sanctions for its failure to protect personal data as required under personal data protection regulations. For instance, if there were errors during the investigation which led to erroneous results for the investigation and consequently, the employee was dismissed, the employee may file a claim for illegal dismissal against the employer.

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